STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF TEACHERS, LOCAL 1474, Charging Party,	)	Case No. S-CE-29-H
v.	)	PERB Decision No. 654-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	December 31, 1987

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg for American Federation of Teachers, Local 1474; Marcia J. Canning for Regents of the University of California.

Before Hesse, Chairperson; Porter, Craib, Shank and Cordoba, Members.

DECISION

SHANK, MEMBER: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the American Federation of Teachers, Local 1474 (Charging Party), of the general counsel's dismissal of its charge that the Regents of the University of California (Respondent or University) violated sections 3571(a), (b) and (c), 3565 and 3570 of the Higher Education Employer-Employee Relations Act (HEERA)[1] by

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571 states, in relevant part:

> It shall be unlawful for the higher education employer to:
>
> (a) Impose or threaten to impose reprisals

unilaterally discontinuing its policy of employing lecturers already employed by the University for additional service as lecturers in the Rhetoric Department.

After reviewing the record, we find that Charging Party has presented factual allegations sufficient to state a prima facie case and we reverse the dismissal consistent with the discussion below.

FACTUAL AND PROCEDURAL SUMMARY

PERB Regulation 32615[2] sets forth the required contents of an unfair labor practice charge and obligates the charging party to, inter alia, set forth in its charge "[a] clear and concise statement of the facts and conduct alleged to constitute an unfair practice." PERB Regulation 32630 authorizes dismissal and refusal to issue a complaint "[i]f the Board agent concludes that the charge or the evidence is insufficient to establish a prima facie case . . . ."

> on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

[2]PERB Regulations are codified in the California Administrative Code, title 8, part III, section 31001 et seq.

In its first amended charge,[3] Charging Party alleges that it is the exclusive representative of certain employees classified as part-time lecturers and employed by Respondent at its Davis campus. Charging Party further alleges that, "The policy of the employer had, for years, been to employ part-time lecturers already employed by the university for additional service on campus." The first amended charge states that in June, 1986, and at the time Charging Party and Respondent were meeting and conferring relative to a memorandum of understanding, Respondent announced that it would hire six full-time visiting lecturers, including three individuals not previously employed by the university and would not be able to employ any part-time visiting lecturers during the coming year. Charging Party included in its first amended charge, as Exhibit A, a memo from Respondent's Department of Rhetoric dated June 24, 1986, which identified the six full-time visiting lecturers scheduled to begin Fall, 1986. The memo stated, inter alia, ". . .a number of changes have been necessitated by events . . ."

The decision to hire full-time lecturers exclusively and to fill three of the positions from outside the University was

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[3]The initial charge was filed by the Charging Party on December 22, 1986. On February 10, 1987, the regional attorney informed Charging Party in writing that the above-referenced charge failed to state a prima facie case and advised that, unless the charge was amended accordingly or withdrawn prior to February 19, 1987, it would be dismissed. On February 18, 1987, an amended charge was filed.

alleged to constitute a unilateral change without notice to the Charging Party and without giving the Charging Party an opportunity to bargain about the changes in policy or impact upon the bargaining unit.

The regional attorney charged with investigating this matter found that the Charging Party failed to state a prima facie case and thus dismissed the charge. He stated Charging Party failed to demonstrate a policy existed regarding the employment of bargaining unit employees for additional employment as lecturers. He indicated that Respondent provided information that it had consistently hired according to a priority system established in 1982, wherein full-time lecturers are hired first, teaching assistants and associates in rhetoric second and part-time lecturers last. He also indicated that the charge does not explain which departments are alleged to be affected by the change or describe the impact upon the employees which the Charging Party represents.

On appeal, the Charging Party argues that the general counsel has exceeded his jurisdiction by receiving and weighing certain evidence received from Respondent. Furthermore, the Charging Party claims that general counsel is mistaken with regard to the substance of the first amended charge. The Charging Party asserts that evidentiary determinations should be made only by a hearing officer and cites Regulation 32180,

which provides that each party to a hearing shall have the right to appear in person or by counsel and to examine and cross-examine witnesses and introduce documentary and other evidence.

DISCUSSION

The only issue here is whether sufficient facts were alleged to state a prima facie case of unlawful unilateral change.[4] To state a prima facie case, the Charging Party must allege facts indicating that action was taken which changed the status quo regarding a matter within the scope of representation without giving the exclusive representative notice and the opportunity to bargain, or, if negotiations have occurred, that the matter was not negotiated to agreement or impasse prior to the implementation of the change: San Francisco Community College District (1979) PERB Decision No. 105. The change of policy must have a generalized effect

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[4] In reviewing the dismissal of a charge for failure to state a prima facie case, the essential facts alleged in the charge are presumed to be true. San Juan Unified School District (1977) EERB Decision No. 12. (Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board [EERB].); State of California (Dept, of Transportation) (1983) PERB Decision No. 333-S.

The dissent asserts that in order to state a prima facie case, the Charging Party should have stated facts sufficient to indicate a previous policy regarding the hiring of part-time lecturers. Furthermore, the charge should allege that the change in policy impacted the terms and conditions of employment. While we agree that a charge must contain facts sufficient to constitute a prima facie case, we believe that the facts alleged in this particular charge have been minimized by the dissent.

or continuing impact upon the terms and conditions of employment of bargaining unit members before it constitutes a violation of the duty to bargain. Grant Joint Union High School District (1982) PERB Decision No. 196; Modesto City Schools and High School District (1985) PERB Decision No. 552.

Here, the Charging Party alleges that, by hiring three full-time visiting lecturers not previously employed, the University unlawfully reduced the available employment opportunities for those lecturers currently employed by the University.[5] Although Charging Party's charge is lacking in specifics and could have been stated with greater clarity, we find that the allegations are sufficient to state a prima facie

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[5]We do not share the dissent's concern of whether or not the charge alleges that part-time instructors were "always employed" or "merely offered employment" by the University in the past. Regardless of which interpretation is applied to the allegation, the charge clearly alleges: a) past policy had been to offer increased lecturing opportunities to lecturers currently employed by the University; b) the decision to hire the full-time visiting lecturers from outside the University constituted a unilateral change; and c) this change had an impact on the terms and conditions of employment of bargaining unit employees.

This reading of the charge is easily inferred, if not self-evident, from the facts alleged. Far from being easily disposable as a matter of management prerogative, and therefore out of scope, the charge raises bona fide issues of whether the part-time lecturers had "incumbent rights" in the positions filled, (a bargainable issue, cf. Healdsburg Union High School District, et al. (1984) PERB Decision No. 375). Moreover, the unfair labor practices attendant to violations of these rights could exist even under the policy claimed by the University (i.e., it wouldn't matter in what order the University hired, if the policy issue concerned only the source of the hires).

case and, therefore, direct that a complaint issue as to this charge. We find that whether or not Respondent in fact had a policy or practice wherein lecturers already employed by the University were employed for additional service as lecturers, and whether such policy or practice was unilaterally changed, are factual questions to be determined after a hearing. As this board noted in Rio Hondo Community College District (1982) PERB Decision No. 279;

> The nature of existing policy is a question of fact to be determined from an examination of the record as a whole. It may be embodied in the terms of a collective agreement (Grant, supra, [(1982) PERB Decision No. 196]). In the absence of such a contract provision, existing policy may be ascertained by examining past practice (Pajaro Valley, supra, [(1978) PERB Decision No. 51]) or . . . other evidence. . . .

Finally, we note that the Charging Party in its appeal from the dismissal expressed concern that the general counsel's office is attempting to exceed its authority. We do not believe that the regional attorney misunderstood PERB regulations by attempting to compel the Charging Party to prove its case on paper without the benefit of cross-examination and confrontation of witnesses. Nor does the fact that the general counsel's office does not prosecute unfair labor practice charges undercut the agency's right, through investigation, to screen out charges that are nonmeritorious as a matter of law. However, we do not believe that the information requested by the general counsel in this instance was essential to reach a conclusion that a prima facie case had been stated.

ORDER

Based on the record, it is hereby ORDERED that the regional attorney's dismissal of the charge in Case No. S-CE-29-H is REVERSED and the charges discussed here are REMANDED to the general counsel for issuance of complaint and initiation of further proceedings.

Member Craib joined in this Decision.

Member Cordoba's concurrence begins at page 9.

Chairperson Hesse's and Member Porter's dissent begins at page 11.

Cordoba, Member, concurring: I concur in the majority's decision and reasoning. However, I feel that the dissent raises certain points that deserve to be addressed.

PERB Regulations 32620(b)(5) and 32630 require the Board agent to dismiss a charge "if . . . the charge or the evidence is insufficient to establish a prima facie case. . . ." In the instant case, though the charge is not a model of absolute clarity, when viewed in conjunction with the evidence appended its essence is unmistakable.

First, it is clear that the instant charge is being made on behalf of the part-time visiting lecturers represented by Charging Party, for these are the only bargaining unit members mentioned in the amended charge whose terms and conditions of employment were directly impacted by the alleged unilateral change.

Second, the nature of the impact of that alleged change is perfectly clear from Respondent's June 24, 1986, memo appended to the charge, which states in pertinent part, " . . . we will not be able to employ any part-time visiting lecturers during the coming year." The only possible meaning of this phrase is that the part-time visiting lecturers currently employed by Respondent were being disemployed. What greater impact could a change have on terms and conditions of employment than to eliminate them?

Viewed in light of these facts, the Charging Party's facially diverse statements that the employer had a policy for

years of "employ(ing) part-time lecturers already employed by the University for additional service on campus" or of "offer(ing) employment opportunities to people already present on campus" emerge as a simple alternative allegation that Respondent's decision to hire three full-time visiting lecturers from outside existing staff unilaterally changed a prior policy of reappointing existing personnel. Under similar circumstances, this Board has found that a change in past practice affecting lecturers' "reasonable expectation of reemployment" amounted to a prohibited unilateral change in policy. Regents of the UC (1983), PERB Decision No. 359-H (vacated on other grounds).

Clearly, neither the Board agent nor the Board should be required to rely upon inference to give sufficiency to a charge when such inference requires making a choice between alternative interpretations. This charge is sufficient solely because the allegations presented are susceptible to only one reasonable interpretation.

Hesse, Chairperson, dissenting: I respectfully disagree with the majority's characterization of Charging Party's allegations and the conclusion that sufficient facts have been asserted by Charging Party to support a prima facie case.

To establish a prima facie case of an alleged unlawful unilateral change, sufficient facts must be stated to demonstrate that the employer either unilaterally changed a matter within the scope of representation, or that the employer changed an established policy or practice, which had a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. (San Mateo County Community College District (1979) PERB Decision No. 94; Grant Joint Union High School District (1982) PERB Decision No. 196; Rio Hondo Community College District (1982) PERB Decision No. 279.)

In pertinent part, the following was alleged by Charging Party:

> . . . . . .
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> The policy of the employer had, for years, been to employ part-time lecturers already employed by the University for additional service on campus .... On June 24, 1986, the university announced that there would be six full-time visiting lecturers as a result of "a number of changes" which had been "necessitated by events." Of the six individuals, three were individuals who had not previously been employed by the university. Prior to that time, the policy of the university had been to offer employment opportunities to people already present on campus and represented by charging party . . . These changes constitute

> unilateral changes without notice to the charging party and without giving the charging party an opportunity to bargain about the change in policy or the impact upon the bargaining unit . . . . (Emphasis added.)

The majority's recognition that the charge is "lacking in specifics" and "clarity" seriously understates Charging Party's failings.[1] Patent ambiguities and defects appear on the face of the charge.

Was the alleged unilateral change a change in the time base (full-time versus part-time) or, in the status of the positions filled (visiting lecturers'[2] versus lecturers already present on campus) or, in the designation of the positions (represented

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[1]PERB Regulation 32615 requires that a Charging Party provide "a clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (Emphasis added.) I do not share the majority's willingness to "minimize" this mandate by ignoring the lack of "specifics" and "clarity" in the charge. The majority's paraphrased, general reference to "lecturers" and "bargaining unit members" rather than part-time lecturers, as stated in the charge, is but one example. The majority's collection of coadunated facts requires viewing the instant charge through a kaleidoscope which, by assembling loose bits of information reflected through mirrors, somehow transforms Charging Party's fragmentary factual images into an "easily inferred" illusory whole.

The concurrence goes even further in its factual melange by relying exclusively upon "appended" material to intuit its "disemployment" theory, rather than focusing upon the charge itself. We simply believe that the contents of the charge, not the "inference" of Board members, should determine whether a complaint shall issue.

[2]The ambiguity of the charge is further compounded by Charging Party's statement that "certain visiting lecturers" were represented by the Charging Party and were employed during the 1985-86 school year.

by Charging Party versus non-represented) or, finally, a change in the number of positions (six positions versus any other number)?

It is unclear whether the "people already present on campus" refers to part-time lecturers only, or whether "additional service" refers to the six full-time positions in the Rhetoric Department exclusively. It is also unclear whether Charging Party is contending that part-time lecturers were, as a matter of University policy, always employed or merely offered employment in these "additional services" by the University in the past.

If the charge challenges the University's decision to hire six full-time rather than part-time visiting lecturers, such a challenge cannot be sustained as it is an infringement upon a fundamental management prerogative that, absent a contractual or statutory restriction, does not in itself create a duty to bargain. (Healdsburg Union High School District (1984) PERB Decision No. 375; see also St. Louis Telephone Employees Credit Union (1984) 273 NLRB No. 90 [118 LRRM 1079].)[3] If, on the

[3]The majority's reliance upon Healdsburg Union High School District (1984) PERB Decision No. 375 for its "incumbent rights" theory is misplaced. The Healdsburg Board held that "the reassignment of incumbent employees from existing classifications to different or newly created classifications is negotiable." (Pg. 47-48; citing Alum Rock Union Elementary School District (1983) PERB Decision No. 322.) The charge alleges a change in hiring policy not reassignments. It is unknown how the majority easily inferred who the incumbents were or what contract rights, if any, were affected.

The concurrence is equally errant in defining the instant

other hand, it is alleged that the University's decision not to first offer full-time employment opportunities in the Rhetoric Department to part-time lecturers on campus constitutes a "change in policy," such a policy must be clearly stated and the change must be alleged to have an "impact upon the terms and conditions of employment of bargaining unit employees." The instant charge fails on both counts.

The regional attorney specifically requested in his letter dated March 10, 1986, that Charging Party provide facts essential to establish a prima facie case as follows:

> Presumably, the allegation is that the Respondent has changed a practice of reemploying part-time instructors. However, the amended charge fails to provide facts from which it may be determined that a policy existed regarding the reemployment of part-time instructors and what the limitations of such a policy were. Moreover, in light of the Respondent's information that the university has consistently hired in the Rhetoric Department according to a priority system

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matter as a "reemployment" policy similar to Regents of the University of California (1983) PERB Decision No. 359-H (vacated on other grounds). In that case, the University unilaterally changed from eight to four years the period of yearly contract renewals (i.e. reemployment) for all lecturers. The instant charge only refers to "additional service" and "employment opportunities to people already present on campus," not reemployment. At most, this may imply that part-time lecturers should have "first choice" in new positions. On the other hand, disemployment (ergo, out-of-work) and reemployment implies that termination of part-time lecturers would occur because of the University's decision to hire six full-time visiting lecturers. Such an "alternative interpretation" goes well beyond the charge and raises even more uncertainty as to what the complaint will contain.

> established in 1982, it is not clear what the change, if any, has been. As written, the charge does not explain which departments are alleged to be affected by the change. Further, in light of the fact that Charging Party represents both part-time and full-time lecturers, it is not clear what the impact is of any change upon the employees which Charging Party represents.

Charging Party had ample opportunity to amend its charge but chose not to do so.[4] The majority apparently presumes the existence of such facts by broadly characterizing charging party's allegation as "whether or not respondent unilaterally changed [its] policy." It does little to merely recite that a change in the University's policy to offer employment opportunities occurred without factually identifying the policy and providing facts that such a change was either itself a matter within scope or that the change had an impact upon the terms and conditions of bargaining unit members. I am perplexed as to how the regional attorney will be able to clearly set forth these essential factual requirements in the complaint under the majority's analysis.[5] At a minimum,

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[4] It should be noted that Charging Party is represented by one of the most experienced and sophisticated labor law firms, and is no doubt capable of meeting this requirement. (Van Bourg v. NLRB (1985) 756 F.2d 692 [118 LRRM 3238]; Van Bourg v. NLRB (1985) 762 F.2d 831 [119 LRRM 2989], vacated on other grounds; Cupertino Union Elementary School District (1986) PERB Decision No. 572.)

[5] The concurring opinion now asserts that Charging Party's allegations are susceptible to only a single reasonable interpretation as to the existing policy allegedly unilaterally changed by the University. The concurring opinion identifies

Charging Party should have stated facts which indicate that part-time lecturers had a contractual, statutory, or, by past practice, an exclusive entitlement to "additional services" or that employment opportunities should have been first offered to these employees. Absent such a fundamental threshold factual allegation, I cannot conclude that the University's alleged departure from such a policy constituted a potential violation of the Act affecting a matter within scope.

Thus, I cannot conclude that sufficient facts exist to demonstrate the University's decision affected anything more than a mere "expectancy" of part-time lecturers within the bargaining unit rather than affecting a matter within the scope of representation.

For these reasons, I would dismiss the charge, with leave to amend, thereby providing Charging Party the opportunity to cure, if it can, the above-described deficiencies.

Member Porter joined in this Dissent.

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this singular policy as one of "reappointing existing personnel." We cannot find such a policy alleged in the charges. We note that neither the majority opinion nor the Charging Party, in its brief on appeal to this Board, assert that there was a policy of reappointing existing personnel.