

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



HARTNELL COMMUNITY COLLEGE DISTRICT,

Employer,

and

HARTNELL COLLEGE FACULTY ASSOCIATION, CTA/NEA,

Employee Organization.

Case No. SF-R-312

PERB Decision No.81

January 2, 1979

Appearances: Andrew Church, Attorney (Abramson, Church & Stave) for Hartnell Community College District; and Duane B. Beeson, Attorney (Brundage, Beeson, Tayer and Kovach) for Hartnell Faculty Association, CTA/NEA.

Before Gluck, Chairperson; Cossack Twohey and Gonzales, Members.

DECISION

On July 15, 1977 hearing officer Ronald E. Blubaugh issued a proposed decision finding that the unit appropriate for meeting and negotiating included all full-time regular and contract certificated employees and all part-time certificated employees who have taught three semesters out of the last six semesters inclusive. The hearing officer also concluded that department chairpersons were not management employees and therefore included them in the negotiating unit. Thereafter, Hartnell Community College District filed timely exceptions to both conclusions of the hearing officer. We have considered the record as a whole and the attached proposed decision in light of the exceptions filed and affirm the rulings, findings and conclusions of the hearing officer to the extent they are consistent with this opinion.

The Part-Time Faculty

Hartnell Community College District (hereafter District) contends that part-time faculty do not possess a sufficient community of

interest with full-time faculty to warrant their inclusion in the same negotiating unit. Conversely, Hartnell College Faculty Association (hereafter Association) seeks to include full and part-time faculty in a single negotiating unit. We find that part-time and full-time faculty in this District possess a community of interest which warrants their inclusion in the same negotiating unit. In reaching this determination, however, we do not rely exclusively on Los Rios Community College District,¹ since the determination as to whether separate groups of employees do or do not possess a community of interest with each other sufficient to require their inclusion in one negotiating unit must be determined on the facts of each case.

I

The District employs approximately 113 full-time faculty, 166 part-time evening faculty² and 25 part-time day faculty. Full-time faculty are those persons hired to fill a vacant permanent position and are either probationary (contract) or tenured (regular). Part-time faculty are persons who teach 40 percent or less of 15 equated units.

While it would appear from a comparison of the District's exhibits that at the time of the hearing none of the full-time faculty was also employed as part-time faculty, there was testimony by witnesses of both the District and the Association that full-time faculty "moonlight" in the evening division. Furthermore, there is

¹(6/9/77) EERB Decision No. 18.

²The evidence concerning the number of part-time instructors was contradictory or at best incomplete. There was testimony that the District employed 213 part-time evening instructors and 25 part-time day instructors. However, District Exhibits 34 and 35, introduced into evidence without objection as a compilation from District's employment records of part-time evening instructors for the Fall 1976-77 term, contain 166 names, exclusive of 10 persons listed solely on District Exhibit 35 as employed at Fort Ord. We are unable to determine on this record whether the discrepancy is the result of a failure to include on the list of part-time instructors those members of the full-time faculty who have assumed extra teaching assignments or is caused by some other factor or error unknown to us.

a District policy which prohibits full-time faculty from teaching more than one class for extra pay (as part-time faculty) in addition to their regular teaching load. Full-time faculty who teach an extra class are paid at a set percentage of their regular salary, whereas persons only employed as part-time faculty are paid according to their placement on the salary schedule.

Full-time faculty are paid according to both their educational attainment and their length of service with the District. Part-time faculty are paid only according to their educational attainment.

In order for the District to maintain its accreditation, all classes must be taught by credentialed faculty. There are, however, several kinds of credentials. Some part-time faculty have only a "special" credential which allows that person to teach a specific course for which no other person is available. Most, if not all, full-time faculty have either a community college or a general secondary credential. All credit courses, whether taught by full- or part-time faculty, may be used without distinction for degree credit. While the procedure for requesting textbooks differs between full- and part-time faculty, an effort is made to have the same textbooks used by both. Full-time faculty who teach in the evening division discuss course content with part-time faculty so that the same subject material is covered in the courses.

There was uncontradicted testimony that only the full-time faculty evaluate probationary employees, evaluate temporary employees, serve on screening committees for new full-time employees, assist in "planning future facilities," are employed under a written contract, are "responsible for institutional equipment," are involved in the formulation and implementation of the affirmative action program, are required to attend commencement exercises, serve on accreditation teams for other community colleges, serve on committees for "developing institutional self-study for accreditation purposes," supervise work-study students, are responsible for record keeping of equipment for replacement purposes, are eligible to serve as department

chairpersons, are required to have the approval of the District's governing board for leaves of absence, are eligible for membership in the Academic Senate, are required to belong to the State Teachers Retirement System, are evaluated pursuant to a procedure set forth in the Education Code, are eligible for "additional professional growth increments" of salary, may have a reduced teaching load while still maintaining State Teacher Retirement System status, and are eligible for tenure. Full-time faculty participate as members of committees in the selection of classified employees; they also evaluate classified employees. When department chairpersons delegate evaluation of part-time faculty, it is only to full-time faculty.

Other testimony revealed that full-time faculty are requested to do a number of things that part-time faculty are not, including participate in such activities as dances and athletic events and give speeches in the community on subjects within their area of expertise.

While there is no policy requiring it, full-time faculty are expected by custom to have office hours. Part-time faculty do so at their own initiative. Part-time faculty are not required to attend departmental meetings but may do so if they choose. Both full- and part-time faculty may and do develop new courses of instruction.

With respect to fringe benefits, only full-time faculty receive sabbatical leave, paid holidays and health and welfare coverage. Both full- and part-time faculty receive sick leave, but it is not cumulative for part-timers.

Finally, full- and part-time faculty share essentially common supervision. As will be discussed more fully later, department chairpersons play a critical role in hiring both full- and part-time faculty. Department chairpersons determine the class assignment, schedule and location for full-time faculty and establish the part-time schedule in consultation with the Associate Dean of the Evening Division.

II

As we stated in Peralta Community College District,³ reading sections 3545(a)⁴ and 3545(b)(1)⁵ of the Educational Employment Relations Act (hereafter EERA)⁶ together establishes a rebuttable presumption that all classroom teachers of a public school employer shall be included in a single negotiating unit unless a single negotiating unit is rendered inappropriate because of a lack of community of interest between and among employees, the past practices of the employees, or the effect of the size of the unit on the efficient operation of the district.

In determining whether employees share a community of interest, superficial distinctions should not be permitted to obfuscate underlying common interests. We have consistently held, in accordance with other jurisdictions,⁷ that such things as qualifications, training and skills, job function, compensation, hours of work, fringe benefits, work-related contact, supervision, integration of

³(1978) PERB Decision No. 77

⁴Gov. Code sec. 3545(a) provides:

3545. (a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

⁵Gov. Code sec. 3545(b)(1) provides:

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

⁶The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise specified.

⁷Sweetwater Union High School District (11/23/76) EERB Decision No. 4; Kalamazoo Paper Box Corp. (1962) 136 NLRB 134 [49 LRRM 1715].

work functions, and interchange between employees are relevant in determining community of interest. Where, as in the case of this District, some factors point to a separate community of interest between full- and part-time faculty and some to a common community of interest, no single factor is controlling. Rather, all factors must be weighed and balanced in their totality.⁸

The record before us establishes that full- and part-time faculty share common qualifications, training and skills, job functions, and integration of work function. Although in special circumstances the credential requirements may be less stringent for part-time faculty, no distinction is made between courses taught by full-time faculty and those taught by part-time faculty; students receive the same credit for both. Both full- and part-time faculty participate in the initiation and development of new classes. Division chairpersons play a central role in the hire and retention of both.

While there are some distinctions between full- and part-time faculty, their common characteristics are more persuasive. In Los Rios Community College,⁹ the first case involving certificated employees at the community colleges decided by the Board, it was concluded that only those part-time employees who had taught three of the last six semesters inclusive should be included in the negotiating unit. We have adhered to this policy in all subsequent decisions.¹⁰ In the instant case, the record establishes that as of the date of the hearing, 37 of the 166 part-time faculty were in their first semester of employment with the District, 112 had been previously employed one or more continuous semesters, 80 had been employed two or more continuous semesters and 55 had been employed three or more continuous semesters. There is no evidence that either the duties or terms and conditions of employment of part-time faculty are

⁸Office of the Santa Clara County Superintendent of Schools (7/19/78) PERB Decision No. 59.

⁹ (6/9/77) EERB Decision No. 18, supra.

¹⁰ Shasta-Tehama-Trinity Joint Community College District (9/22/77) EERB Decision No. 31; San Joaquin Delta Community College District (5/12/77) EERB Decision No. HO-R-5; Riverside Community College District (5/9/78) PERB Decision No. HO-R-66.

affected in any material way by the length of their employment with the District. Thus, the community of interest with full-time faculty of part-time faculty who teach less than three of the last six semesters and those who teach three or more of the last six semesters is identical. Accordingly, there is no basis for excluding part-time faculty who teach less than three of the last six semesters from the negotiating unit. In fact, upon reflection such a distinction is potentially disruptive of the very stability and harmony in employer-employee relations which the EERA, seeks to promote through the collective negotiations process. We therefore conclude that the unit appropriate for negotiations includes all full- and part-time faculty. To the extent that Los Rios and its progeny are inconsistent with this decision, they are expressly overruled.¹¹

Department Chairpersons

The District contends that department chairpersons are managerial employees within the meaning of section 3540.1(g) while the Association contends that they are employees and should be included in the negotiating unit. Both the District and the Association stipulated at the hearing that department chairpersons are not supervisors within the meaning of section 3540.1(m). The hearing officer adopted that stipulation without inquiry, found that they were not management employees, and included them in the negotiating unit. The District has filed exceptions to that conclusion.

¹¹ While our dissenting colleague is apparently of the opinion that Los Rios Community College, supra, is a "precedential" decision that may not be modified or disapproved in light of new information or experience, our understanding of precedent differs from his. Reverence for precedent is misplaced when it constrains the Board to remain faithful to decisions, which, upon reconsideration, bear improving.

I

It would appear that the hearing officer, in accepting the stipulation of the parties that department chairpersons are not supervisors, was relying on the Board's early policy of accepting the stipulations of the parties without question so long as such stipulations were not "inconsistent with the clear and specific mandate in the unit criteria provisions" of the EERA.¹² To the extent that this policy authorized the acceptance of stipulations of the parties as to the ultimate conclusion of law before the Board, it is expressly overruled.

The instant case presents a classic example of the danger in such a policy. The issue before the Board is the determination of appropriate unit, including the question of whether department chairpersons are appropriately included. While it is true that if department chairpersons are found to be either supervisory or managerial they would be excluded from the negotiating unit in question, nonetheless the difference between the basis for their exclusion is critical. Supervisors are accorded negotiating rights under the EERA, while managerial employees are denied those rights.

Since the record in this case clearly establishes that department chairpersons are supervisors, were we to accept the stipulation of the parties in this regard, we would be in the anomalous position of making a decision contrary to the express language of the EERA. If we concluded that chairpersons were managerial, we would be denying employees negotiating rights granted them by the EERA. Conversely, if we concluded that chairpersons were not managerial,

¹²Tamalpais Union High School District (7/20/76) EERB Decision No. 1.

we would be placing supervisors in the same negotiating unit as rank-and-file employees. Such a result is contrary to both common sense and the express responsibility of the Board. The status of the chairpersons is a question of law and fact requiring legal conclusions to be drawn from the facts adduced at the hearing. The rendering of the ultimate legal conclusion is the prerogative of the Board, not the parties.¹³ Accordingly, we have examined the facts of this case and conclude that department chairpersons are not managerial employees, nor do they share a community of interest with other unit employees, but rather are supervisory employees within the meaning of section 3540.1(m).

II

There are 11 department chairpersons in dispute. Eight of the chairpersons teach 80 percent of a full-time load,¹⁴ one teaches 70 percent of a full-time load¹⁵, and two have no teaching responsibilities.¹⁶ They are selected by recommendation from the department faculty to the dean of instruction. The dean makes a recommendation to the superintendent, who in turn makes a recommendation to the Board of Trustees. The present dean of instruction has never rejected

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See ~~Leonard v. City of Los Angeles~~ (1973) 31 Cal.App.3d 473, 476; ~~Smith Alarm Systems~~ (1974) 214 NLRB 501, enfd. (5th Cir. 1975) 524 F.2d 983 [91 LRRM 2057]; and ~~Willet Motor Coach Co.~~ (1977) 227 NLRB 882.

¹⁴ Business, Fine Arts, Health/PE/Recreation, Language Arts, Mathematics, Social Science, Technology, Director of Athletics.

¹⁵ Natural Science.

¹⁶ Director of Nursing and Director of Learning Resource Center.

the faculty recommendation, nor have the superintendent or the Board of Trustees rejected the dean's recommendation. All chairpersons are tenured and on the same tenure track as regular faculty. Chairpersons work longer than the academic year; how much longer varies from department to department. They are paid five percent of their contract salary for each two weeks worked beyond the academic year. Chairpersons are prohibited from being members of the Academic Senate. There is a chairperson meeting on Friday of each week, also attended by the associate and assistant deans of instruction.

Chairpersons play a pivotal role in the hiring of full- and part-time faculty, student assistants and laboratory assistants. Chairpersons are responsible for the recruitment of full- and part-time faculty. They prepare all job descriptions and determine what credentials are required.

Recommendations for hire of full-time faculty are made by a screening committee to the dean of instruction. Testimony was unclear on whether chairpersons appoint the eight person screening committee or whether five are appointed by the academic senate and three, including the chairperson, are administration representatives. The screening committee interviews job applicants and determines, by majority vote of the committee, which applicant to recommend. The dean may and has asked the chairperson for a personal recommendation in addition to that of the screening committee. The present dean of instruction has followed the recommendation of the chairperson in all but one or two circumstances. One department chairperson, the only witness who testified on this point, testified that his recommendations have always been the same as those of the screening committee.

The chairperson may be the only one who interviews part-time faculty applicants. The dean of the evening division must have the chairperson's approval before hiring a part-time faculty member. Chairpersons have complete control over the selection of student assistants and determine to which faculty member they are assigned. They also select and obtain substitute faculty when a regular faculty member is ill and "secure clerical help."

Proposals for new courses of instruction must be approved by the chairperson before they are submitted to the curriculum committee; no proposal for a course offered through the department will be submitted without the chairperson's approval. Approval of chairpersons is not required for courses offered through the community services division. The chairperson recommends a new course to the dean of instruction, who sends it to the curriculum committee. The curriculum committee is composed of 17 people: one representative, usually the chairperson, of each department, the administration, student body and academic senate. Department representatives are selected by the department faculty. If the curriculum committee agrees that the proposed new course should be offered, the dean submits the recommendation to the Board of trustees. The Board of Trustees have never rejected a course recommended by the curriculum committee. If the curriculum committee rejects the proposed course, the department chairperson has no recourse. A new course may be offered twice without the approval of the curriculum committee at the discretion of the chairperson. However, it must be reviewed after each offering. The chairperson, without independent review by the dean, may authorize special study courses. The chairperson decides which courses are to be cancelled and when, based on enrollment, any given course is to be offered. Chairpersons are solely responsible for the assignment of classes; they determine who teaches what class, at what time and where. The chairperson must approve all textbook requests but it is highly unusual for a chairperson to deny a textbook request. Chairpersons are also responsible for supervising evening courses and faculty. The evening course schedule is set by the chairperson and the associate dean of the evening division.

Departmental budgets generally contain 15 or 16 accounts, such as teacher salaries, classified salaries, student help, equipment replacement, supplies, field trips and conferences. Chairpersons submit draft budget requests to the dean of instruction. Individual faculty members may submit requests for additional supplies and capital equipment. The chairperson does not evaluate the necessity

for the requested material; the faculty member's professional judgment is accepted. The dean of instruction reviews the budget requests and modifies them. The extent and frequency of modification varies from department to department. Salaries comprise the largest percentage of each department's budget. Chairpersons have no authority over faculty salaries; their control over classified salaries is limited to expanding and contracting the number of persons employed. Chairpersons frequently request budget changes in mid-year. The Board of Trustees generally grants these requests, if they are not exorbitant.

The chairperson's approval is required for all supply, equipment, conference attendance and leave of absence requests. The chairperson's review of faculty requests, however, is pro forma. There is a District policy with respect to leaves of absence to which the chairperson must conform; the rule is that the requested leave generally should be granted. The chairperson's approval of requests for sabbatical leave is required; however, the dean of instruction testified that he knew of no instance where a chairperson had rejected such a request.

While chairpersons conduct classroom observation, evaluation of full-time faculty is done by committee. The members of the committee must be mutually agreeable to the chairperson and the faculty member to be evaluated. Each member of the committee has an equal voice in the evaluation; the consensus of the committee is summarized by the chairperson and given to the dean of instruction. Although rarely, the dean has overturned the committee's recommendation. Chairpersons discipline recalcitrant faculty by withholding conference approval and class assignments. The chairperson delegates the evaluation of part-time faculty to a regular faculty member with expertise in the particular subject field.

Finally, chairpersons hold department meetings at least once a month in which new courses are discussed and faculty comments and criticism are solicited.

III

The District contends that department chairpersons are management employees because the District "...looks to chairpersons and holds them directly responsible for administration of DISTRICT programs and also for suggestions in formation of DISTRICT policy." We cannot agree that chairpersons possess the type of responsibility contemplated by the legislature when it defined management employees as those "having significant responsibilities" on behalf of the District.¹⁷

The Board has previously concluded that a "management employee" within the meaning of section 3540.1(g) of the EERA must possess significant responsibilities both for the formulation of district

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policy and the administration of district programs.¹⁸ The formulation of policy contemplates the exercise of discretionary authority to develop and modify institutional goals and priorities. The administration of programs contemplates effective implementation of the policy through the exercise of independent judgment. Thus, managerial status contemplates those persons who have discretion in the performance of their jobs beyond that which must conform to an employer's established policy. The question as to whether particular employees are managerial must be answered in terms of the employees' actual job responsibilities, authority and relationship to the employer. Managerial status is not necessarily conferred upon employees because they possess some limited authority to determine, within established limits, curriculum, course content or budgetary allocations.

¹⁷ Gov. Code sec. 3540.1(g) states:

"management employee" means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Educational Employment Relations Board.

¹⁸ Lompoc Unified School District (3/17/77) EERB Decision No. 13; Oakland Unified School District (3/28/77) EERB Decision No. 15.

In the instant case, the evidence established that the authority of the chairpersons was either collegial in nature and no greater or lesser than that of other persons serving on various committees, or substantially determined by established District policy. Those areas in which chairpersons act autonomously concern matters which provide the indicia of supervisory status.

Thus, chairpersons may recommend new courses, but their recommendations are subject to the approval of the curriculum committee. Their discretion to independently authorize courses is limited to a specified length of time. Their fiscal responsibilities do not require the exercise of discretion; rather, they generally involve pro forma approval of faculty requests.

Conversely, chairpersons independently schedule both full- and part-time faculty class assignments, effectively determine who shall be hired to fill a part-time position, and discipline faculty members. This authority is that of supervisory employees.¹⁹ 17

Accordingly, we find that department chairpersons are not management employees but are supervisory employees within the meaning of the EERA.

ORDER

On the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

(1) The unit appropriate for negotiating shall include all full-time regular and contract certificated employees and all part-time employees and shall exclude all department chairpersons, management, supervisory and confidential employees.

¹⁹ Gov. Code sec. 3540.1(m) states:

"Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(2) Department chairpersons are supervisory employees.

Within 10 workdays after the employer posts the Notice of Decision, the employee organization shall demonstrate to the regional director at least 30 percent support in the negotiating unit.

The regional director shall conduct an election at the end of the posting period if :

(1) More than one employee organization qualifies for the ballot, or

(2) If only one employee organization qualifies for the ballot and the employer does not grant voluntary recognition. Voluntary recognition requires majority proof of support in all cases. See Government Code section 3544 and 3544.1. The date used to establish the number of employees in the above units shall be the date of this decision unless another date is deemed appropriate by the regional director and noticed to the "parties". In the event another date is selected, the regional director may extend the time for employee organizations to demonstrate at least 30 percent support in the negotiating unit.

Jerilou Cossack Twohey, Member

Harry Gluck, Chairperson

Raymond J. Gonzales, Member, dissenting in part:

This may appear to be a rather strange dissent; strange in that I have included my original dissent signed November 16, 1978, which is no longer valid since the majority, as a result of that dissent, has re-drafted its original signed decision of October 18, 1978. I include the first dissent here to give a chronology of events that have led up to this "final" decision which, may, of course, be changed again by the majority after they read my second dissent.

The Hartnell case was originally decided by the Board in Executive Session on May 11, 1978, nine months after the case was placed on the Board's docket. Members Gluck and Cossack Twohey were in the majority in the case, while I dissented for the reasons expressed in my Los Rios Community College dissent. The case was assigned to Member Cossack Twohey, who was to write an affirmance, with minor modifications, of the hearing officer's decision.

Six months later, when the 14-page majority draft appeared, however, it included a major modification of the hearing officer's decision. The Board decision rejected the Los Rios formula of placing in the unit part-time teachers who had taught three semesters in the last six semesters. Instead, as I discussed in my attached first dissent, the majority included all part-time teachers in the unit of certificated employees but gave voting rights only to those part-time teachers who fitted the Los Rios formula for inclusion in the unit.

Within the allotted ten day period of time for minority decisions, I submitted my dissenting view attacking the majority's formula for inclusion in the unit and the basic denial of voting rights to members of the unit (see attached dissent). Thereupon the majority withdrew its first signed opinion and spent another five weeks preparing a second, even more ludicrous, majority opinion to which I now dissent. I would not at all be surprised if the majority now makes a third attempt at drafting a majority opinion in

the Hartnell case, if for no other reason than to vent their displeasure with my approach to this case.¹

So now we are at January 2, 1979, the date of my second dissent in response to the majority's second signed opinion. I give this chronology to inform the parties why there appear to be frequent delays in the issuance of Board decisions. In the Board's early days, the backlog of cases was a result of the fact that many cases hit the Board docket at approximately the same time due to the newness of the EERA. Now the backlog is more a result, in my opinion, of the judicial frivolity that this Board appears to be engaged in.

In an effort not to hold this case up any further, I will comment only briefly on the majority's second signed opinion and include my first dissent for the curious reader's enlightenment.

In the latest chapter of Hartnell, the majority has scrapped all formulas for inclusion of some part-timers in the unit of certificated employees, as in Los Rios, and has eliminated any formula for voting requirements, as in their first signed opinion in this case. Now every part-time teacher in the District is to be placed in the unit of certificated employees and given the right to vote. As the majority points out, there are approximately 113 full-time faculty

¹ I have always opposed the continued exchange of majority and minority opinions by the Board members because I have felt that they served no real purpose other than to delay the issuance of an opinion to the parties. In this case, for example, it has been two years, eight months since the Association filed its first petition. My colleagues, however, as in Peralta and other cases, seem to feel that the majority should have the last word regardless of how long it takes to issue a decision.

members, 166 part-time evening faculty, and 25 part-time day faculty members in the Hartnell District. That means there are more than half again as many part-time faculty members as there are full-time faculty members. Even the full-time faculty members of Hartnell, Los Rios, and other community college districts in the state may begin to have serious misgivings over a decision which is likely to give control of the certificated unit to the part-time faculty of any given district.⁴ Regular certificated employees will be hindered in successfully negotiating a contract with their employers, since they have little in common with the part-timers who now make up the majority of the units. And given the Board's current position on stipulated units, full-time teachers have no choice but to be represented with part-time teachers.

This apparently does not bother the majority in this case for it has rejected the option of allowing a separate unit of part-time instructors as well as the option of declaring that some part-time faculty who cannot demonstrate "an expectation of continued employment" could be excluded from the unit as casual employees. I continue to believe that part-time teachers should not be included in a unit with full-time faculty members, for the reasons stated in my dissent in Los Rios.

In addition, I would note, as I suggested in my dissent in Peralta and Pittsburg, that a majority of this Board has no intention of ever leaving any school employees outside of a unit. Even the

⁴See my dissent in Los Rios, p. 40.

"esteemed" NLRB excludes from a unit some "casual" employees who do not work regularly. Yet the majority of this Board has included noon-duty supervisors and will probably include day-to-day substitutes, even those who teach only one day in the year. While I would agree that employees whose primary place of employment is with a particular school district should have the right to choose an employee organization to represent them in negotiations with the employer, I can never condone the inclusion in these units of every individual who merely passes through the institution on his/her way to work some place else. As I suggested in my original Los Rios dissent, public employees in this situation will be given two bites at the taxpayers' apple.

Regarding the issue of precedential Board decisions, I take personal exception to the majority's self-serving comment in footnote number 11 in their second Hartnell opinion in which they state, "While our dissenting colleague is apparently of the opinion that Los Rios Community College, supra is a "precedential" decision that may not be modified or disapproved in light of new information or experience, our understanding of precedent differs from his." I am especially offended by the majority's comment in reference to "new information or experience" as being the motivating factor for changing their Los Rios decision and the first draft of Hartnell. Their second majority opinion in Hartnell does nothing to amplify on any "new information or experience"; rather what the majority does is cover up what was initially a weak argument by presenting to the parties an even more absurd solution

In this case, the Board almost casually overrules Los Rios and its "progeny." Contrary to the majority's apparent belief expressed

in footnote 11, I acknowledge that previous Board decisions should not bind the Board forever. I nevertheless think that a decision to overturn a Board ruling should not be made lightly. The value of precedent is too high—it enables Board agents to obtain settlements on Board decisions; it speeds the litigation process by eliminating the need to relitigate every issue; and it increases respect for the Board as the purveyor of opinions based on law rather than on the current make-up of the Board. The present chairperson recognized the importance of precedent in his initial comments upon taking office at the Board's public meeting on March 7, 1978:

There has been some concern that as a new man maybe I will tear things apart. Well, assuming that as an individual Board member I had that power, I assure you that is not why I'm here. I believe in stability in employee relations, and I believe, in a sense, that the Board must set that example by consistency in its decision-making and its rule-making. I'm certainly not here to uproot the past in any sense of the word.

Despite this, virtually every precedential case of any significance has been overturned by a new majority.³ These changes have occurred as a result of a change in the membership of the Board. Additional changes may occur in January 1979, December 1980, and December 1981, resulting in a further re-working of Board precedent.

³See, e.g., Sierra Sands Unified School District (10/14/76) EERB Decision No. 2, by Campbell Union High School District (8/17/78) PERB Decision No. 66; Sweetwater Union High School District (11/23/76) EERB Decision No. 4, by Washington Unified School District (6/27/78) PERB Decision No. 56; Belmont Elementary School District (12/30/76) EERB Decision No. 7, by Peralta Community College District (11/17/78) PERB Decision No. 77; Los Rios Community College District (6/9/77) EERB Decision No. 18, by Hartnell Community College District (1/2/79) PERB Decision No. 8.1.

When a Board decision is to be overruled, the reasons for doing so should be very persuasive and clearly articulated. In the present case, the majority intimated, in footnote 11, that it would change a decision in light of "new information or experience." Yet the rationale in the second majority decision does not rely on any "new information or experience." No new facts or changes in circumstances are put forth by the majority to justify their departure from the Los Rios formulation. In fact, the record in Hartnell was made at approximately the same time as the record in Los Rios.⁴

The obligation of the majority to have strong reasons for overturning Los Rios is, if anything, increased by the history of that case before the Board. As noted in my first dissent, the Board itself specifically voted unanimously in a public meeting to retain jurisdiction over Los Rios, while remanding other cases for hearing officer decisions, on the grounds that it would be desirable for the Board itself to establish a precedential case for the purpose of guiding our hearing officers in dealing with community college part-time faculty issues.⁵ Thus, Los Rios was decided with the specific intention that it would guide future certificated unit determination decisions. Presumably, much thought went into that decision. Yet the majority has overruled it with very little discussion.

⁴The hearings in Los Rios were completed on September 17, 1976 and in Hartnell on September 22, 1976.

⁵Original Hartnell dissent (attached), pp. 15-16.

To overturn such a decision without a very strong rationale works basically to nullify the concept of precedential cases established by the Board. Board agents will now find it difficult to obtain informal agreements based on Board decisions; why should a disadvantaged party settle when the chances are good that the Board may change its opinion? Parties will appeal more hearing officer decisions for the precedent guiding the hearing officers' decisions may change. Stability in educational labor relations, extolled by the Board's chairperson, has been undermined by the overruling of a landmark case without carefully weighing the reasons for doing so against the powerful considerations for not overturning past decisions. I do not think that the Board has sufficiently strong reasons for overruling Los Rios. There is no question in my mind that that case "bears improving," since I dissented from the majority decision. At least in that decision, however, the majority made some effort to limit the number of part-time employees included in the overall unit in acknowledgment that some part-time teachers have a greater connection with the colleges and the faculty than others. In the present decision, this distinction is thrown out the window because it is "potentially disruptive." Needless to say, the majority has no evidence from the districts which have followed Los Rios that any disruption in employment relations has occurred. And, in fact, the majority was willing in its first signed opinion to tolerate the greater potential for disruption inherent in allowing a minority of part-time teachers to vote for the representative for all part-time teachers.

What the majority has done in Hartnell by stating that "to the extent that Los Rios and its progeny are inconsistent with this

decision, they are expressly overruled," is to suggest that even consent agreements, stipulated settlements and voluntary recognitions are all susceptible to being overruled by the Board and its agents.

As a result of this case, the situation has gone from bad to worse. The Board has left the educational establishment of this state a virtual battlefield scattered with landmines that have the potential of destroying any unity, cohesiveness, and spirit of cooperation that might have existed among the parties. They even come close to destroying the collective bargaining statute that we as a Board are duty-bound to uphold. What the majority has done in this case, and I must confess that I joined with them in Centinela, is to put ajar the door to total disruption of the collective negotiations process. In the past our Board agents were often successful in obtaining settlements among the parties by citing the Board's precedential rulings; they are now handicapped in attempting to convince the parties that formal and costly hearings are not necessary. Why should any party settle when no decisions of the Board appear to be precedential? In addition, hearing officers will now be at a loss in writing decisions after formal hearings have been held. The majority in this case basically instructed the hearing officer to write Hartnell in accordance with the Los Rios precedent and then overturned the same hearing officer for having applied the Los Rios precedent in the Hartnell case. This can lead us to only one conclusion and that is that this Board can never be relied upon for any precedential decisions.

And finally, while the majority accuses me of being wedded to PERB precedential cases, they should explain to the parties under

our jurisdiction why the current majority is so often wedded to the NLRB cases that govern the "private" sector.

All of this leads me to conclude that perhaps the entire case by case process in the representation area might be a big mistake. The parties may have perhaps been better served by a rule-making process. It would seem that changing the rules would not be as whimsical an activity as the case deliberation process in representation matters has become. What can I say at this point but to beg forgiveness from both employers and employees whom we have made suffer under such a ridiculous, time-consuming and expensive process that the PERB has established? If this law is eventually repealed either by initiative or legislative action, I think it will be due in great part to the continued reliance on the private sector model and the lack of appreciation for the "public" nature of this Board's jurisdiction. Our very neutrality is now even in question.

Raymond J. Gonzales, Member

January 2, 1979

Raymond J. Gonzales, Member, dissenting in part:

I would have preferred in this case to refer to my dissent on the part-time faculty question in Los Rios Community College District¹ rather than to engage in a lengthy discussion of the

¹ { (y/9111) EERB Decision No. 18, 31 (conc. and dis. opn. of Gonzales) .

part-time issue, because many of the considerations expressed in that case are equally applicable to the present case. However, since the majority has chosen to make even more confusing its resolution of the part-time community college faculty issue, as I feel they have done in the present case, I am compelled to point out the grievous deficiencies in the majority's opinion.

First, the majority has chosen to alter, in a significant way, the manner in which they will treat the part-time issue. The majority, in this decision, has decided that:

In reaching this determination, however, we do not rely exclusively on Los Rios Community College District (citation omitted), since the determination as to whether separate groups of employees do or do not possess a community of interest with each other sufficient to require their inclusion in one negotiating unit must be determined on the facts of each case.²

What the majority has now concluded is that they will decide the part-time question at community colleges on a case-by-case basis. While this approach is obviously advantageous to my position and while I acknowledge that factual distinctions do merit consideration when evaluating a case independently, I am nevertheless disturbed by the majority's new treatment of the part-time faculty issue because of what it portends for other precedential rulings of this Board, namely, a dilution of their value and purpose.

Los Rios was originally selected as a precedential case to provide guidance to the hearing officers and to serve notice to interested parties statewide regarding the Board's view of the

²Supra at p.2.

part-time faculty issue.³ Now, however, a new majority has concluded that it will decide the part-time faculty question on a case-by-case basis, apparently totally disregarding the need for precedential decisions by this Board and at the same time demonstrating its lack of understanding of the community college system of this state. For this Board to assume that part-time teaching in Hartnell is so different from the part-time teaching situation in Los Rios is to disregard even the facts as presented in this case. The role played by part-time faculty in a given community college district certainly cannot be equated to that of supervisory employees or confidential employees that may indeed change from district to district. What we are considering here is a class of employees whose working conditions are virtually identical throughout the various community colleges of this state.

A second reason for dissenting in this case and which also illustrates how little precedential value the Los Rios decision apparently has held for the majority, is the fact that the Board has substantially changed its definition of a part-time faculty person eligible to be included in the overall unit of certificated personnel and eligible to vote. The majority now finds that

³Minutes of the March 1, 1977, public meeting of this Board reflect the unanimous adoption of a resolution which remanded certain cases, initially felt to have precedential impact, to the General Counsel, but left other cases, considered to be of precedential value, to initial determination by the Board. Los Rios was among the cases retained for Board determination because it was felt that the ruling on the part-time faculty issue presented by that case would have statewide impact.

"[t]he unit appropriate for negotiating shall include all full-time regular and contract certificated employees and all part-time employees and shall exclude all department chairpersons, management, supervisory and confidential employees." ⁴ (Emphasis added.) But they have limited voting only to those part-time employees who have worked three of the last six semesters. ⁵ Lest I be viewed as now supporting the Los Rios holding, I merely wish to point out that the majority has only compounded the problem of the ambiguity existing in the Los Rios formula. Originally, in Los Rios, the majority issued an order that read:

The following unit is appropriate for the purpose of meeting and negotiating, provided an employee organization becomes the exclusive representative:

All certificated employees, including full-time instructors, part-time instructors who have taught at least the equivalent of three semesters of the last six semesters inclusive, . . .

This original order by the majority in Los Rios caused so much confusion among the community college personnel in the state that the Board was required to issue an errata sheet explaining what was meant by "inclusive." In addition, the parties had a great deal of difficulty in understanding what was meant by the language "the equivalent of three semesters." ⁶

⁴Supra at 13.

⁵Supra at 6, 7, and 14

⁶Numerous calls were received by agents of this Board asking them to explain what was meant by "the equivalent of three semesters" of instruction by part-time teachers. Did it mean 45 weeks of teaching? Did it mean 45 semester units? Was it related to the number of units? Or did it refer to the number of hours taught? Neither the Board agents nor the majority in Los Rios could explain

Subsequently, on September 26, 1977, the Executive Assistant to the Board, as per Board direction, issued an order in Shasta-Tehama -Trinity Joint Community College District⁷ in which the term "inclusive" was defined:

As used in this proposed decision the word 'inclusive' means that an instructor who is presently teaching for a third semester, under this formula, would also be considered eligible.

But while the definition of the term "inclusive" has apparently been clarified by Shasta-Tehama and problems of determining how to apply the Los Rios formula resolved, the majority has thrown the parties another curve ball by introducing an eligibility to vote requirement separate and apart from an eligibility to be in the unit requirement. Not only does this leave the unit designation of part-time faculty in the community college system in total disarray, it is inconsistent with previous Board policy. In Shasta-Tehama and all previous Board decisions establishing appropriate units, being considered eligible meant being considered eligible to be in the unit and to vote, assuming that one were an employee at the time of the election. Even the hearing officer's proposed decision in this case, in accordance with previous Board decisions, took "inclusive" to mean both eligibility for inclusion

what was meant by its vague order. Ultimately, it was understood that the purpose of including the word "equivalent" was to account for those community college districts which maintained a quarter rather than a semester system.

⁷(9/26/77) EERB Decision No. 31.

in the unit and eligibility to vote, making no separate provision for voting eligibility. I can only conclude that the Board has gone from bad to worse in attempting to resolve the part-time faculty issue, a matter of statewide concern.

But let us examine more fully the absurdity of the Board's new position. By eliminating the single formula for part-time faculty that included them in the unit and gave them the right to vote, the majority has created an administrative nightmare. One must now conclude that an individual who has a continued expectation of reemployment in a community college district as a part-time instructor may or may not be in the unit or may or may not have the right to vote. Some instructors may have a standing commitment from the district to teach only spring semester courses or fall semester courses but can demonstrate nevertheless expectancy of reemployment. Nowhere in its order, however, does the majority indicate whether or not the part-time instructor must be currently employed by the District to be in the unit. Thus, what the majority has done is to create three types of part-time faculty: those who are in the unit but cannot vote; those who are in the unit and can vote; and those who are in the unit every other semester and can demonstrate continued reemployment but can vote only if they are fortunate enough to be teaching when an election occurs. The majority appears to have no concern for the efficiency of operation criterion found in Section 3545(a) of the Educational Employment Relations Act (EERA).⁹

⁸Hartnell Community College District (7/15/77) Case No. SF-R-312, at 17.

⁹Government Code section 3540 et seq.

Adding to this confusion and clearly raising a fundamental legal question, is the majority's order that limits voting. The majority attempts to rationalize this conclusion. They state:

However, having determined that the unit appropriate for meeting and negotiating includes both full- and part-time faculty, we are not satisfied that all part-time faculty possess either a sufficient expectation of re-employment with the District or a substantial continuing interest in those matters within the scope of representation to entitle them to vote in the election. Therefore, only those part-time faculty who have worked at least three of the last six semesters inclusive shall be eligible to vote.¹⁰

The precise concern here is the majority's total disregard for the language of EERA found in Government Code sections 3540 and 3543. Section 3540 of EERA provides in pertinent part:

It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative or the employees in an appropriate unit. (Emphasis added.)

Similarly, section 3543 of EERA provides in pertinent part:

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

¹⁰Supra at 6, 7.

We must ask whether or not every member of a negotiating unit consisting of all part-time faculty members of a community college and their full-time counterparts should be permitted to vote in a representation election involving their unit. The answer must be yes in view of the plain language of sections 3540 and 3543 of EERA which provides public school employees with the right to select a negotiating representative and to participate in the activities of their employee organization. To deny some part-time faculty members the right to vote in a representation election involving their negotiating unit contravenes the spirit of this legislation.

In fact, it is interesting to note that in a brief recently submitted to the California Supreme Court, San Diego Teachers Association and Hugh P. Boyle v. Superior Court for the County of San Diego, Case No. LA-30-977, the majority argued the rights of employees to participate in the activities of their organization as a basis for concluding that it is arguable that peaceful strikes by public school employees are protected by the EERA.

I quote:

The EERA insures public school employees the right 'to form, join, and participate in the activities of employee organizations of their own choosing . . .'¹¹

¹¹ Brief of the Public Employment Relations Board, San Diego Teachers Association and Hugh P. Boyle v. Superior Court for the County of San Diego (11/1/78) L.A. No. 30977 at 18.

It is inconceivable that the majority would, in the present case, disregard the language that they argued so forcefully for in their brief in favor of granting public employees the right to strike, and turn around in the present case and deny the same employees the right to "participate in the activities of an employee organization of their choosing" by denying them the most fundamental right of voting for their negotiating representative.

Additionally, it is incongruous to claim on the one hand that all part-time faculty have a sufficient community of interest with full-time faculty to be included in the same negotiating unit and then to assert, as does the majority in this case, that they do not have a substantial continuing interest in those matters within the scope of representation to entitle them to vote in the election. The majority opinion is based on the reasoning that there is a distinction to be made between employees who have an "expectation of re-employment with the district or a substantial continuing interest in those matters within the scope of representation to entitle them to vote in the election" and those who do not. This is pure speculation. How is it possible for the majority in this case to conclude that one employee has a substantial continuing interest while another does not? This cannot even be said of the regularly employed faculty who might at any given time choose to terminate their services with the district, or conversely, the district may find it necessary to terminate their services.

Moreover, if some part-time faculty members do not share a substantial interest in "those matters within the scope of representation" then they obviously do not share a community of interest with full-time faculty and should not be included in the

same negotiating unit. On the other hand, if they do share a community of interest then logically they must also share a mutual interest in "matters within the scope of representation" and should thus be included in the same negotiating unit and enjoy the equal right to vote and participate in the activities of employee organizations of their own choosing.

The majority's formula as to voting eligibility is flawed in another respect. Part-time employees who have been designated by the majority as members of the overall certificated unit could sign proof of support cards or petitions pursuant to Government Code section 3544.¹² A district, as a result of receiving a showing of majority support, could grant voluntary recognition to the employee organization. This would clearly undermine the majority's new holding that not all part-timers in the unit have the right to vote since any part-timer would in effect be casting a vote by signature rather than by ballot even though that employee does not have a "sufficient expectation of re-employment with the District or a substantial continuing interest in those matters within the scope of representation to entitle them to vote in the election."¹³

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Section 3544 provides in part:

An employee organization may become the exclusive representative for the employees of an appropriate unit for purposes of meeting and negotiating by filing a request with a public school employer alleging that a majority of the employees in an appropriate unit wish to be represented by such organization and asking the public school employer to recognize it as the exclusive representative. The request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall include proof of majority support on the basis of current dues deduction authorizations or other evidence

--¹³ Supra at 6.

Equally absurd is that while any part-time employee's signature can be used to establish an employee organization proof of support, because of the new voting eligibility requirement, the very same part-time employees would be unable to select the exclusive representative of their choice.

Finally, referring specifically to page 3 of the majority opinion wherein the majority presents a litany of areas, though by no means exhaustive, where there exists no community of interest between regular faculty and part-time faculty, I think it behooves the Board to find a separate unit of part-timers if, indeed, the majority intends to analyze the part-time issue on a case-by-case basis. They state:

There was uncontradicted testimony that only the full-time faculty evaluate probationary employees serve on screening committees for new full-time employees are employed under a written contract are involved in the formulation and implementation of affirmative action programs serve on accreditation teams for community colleges are eligible to serve as department chairpersons are eligible for membership in the academic senate are required to belong to the State Teachers Retirement System are evaluated pursuant to procedures set forth in the Education Code are eligible for 'additional professional increments' of salary serve as members of committees in the selection of classified employees are expected by custom to have office hours receive sabbatical leave, paid holidays, and health and welfare coverage

In conclusion, I would only say that this decision surpasses Los Rios in its absurdity, for not only does the majority now attempt to include all part-time faculty members while denying some of them their legal right to vote for a representative of their choosing, but the majority also concludes that now it will attempt to resolve the part-time question at the community college level on a case-by-case basis, apparently leaving the precedential value of Los Rios

in abeyance. This "flip-flop" by the majority not only frustrates the entire Board hearing process but clearly dampens any incentive for settlement that the parties may have. Perhaps it would be wiser to abandon the entire unit determination process as it now exists and render these decisions in the form of rules to eliminate the cost both to the districts and to the employee organizations. For if this Board cannot assure the parties of consistent and reasonable decisions, the entire process is frustrated and has the potential of becoming too costly to be worth the effort. It is my conclusion that this decision by the Board is another indication of the majority's attempt to impose the private sector collective bargaining attitudes, concepts, and traditions upon the public sector, and I believe this is perhaps the greatest damage the PERB can inflict on the public school system of this state.

Raymond J. Gonzales, Member

November 16, 1978

EDUCATIONAL EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of)

HARTNELL COMMUNITY COLLEGE DISTRICT,)

Employer,)

and)

HARTNELL COLLEGE FACULTY
ASSOCIATION, CTA/NEA)

Employee Organization.)

Case No. SF-R-312

PROPOSED DECISION
(7/15/71)

Appearances: Andrew Church, Attorney (Abramson, Church and Stave), for Hartnell Community College District; Duane B. Beeson, Attorney (Brundage, Beeson, Tayer and Kovach), for Hartnell College Faculty Association, CTA/NEA.

Proposed Decision by Ronald E. Blubaugh.

PROCEDURAL HISTORY

On April 1, 1976, the Hartnell College Faculty Association, CTA/NEA filed a request for recognition with the Board of Trustees of the Hartnell Community College District.¹ The request asked for recognition of the Association as the representative of a unit of all certificated

¹ Throughout this opinion, the Hartnell College Faculty Association, CTA/NEA will be referred to as the "Association." The Hartnell Community College District will be referred to as the "District."

employees with certain listed exclusions.²

The District posted a notice of the request on April 9, 1976, and at a special meeting on May 4, 1976, the governing board approved a resolution doubting the appropriateness of the unit requested by the Association. The District also requested an election. On June 11, 1976, the Association requested the Educational Employment Relations Board (EERB) to conduct a hearing and resolve the dispute.³ A hearing was conducted by EERB member Raymond Gonzales in Salinas on September 22, 1976.

At the hearing, the parties agreed that their dispute presents two issues for the EERB. The first issue is whether part-time certificated employees should be included in the same negotiating unit with the full-time certificated employees. The Association argues that full-time and part-time faculty members should be included in the same unit because they share a community of interest. The District contends that the part-time faculty should not be included in the regular certificated unit because they do not share a community of interest.

² The Association proposed the exclusion of the superintendent, the dean of instruction, the associate dean of instruction/evening and summer, the associate dean of instruction of careers, the dean of student personnel, the business manager, the director of community services, the associate dean of student personnel, the special student services officer, the director of cooperative educational/occupational work experience, the director of learning resources, and the director of applied health services.

The record does not reflect that the parties stipulated to these exclusions. However, it would seem from the transcript that the parties are not in disagreement about these positions. Therefore, the author of this decision will not inquire further about them.

³ Government Code Section 3544.5 empowers the EERB to conduct a hearing about the appropriateness of a disputed unit upon the request of an employee organization.

The second issue is whether department chairpersons are management employees. The Association argues that department chairpersons should be included in the regular certificated unit because they are not management employees. The District contends that department chairpersons are management and should be excluded.

ISSUE

Should part-time certificated employees be included in the same negotiating unit with full-time certificated employees?

FINDINGS OF FACT

The Hartnell Community College District comprises the entire Salinas Valley. Hartnell Community College is accredited by the Western Association of Schools and Colleges. It has the authority to confer Associates of Arts degrees, and in programs that are shorter than two years, the college has the authority to confer certificates of completion. There are 6,923 students enrolled at Hartnell Community College.

The Hartnell Community College District has approximately 113 full-time faculty members. Of these, approximately 20-25 are contract employees, and approximately 90-95 are regular employees.⁴ There are 213 part-time faculty members in the evening program, and 25 part-time faculty

⁴ Certificated employees in the community colleges must be classified as either contract, regular or temporary. Education Code Sections 87476 (formerly numbered 13334) and 87604 (13346). The statutory scheme covering the achievement of tenure by certificated employees envisions the progression of a satisfactory employee from the probationary status of "contract" to the permanent status of "regular" after two years. See Education Code Section 87600 (13345) et seq.

members in the day program. Instructors who teach 40 percent or less of 15 credits (approximately two classes) are designated by the District as part-time. Part-time teachers are paid on an hourly basis. No evidence was presented as to how many of the part-time teachers are designated regular or contract.

Several full-time day instructors teach evening classes. Some teach evening classes as part of their regular assignment. Others teach in the evening as an addition to their regular assignment, for which they are paid at an hourly rate of 1/1150 of their annual contract salary.

While part-time faculty members do not receive additional compensation for longevity of service, they do receive additional compensation for increased educational attainment, as do the full-time teachers.

The District applies the same standards of course content and the same standards of quality of course offerings for both the day and evening classes. An effort is made by the department chairperson to have the part-time instructors use the same textbooks as the full-time instructors. Students can obtain credit toward degrees from either day or evening classes, interchangeably.

The process for hiring full-time instructors begins when the department chairperson assesses the needs of the department. If another teacher is needed, the chairperson asks the dean of instruction. The position is then advertised. The chairperson reviews the applications, and appoints a screening committee which the chairperson heads. The chairperson is always one of the interviewers, however each member of the committee has a voice in the decision about which candidate is hired. In contrast, the interviewing and screening of the part-time instructors is done solely by the department chairperson. The recommendations for employment of both full-time and part-time day instructors are reviewed by the dean of

instruction. Recommendations for the employment of an evening instructor are reviewed by the dean of the evening program.

The full-time instructors are evaluated by a committee of three persons, one of whom is the department chairperson. It is the responsibility of the chairperson to write the committee's report. Evaluation of the part-time instructors is done by the department chairperson, unless the chairperson has delegated this duty. The recommendation of either the committee or the department chairperson is given to the dean of instruction.

The full-time instructors are not required by the governing board to have office hours. However, it is expected that all full-time instructors will have office hours. One part-time instructor testified that she has an office and maintains regular office hours. Only the full-time instructors are required to attend faculty meetings, however some part-time instructors do so voluntarily.

Membership in the academic senate is limited to full-time contract or regular instructors. The full-time instructors participate on such faculty bodies as the screening committees, the accreditation committees, and the budget committees. There was testimony by a part-time instructor that she also belongs to such bodies.

There is some difference in the benefits received by the part-time and the full-time certificated employees. Full-time instructors are entitled to sabbatical leaves; part-time faculty members are not. The full-time instructors receive health benefits; part-time faculty do not. Sick leave can be earned by both the part-time and the full-time instructors. The full-time instructors participate in the State Teachers' Retirement System.

The California Teachers Association (CTA) is the only faculty organization that participated on the certificated employees council under the Winton Act. A wage proposal presented by the CTA included increased pay and benefits for the part-time instructors. A part-time instructor has served on the certificated employees council in the past. The administration did not object to this.

CONCLUSIONS OF LAW

The issue presented in this case is essentially identical to that considered by the EERB in Los Rios Community College District.⁵ In Los Rios, the EERB held that "part-time instructors who have taught at least the equivalent of three semesters of the last six semesters inclusive" should be in the same unit with the full-time instructors.

After noting the Educational Employment Relations Act's mandates for resolving unit questions,⁶ the EERB analyzed

⁵ EERB Decision No. 18, June 9, 1977.

⁶ Government Code Section 3545 reads as follows:

(a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

(2) A negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district and shall not be represented by the same employee organization as employees whom the supervisory employees supervise.

(3) Classified employees and certificated employees shall not be included in the same negotiating unit.

New York University,⁷ the leading National Labor Relations Board case dealing with unit placement in private universities. The EERB thus met its obligation to consider NLRB precedent.^{8 8}

In New York University, the NLRB set forth four areas in which it found "no real mutuality of interest" between the part-time and full-time faculty members: 1) compensation, 2) participation in university government, 3) eligibility for tenure, 4) working conditions. The NLRB reversed its prior position⁹ and excluded part-time instructors who were not employed in "tenure track" positions.

The NLRB noted that most of the part-time instructors received their primary income elsewhere and that their primary work interest was elsewhere. They received no fringe benefits and were excluded from the faculty senate. They did not participate in department decisions on appointments, promotions or tenure. They were not consulted on curriculum development, degree requirements of department chair selection. They had no voice in developing institutional policies, nor were they obligated to engage in research, writing or other creative endeavors, counsel students or participate in department and university affairs. Finally, they could not achieve tenure under any circumstances.

In Los Rios, the EERB found this analysis inapplicable to the California Community Colleges. The EERB noted that the

⁷ 205 NLRB 4 (1973), 83 LRRM 1549.

⁸ Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 606 (1974).

⁹ In Long Island University, C.W. Post Center, 189 NLRB 904 (1971), 77 LRRM 1001, and in University of New Haven, 190 NLRB 478 (1971), 77 LRRM 1273, the NLRB developed a formula for including certain part-time instructors in the same unit as full-time instructors.

NLRB cases¹⁰ deal with four-year universities which place emphasis on research and writing by faculty members. The EERB noted that the California community colleges are primarily teaching institutions which offer instruction through the second year of college.¹¹ The University of California is designated by law as "the primary state-supported academic agency for research."¹² There is no authorization for research in the community colleges.

Another major distinction the EERB considered between the California community colleges and the private four-year institutions is the whole question of tenure. It is clear from the NLRB decisions that faculty members who can acquire tenure are not excluded from the unit. This occurs because the institutions considered by the NLRB link tenure directly with the instructor's status as a full-time employee. Full-time instructors are on the tenure track. Part-time instructors are not.

In California, there is not such a fixed linkage between tenure and the instructor's status as either part-time or full-time. It is clear that part-time community college instructors can obtain tenure in this state. Ferner v. Harris (1975), 45 C.A.3d 363 at 368; Vittal v. Long Beach Unified School District (1970), 8 CA.3d 112. There has been a great deal of litigation about whether certain "temporary" instructors can obtain tenure in the community colleges and the results are

¹⁰ For NLRB decisions applying the New York University rule see University of San Francisco 207 NLRB 12 (1973), 84 LRRM 1403; Point Park College, 209 NLRB 1064 (1974), 85 LRRM 1542; University of Miami, 213 NLRB No. 64 (1974), 87 LRRM 1634; Goddard College, 216 NLRB No. 81 (1975), 88 LRRM 1228; Rensselaer Polytechnic Institute, 218 NLRB No. 220 (1975), 89 LRRM 1844; Yeshiva University, 221 NLRB No. 169 (1975), 91 LRRM 1017; University of Vermont, 223 NLRB No. 46 (1976), 91 LRRM 1570.

¹¹ Education Code Section 66701 (22651).

¹² Education Code Section 66500 (22550).

conflicting. Balen v. Peralta Junior College Dist. (1974), 11 CA.3d 821; Coffey v. Governing Bd. of S.F. Community College Dist. (1977), 66 CA.3d 279; Peralta Federation of Teachers v. Peralta Community College District (1977), 69 CA.3d 281. But however the California Supreme Court ultimately unscrambles these cases, the mere possibility of tenure for any part-time instructors marks a significant distinction from the NLRB precedent.

Consistent with what the EERB found in Los Rios, there are these and other distinctions between Hartnell Community College and New York University. It is true that the part-time faculty at Hartnell College cannot become members of the academic senate. However, both the part-time and full-time instructors participate on such faculty committees as the screening committees, accreditation committees, and budget committees. Moreover, it seems doubtful that even full-time faculty members at Hartnell College have anything like the role in governance possessed by the New York University faculty. At New York University, the full-time faculty has a significant role in establishment of both admission standards for students and degree requirements. In accord with the practice of shared governance at major universities,¹³ the New York University faculty has a key voice in the operation of that school.

In the California community colleges, many of these matters are not subjects for faculty participation. By law, admission in the community colleges is open to any person with a high school diploma or its equivalent.¹⁴ By law, the district governing board is to establish policies for and approve the total educational program for the district.¹⁵ No evidence submitted in the Hartnell College hearing indicates the faculty

¹³ See generally Kahn, "The NLRB and Higher Education: The Failure of Policy-making through Adjudication," 21 UCLA L.R. 63.

¹⁴ Education Code Section 7600 (25503).

¹⁵ Education Code Section 72283 (1010.4).

participates in these matters.

There is some parallel between the salary structure for the Hartnell College full-time contract and regular teachers and that for the part-time certificated employees. They both receive additional compensation for increased educational attainment.

Most of the factors considered by the NLRB in its decision to separate part-timers are thus distinguishable in part or in full from the situation in the Hartnell Community College District. When that rationale is set aside, as the EERB found in Los Rios, the case becomes compelling for the inclusion of at least some part-time instructors in the same unit with full-time instructors. The most fundamental consideration is that they do the same work. They teach. The courses are the same. An effort is made by the department chairperson to have the part-time teachers use the same textbook as the regular certificated teachers. The grading is the same. Students may complete their entire program in either day or evening or a combination of both. There is no element in community of interest considerations more basic than the nature of the work. In some cases, there may be reasons to place employees performing essentially identical work into separate negotiating units. The NLRB has chosen this path for the private universities under its jurisdiction. The EERB has decided to the contrary in the California community colleges.

In Los Rios, the EERB decided that the length of a part-time instructor's relationship with the district should form the dividing line between those who are in the unit and those who are not. The hearing officer will follow the same

approach in this case.¹⁶ On the basis of the evidence recited above and the whole record, the hearing officer finds that part-time certificated employees shall be in the unit with regular and contract instructors if those part-time employees have taught at least the equivalent of three semesters out of the last six semesters inclusive.

ISSUE

Are department chairpersons management employees? ¹⁷

¹⁶ Government Code Section 3545 commands that a negotiating unit with classroom teachers shall contain all classroom teachers. In Los Rios, the EERB considered whether that section requires all part-time instructors to be placed in the unit. Relying on its earlier reasoning in Belmont Unified School District, EERB Decision No. 7, December 30, 1976, the EERB concluded all part-time instructors need not be included in the unit.

In addition to community of interest considerations, Government Code Section 3545 also commands that attention be paid to established practices and efficiency of operation. The EERB has decided it will give little weight to past representation practices under the Winton Act, when they occurred in a unilateral context. Sweetwater Union High School District, EERB Decision No. 4, November 23, 1976, and Grossmont Union High School District, EERB Decision No. 11, March 9, 1977. For whatever weight it does have, however, there was evidence the formerly existing certificated employees council at Hartnell College negotiated at least once on behalf of the salaries and benefits for the part-time teachers. In addition a part-time teacher has served on the certificated employees council in the past, and the administration did not object to this. Finally, there was no evidence suggesting it would be inefficient for the part-time instructors to be placed in the same unit as the full-time instructors.

¹⁷ In Los Rios, the EERB held that division chairpersons in the community college were supervisors as defined by Government Code Section 3540.1(m), and therefore they were not included in the same negotiating unit with the certificated teachers. In the present case, the District and the Association stipulated that the department chairpersons are not supervisors. The hearing officer adopts that stipulation without inquiry. Therefore, the only issue is whether department chairpersons should be excluded from the certificated teacher negotiating unit because they are management employees.

FINDINGS OF FACT

There are nine departments at the Hartnell Community College. The departments are: applied health services, fine arts, health/physical education/recreation, natural science, business, language arts, mathematics/engineering, social science, and technology/agriculture. Each department has a department chairperson. They are all tenured employees. Candidates for department chairperson are nominated by instructors in the various departments, and selected by the board of trustees. The term of service is one year, although as a practical matter elections are held about once every three years. No particular credential is required beyond that of a regular instructor. The job necessitates release time from teaching. At least two department chairpersons have 100 percent release time because of their extensive duties. The salary of the department chairpersons includes a 3 percent responsibility factor over the contract of the regular teachers, and 5 percent of their contract salary for every two weeks of extra service. Their benefits are the same as those of the regular instructors.

Department chairpersons have several responsibilities. The chairperson is responsible for formulating the budget of the particular department. Based upon faculty input, the department chairperson recommends to the governing board the amount of money which should be allocated to the particular department. Some of the components of a budget are: the teachers' salary account, the classified salary account, the student help account, the replacement equipment account, and the supplies account.

Determining the department curriculum is another responsibility of the chairperson. Most suggestions concerning the department curriculum originate with the faculty members. If the department chairperson decides that something should

become part of the curriculum, the idea is submitted to the dean of instruction, so that it can be put on the agenda of the curriculum committee. Each department has a representative on this committee. Usually the representative is the department chairperson. The curriculum committee makes recommendations to the governing board.

In determining the schedule of the classes in the department, the chairperson takes suggestions from the faculty members. The chairperson then makes recommendations to the dean of instruction who has the power of review.

It is the responsibility of the department chairperson to set up and head the screening committees which interview people for full-time employment as instructors in the department. The screening committees make recommendations to the dean of instruction. In selecting part-time instructors, the department chairperson has almost sole responsibility for screening and interviewing the applicants. The chairperson then makes recommendations to the dean of instruction, or for the evening program, to the dean of the evening program.

The department chairperson has a role in recommending personnel changes within the department. The full-time instructors are evaluated by a committee of three persons. The department chairperson sets up the evaluation committees and is one of the three members. It is the department chairperson's responsibility to write the report for the committee. Evaluation of the part-time instructors is done by the department chairperson, unless the chairperson has delegated this duty. The recommendation of either the committee or the department chairperson is given to the dean of instruction.

When district policy concerns an area of instruction, the department chairperson and the dean of instruction administer it. If the policy affects one department, just the department chairperson administers it. It appears that the department

chairperson's responsibilities consist mainly of communicating the district policy to the faculty in their department, and seeing to it that the district policies are complied with.

CONCLUSIONS OF LAW

There is applicable precedent on this matter from both the National Labor Relations Board and the Educational Employment Relations Board. Even though the National Labor Relations Act does not define "management employee," the NLRB and the federal courts have characterized management employees as:

Those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their established policy.¹⁸

The California Legislature has by statute defined "management employees." Government Code Section 3540.1(g) provides:

"Management employee" means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Educational Employment Relations Board.

In NLRB v. Bell Aerospace Co., 416 U.S. 267, 85 LRRM 2945 (1974), the United States Supreme Court held that it was the intention of Congress to exclude all managerial employees

¹⁸ NLRB v. Flintkote Co., 217 NLRB No. 85, 89 LRRM 1295, 1297 (1975)

from the ambit of the NLRA. Apparently, because of this, the NLRB has been reluctant to find that an employee is a management employee when the facts in the record do not clearly establish that the employee is closely allied with management.¹⁹

In California, the EERA provides that managerial employees are not considered employees for the purposes of the Act,²⁰ and they do not have the same negotiating rights as do the regular employees.²¹ Because of this, the EERB has held that great care must be exercised in determining who shall be considered a management employee.²²

The department chairpersons at Hartnell Community College do not have significant responsibilities in forming district policy. They are not part of the administration of the District. All but two of them are instructors. The main

¹⁹ NLRB v. New York University, 221 NLRB 1148, 91 LRRM 1165, TT7T (1975)

²⁰

Government Code Section 3540.1(j) provides:

"Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

²¹

Government Code Section 3543.4 provides:

No person serving in a management position or a confidential position shall be represented by an exclusive representative. Any person serving in such a position shall have the right to represent himself individually or by an employee organization whose membership is composed entirely of employees designated as holding such positions, in his employment relationship with the public school employee, but, in no case, shall such an organization meet and negotiate with the public school employer. No representative shall be permitted by a public school employer to meet and negotiate on any benefit or compensation paid to persons serving in a management position or a confidential position.

²² Oakland Unified School District, EERB Decision No. 15, March 28, 1977 at 7.

responsibilities of the department chairpersons are: determining the department budget, formulating the department curriculum, making a schedule of the classes in their departments, and setting up and heading the committee for hiring and evaluating instructors within their department. At department faculty meetings, the chairperson solicits ideas on these matters from the faculty members, thus acting primarily as an instrument of the faculty. When decisions are made they must be approved by the District.

On the other hand, proposals for district policy are made by the academic senate, the associated student body, and the president's advisory committee. The department chairpersons sit on the president's advisory committee, while they do not sit on the academic senate nor do they sit on the associated student body. The proposals of these committees are presented to the governing board which makes the final decision on most of the district policies.

In sum, the department chairpersons are as much the voice of the faculty as they are of the District. They do not have significant responsibilities for formulating district policy.

The department chairpersons also do not have significant responsibilities for administering district programs. "Significant" can be defined as "having meaning," "full of import," "having or likely to have influence or effect," "deserving to be considered," "important," "weighty," "notable."²³ Because of the reluctance of the NLRB and the EERB to designate employees as management employees, "significant responsibilities" should apply to those responsibilities which are more than just

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Webster's Third New International Dictionary.

routine and nondiscretionary. The EERB in Lbs Rios held that an employee does not have significant responsibilities for administering district programs when "the administrative duties consist primarily of assuring compliance with the policy, and there is no discretion to deviate from the policy."²⁴

In Hartnell Community College, when the district policy concerns an area of instruction, the dean of instruction and the department chairperson administer it. If the policy affects one department, just the department chairperson administers it. It appears that the department chairperson's responsibilities consist mainly of communicating the district policy to the faculty in their department, and seeing to it that the district policies are complied with. For purposes of Government Code Section 3540.1(g), these are not significant responsibilities for administering district programs.

The department chairpersons at Hartnell Community College District perform neither of the functions delineated in Government Code Section 3540.1(g). They are not management employees. Therefore, the department chairpersons should be included in the regular certificated negotiating unit.

PROPOSED DECISION

It is the proposed decision that:

The following unit is appropriate for the purpose of meeting and negotiating, providing an employee organization becomes the exclusive representative of the unit:

Certificated Employee Unit consisting of all full-time regular and contract certificated employees, all part-time certificated employees who have taught at least the equivalent of three semesters out of the last six semesters inclusive,²⁵

²⁴ Los Rios at 19.

²⁵ As used in this proposed decision the word "inclusive" means that an instructor who is presently teaching for a third semester, under this formula, would also be considered eligible.

and all department chairpersons, and excluding all management, supervisory and confidential employees.

The parties have seven (7) calendar days from receipt of this proposed decision in which to file exceptions in accordance with Section 33380 of the Board's Rules and Regulations. If no party files timely exceptions, this proposed decision will become a final order on July 26, 1977, and a Notice of Decision will issue from the Board.

Within ten (10) workdays after the employer posts the Notice of Decision, the employee organization shall demonstrate to the Regional Director at least 30 percent support in the above unit. The Regional Director shall conduct an election at the end of the posting period if the employee organization qualifies for the ballot and the employer does not grant voluntary recognition.

Dated: July 15, 1977

Ronald E. Blubaugh *0*
Hearing Officer