STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL-AMERICAN FEDERATION OF TEACHERS, Charging Party, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case No. SF-CE-272-H LA-CE-235-H PERB Decision No. 907-H October 1, 1991

Appearances: Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar by William H. Carder, Attorney, for University Council-American Federation of Teachers; Marcia J. Canning, Attorney, for The Regents of the University of California.

Before Hesse, Chairperson; Camilli and Carlyle, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by The Regents of the University of California (University or UC) to the Supplemental Proposed Decision and Order Transferring Proceeding to the Board, issued by a PERB administrative law judge (ALJ) (attached hereto) which found that the charge filed by the University Council-American Federation of Teachers (Federation) in Case No. LA-CE-235-H was timely filed.

In Regents of the University of California (University Council-American Federation of Teachers) (1990) PERB Decision No. 826-H (UC (UC-AFT) I). the Board affirmed the ALJ's proposed decision, finding that the University violated section 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations

Act (HEERA or Act) by its conduct on the Santa Cruz campus.[1] With regard to the Los Angeles campus, the Board reversed the ALJ's dismissal of the charge and ordered the record be reopened and evidence be taken on the issue of timeliness of the filing of the charge.[2]

In his Supplemental Proposed Decision, the ALJ found that the charge in Case No. LA-CE-235-H was filed in a timely manner. The Board has reviewed the entire record in this matter, including the University's statement of exceptions, the Federation's response and the transcripts of the supplemental hearing, and finding the Supplemental Proposed Decision to be free from prejudicial, error, adopt it as a portion of the decision of the Board itself.

---

[1] Similar charges were filed with regard to conduct engaged in on the Los Angeles campus, although the complaint alleged solely a violation of HEERA section 3571(b) and (c), and did not include subsection (a). HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571(b) and (c) provides, in pertinent part:

> It shall be unlawful for the higher education employer to do any of the following:
>
> (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] At the same time, the Board, in UC (UC-AFT) I, clarified the rule of law to be applied in determining timeliness, i.e., commencement of the statute of limitations. (UC (UC-AFT) I, pp. 7-8.) In addition, the Board held that the relation back doctrine did not apply to the charge concerning events occurring on the Los Angeles campus. (Id. at pp. 6-7.) Further, the Board held that the doctrine of equitable tolling is no longer viable. (Id. at pp. 2-5.)

As the Board finds the charge in Case No. LA-CE-235-H was timely filed, it is necessary to address the merits of the alleged violation by the UC on its Los Angeles campus. In JC (UC-AFT) I, the Board adopted the ALJ's recitation of the facts in the proposed decision and affirmed the ALJ's conclusions of law, with some clarification. The findings of fact adopted by the Board contained facts relevant to the charges concerning both the Los Angeles and Santa Cruz campus. Only the findings of fact relevant to the case currently before the Board are reiterated herein.

FINDINGS OF FACT

Background

UC, which operates a statewide system of public universities, is an employer within the meaning of HEERA section 3562(h). The Federation, an employee organization within the meaning of section 3562(j), is the exclusive representative of a statewide unit of the University's non-senate instructional employees. The unit, totaling between 1,800 and 2,000 employees, primarily consists of lecturers who are not on tenure track to become permanent faculty members. They serve two major functions for the University, the first being to act as fill-ins for tenured staff on leave, and the second being to provide instruction for specialized courses which the tenure-track staff (which numbers about 8,000) does not have the specialized training and/or desire to teach. UC also employs teaching assistants who are usually graduate students, to perform some of

these functions. Historically, UC had offered lecturers appointments ranging in length from one quarter to one year, although two-year appointments were possible under the University's policies. Part-time appointments were common, and the University's policy also provided for split appointments, whereby lecturers would teach courses for more than one department.

UC also had a policy limiting the employment of lecturers, known as the "eight-year rule." Under that policy, lecturers who had taught courses at a campus for eight years at over 50 percent time were only eligible for continued employment at no more than a 50 percent appointment. It was this lack of security in employment that the Federation sought to change when it commenced negotiations with the University for an initial collective bargaining agreement (Agreement).

Bargaining History and Findings Based Thereon

The initial Agreement, which took some 27 months to negotiate, became effective on July 1, 1986, and was renegotiated, in part, effective for the period July 1, 1987 to June 30, 1990. Both Agreements contain the same provisions with respect to appointments of unit members. Those provisions, in pertinent part, read as follows:

> Article VII. APPOINTMENT
>
> A. General Provisions
>
> 1. Upon the execution of this Memorandum of Understanding the provisions of APM 287-17 (Terms of Service) shall no longer be applicable.

2. When a faculty/instructor in the unit is offered an appointment or reappointment, she or he shall be informed in writing of:

   a) the title of the position;

   b) the salary rate;

   c) the name of the employing department;

   d) the period(s) for which the appointment is effective;

   e) the percentage of time;

   f) the nature of the appointment and the general responsibilities; and,

   g) the name of the department chair, program head or other person to whom the faculty/instructor in the unit reports.

3. Letters of appointment or reappointment shall be consistent with this Memorandum of Understanding. If conflicts exist, this Memorandum of Understanding shall be controlling.

4. The appointment or reappointment shall have a definite ending date and shall terminate on the last day of the appointment set forth in the letter of appointment. The appointment or reappointment may be terminated prior to the ending date of the appointment in accordance with the provisions of this Memorandum of Understanding.

5. The University has the sole right to assign employees to teach courses offered by the University, and to assign other duties. Whenever possible the faculty/instructor in the unit should be consulted in advance of these assignments.

6. One (1) year of service is defined as three (3) quarters or two (2) semesters for 9-month appointees and four (4) quarters or equivalent for 11-month appointees at any percentage of time of service in any unit title at the same campus.

1. Lecturers on track to SOE and the Lecturers with COE, title codes 1600, 1602, 1605, 1606, 1610, 1615, 1616, and 1619, will be appointed and evaluated in accordance with the applicable

procedures currently in effect at the time of implementation of the Memorandum of Understanding, unless otherwise agreed to in writing by the parties to this Memorandum of Understanding.

8. Provisions of this article will not apply to faculty/instructors in the unit whose appointments have indefinite ending dates.

9. All appointment and reappointment decisions shall be made at the sole discretion of the University except as provide [sic] herein and shall not be subject to Article XXXIII. Grievance Procedure except for procedural violations.

10. The provisions of this Article are not subject to Article XXXIV. Arbitration.

B. Initial Appointment and Reappointment

1. Appointment and Reappointment

a) Normally, the initial appointment shall be for a period of service of one (1) academic year or less. However, the initial appointment may be for a period of up to two (2) academic years.

b) Reappointment(s) during the first six (6) years of service at the same campus may be for a period of up to three (3) academic years.

c) The duration of an appointment or reappointment shall be at the sole discretion of the University, except as provided in this Article.

2. Evaluation

a) Any reappointment shall be preceded by an evaluation of the performance of the faculty/instructor in the unit which shall be undertaken in accordance with each campus' applicable review procedure in effect at the time.

b) As soon as possible prior to the initiation of an evaluation faculty/instructors in the unit shall be notified of the purpose, timing, criteria, and procedure that will be followed.

c) Evaluations of individual faculty/instructors in the unit for reappointment are to be made on the basis of demonstrated competence in the field and demonstrated ability in teaching and other assigned duties which may include University co-curricular and community service. Reappointment to the senior rank requires, in addition, service of exceptional value to the University.

d) Faculty/instructors in the unit may provide letters of assessment from others including departmental faculty/instructors in the unit to the department chair, the chair's equivalent or other designated official as part of the evaluation process.

C. Post Six Years of Service

1. Reappointments

a) Reappointments which commence at or beyond six (6) years of service at the same campus can be made only when the following criteria have been met:

1) there is a continuing or anticipated instructional need as determined by the University; or, there is need for teaching so specialized in character that it cannot be done with equal effectiveness by regular faculty members or by strictly temporary appointees; and, if so found,

2) the instructional performance appropriate to the responsibilities of the faculty/instructor in the unit has been determined by the University to have been excellent, based upon the criteria specified in Section E.

b) Provided that the criteria set forth in Section C.1.a) continue to be met, reappointments shall be made for three-year periods. The three-year appointment does not guarantee that either the percentage of appointment or the specific teaching assignment will be constant for each quarter or semester during the term of the three-year appointment. The appointment letter

shall specify the minimum percentage time for each quarter or semester of the three-year period and the quarters or semesters during which the faculty/instructor in the unit shall be employed. Faculty/instructors in the unit appointed at less than 100% time and/or for less than the full academic year may be subsequently offered additional courses or additional academic duties.

c) Review for subsequent three-year appointments will normally occur during the second year of each three-year appointment.

The foregoing provisions represent a substantial departure from the initial proposals by the parties. The Federation initially proposed a system of increasingly longer appointments, culminating in an indefinite contract and a "Certificate of Continuous Employment." The University initially rejected any provisions for tenure in employment for lecturers, and desired to retain total discretion in appointment decisions. The parties soon were at logger heads on this and other issues, and formal bargaining virtually ceased. Progress was made during a series of informal meetings in May and June, 1985, and the University began to rethink its position on the length of appointments for long-term lecturers. Commencing on October 24, 1985, the parties exchanged a number of appointments proposals, culminating in tentative agreement for an appointments article on February 7, 1986. Upon agreement to the entire contract, that language became part of the 1986 Agreement, and was reiterated in the current Agreement.

Much of the testimony and documentary evidence presented at the hearing consisted of various witnesses' interpretations of

the appointments article, the positions taken by the parties during and after the completion of negotiations, and various interpretations given to the article in the University's policy manuals and other publications. Upon review of the record, certain elements of this article are apparent, and need no interpretation.[3] First], it is clear that Article VII (B) is an express limitation on UC's discretion in making post-six-year appointments.[4] Secondly, Article VII (C)(l)(b), on its face, mandates three-year appointments for lecturers who have completed six years of employment at the same campus, provided that certain conditions are met.[5] Thus, Article VII (C)(l)(b) states that such appointments "shall" be made for three-year periods, and upon reaching agreement on this article, it is found, as witnesses for the Federation testified, and as their bargaining

---

[3]In the proposed decision, the ALJ noted that any testimony to the contrary was not credited if it alleged that a different meaning was agreed to at the bargaining table; or was considered irrelevant if it consisted of alleged statements made during the course of the ever-changing positions of the parties during the negotiations, or a witness' personal interpretation of the provisions.

[4]In UC (UC-AFT) I, the ALJ and Board resolved any doubt on this issue by the fact that the University's proposed Article VII (A)(9), as of February 7, 1986, read, "All appointment and reappointment decisions shall be made at the sole discretion of the University . . . ." The Association objected to this language, and the parties, on that date, initialed the current language, which reads, "All appointment and reappointment decisions shall be made at the sole discretion of the University except as provided herein . . . ." (Emphasis added.)

[5]Again, any testimony that the parties agreed to a contrary interpretation was not credited by the ALJ, and pre-agreement positions and personal interpretations were considered irrelevant.

notes reflect, that Robert Bickal (Bickal), UC's then chief negotiator, commented that three-year appointments were now "mandatory."[6]

Therefore, UC, under the Agreement, was and is obligated to grant three-year appointments in accordance with the requirements set forth in Article VII (C)(1)(a). Those requirements are: (1) six years of service at the same campus; (2) continuing or anticipated instructional need as determined by the University, or a specialized need for instruction; and (3) excellence in instructional performance.

Astonishingly, through the entire course of these lengthy negotiations, the parties never defined the term, "instructional need." One not privileged to any specialized meaning for the term would ordinarily assume that it means what it appears to, on its face: the need for instruction, which is the meaning attached to it by the Federation's witnesses. Recognizing that the term may have a special meaning in the context of the University's operations, the parties were permitted to present testimony and documentary evidence as to any commonly understood different meaning for the term in the academic community, and circumstantial evidence that would show a specialized

[6]Bickal, when confronted with this statement, did not deny having made it. His explanation, that he only meant that the University was required to "consider individuals for the possibility of three-year appointments" is irrelevant in the absence of evidence that such an interpretation was communicated to the Federation. Furthermore, in light of his use of the terms, "mandatory" and "major concession," on February 7, 1986, it is also concluded that Bickal meant exactly what he said when the parties reached agreement on this article.

understanding of the terms by the parties. Not surprisingly, the interpretations ranged in length from one-liners to detailed analyses covering several pages of transcript. Also not surprisingly, the interpretations, in substance, ranged from the rather straightforward meaning attached to the phrase by the Federation's witnesses, to an all-encompassing concept that would, in effect, permit the University to deny three-year appointments on the basis of virtually any consideration it deemed relevant. While most, if not all, of UC's witnesses appeared to be motivated by a deep-seated bias against relinquishing any control over appointments, even if their interpretations of the term, "instructional need," were credited (and there were certainly many conflicts in testimony and documentary evidence as to UC's interpretation of Article VII), the University has clearly failed to establish any mutually understood meaning for the term, "instructional need" other than would be suggested by the dictionary definition.[7]

[7]It is noted that initially, the appointments proposals referred to UC's "instructional and programmatic" needs in determining the availability of three-year appointments. The term, "programmatic," (which was also the subject of extensive definitional testimony) was deleted at the Federation's insistence, on the stated ground that it would permit arbitrary action by departments opposed to three-year appointments. The University presented evidence that Marde Gregory (Gregory), the Federation's chief negotiator, at one point acknowledged that instructional need "in one sense" includes programmatic need, and that Bickal, on agreeing to delete the term, "programmatic," stated that instructional need flows from (or is the residue of) programmatic need. Neither of these isolated and rather vague statements establish that the parties agreed that UC would have the broad-based discretion in post-six-year appointments claimed by UC's witnesses. To the contrary, the credible evidence establishes that the Federation requested that the word,

UC contends that the parties agreed or understood that financial considerations could be considered in determining instructional need. Inasmuch as Article VII (C) nowhere mentions financial considerations, it is the University's burden to prove that the parties clearly agreed to this. The strong preponderance of the evidence, however, is to the contrary. It is undisputed that during negotiations, the Federation's representatives repeatedly expressed a serious concern that certain departments, fearful of the "soft money" basis for funding lecturer positions, would be recalcitrant in making three-year commitments, and that Bickal assured those representatives that under the Agreement, this would not be permitted. There is also no dispute that the Federation's representatives specifically asked if there would be any quotas placed on three-year appointments, and that Bickal assured them that this would not happen.

Also highly significant in this determination is the fact that before agreeing to the appointments article, the University had carefully calculated the number of lecturers who would be eligible for post-six-year reviews, and had concluded that the number would be small, perhaps 15 percent to 16 percent. In addition, the University was fully aware that even that number

---

"programmatic," be deleted from Article VII for the stated purpose of preventing arbitrary action by departments opposed to three-year appointments, and that in deleting the term, the University acknowledged that unless a program or curriculum was changed or eliminated by the academic senate, three-year appointments would be mandatory, and based only on instructional need and excellence.

would be reduced through terminations and failures to obtain "excellent" ratings in the reviews. Thus, while the somewhat dire implications that some of UC's witnesses predicted would arise from interpreting the Agreement to exclude financial considerations from these appointments might be true if applied to a substantial portion of the University's faculty, the evidence establishes that the parties understood that Article VII would only apply to a very small percentage of the entire faculty budget.

Furthermore, Bickal, when testifying, initially supported the interpretation of the Federation's witnesses when he stated:

> All right. Instructional [need] meant pretty much, I think, what the term would suggest, that there was ongoing need in an area of in an academic discipline for which a lecturer had been or was to be employed. (UC (UC-AFT) I. proposed decision, p. 13.)

Bickal then defined the term, "programmatic need," and included resource considerations in his definition of that term. Later in his testimony, Bickal was again asked to state what he understood the term, "instructional need," to mean, and this time, he added that it included the anticipated resources to support a three-year appointment. Bickal further added that funding and appointment decisions are "inextricable." When called as a rebuttal witness near the close of the hearing, however, Bickal testified that in determining the percentage level of the three-year appointments, Article VII (C)(1)(b) permits a reduced percentage appointment based on the difficulty in projecting the "level of work" over the three-year period. At that point,

Bickal made no reference to financial considerations. Based on the foregoing, it is concluded that at no time did Bickal state to the Federation's representatives that financial considerations would be a determinative factor in Article VII (C) reappointment decisions and that, in fact, he understood that financial considerations would not be a factor, at least beyond the decision as to whether specific courses would be taught, as opposed to broader financial considerations.[8]

Finally, with respect to finances, the record establishes that the parties agreed to deal with unanticipated financial problems by virtue of layoffs, and not by limiting initial three-year appointments. The Federation had initially proposed a "faculty displacement" article which afforded substantial job security for unit members. It is undisputed that when UC initially agreed to the concept of three-year appointments, Bickal insisted that a traditional layoff provision replace the

[8]Bickal's testimony, that he told the Federation's representatives that resources would be considered both before and after three-year appointments, was not credited by the ALJ. Said testimony conflicts with the documented bargaining history of Article VII, and it is highly unlikely that the Federation, in agreeing to a layoff proposal, would have also agreed, in effect, to give the University "two bites at the apple" in limiting appointments. At any rate, even if Bickal did, at some point during negotiations, make such a statement, the language agreed to by the parties and Bickal's statements on February 7 override any mid-point positions he may have taken. In addition, any statements made by the University's other negotiating team members at various mid-points in the negotiations which would conflict with this interpretation are irrelevant. In this regard, the Federation was entitled to rely on Bickal's statements as chief negotiator, and not on any mixed signals that may have been given by lesser authorities. Again, it is the final agreement of the parties that is determinative, and not their ever-changing postures during negotiations.

faculty displacement proposal to cover financial emergencies. In his comments on February 7, 1986, when the parties reached tentative agreement on Article VII, Bickal stated, "Now that we have mandatory, multiple year appointments, the layoff procedure becomes important." The Federation subsequently agreed to a far more restrictive layoff article than the provisions contained in its faculty displacement proposal. Thus, the parties specifically agreed that in exchange for more traditional layoff provisions, financial considerations would be deferred to layoff decisions.[9]

Based on the foregoing, it is concluded that the parties agreed, in effect, by virtue of Article VII, that if courses were going to be taught for the next three years by a lecturer, as opposed to" tenured faculty or teaching assistants, eligible lecturers would be reviewed and would receive three-year appointments if rated excellent. It is also concluded that the three-year appointments were to be effective immediately upon completion of the six-year review, and Bickal's testimony, that multiple-year appointments would only commence in the appointment subsequent to the six-year review appointment, is not credited.[10]

---

[9]This conclusion is reinforced by Bickal's comments at the February 20, 1986 bargaining session, as reflected by UC's bargaining notes, that the University was proposing layoff language ". . .as the quid pro quo for appointments and multiple year appointments when circumstances justify. Otherwise it would be difficult to make these appointments."

[10]The ALJ determined that while Gregory credibly denied that any such understanding was reached, none of the University's other witnesses contended that this was agreed to or is a valid interpretation and the University, in practice, has never adopted

Implementation of Article VII

Implementation of the Agreement has largely been left to the University's campus administrators. UC produced several witnesses and documentary evidence, including interpretative campus publications, showing the various meanings given to the appointments article by the office of the President, and by the Santa Cruz and Los Angeles administrations. Those interpretations are by no means consistent, even within the campuses, and are marked by the re-infusion of the term, "programmatic need," and ever-widening definitions of the term, "instructional need."[11] It is undisputed that the Federation did

---

such an interpretation. The ALJ noted that Bickal, and several of UC's other witnesses, had a disturbing tendency to justify their conduct on the basis of ex post facto contractual manipulations. Article VII (C)(1)(c) reads, "Review for subsequent three-year appointments will normally occur during the second year of each three-year appointments." This clearly does not limit three-year appointments to those subsequent to the appointment at the six-year review. On the other hand, UC's November 7, 1985 proposal for Article VII (C)(1)(c) reads, "Provided that the criteria set forth in paragraph C-1-a above [instructional and programmatic need, and excellent performance] continue to be met, subsequent appointments shall be for three (3) year periods." Arguably, that language would support Bickal's testimony, which is probably why it was changed. The ALJ commented that Bickal surely must realize that the current language and the parties' interpretation thereof does not support his testimony, and such a contrivance only weakens the persuasiveness of UC's arguments.

[11]By way of example, UC's Contract Administration Manual dated October 1986 contains a much broader definition of the term, "instructional need," than does the July 1986 version of the same manual. Neither, however, includes financial resources as a factor to be considered, as contrasted with the University's UCLA Summary of Policy and Procedure, dated October 20, 1986, which includes as a factor the determination that sufficient funding will be available to support three-year appointments. With respect to the more important issue of whether the parties agreed to include financial resources as a consideration, the

not protest any of these generalized interpretations, and did not file any unfair practice charges thereon. The evidence, however, reflects that no specific adverse action was taken during the first academic year under the Agreement based on those interpretations. Rather, and apparently due to the relatively few lecturers eligible for post-six-year reviews at Santa Cruz and Los Angeles, the Federation was satisfied that the University was complying with Article VII.[12]

The situation radically changed in the second year that the parties operated under the Agreement. The Federation's evidence focused on the writing programs at the two campuses, although some evidence was presented as to violations in other departments at those campuses.

The conduct complained of at the Los Angeles campus stems from a decision by Raymond L. Orbach (Orbach), Provost of the College of Letters and Sciences, on October 5, 1987, to set a limit on the allocation of long-term appointments for the writing program there. The Federation contends that this limit constituted an impermissible quota, and was based on

---

October 20, 1986 Contract Administration Manual, even in its broadly phrased terms, contends: "As was stated at the bargaining table, a whole series of academic decisions will need to be made at the campus, with the final residue being the determination regarding instructional need." (Emphasis added.)

[12]The evidence shows that UC, while sometimes adopting a broad interpretation of Article VII, ultimately justified its refusal to grant some lecturers long-term appointments based on anticipated changes in course offerings or plans to increase the level of tenure-track faculty teaching those courses, which are both factors which the Federation considers within the ambit of instructional need.

considerations not agreed to in Article VII; in particular, a preference that the University, should hire new lecturers, even if it meant denying appointments to lecturers eligible for three-year appointments under Article VII. The Federation argues that as the result of Orbach's decision, lecturers who qualified for three-year appointments commencing in the 1988-1989 academic year were denied employment.[13]

At the Los Angeles campus, Charles Linwood Batten (Batten), then the Director of that campus' writing program, and Herbert Morris (Morris), Dean of Humanities, both recommended that there was a sufficient, anticipated instructional need in the writing program to offer, in effect, all of the lecturers at the six-year review level three-year appointments, commencing in the 1988-1989 academic year, subject to their being reviewed as excellent instructors. Batten and Morris both testified that it was highly unlikely that members of the faculty senate would be teaching courses in the writing program and that, if anything, more courses would be offered in the future.

Their recommendations were rejected by Orbach who, in effect, cut the number of potential three-year appointments in half. Carol P. Hartzog, Vice Provost for Academic

---

[13] The parties agree that the prefatory language of Article VII (C)(1)(a) means that unless a lecturer receives a three-year appointment at some percentage of employment level after six years, the lecturer cannot receive a shorter appointment, and therefore, is ineligible for any further employment at that campus.

Administration, prepared a memorandum dated October 5, 1987, which was sent to Morris along with Orbach's decision on three-year commitments for the Los Angeles writing program. The memorandum states that Orbach had projected an overall increase in the number of tenured faculty in the college "during perhaps a five-year period," and a corresponding reduction in the anticipated need for temporary lecturers. Rather than allocate that reduction to the departments most likely to experience a change in instructor composition, Orbach had determined that the reductions should be equally distributed throughout the college divisions.

Even with that reduction, however, there were enough positions available to grant full-time, post-six-year appointments to all of the writing department lecturers eligible for review during the life of the Agreement. Nevertheless, the October 5, 1987 memorandum states that since 60 percent of the **total** lecturers eligible for six-year reviews over the life of the Agreement were eligible for review in that year, only 60 percent of their positions should be committed for three-year appointments, and that an additional long-term position was cut on the basis of possible future cuts in enrollment and staff positions allocated to the college.

Orbach, in his testimony, admitted that this allocation was, in fact, based on a decision to reach a ratio of three lecturers on one-year appointments to every one lecturer on a three-year appointment. Orbach testified that if he approved all of the

long-term positions requested, this would result in roughly a one-to-one ratio between short-term and long-term appointees. According to Orbach, this would be undesirable because "the historic character of the writing program would be changed," because he prefers that "there should be turnover in the writing program," and because he feels that the University "should bring in as many new people into the writing program" as it can find who are qualified for the position. Having targeted this ratio, Orbach testified that he felt it was only fair to apportion the number of appointments on a yearly basis so that all lecturers eligible for six-year reviews during the life of the contract would have an equal chance to obtain three-year appointments.

Due to attrition and non-excellent reviews, several writing program lecturers did not participate in, or failed to successfully complete, the review process. Enough lecturers did complete the review process, and were rated as excellent instructors (through two levels of review), that there were four more lecturers eligible for long-term appointments than full-time positions available. Rather than assigning some or all of the instructors to part-time appointments, an additional screening process for "excellence" occurred, resulting in eight lecturers receiving three-year appointments and four, who had otherwise successfully completed the review process, being denied any future employment.

DISCUSSION

The Unilateral Changes at UC, Los Angeles

It is undisputed that the matter at issue herein, the appointments article of the parties' Agreement, is within the scope of representation. (UC (UC-AFT) I. proposed decision, p. 30.) It is an unfair practice for an employer to alter the clear terms of a collective bargaining agreement without the consent of the exclusive collective bargaining representative. (Grant Joint Union High School District (1982) PERB Decision No. 196; South San Francisco Unified School District (1983) PERB Decision No. 343; Palo Verde Unified School District (1983) PERB Decision No. 354.) If the contractual language is clear and unambiguous, there is no need to consider extrinsic, conflicting evidence as to what the parties meant by their agreement. (Marysville Joint Unified School District (1983) PERB Decision No. 314; cf. Rio Hondo Community College District (1982) PERB Decision No. 279.) In UC (UC-AFT) I. the Board found it appropriate to hold the parties to the apparent language of the Agreement. (Id., proposed decision, pp. 30-31.)

It is a well established rule of law that the doctrine of collateral estoppel (or issue preclusion) precludes relitigation of an issue which has been fully and fairly litigated and finally decided in a prior action involving the same parties. (State of California, Department of Personnel Administration (CSEA) (1991) PERB Decision No. 871-S, p. 6., citing Pacific Coast Medical

Enterprises v. Department of Benefit Payments (1983) 140 Cal. App. 3d 197, 214 [189 Cal.Rptr. 558].)

In UC (UC-AFT) I, the Board affirmed the ALJ's interpretation of the parties' Agreement, with some further clarification. The Agreement at issue was negotiated on behalf of the University by its negotiators and applied to all of the UC campuses. In addition, the ALJ, in determining the correct interpretation to ascribe to the Agreement, focused on the conduct of the UC negotiators, as opposed to the statements and opinions of individuals at any of the UC campuses. (UC (UC-AFT) I, p. 31.) Therefore, the issue of the meaning to be ascribed to the parties' Agreement in this case is identical to the issue of contract interpretation ruled upon in UC (UC-AFT) I. As this issue was fully and fairly litigated and finally decided in UC (UC-AFT) I, the Board finds that the Board's prior ruling on this issue applies with equal force to the present case.

In UC (UC-AFT) I, the Board found that Article VII of the Agreement was clear and unambiguous on its face, and that it set forth mandatory criteria which, if satisfied, require three-year appointments. The Board found that the phrase "instructional need" was intended to hold its dictionary definition, e.g., UC anticipated that courses taught by a lecturer under review would continue to be taught by a lecturer for the relevant three-year period. (UC (UC-AFT) I, proposed decision, pp. 30-32.)

In addition, the Board found that Article VII does not disallow the University from taking fiscal or financial

considerations into account at every stage of the decision-making process regarding reappointment of post-six-year lecturers. Rather, those considerations must be taken into account in order to determine instructional need in Article VII C(1)(a)(1) of the Agreement, and specifically whether a certain class will be taught for three years by a Unit 18 lecturer. However, once it has been decided that a course will be taught for three years by a Unit 18 lecturer, the University must apply the criteria delineated in Article VII C(1)(a)(2). Financial or fiscal considerations are not among the criteria specified, and therefore cannot be taken into consideration at that stage of the decision-making process. The Board therefore held that it is not a unilateral change to take financial considerations into account at any time; it is a unilateral change to take such factors into account only when considering Article VII C(1)(a)(2), when instructional need has already been determined. (UC (UC-AFT) I, pp. 9-10.)

On the Los Angeles campus, the decision was made to achieve a ratio of three lecturers on one-year appointments to every one lecturer on a three-year appointment. Thus, three-year writing lecturer positions were allocated accordingly. The Board finds that the decision to create a percentage ratio of three-year to one-year appointments was not based upon the criteria established under the Agreement.[14] Instead, the University interjected

[14]Similarly, in UC (UC-AFT) I, the Board found that, as to the Santa Cruz campus, the decision to create a percentage ratio of three-year-to-one-year appointments was not based upon the

criteria into the determination not agreed upon by the parties. Based upon that finding, the Board holds that UC violated the Act by unilaterally implementing a change in the parties' agreed upon policy with regard to post-six-year appointments.

The Remedy

With regard to the appropriate remedy in this case, the Board notes that as a result of the violation, eight lecturers received three-year appointments and four lecturers, who had otherwise successfully completed the review process, were denied any future employment.[15] Therefore, as to the four employees who were denied future employment as a result of this violation, they must be restored to the status quo ante and made whole for any damage they suffered as a result of the unlawful conduct. (Rio Hondo Community College District (1983) PERB Decision No. 292.)

In accord with UC (UC-AFT) I. the Board should not order the parties to do something which is in contravention of the contract, but, rather, should order the lecturers be returned to the positions they would have held had the violation not been committed. To achieve the proper remedy, a compliance proceeding is required wherein the instructional need during the applicable

---

criteria established in the Agreement. As such, the Board found that by interjecting criteria into the Agreement not agreed to by the parties, UC violated the Act by unilaterally implementing a change in the agreed-upon policy regarding post-six-year reappointments. (UC (UC-AFT) I. p. 10.)

[15]On the Santa Cruz campus, by comparison, no lecturers were denied employment. Rather, lecturers were given reduced schedules.

three-year period will be determined, and any harmed lecturers will receive restitution.

The violations occurred with regard to three-year appointments beginning in the 1987-88 school year. Therefore, any lecturers who would have been employed by UC during the three-year contract period should be awarded the other benefits of employment which the lecturers would have accrued had no violation occurred. This includes, but is not limited to, evaluation for employment under the current Agreement, including the restoration of any benefits to which the otherwise employed lecturers would have been entitled, if no violation had occurred.

With regard to the posting requirement, in accord with UC (UC-AFT) I, the Board finds it appropriate that the notice be posted system-wide. The notice itself will specify that the violation occurred only on the Los Angeles campus.

ORDER

Based upon all of the above and the entire record in this matter, the Board finds that The Regents of the University of California violated section 3571(b) and (c) of the Higher Education Employer-Employee Relations Act. The Board REMANDS this case to the Los Angeles Regional Director and ORDERS that compliance proceedings be instituted, in order to determine the instructional need at the Los Angeles campus during the three-year period in question (academic years 1987-88, 1988-89 and 1989-90), upon which back pay, reinstatement, and/or other benefits of employment as described above will be awarded to any

unit members who suffered harm as a result of the conduct found herein to be in violation of the Act.

IT IS HEREBY ORDERED that The Regents of the University of California (University) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Denying the University Council-American Federation of Teachers (Federation) rights guaranteed to it by the Higher Education Employer-Employee Relations Act by unilaterally changing the criteria for post-six-year appointments contained in the Agreement between the University and Federation during its term.

2. Failing and refusing to meet and negotiate in good faith with the Federation by unilaterally changing the criteria for post-six-year appointments contained in the Agreement, without the Federation's consent.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

1. Make whole any unit member at the University's Los Angeles campus, who is found to have suffered economic and other harm as discussed above as a result of the conduct found herein to be in violation of HEERA, in accord with the compliance proceedings ordered herein.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all University of California campuses, in all work locations where notices to employees are customarily placed, copies of the

Notice attached as an Appendix hereto, signed by an authorized agent of the Regents of the University of California. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with her instructions.

Chairperson Hesse joined in this Decision.

Member Carlyle's dissent begins on page 28.

Carlyle, Member, dissenting: I dissent from the decision of the administrative law judge (ALJ) and the conclusion of my colleagues that the charge in this case was timely filed.

In the original proceeding, Regents of the University of California (University Council-American Federation of Teachers) (1990) PERB Decision No. 826-H (UC (UC-AFT) I), the Public Employment Relations Board (Board) clarified the issue of when the six months statute of limitations begins to run by determining that:

> The statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, providing that nothing subsequent to that date evinces a wavering of that intent. . . .
> (Id. at p. 7.)

The complaint was filed on May 4, 1988. Therefore, the charge would be timely filed if the University Council-American Federation of Teachers (Federation) did not learn of the Regents of the University of California's (University or UC) action prior to November 4, 1987.[1] To establish that the action was filed in a timely manner, the Federation had the burden to prove timeliness as part of its prima facie case. (California State University, San Diego (1989) PERB Decision No. 718-H.) The Federation has not sustained this burden.

[1]All dates herein refer to 1987, unless otherwise stated.

FACTUAL BACKGROUND

Writing program lecturer Susan Griffin (Griffin) was designated by the Federation to handle a grievance under the Memorandum of Understanding (MOU) with the University challenging the limitation of three-year appointments in the UC Los Angeles (UCLA) writing program. Griffin was also designated as the Federation's representative in handling similar grievances that might arise in other departments or programs on the UCLA campus. During this time, Griffin did not hold an elective office.

On October 5, Herbert Morris (Morris), Dean of Humanities, issued a letter to various programs and departments, including the writing program, in which he set forth limits on the number of three-year appointments that would be approved. This letter was based upon a decision by Raymond L. Orbach, Provost of the College of Letters and Sciences, who had set a limit on the allocation of long-term appointments for the writing program.

On October 8, the writing program lecturers met with Lynn Batten, director of UCLA's writing program, to discuss portions of Morris' October 5 letter and the announcement that only eight full-time equivalents (FTEs)[2] would be approved for three-year term appointments. At this time 17 individuals, who had taught at the University for six years, were eligible for three-year appointments in that program.

---

[2]"Full-time equivalent" refers to the University's commitment to provide one full-time teaching position, and is the method by which budgets for the various departments are allocated.

Griffin attended several meetings with University officials to discuss the total number of FTE appointments. On November 2, Griffin attended a grievance meeting concerning the effect of Morris' announced limit on three-year appointments in denying the three-year appointment to an individual in the English Department. Morris and Vice Provost Carol Hartzog (Hartzog) attended this meeting.

The next day, on November 3, Griffin had scheduled another Step II[3] grievance meeting pertaining to a separate grievance involving the writing program. Griffin did not attend this meeting. Instead, several lecturers met with Morris and Hartzog to discuss the reduction in the allocation for three-year appointments.

I agree with the ALJ that the meetings, telephone calls and other contacts prior to November 3, between the Federation and the University, failed to show that the Federation learned of the University's rationale for its action in limiting three-year appointments. However, the record clearly demonstrates that the Federation learned, at the November 3 meeting, the rationale for the University's action for the limitation of the three-year appointments.

---

[3]Under the terms of the MOU, Step I of the grievance procedure involves informal discussions between the grievant and his or her immediate supervisor. Step II involves a review of those discussions with a designated campus official at a higher administrative level. Step III involves reduction of the grievance to writing, a further meeting of the parties to review the matter, and the issuance by the University of a written decision granting or denying the grievance.

Morris testified that, in attending the November 3 meeting, it was his intention to provide information as to what the basis was for the limitation on long-term reappointments. Additionally, the grievance notes taken by the University indicated Morris believed that: (1) the determination of "instructional need" did not depend upon whether the courses taught by the lecturers seeking reappointment would continue to be offered; and (2) the University, under the MOU, had the right to establish an appropriate "balance" of long-term and short-term lecturers and thereby assure a sufficient "infusion of new blood" into the writing program.

This view is supported by the Federation when it stated in its charge that Morris, on November 3, provided the rationale for the allotment of three-year appointments when he said:

> . . . three-year appointments would be limited to ensure an appropriate balance between lecturers with three-year appointments and those with one-year appointments. He also said that this balance must be achieved, not just in the writing program, but throughout the College.
>
> Dean Morris' statement was the announcement of a change in policy in a major unit of the University. It means that, contrary to the policy stated in Article VII, the College of Letters and Science will no longer review every incumbent lecturer for a three-year term after six years of service, even though it has been determined that the incumbent's position should continue to be filled by a lecturer.

Moreover, the Federation, in their own exceptions to the initial decision of this case (UC I), stated:

> . . . the unfair practice charge in Case No. LA-CE-235-H, which is part of the record herein . . . . stated explicitly that the basis for the University's limitation on long-term reappointments was not communicated to the Union until the Step II hearing on the Union's Writing Program grievance, which took place on November 30, 1987[4] . . . . (UC (UC-AFT) I. Charging Party's Exceptions, p. 13; emphasis added.)

Based upon the entire record, it is sufficiently demonstrated that the November 3 meeting provided the attendees with the rationale behind the University's action in its allocation of long-term reappointments.

The question left to decide is whether any person attending the November 3 meeting was representing the Federation. The Board has held that, in determining whether an individual is a representative of an employee organization, common law agency principles are applicable. (Los Angeles Community College District (1982) PERB Decision No. 252.) Four lecturers attended the November 3 meeting: Cynthia Tuell (Tuell), Jeanne Gunner (Gunner), Lisa Gerrard and Bill Cullen.

Cynthia Tuell was a writing program lecturer. Although Tuell was not a Federation official, she testified that she and Griffin had volunteered to handle the grievance for the writing program. Additionally,. Tuell testified that she and Griffin "basically did everything for the grievance*" As to the November 3 meeting, Tuell testified that Griffin asked her to attend the meeting as Griffin had attended a Step II hearing the

[4]The correct date should read November 3, 1987.

day before on the English program grievance. Although Tuell stated that she would have gone anyway, the testimony demonstrates that Tuell took the responsibility seriously as she testified that she took the lead, did most of the speaking **and** was seen by the other unit members as "in charge" of the grievance. This is confirmed by Tuell's statement to Morris at the end of the meeting that a grievance would be filed, and Tuell informing Griffin the next day what had occurred at the November 3 hearing. Just as Griffin represented the Federation at the November 2 meeting, I would conclude that Tuell was working in concert with Griffin on the writing program grievance **and** was representing the Federation at the November 3 meeting.

As to the other lecturers who attended the meeting, there is sufficient evidence to demonstrate that Gunner was also a representative of the Federation.[5]

In the Federation's statement of exceptions to the UC (UC-AFT) I case, the Federation stated:

> Contrary to the findings of the Administrative Law Judge (see Proposed Decision, p.24), Griffin further testified that Lisa Gerrard and Jeanne Gunner, who attended the November 3, 1987, Step II hearing on the Writing Program grievance, were also acting as Union representatives (R.T.II, p.84).

While briefs are considered to be outside the record, it

[5]I would agree with the ALJ that the record does not support **a** finding that either Lisa Gerrard or Bill Cullen were acting as representatives of the Federation at this meeting.

has been found that information contained within the briefs are reliable indications of a party's position on the facts as well as the law. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal sec. 251, p. 258.) An admission in a brief may be treated as dispositive "where it represents an express concession in the instant phase of the case (Williams v. Superior Court (1964) 226 Cal.App.2d 666, 674 [38 Cal.Rptr. 291]). (Coffee-Rich, Inc. v. Fielder (1975) 48 Cal.App.3d 990, 999 [122 Cal.Rptr. 302.]

The ALJ, in his supplemental decision, stated:

> [t]hat-counsel, at one point in this proceeding, somehow felt it would be advantageous to claim a presence by the Charging Party at the November 3 meeting based on Griffin's testimony does not require a finding which is not supported by the record.
>
> (P. 16.)

However, the Federation's admission and testimony of the Federation's own witnesses provided sufficient indicia of an agency relationship. Testimony showed that Gunner worked on the grievance, when she was not among the group directly affected by the limitation on three-year appointments. In addition to attending the November 3 meeting, Griffin testified that, at the Step III meeting in December, Gunner split responsibility with Griffin for the particular writing program grievance.

At no time during the hearing did the Federation witnesses (Tuell and Griffin) dispute the others role in the grievance. I would therefore conclude that, based upon the entire record, the evidence establishes that unit members Tuell and Gunner were

representatives of the Federation and any knowledge provided to them at that meeting is imputed to the Federation as of that date.

Finally, there is a question as to whether there was a wavering of the University's intent regarding limitation of three-year appointments when Morris stated, at the November 3 meeting, that he would be "thinking further about the allocation" and "would be in communication with the Provost." I would conclude that Morris' comment was not an "evincing of a wavering intent" as the testimony indicates that the Federation representatives at the meeting believed that it was not likely that a change would occur and that a grievance should be filed.

As the charge was not filed by the Federation until May 4, 1988, outside the six-month statute of limitations, the Board is without jurisdiction to issue a ruling on the merits of this case.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-235-H, University Council-American Federation of Teachers v. The Regents of the University of California, in which all parties had the right to participate, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), section 3571(b) and (c) by unilaterally changing the requirements for post-six-year, three-year appointments for nonsenate instructional unit employees during the term of a negotiated agreement with University Council-American Federation of Teachers (Federation) at its Los Angeles campus.

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

A. CEASE AND DESIST FROM:

1. Denying the University Council-American Federation of Teachers rights guaranteed to it by the Higher Education Employer-Employee Relations Act by unilaterally changing the criteria for post-six-year appointments contained in the Agreement between the University and Federation during its term.

2. Failing and refusing to meet and negotiate in good faith with the Federation by unilaterally changing the criteria for post-six-year appointments contained in the Agreement, without the Federation's consent.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

1. Make whole any unit member at the University's Los Angeles campus, who is found to have suffered harm as a result of the conduct found herein to be in violation of HEERA, in accord with the compliance proceedings ordered herein.

Dated:

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

By _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL-AMERICAN FEDERATION OF TEACHERS, Charging Party, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Unfair Practice Case Nos. SF-CE-272-H LA-CE-235-H SUPPLEMENTAL PROPOSED DECISION AND ORDER TRANSFERRING PROCEEDING TO THE BOARD (11/26/90)

Appearances; Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar by William H. Carder, Attorney, for University Council-American Federation of Teachers; Marcia J. Canning, University Counsel, for The Regents of the University of California.

Before Douglas Gallop, Administrative Law Judge.

INTRODUCTION

On July 3, 1990, the Public Employment Relations Board (hereinafter PERB or Board) issued its Decision in the above-captioned matter,[1] finding that The Regents of the University of California (hereinafter Respondent) violated section 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA) in Case No. SF-CE-272-H. Respondent violated the HEERA by repudiating provisions in Article VII of its memorandum of understanding (MOU) with University Council-American Federation of Teachers (Charging Party) concerning three-year appointments for lecturers with more than six years of employment at Respondent's Santa Cruz, California campus. The Board remanded Case No. LA-CE-235-H, which alleged a similar violation at

[1]PERB Decision No. 826-H.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

Respondent's Los Angeles, California campus (UCLA), for further hearing on the issue of timeliness, and directed the undersigned to prepare a supplemental proposed decision on that issue, to be transferred to the Board for further action.

Upon notice to the parties, the record was reopened on September 6, 1990, and further evidence was presented. The parties filed post-hearing briefs, and the matter was submitted for decision on November 15, 1990.

FACTS

The Charging Party recalled Susan Griffin, a lecturer in the UCLA writing program and currently its president, and called Cynthia Tuell, a writing program lecturer, as witnesses. Respondent recalled Sandra Rich, assistant labor relations manager. The parties also introduced documentary evidence to corroborate the witnesses' testimony.

As set forth in the Proposed Decision for these cases, issued on February 24, 1989, Respondent took adverse action on October 5, 1989, when its provost, Raymond L. Orbach, elected to reduce the long-term appointments for the UCLA writing program to eight full time equivalents (FTE). The reduction just referred to was from the 17-FTE recommendation of Charles Linwood Batten, then the program's director. It has been established, that this decision was based on several factors not contained in the MOU, including college-wide financial considerations, college-wide

ladder faculty hiring goals,[2] the desire to save three-year appointments for lecturers not yet eligible under the MOU and to infuse "new blood" into the program through new hires.

By letter dated October 5, 1987,[3] Herbert Morris, the college dean, informed Batten of the reduction in his request for three-year FTEs. The letter, inter alia, stated:

> The Provost and I have reviewed your request carefully, taking into account the programmatic need for these positions, anticipating other needs for ladder and temporary FTE, and considering College resources, priorities and goals, as well as the appropriate balance of ladder and temporary faculty within the College.

Rich credibly testified that on October 8, Marde Gregory, then president of the Charging Party's UCLA local, called her to discuss Morris' letter of October 5 regarding the writing program, and a similar letter denying any three-year FTE allocations for an English department course. Gregory, while not stating the extent of her knowledge of the letters, objected to Morris' use of the term, "programmatic need," and stated she knew the writing program needed more than eight FTEs. Gregory said that unless Respondent was going to cut its overall FTE allocation to the program, Respondent was in violation of the MOU. Gregory further claimed that it was impermissible for Respondent to replace lecturers eligible for three-year

---

[2]Ladder faculty rarely teach writing program courses.

[3]All dates hereinafter refer to 1987 unless otherwise indicated.

appointments with one-year appointees. She noted that the MOU's requirements for three-year appointments were rigorous enough to limit the number thereof without imposing what she saw as a quota. Gregory also protested the failure to grant any three-year FTEs for the English department course. There is no evidence that Rich gave any reasons for Respondent's actions during this conversation.[4]

Rich testified that Gregory expressed an intention to file grievances, and concern because Morris was unavailable. She believes Gregory stated that Griffin would be a representative in the grievances. Gregory told Rich the Association was "looking at" filing an unfair practice charge because Morris had cited "programmatic need" in the allocation letters.

Rich also testified that she and Gregory had previously engaged in ongoing discussions concerning Respondent's interpretation of the term, "instructional need." The record in the original proceeding reflects that Gregory, during the first year of the MOU, had protested Respondent's contention that it could consider "programmatic need," including college-wide resource and faculty hiring goals, in determining instructional need for three-year appointments. Grievances filed concerning those first year allocations were resolved when the Association realized that, in fact, permissible considerations such as the

[4]While Rich's testimony concerning Gregory's statements is hearsay, the statements are received as admissions against interest by an officer and agent of the Charging Party.

use of ladder-rank faculty had determined the appointment decisions.

The original record also reflects that Respondent initially proposed including programmatic need as a factor in determining three-year appointments. The Charging Party, and Gregory in particular, strongly opposed this as a consideration. Gregory understood programmatic need to be a wider concept than instructional need, and included such factors as college-wide resource planning. At the Association's demand, the term was dropped from the appointments article, a major concession in Respondent's view.

Also on October 8, Griffin, along with other writing program lecturers, attended a meeting called by Batten which lasted several hours. Clearly, the subject of the meeting was known to those in attendance because, almost at the outset, the lecturers informed Batten that it would constitute a step one meeting for any grievance to be filed. According to Griffin, Batten read unspecified portions of Morris' October 5 letter. Batten told them that Morris had given, as reasons for the reduction in three-year appointments, "programmatic need," the balance between ladder and temporary faculty, and possibly other factors. Minutes of the meeting state that Batten, contradicting Orbach's position, told the group that it was "totally inappropriate" to consider a relationship between tenured (ladder) faculty and the needs of the writing program. When asked, Batten said that Morris had not defined the term "programmatic need." According

to the minutes, Batten could only guess that "programmatic need" was some Platonic, ideal mix of permanent and semi-permanent positions in the program. Griffin did not attend negotiations leading to the MOU, nor was she involved in the prior disputes concerning the term, "programmatic need."

Batten was also questioned as to the relevance of ladder faculty, since they rarely taught in the writing program. He replied that he could not see the relationship. Apparently, the subject of one-year lecturers also came up, since Griffin testified that Batten was asked what the administration thought the ideal balance between one and three-year lecturers should be. Batten was unable to answer this inquiry. The lecturers also asked Batten if he saw a distinction in instructional need between one and three-year lecturers, and he replied that he could not. There was extensive discussion as to the review process for three-year appointment candidates. Batten denied that any ratio of one to three-year appointments had been established.[5]

Griffin testified that as of October 8, she believed Respondent had allocated the same number of FTE positions for the entire program as the year before. Batten was purportedly unable to confirm this at the meeting; however, Respondent provided confirmation within a week thereafter.

---

[5]Unknown to Batten, Orbach did, in fact, desire that 75 percent of the writing department courses be taught by lecturers on one-year appointments. This ratio does not appear to have been communicated as the goal for achieving "balance" in the department.

Batten, in his testimony from the original proceeding herein, demonstrated his opposition to, and initial lack of understanding of the reasons for the reduction in FTE for three-year appointments, as expressed in Morris' letter of October 5. On October 13, he met with Orbach to discuss the allocation, and Orbach explained the reasons for the reduction in detail. There is no evidence that Batten related this to Griffin or Gregory. Batten also discussed the issue with Morris and Carol P. Hartzog, vice provost for academic administration. Batten, in attempting to increase the allocation, cited low morale and the difficulty in replacing experienced lecturers.

Morris, in his prior testimony, stated he was impressed with these arguments and requested that the three-year allocation be increased from 8 to 12. Orbach rejected the request. There is no evidence that any of the Charging Party's representatives were aware that Morris had sought an increase in the allocation.

On November 2, Griffin attended a step two grievance meeting with Morris, Hartzog and the affected lecturer regarding the English department FTE allocation. Morris stated that the allocation of three-year positions was in its beginning stages, and perhaps the lecturer should file an appeal of non-reappointment rather than a grievance. Morris anticipated the letters of non-reappointment would be sent in about two weeks. Griffin and the lecturer questioned the viability of such an appeal under the MOU.

The lecturer objected to the use of programmatic need in the appointment decision, and stated that inasmuch as there was clearly an instructional need for her course, Respondent was violating the MOU. Morris replied that one-year appointments offered Respondent "flexibility," and asked what provision of the MOU had been violated. When the lecturer and Griffin cited Article VII, Morris asked whether they interpreted Article VII as requiring three-year appointments. It does not appear that Morris, at the time, took a position on this issue.

The discussion then turned to the lecturer's qualifications and experience in teaching the courses. Morris was impressed with arguments that she should continue teaching them, and stated he would take the matter under consideration. Respondent subsequently offered the lecturer a three-year appointment, but for only one of her three courses. The offer was rejected.

Griffin did not attend the step two writing program grievance meeting, which took place on November 3, because she had attended the English department meeting on November 2. Instead, four lecturers, including Tuell, met with Morris and Hartzog. Tuell had "volunteered" to work on the writing program grievance, and to act as spokesperson at the meeting. Tuell did not hold any office with the Charging Party, or its UCLA local, and was not generally a designated grievance representative. In addition to Tuell's testimony, the testimony of Hartzog and Morris from the original hearing, along with Hartzog's notes, are

considered in determining what took place. (Tuell's recall of the meeting was admittedly poor.)

Tuell contended there was a continuing instructional need for the writing program courses, and asked what Respondent meant by programmatic need. Morris responded that the determination of need did not stand alone on whether a course had been taught for a long time. Respondent had to account for changed circumstances, for example, new programs. Due to the unpredictability of future funding, it was difficult to commit to continuing existing courses indefinitely. As an example, Morris cited a language course (not in the writing program) that consistently had a low enrollment. Thus, Respondent needed to have the option to shift resources from program to program.[6]

In response, Tuell asked Morris if the writing program courses were going to be cut, and Morris said he did not think so. Morris went on to defend the allocation on grounds of "fairness," e.g., a desire to have three-year appointments available in the future for those who had not yet taught for six years. He also stated Respondent's "new blood" rationale, e.g., the desire to hire new lecturers.

Tuell argued that normal turnover would provide Respondent the opportunity to satisfy its need for new lecturers. Morris, however, maintained that by granting three-year appointments,

---

[6]The above facts are from Hartzog's notes and testimony, which are credited. Tuell testified that Morris failed to clearly define programmatic need and he appeared uncertain of what the concept meant.

with the possibility of indefinite renewal, the remaining positions in the program would become less attractive. Tuell questioned Morris concerning the balance of ladder and temporary-faculty as a consideration. After Morris gave an explanation, Hartzog's notes state she clarified it by stating that Respondent was referring to the balance between the ladder and temporary faculty on a college-wide basis. Hartzog also said that she had discussed this issue with Gregory. No date or context is set forth in the notes regarding such discussion(s) with Gregory.

After listening to the lecturers' arguments, including assertions concerning the difficulty Respondent might have in filling one-year appointments and claims that excellent staff members were seeking employment elsewhere, Morris said that there were a number of important considerations involved, among those the points raised by the lecturers. Morris promised to think further about the allocation and stated that he would contact Orbach. At the meeting, Morris made it clear that the final allocation decision was Orbach's. Tuell responded that a written grievance would be filed.

The MOU permitted only procedural grievances to be filed concerning Article VII. The MOU's grievance article generally allowed grievances to be filed either by unit members or the Charging Party. In grievances filed by unit members, the MOU permitted representation by Charging Party.

On November 4, Tuell discussed the November 3 meeting with Griffin, summarizing what Morris and Hartzog had said. Griffin

was told that while Morris had agreed to consider the arguments raised by the lecturers, it did not appear likely the three-year allocation would change.

Griffin, on November 4, prepared and signed a written grievance concerning the writing program. The grievant was set forth as "Writing Program Lecturers."[7] It is noted that the writing program grievance at the Santa Cruz campus listed the Charging Party as the grievant. The UCLA English department grievance apparently listed the affected lecturer, inasmuch as Respondent's correspondence referred to it as the lecturer's grievance, and Griffin as the Charging Party's representative.

The writing program grievance stated that Respondent had violated Article VII of the MOU by reducing the FTE allocation for three-year appointments, even though the FTE allocation for the entire program remained the same. Thus, some lecturers would be denied appointments regardless of their qualifications, even though instructional need remained the same. Tuell testified that she felt there was a clear violation of the MOU, because Respondent was not following the contractual definition of "instructional need."

The parties conducted a step three writing program grievance meeting on December 9. Griffin, who was in attendance, contended that there was sufficient instructional need to warrant Batten's FTE request for 17 three-year FTEs. She accused Respondent of

---

[7]Griffin, at that time, was also a lecturer in the writing department.

establishing a quota system in violation of the MOU, even through she and Morris agreed that such quotas were "illegal." Griffin argued that considering the need for "new blood" in the program was equally violative of the contract in that said consideration was not provided for under instructional need, and claimed that by hiring too many new lecturers, the quality of the program would suffer. Griffin contended that since the criteria set forth in Article VII had been satisfied, Respondent was obligated to provide three-year appointments to all post six-year lecturers found to be excellent in their performance.

Rich responded that, based on the parties' collective bargaining history, the definition of instructional need encompassed all aspects of academic planning, including the balance of one to three-year appointments, balance between ladder and temporary faculty, turnover, budgetary considerations, projected changes in enrollment and the need to be flexible in maintaining resources for future needs. Rich stated that Respondent did not, by the MOU, commit to the establishment of any three-year appointments, but had only set forth the conditions under which such appointments can be made.

Rich again denied the existence of any established ratio between one and three-year appointments. Hartzog added some comments as well. The grievance was denied, thus ending the contractual grievance procedure for this dispute. Griffin testified that Rich's remarks constituted the first time that Respondent had disputed the Charging Party's interpretation of

the term, "instructional need," and that Respondent never confirmed its desire for a ratio of one to three-year lecturer appointments.[8]

ISSUE

Did the Charging Party file the charge in Case No. LA-CE-235-H in a timely manner?

ANALYSIS AND CONCLUSIONS

In its July 3, 1990 Decision,[9] the Board stated:

> The statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, providing that nothing subsequent to that date evinces a wavering of that intent. . . . In the present case, the date of notice would be the date when the [Charging Party] first learned of [Respondent's] rationale for its allocation of Full Time Equivalents (FTEs) for three-year appointments on the UCLA campus. (Footnote omitted.)

The Charging Party contends that it did not learn Respondent's rationale until, at the earliest, December 9, when Rich explained Respondent's interpretation of instructional need, as set forth in Article VII of the MOU. The Charging Party further contends that even if knowledge was obtained earlier, Respondent waivered in its intent to implement the change in policy. The charge in Case No. LA-CE-235-H was filed on May 4, 1988. Hence, the statute began to run on November 4, 1987.

---

[8]It appears that the first notice of a three to one ratio was when Orbach testified in the original hearing in this matter.

[9](1990) PERB Decision No. 826-H, at page 7.

Saddleback Valley Unified School District (1985) PERB Decision No. 558.

It is undisputed that Gregory, as an officer of the Charging Party's local, was an agent whose conduct would bind the Charging Party. The PERB applies common law agency principals to its public sector decisions. Los Angeles Community College District (1982) PERB Decision No. 252. Decisions of the National Labor Relations Board have found grievance committee members acting within the scope of their grievance processing responsibilities to be agents of the union. Graphic Communications International Union, Local 388, a/w Graphic Communications International Union, District Council No. 2 (Georgia Pacific Corp.) (1988) 287 NLRB No. 107 [128 LRRM 1176]; International Union of District 50, Allied and Technical Workers of the United States and Canada and its Local 15440 (Dow Chemical Company - Rocky Flats Division) (1971) 187 NLRB 968 [76 LRRM 1217].

Although Griffin was a writing program lecturer, she had volunteered to act as the Charging Party's grievance representative. Her role extended beyond the writing program grievance, and she appeared as the Charging Party's representative for grievances in other departments. She was understood by Respondent to be a grievance representative of the Charging Party, and in fact she acted in such capacity. Accordingly, she is found to be an agent of the Charging Party for grievance purposes, and her knowledge of the rationale for Respondent's actions is imputed to the Charging Party.

Agent status is not found for Tuell or the other lecturers who attended the November 3 meeting with Morris and Harzog. Since the grievance was filed in the name of the writing program lecturers, their appearance on November 3 was as grievants, not as Charging Party representatives, absent facts establishing such status. The facts show that Griffin, having attended a step two grievance for a different department the previous day, chose not to attend on November 3. Instead, Tuell and three other lecturers appeared at the meeting, with Tuell as their spokesperson. In the absence of sufficient evidence to show either that Tuell was designated as a grievance representative of the Charging Party, or that this was communicated to Respondent, it is concluded she was spokesperson for the grievants, and not the Charging Party. Accordingly, the information communicated to the four lecturers on November 3 will not be imputed to the Charging Party, at least as of the time the statements were made to them.

Respondent urges that a contrary result is mandated based on purported admissions made by the Charging Party. Respondent first quotes the charge in Case No. LA-CE-235-H, which it construes as an admission of knowledge on November 3, 1987. The charge, however, alleges that Morris, on November 3, conducted "a meeting with members of the Writing Program faculty" (emphasis added), in which Morris made various statements explaining the reduced allocation of three-year appointments. The charge nowhere admits that any of those unit members were officers or

agents of the Charging Party, or that the Charging Party had knowledge of the violation on November 3.

Respondent further cites the following statement from the Charging Party's brief in support of its exceptions to the Proposed Decision in this case:

> Contrary to the findings of the Administrative Law Judge . . . Griffin further testified that Lisa Gerrard and Jeanne Gunner, who attended the November 3, 1987, Step II hearing on the Writing Program Grievance, were also acting as union representatives.

In fact, Griffin's prior testimony, when asked to name the grievants in the allocation disputes, was "the representatives for the Writing Programs" were herself, Gerrard and Gunner.

That counsel, at one point in this proceeding, somehow felt it would be advantageous to claim a presence by the Charging Party at the November 3 meeting based on Griffin's testimony does not require a finding which is not supported by the record. Thus, Griffin did not testify that Gerrard or Gunner were acting as representatives of the Charging Party, and counsel's contention that she did so testify will not be adopted, even if contrary to interest. Furthermore, if the statement in brief and Griffin's earlier testimony were to be accorded some weight in determining agent status, it would be concluded that based on the entire record, the evidence fails to establish those unit members as agents. Finally, Griffin's failure to mention Teull as a representative for the writing program will not be interpretated as an admission that she instead was a representative of the

Charging Party, particularly in light of the additional evidence presented on the issue of Tuell's status.[10]

Turning to Gregory, with respect to her knowledge of Respondent's rationale for reducing the long-term appointments, the only definitive evidence consists of her conversation with Rich on October 8. Based on Rich's testimony, the only program-specific information concerning the rationale possessed by Gregory was her knowledge of an unspecified portion of Morris' October 5 letter to Batten. Certainly, Gregory made some educated guesses in her conversation with Rich, based on her beliefs as to the program-wide FTE allocation, her prior disputes with Respondent and her knowledge of the collective bargaining history, but in the final analysis her comments were, in fact, educated guesses.

While the use of the term, "programmatic need," in the letters would understandably raise a red flag for Gregory, similar alarms had been raised during the first year of the MOU, only to prove false upon further explanation by Respondent. Furthermore, that term has been given many interpretations, and consists of several components.

Similarly, assuming Gregory knew the remaining contents of Morris' letters, his vague references to "other needs" for ladder and temporary FTE, college resources, priorities and goals, and the balance between ladder and temporary faculty within the

---

[10]Griffin, in her testimony, also failed to note that Bob Cullen, another lecturer, was present at the meeting.

college were insufficient to explain Respondent's rationale. This is particularly true since, in the absence of ladder faculty in the writing program, the statements required clarification.[11] In like manner, because Gregory surmised Respondent was going to replace three-year with one-year appointees, and accused Respondent of imposing a quota does not establish that Respondent had informed Gregory of this.

Respondent clearly may not rely on Batten's statements of October 8 to establish knowledge of its rationale. To the contrary, his conduct of the meeting confused more than clarified the issues, and the responses, at times, were in direct conflict with those expressed by Batten's superiors.

The information obtained by Griffin at the November 2 English department meeting, in addition to being given in a substantially different context, was also insufficient to give adequate notice of the rationale for reducing three-year FTEs in the writing program. Indeed, Morris confused the issue by stating that the allocation of three-year positions was in its "beginning stages" and suggesting that instead of pursuing a grievance, appeals should be filed for non-reappointments. The only definition by Morris of "programmatic need" at that meeting was the vague concept of "flexibility." There is no evidence that Morris discussed the issues of "fairness," "new blood," college-wide resources, college-wide ladder faculty hiring goals,

[n]The reference to discussions on this topic in Harzog's notes, absent dates or contexts, is simply too vague to establish notice.

balance between one and three-year lecturers or Respondent's interpretation of "instructional need," and it is unreasonable to expect that Griffin, or any other representative, would have been alerted to these factors based on what Morris said.[12]

Without deciding whether Morris' and Hartzog's statements on November 3 were otherwise sufficient to place the Charging Party on notice of Respondent's rationale, it has been concluded that the remarks were not made to an officer or agent of the Charging Party. Assuming the statements were sufficient, and Tuell related them in sufficient detail to Griffin, said recitation was not made until November 4, within the limitations period.[13]

Based on the foregoing, it is concluded that, at the earliest, the Charging Party learned of Respondent's rationale for reducing the three-year FTE allocation on November 4, 1987, and therefore, the charge in Case No. LA-CE-235-H was timely filed. In light of this conclusion, it is unnecessary to address the Charging Party's alternative argument, that Respondent waivered in its intent to implement the decision.

ORDER

IT IS HEREBY ORDERED that the herein proceeding be transferred to the Board for further action.

---

[12]This is not to say that the Board's standard necessarily requires that each and every reason be expressed in detail; however, the above-listed reasons were substantial factors in the allocation decision for the writing program.

[13]As with Gregory, Griffin's belief that the MOU had been violated, based on the facts in her possession, does not satisfy the Board's requirement that the Charging Party knew the rationale for Respondent's conduct.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing "... . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, sections 32300, 32305 and 32140.

Dated: November 26, 1990

Douglas Gallop
Administrative Law Judge