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. 826-H July 3, 1990

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

Before Hesse, Chairperson; Craib and Camilli, Members.

DECISION

CAMILLI, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions taken by both parties to an administrative law judge's (ALJ) proposed decision (attached hereto). The ALJ found that the Regents of the University of California (University or UC) violated the Higher Education Employer-Employee Relations Act (HEERA or Act) section 3571(a), (b) and (c)[1] at the Santa Cruz

[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 pertinent part:

> It shall be unlawful for the higher education employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

campus by failing to appoint post-six-year lecturers in the writing program to three-year terms in accord with the memorandum of understanding (MOU) currently in effect between the parties, thereby unilaterally changing its policy regarding such appointments. The ALJ dismissed Case No. LA-CE-235-H, in which a similar violation was alleged to have occurred on the Los Angeles (UCLA) campus, for lack of timeliness.

We have reviewed the entire record in this case, including the proposed decision, the exceptions filed by both parties and responses thereto, and finding the ALJ's recitation of the facts to be free from prejudicial error, we adopt them as our own. Consistent with the following discussion, we affirm the ALJ's conclusions of law, with the exceptions of the remedy awarded in Case No. SF-CE-272-H, and the dismissal of Case No. LA-CE-235-H for lack of timeliness.

DISCUSSION

I. Case No. LA-CE-235-H

Survival of the Doctrine of Equitable Tolling

The doctrine of equitable tolling provides that where a grievance has been filed in an effort to resolve the same dispute which is the subject of the charge, the statute of limitations is

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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.

tolled during the period of time the grievance is being pursued if: (1) the charging party reasonably and in good faith pursues an alternate method of relief; and (2) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent. (Victor Valley Community College District (1986) PERB Decision No. 570.) In Victor Valley, the Board also held that, in a unilateral change case, equitable tolling of the statute of limitations is achieved while an employee grieves based upon the same unilateral change which the union now seeks to vindicate through a charge, as the union is an aggrieved party in a unilateral change case. (Id., at p. 15.)

The University Council-American Federation of Teachers (AFT or Federation) excepts to a comment in the proposed decision that the doctrine of equitable tolling may not survive the case of California State University, San Diego (1989) PERB Decision No. 718-H. The Federation argues that California State University, San Diego was incorrect and that equitable tolling is still a viable theory.[2] We find that the theory of equitable tolling does not survive California State University, San Diego for the reasons that follow.

Cases construing the National Labor Relations Act (NLRA) consider the 6-month statute of limitations to be an affirmative defense, and the proponent of such defense has the burden of

[2]The Federation's exception based upon its disagreement with California State University (San Diego) is found to be without merit as that case has not been overruled, and is good PERB law.

establishing notice on the part of the charging party.[3] (Harvard Folding Box Company (1984) 273 NLRB 841 [118 LRRM 1323]; Strick Corp. (1979) 241 NLRB 210 [100 LRRM 1491].) In the past, PERB has also held the 6-month statute of limitations to be an affirmative defense which was waived by the proponent of such defense if not raised in the answer.[4] (Walnut Valley Unified School District (1983) PERB Decision No. 289.) Walnut Valley, however, was overruled by the Board in California State University, San Diego, supra. There the Board held that the 6-month time period is not a statute of limitations and need not be raised as an affirmative defense. Rather, the time period is jurisdictional and cannot be waived by either of the parties or by the Board itself. Based upon the Board's interpretation of the "statute of limitations" found in all three of the statutes which it administers, if the charge is not filed within the

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[3]Cases construing the NLRA are persuasive in interpreting parallel provisions of HEERA. (Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191, 196.) The 6-month statute of limitations is found in the NLRA at section 10(b), 29 U.S.C, section 160(b).

[4]The statute of limitations is found in section 3563.2 of HEERA, which reads in pertinent part as follows:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

Similar sections are also found in section 3541.5 of the Educational Employment Relations Act and section 3514.5 of the Ralph C. Dills Act.

relevant 6-month period, the Board has no subject matter jurisdiction over the case and may not issue a complaint under any circumstances.[5]

A logical progression of the analysis used in California State University, San Diego results in the conclusion that the doctrine of equitable tolling does not survive. That decision stated emphatically that the 6-month time period was jurisdictional in nature and could not be waived, for any reason, by either of the parties or by the Board itself. The doctrine of equitable tolling allowed the Board, in its discretion, and in furtherance of the principles of equity, to waive, in essence, the 6-month statute of limitations for the time period during which a grievance was pursued. Under California State University, San Diego, the Board no longer has discretion to waive the 6-month period, as it has no power to entertain the case for lack of jurisdiction.[6]

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[5]The Board cited a similar analysis in Lake Elsinore School District (1987) PERB Decision No. 646 (affd. by the California Court of Appeal, 4th District, Division 2 in an unpublished decision issued July 28, 1988, case no. EO05078), where the Board held that it lacks subject matter jurisdiction over matters where the alleged conduct was prohibited by the parties' contract and covered by its grievance procedures providing for binding arbitration.

[6]Based upon the above analysis, we agree with the ALJ that as a result of California State University, San Diego, the burden is on the charging party to show timeliness as part of its prima facie case.

Application of the Relation Back Doctrine

The Federation argues that the doctrine of relation back should be applied to this case, such that the UCLA charge would relate back to the Santa Cruz charge, which was timely filed.

The Board has held that if an amended charge raises the same issue alleged in the original charge and is intertwined with the conduct in the original charge, where the amended charge is outside of the statute of limitations, the doctrine of relation back can be applied to render the amended charge timely. (Regents of the University of California (1987) PERB Decision No. 640-H, p. 15.) Where the conduct alleged in the original charge is the same conduct or factual allegation contained in the amended charge, and where the second charge or amended charge either clearly indicates a legal theory for the first time or merely alleges another theory on the same facts already before the Board, the doctrine of relation back has been applied to allow timely filing of the amended charge. (Gonzales Union High School District (1984) PERB Decision No. 410; Temple City Unified School District (1989) PERB Order No. Ad-190.) The Board has refused to apply the doctrine, however, where the original charge failed to raise the issue which is the subject of the amended charge. (Burbank Unified School District (1986) PERB Decision No. 589, Monrovia Unified School District (1984) PERB Decision No. 4 60.)

The circumstances presented here do not warrant the application of the relation back doctrine. The UCLA charge and

the Santa Cruz charge are not based upon the same course of conduct. The cases were consolidated because they involve interpretation of the same contract provisions. The conduct relating to the contract negotiations and, therefore, the contract interpretation, may be the same, but the conduct giving rise to the allegations of a unilateral change violation is peculiar to each campus. There is no evidence that the actions taken at the two campuses were the result of a systemwide plan or directive. Further, the record reflects that each campus enjoyed relative autonomy in administering the contract. Because these two cases are not based upon the same alleged facts or conduct, the doctrine of relation back does not apply.

Commencement of the Statute of Limitations

The factual scenario presented by the UCLA case is one wherein it appears that the Federation received notice of an alleged change in the criteria used in the allocation of 3-year appointments prior to the time the lecturers in the writing program were actually affected by the change. The question therefore arises as to when the 6-month time period begins to run.

PERB law has heretofore been unclear as to the rule on this issue. We wish to clarify the rule herein. 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. (See

Anaheim Union High School District (1982) PERB Decision No. 201.) This rule reflects the Board's view of when a change in policy actually occurs.

In stating this rule, we find that a charging party is not required to wait until actual implementation to file a charge alleging a unilateral change. In addition, a charging party must file such charge when it has actual or constructive notice of a clear intent to implement the change, and may not rest on its rights until actual implementation occurs. In the present case, the date of notice would be the date when the Federation first learned of the University's rationale for its allocation of Full Time Equivalents (FTE's)[7] for three-year appointments on the UCLA campus.

In accordance with California State University, San Diego, supra, PERB Decision No. 718-H, the charging party has the burden to prove timeliness as part of its prima facie case. However, we note that California State University, San Diego did not issue until after the close of hearing in the present case, and before post-hearing briefs were due.[8] As neither the ALJ nor the parties addressed this issue until after the hearing, the Board,

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[7]"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.

[8]In the present case, the last day of hearing was October 19, 1988. California State University, San Diego was issued on January 17, 1989, and post-hearing briefs were filed simultaneously by both parties on February 15, 1989.

in the interest of fairness and to afford both parties full due process rights, finds that the record should be reopened so that evidence may be taken on the narrow issue of timeliness.

II. Case No. SF-CE-272-H

Contract Interpretation[9]

The proposed decision could be construed to find that Article VII of the MOU currently in effect is interpreted to 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. In affirming the proposed decision, we would like to clarify that we do not intend such a reading of the decision.

[9]The University claims that PERB lacks jurisdiction over this matter because it is solely an issue of contract interpretation, citing Eureka City School District (1985) PERB Decision No. 528 (wherein the contract language was found to be ambiguous and the Board held that no extrinsic evidence was introduced at the hearing which would demonstrate a mutual understanding or intent of the parties. The Board found that the evidence did not reflect any policy change under Grant Joint Union High School District (1982) PERB Decision No. 196, and thus there was no independent violation of the Educational Employment Relations Act).

The Board has jurisdiction to interpret contract language in order to resolve an unfair practice charge. (Grant Joint Union High School District, supra, PERB Decision No. 196, at p. 8; Victor Valley Union High School District (1985) PERB Decision No. 487, at p. 25.) Because this case alleges an independent violation of the Act (i.e., a policy change) which requires the Board to interpret the contract language, this exception has no merit.

In order to make a decision with regard to instructional need in Article VII C.(l)(a)(l) of the MOU,[10] specifically, whether a certain class will be taught for three years by a Unit 18 lecturer, the University must take financial and fiscal considerations into account. Otherwise, the University could not accurately project whether resources will be available to support three-year appointments. Once it has been decided that a course will be taught for three years by a Unit 18 lecturer, the University must then apply the criteria delineated in Article VII C.(l)(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.

It is, therefore, 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.(l)(a)(2), when instructional need has already been determined.

In this case, the decision to create a percentage ratio of three-year to one-year appointments (70 percent 3-year to 30 percent 1-year) was not based upon the criteria established under the MOU. The University has therefore interjected criteria into the determination not agreed upon by the parties. Based upon that finding, UC has violated the Act by unilaterally implementing a change in the parties' agreed upon policy with regard to post-six-year reappointments.

[10]See proposed decision, pages 4-7.

The Remedy

Based upon a finding that UC violated the Act on its Santa Cruz campus, the ALJ issued a cease-and-desist order and a return to the status quo ante, ordering the University, beginning with the next academic year following the date the decision becomes final, to increase the percentage level of any three-year appointments made in violation of the MOU to at least the percentage level the lecturers held during the year prior to these three-year appointments. He also ordered back pay be reimbursed to all lecturers who suffered losses as a result of this violation and ordered the University to post a notice at the Santa Cruz campus.

We do not adopt that portion of the order which requires the UC to increase the percentage level of the reduced three-year appointments which resulted from a violation to at least the percentage level the lecturers held during the year prior to the three-year appointments, because it would not comport with the terms of the Agreement. Although it is true that a unilateral change violation is generally remedied with a return to the status quo ante (Rio Hondo Community College District (1983) PERB Decision No. 292), in this case, the remedy should not order the parties to do something which is in contravention of the contract.

Neither the MOU itself, nor any extrinsic evidence, show that the MOU required UC to grant reappointments at a certain percentage. On the contrary, Article VII (c)(1)(b) states with regard to post-six-year appointments:

> 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.

Based upon the contract language, there is no indication that a lecturer must be appointed for a percentage of time equal to his most recent appointment or any other specific percentage of appointment. In fact, it is apparent that the percentage of appointment is not guaranteed and that the percentage of appointment may vary even within the three-year time period. There was no evidence presented that the parties agreed that a three-year appointment would be based upon the current percentage of appointment of the individual lecturer.

In addition, by requiring the lecturers to be appointed at the percentage they held in the year prior to the violation, the Board would not truly be returning the lecturers to the position they would have held had the violation not been committed. The only way to achieve that is to order compliance proceedings wherein it will be determined what the instructional need actually was in the 3-year period, and any harmed lecturers will receive restitution. The violations occurred with regard to three-year appointments beginning in the 1987-88 school year,

therefore, we find that back pay is sufficient to restore the statue quo ante.[11]

With regard to the posting requirement, the proposed decision required posting at the Santa Cruz campus only. We find it more appropriate that the notice be posted systemwide, although the notice itself will specify that the violation occurred on the Santa Cruz campus. This is so because the named respondent is the Regents of the University of California, and not solely the Santa Cruz campus. Furthermore, the violation to be remedied by the posting order concerns contract language applicable to the entire unit, whose members are employed at all University campuses. (Trustees of the California State University (1988) PERB Order No. Ad-174-H.[12]) The Order and Notice have been modified accordingly.

ORDER

Los Angeles - Case No. LA-CE-235-H

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Board REMANDS this

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[11]All of the lecturers who met the criteria provided in the MOU were given 3-year appointments, albeit at reduced levels, in order to allow the then chair of the Santa Cruz writing program to avoid terminating the employment of some of the lecturers.

[12]AFT also argues that a systemwide remedy is appropriate, based upon the Santa Cruz violation. We reject this argument. Although our decision concerning interpretation of the MOU can be given preclusive effect over the same issue under the doctrine of collateral estoppel in a future case, a finding of a violation on each campus must be proven by the facts of each case. This is especially true as there is no evidence of a systemwide change in policy, and in light of the ALJ's finding that the MOU was administered by each campus autonomously.

case to the Chief ALJ and ORDERS that evidence be received on the issue of timeliness as discussed,in this decision, and to make supplemental findings of fact and conclusions of law on the issue of timeliness, whereupon such findings and conclusions shall be forwarded to the Board.

Santa Cruz - Case No. SF-CE-272-H

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Board finds that the Regents of the University of California violated section 3571(a), (b) and (c) of HEERA. The Board REMANDS this case to the San Francisco Regional Director and ORDERS that compliance proceedings be instituted, in order to determine actual instructional need at the Santa Cruz campus during the three-year period in question (academic years 1987-88, 1988-89 and 1989-90), upon which back pay will be awarded to any unit members who suffered harm as a result of reduced percentage appointments in violation of the Act.

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

A. CEASE AND DESIST FROM:

1. Interfering with the exercise of rights guaranteed under the Higher Education Employer-Employee Relations Act by the University's employees in the nonsenate instructional unit by unilaterally changing the criteria for post-six-year appointments contained in the Memorandum of Understanding (MOU) between the

University and University Council-American Federation of Teachers (Federation) during its term, without the Federation's consent.

2. Denying the 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 MOU, without the Federation's consent.

3. 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 MOU, 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 of California, Santa Cruz campus, who is found to have suffered economic harm as a result of reduced percentage appointments made in contravention of the MOU and 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 San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Chairperson Hesse and Member Craib joined in this Decision.

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. SF-CE-272-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 violated the Higher Education Employer-Employee Relations Act, section 3571(a), (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 Santa Cruz campus.

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

A. CEASE AND DESIST FROM:

1. Interfering with the exercise of rights guaranteed under the Higher Education Employer-Employee Relations Act by the University's employees in the non-senate instructional unit by unilaterally changing the criteria for post-six-year appointments contained in the Memorandum of Understanding (MOU) between the University and the Federation during its term, without the Federation's consent.

2. Denying the 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 MOU, without the Federation's consent.

3. 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 MOU, without the Federation's consent.

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

Make whole any unit member at the University of California, Santa Cruz, campus who is found to have suffered

economic harm as a result of reduced percentage appointments made in contravention of the MOU and 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,	)	Unfair Practice
	)	Case Nos. SF-CE-272-H
Charging Party,	)	LA-CE-235-H
	)	
v.	)	PROPOSED DECISION
	)	(2/24/89)
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	
	)	
Respondent.	)	
	)	

Appearances: Leonard, Carder & Zuckerman by William H. Carder for University Council-American Federation of Teachers; Marcia J. Canning and Susan H. von Seeburg for the Regents of the University of California.

Before Douglas Gallop, Administrative Law Judge.

PROCEDURAL HISTORY

On November 17, 1987, University Council-American Federation of Teachers (hereinafter Association) filed an unfair practice charge in Case SF-CE-272-H alleging that the Regents of the University of California (hereinafter Respondent or University) violated section 3571(a), (b), (c) and (e) of the Higher Education Employer-Employee Relations Act (hereinafter HEERA or Act),[1] by unilaterally modifying terms and conditions of employment contained in a memorandum of understanding between the parties, at Respondent's Santa Cruz, California campus. On May 4, 1988, the Association filed an unfair practice charge in Case

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

LA-CE-235-H alleging that Respondent violated section 3571(a), (b) and (c) of the HEERA by modifying the same provisions of the memorandum of understanding, at its Los Angeles campus. On February 26, 1988, the then Acting General Counsel of the Public Employment Relations Board (hereinafter PERB) issued a complaint in Case SF-CE-272-H alleging said modification as violative of section 3571(a), (b), and (c), and on June 21, 1988, issued a complaint in Case LA-CE-235-H alleging this conduct as violative of section 3571(b) and (c). Respondent filed answers to the complaints denying the commission of unfair practices and alleging various affirmative defenses. An informal settlement conference was conducted in Case SF-CE-272-H, but the matter was not resolved, and the parties declined to participate in an informal settlement conference in Case LA-CE-235-H. The cases were consolidated for hearing, and after a pre-hearing conference, the hearing was conducted on October 12, 13, 14, 17 and 19, 1988. The parties filed post-hearing briefs, and the matter was submitted for decision on February 15, 1989.

FINDINGS OF FACT

Background:

Respondent, which operates a statewide system of public universities, is an employer within the meaning of section 3562(h). The Association, an employee organization within the meaning of section 3562(j), is the exclusive representative of a statewide unit of Respondent's non-senate instructional employees. The unit, totalling between 1,800 and about 2,000

employees, primarily consists of lecturers who are not on tenure track to become permanent faculty members. They serve two major functions for Respondent, 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. Respondent also employs teaching assistants, who are usually graduate students, to perform some of these functions. Historically, Respondent had offered lecturers appointments ranging in length from one quarter to one year, although two-year appointments were possible under Respondent's policies. Part-time appointments were common, and Respondent's policy also provided for split appointments, whereby lecturers would teach courses for more than one department.

Respondent 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% time were only eligible for continued employment at no more than a 50% appointment. It was this lack of security in employment that the Association sought to change when it commenced negotiations with Respondent for an initial 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.

7. 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 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 Association

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 loggerheads 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 Respondent 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 Respondent's policy manuals and other publications. Upon review of the record, certain elements of this article are apparent, and need no interpretation.[2] First, it is clear that Article VII (B) is an

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therefore, any testimony to the contrary is not credited if it alleges that a different meaning was agreed to at the bargaining table; or is considered irrelevant if it consists of alleged statements made during the course of the ever-changing positions of the parties during the negotiations, or a witness'

express limitation on Respondent's discretion in making post-six-year appointments.[3] 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.[4] 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 Association testified, and as their bargaining notes reflect, that Robert Bickal, Respondent's then chief negotiator, commented that three-year appointments were now "mandatory."[5]

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personal interpretation of the provisions.

[3]Any doubt on this issue is resolved by the fact that Respondent'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.)

[4]Again, any testimony that the parties agreed to a contrary interpretation is not credited, and pre-agreement positions and personal interpretations are considered irrelevant.

[5]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 Association. 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.

Therefore, Respondent, under the agreement, was and is obligated to grant three-year appointments in accordance with the requirements set forth in Article VII (C)(l)(a). Those requirements are: 1) Six years of service at the same campus; 2) Continuing or anticipated instructional need as determined by Respondent, 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 Association's witnesses. Recognizing that the term may have a special meaning in the context of Respondent'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 understanding of the term 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 Association's witnesses, to an all-encompassing concept that would, in effect, permit Respondent to deny three-year appointments on the basis of virtually any consideration it

deemed relevant. While most, if not all, of Respondent'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 Respondent's interpretation of Article VII), Respondent has clearly failed to establish any mutually understood meaning for the term, "instructional need" other than would be suggested by the dictionary definition.[6]

Respondent 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 Respondent's burden to prove that

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[6]It is noted that initially, the appointments proposals referred to Respondent'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 Association's insistence, on the stated ground that it would permit arbitrary action by departments opposed to three-year appointments. Respondent presented evidence that Marde Gregory, the Association's chief negotiator, at one point acknowledged that instructional need "in one sense" includes programmatic need, and that Robert 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 Respondent would have the broad-based discretion in post-six-year appointments claimed by Respondent's witnesses. To the contrary, the credible evidence establishes that the Association requested that the word, "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, Respondent 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.

the parties clearly agreed to this. The strong preponderance of the evidence, however, is to the contrary. It is undisputed that during negotiations, the Association'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 Association'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, Respondent 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%-16%. In addition, Respondent was fully aware that even that number would be reduced through terminations and failures to obtain "excellent" ratings in the reviews. Thus, while the somewhat dire implications that some Respondent'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 Respondent'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 Association'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.

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)(l)(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 Association'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.[7]

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 Association had initially proposed a "faculty displacement" article which afforded substantial job security for unit members. It is undisputed that when Respondent initially agreed to the concept of three-year appointments, Bickal insisted that a traditional layoff provision replace the 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 Association subsequently agreed to a far

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[7]Bickal's testimony, that he told the Association's representatives that resources would be considered both before and after three-year appointments, is not credited. Said testimony conflicts with the documented bargaining history of Article VII, and it is highly unlikely that the Association, in agreeing to a layoff proposal, would have also agreed, in effect, to give Respondent "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 Respondent's other negotiating team members at various mid-points in the negotiations which would conflict with this interpretation are irrelevant. In this regard, the Association 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.

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.[8]

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.[9]

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[8]This conclusion is reinforced by Bickal's comments at the February 20, 1986 bargaining session, as reflected by Respondent's bargaining notes, that Respondent 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."

[9]Gregory credibly denied that any such understanding was reached, none of Respondent's other witnesses contended that this was agreed to or is a valid interpretation and Respondent, in practice, has never adopted such an interpretation. Bickal, and several Respondent's other witnesses, had a disturbing tendency to justify their conduct on the basis of ex post facto contractual manipulations. Article VII (C)(l)(c) reads, "Review for subsequent three-year appointments will normally occur during the second year of each three-year appointment." This clearly does not limit three-year appointments to those subsequent to the appointment at the six-year review. On the other hand, Respondent's November 7, 1985 proposal for Article VII., (C)(l)(c) read, "Provided that the criteria set forth in paragraph C-l-a above [instructional and programmatic need, and excellent

Implementation of Article VII:

Implementation of the collective bargaining agreement has largely been left to Respondent's campus administrators. Respondent 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."[10] It is undisputed that the Association did not protest any of these generalized interpretations, and did not file any unfair practice charges thereon. The evidence,

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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. 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 Respondent's arguments.

[10]By way of example, Respondent'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 Respondent'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 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.)

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 Association was satisfied that Respondent was complying with Article VII.[11]

The situation radically changed in the second year that the parties operated under the agreement. The Association'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. At Santa Cruz, the then Academic Vice Chancellor sent letters dated February 5, 1987 to the deans of the College of Letters and Science specifically limiting long-term funds for temporary appointments to 70% of the faculty pool for long range curricular need, and specifying the number of positions that could be filled in the divisions based on long-term need. Those limitations were based on admittedly very conservative college-wide resource projections. Roswell Spafford, a lecturer in the writing program at Santa Cruz and the Association's contract administrator for that campus, credibly testified that she first saw one of these letters in June 1987.

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[11]The evidence shows that Respondent, 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 Association Considers within the ambit of instructional need.

Prior to this, Spafford had been generally informed, at a writing program meeting, that there would be some sort of limit placed on the number of lecturers who would be permitted to undergo post-six-year reviews. Spafford testified that the meeting took place in the last week of May 1987. In a grievance dated June 16, 1987, alleging the limit on long-term appointments as violative of the agreement, however, Spafford set forth May 18, 1987 as the "date of occurrence or knowledge" of the alleged contract violation.[12]

In a letter dated October 12, 1987, Bickal, acting in his role as Director of Labor Relations for the Santa Cruz campus, denied that any contractual violation had taken place, but decided that it would be more appropriate to place dollar ceilings on long-term appointments rather than to express the limits in terms of positions. On November 4, 1987, those limits were communicated to the various college divisions. Michael Cowan, Dean of Humanities, set forth additional reasons for limiting the number of long-term appointments in the writing program, including the use of "temporary lecturers," "ladder rank" faculty (e.g. tenure-track faculty) and teaching assistants. The credible evidence, however, establishes that Cowan was aware that it was highly unlikely that any of these courses, at least in the writing program, were likely to be

[12]The parties agree that Article VII only permits grievances pertaining to violations of that Article to be processed to the last pre-arbitration level.

taught by "ladder rank" faculty, or that additional teaching assistants would be used to teach the courses then taught by lecturers. In addition, Spafford and Paul Skenazy, then the Chairman of the Santa Cruz writing program, credibly testified that Cowan admitted to them that the financial limitations placed on him by the Academic Vice Chancellor had influenced his decisions regarding allocating long-term appointments to the writing program, and that while he advocated a "mix" of instructors in the program, it would have been a different mix without the financial limit on long-term appointments. Cowan did not testify.

In letters dated January 22, 1988, Cowan set specific limits on the number of long-term positions in the various departments in the College of Letters and Science. In the writing program, Skenazy, who had vigorously opposed the limit on long-term appointments as both educationally unsound and as a violation of the agreement, commenced the six-year reviews. More lecturers were reviewed as excellent than full-time positions were available. Some of these lecturers had worked full-time the year before, while others had been employed on part-time appointments. Rather than completely terminating the employment of some of the lecturers[13] Skenazy, under protest, assigned all of the lecturers

[13]The parties agree that the prefatory language of Article VII (C)(l)(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.

who were rated as excellent to part-time, three-year appointments. Spafford credibly testified that lecturers in other departments similarly received reduced-level three-year appointments. It is undisputed that no lecturer at Santa Cruz was terminated as the result of the financial limits placed on the departments, and that the lecturers were free to, and in some cases did, receive supplemental appointments up to full-time positions on a year-by-year basis.[14]

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

At the Los Angeles campus, Charles Linwood Batten, then the Director of that campus' writing program, and Herbert Morris,

[14]It appears that all of the writing program lecturers received supplemental appointments for the 1988-1989 academic year; however, it also appears that lecturers in at least one other department did not obtain supplemental appointments.

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 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% of the total lecturers eligible for six-year reviews over the life of the agreement were eligible for review in that year, only 60% 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 Respondent "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.

The record does not disclose the date when the Association first learned that the allocation for three-year appointments at UCLA had been reduced by Orbach. None of the Association's representatives testified as to when they, or any other representative, became aware of the October 5, 1987 reduction in long-term appointments for the writing program, or the reasons therefore. The record establishes that a grievance was filed concerning the reduction of long-term commitments in that program, and that a step II grievance meeting took place on November 3, during which Morris explained the reasons for the reduction. The record, however, does not establish that the Association filed or participated in that grievance, or that this constituted the first date that the Association learned of the reduction or the reasons therefore.

The collective bargaining agreement permits employees to file and process grievances up to, but not including,

arbitration. The agenda minute for the November 3, 1987 writing program step II grievance lists, as attendees, Morris, Hartzog, Robert Cullen, Lisa Gerrard, Jeanne Gunner and Cynthia Tuell. Tuell appears to have been the grievants' spokesperson. Tuell, Gerrard and Cullen are elsewhere identified as lecturers in the writing program eligible for post-six-year reviews. Morris and Hartzog, of course, are representatives of Respondent, and it appears that Gunner was also present as a management representative. Susan Griffin, an Association representative, summarily testified that she was a "representative" in the writing program grievance, but was not asked the nature or dates of her involvement therein.

The record also establishes that this grievance was denied by Respondent at step III, but does not disclose the date of that denial, or how long the entire grievance process lasted. Griffin also testified concerning her participation in grievances arising from denials of, or reductions in the percentage of long-term commitments in other departments at the Los Angeles campus, and Respondent's explanations for those actions. The Association did not, however, establish when those other cuts were made, when it first learned of them (or the reasons therefore), whether the reductions were made for the same reasons as in the writing

program or how long it took to process those disputes through the grievance procedure.[15]

THE ISSUES

1. Were either or both of the charges untimely filed?

2. Did Respondent repudiate Article VII of the agreement in violation of the HEERA at either its Santa Cruz or its Los Angeles campus?

ANALYSIS AND CONCLUSIONS OF LAW

Timeliness:

Pursuant to section 3563.2(a) of the HEERA, the PERB cannot consider unfair practice allegations occurring more than six months prior to the filing of a charge. With respect to unilateral change allegations, the PERB has, in some cases, ruled that the time period commences as of the date when the affected party knew or reasonably should have known that the change was implemented, while in a more recent case, the time period was held to commence as of the date of actual or constructive knowledge of a clear intent to implement the change. El Dorado

[15]By way of example, lecturer Donna Brinton, in the Linguistics Department, received a reduced-percentage three-year appointment, which she grieved. The record reflects that her grievance was processed at least for the period November 2, 1987 (step II meeting) through January 12, 1988 (Respondent's letter denying the grievance at step III). The record does not reflect, however, when the Association first learned of this action or the reasons therefore. More significantly, while the January 12 letter reiterates Respondent's broad interpretation of the term, "instructional need," it also specifically cites Respondent's intention to hire more "ladder rank" faculty to teach the courses as the reason for the percentage level of her three-year appointment, a reason the Association does not dispute as being within the ambit of instructional need.

Union High School District (1984) PERB Decision No. 382; Healdsburg Union High School District (1984) PERB Decision No. 467; cf. Victor Valley Community College District (1986) PERB Decision No. 570. The current interpretation of the National Labor Relations Board appears to be that notice of implementation, rather than notice of an intent to implement unilateral changes, governs the commencement of the six-month period set forth in section 10(b) of the National Labor Relations Act. Harvard Folding Box Company, Inc. (1984) 273 NLRB 841 [118 LRRM 1209]. The PERB has also held that in computing the six-month period, the first day that the misconduct takes place is excluded and the last day is included. Saddleback Valley Unified School District (1985) PERB Decision No. 558.

Respondent has alleged that pursuant to HEERA section 3563.2, subdivision (a),[16] the charges were not filed in a timely manner. While Respondent alleges timeliness as an affirmative defense, the PERB, in its recent decision in California State University, San Diego (1989) PERB Decision No. 718-H, held that section 3563.2 is a jurisdictional matter, and not an affirmative

[16]HEERA section 3563.2, subdivision (a) provides:

> Any employee, employee organization or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

defense.[17] Even if section 3563.2(a) were still considered an affirmative defense, it would be concluded that once Respondent has properly raised that defense, and established that the alleged unilateral change took place outside the six-month period, the burden would shift to the Association to establish that it did not learn of the change or the reasons therefore until a date within the six-month period, or that the statute should be tolled. As a jurisdictional matter, it is clearly the Association's burden to establish timeliness as part of its prima facie case.

The charge in Case No. SF-CE-272-H was filed on November 17, 1987, while the charge in Case No. LA-CE-235-H was filed on May 4, 1988. With respect to the Santa Cruz charge, the record establishes that the earliest date when the Association may have first gained knowledge that some limit was going to be placed on three-year appointments was May 18, 1987 (pursuant to Spafford's grievance letter), and even that knowledge was of a general and unexplained nature. Thus, the charge in Case No. SF-CE-272-H was filed in a timely manner.

The Association has failed to establish that the charge in Case No. LA-CE-235-H was filed in a timely manner. The record reflects that the purported unilateral change in the agreement, as applied to the writing program, was made on October 5, 1987,

[17]In so ruling, the PERB overruled Walnut Valley Unified School District (1983) PERB Decision No. 289, and construed PERB Regulation 32644(b)(6) as to not require that timeliness be raised as an affirmative defense.

outside the six-month period. The Association has failed to establish that it first learned of this action, or the reasons therefore, within the six-month period, despite the availability of witnesses capable of testifying on that subject.

Although it is unlikely that the PERB will continue to follow this doctrine, particularly in light of San Diego Community College District, supra, existing precedent still applies the principle of equitable tolling to cases arising under the HEERA. California State University, Hayward (1987) PERB Decision No. 607-H.[18] Under that principle, the six-month period will be tolled during the time the charging party utilizes existing grievance procedures, even if they do not provide for binding arbitration, unless the respondent can show a substantial prejudice to its rights. Victor Valley Community College District (1986) PERB Decision No. 570.

Even assuming that the principle of equitable tolling will continue to be applied, the Association has failed to establish the facts necessary to toll section 3563.2(a) in Case No. LA-CE-235-H. Thus, the Association has failed to establish that it filed or meaningfully participated in the writing program grievance, and more importantly, has failed to establish that the processing of that grievance was of a sufficient duration to

[18]In San Diego Community College District, the PERB overruled Walnut Valley "and its progeny" to the extent that they require the statute of limitations to be raised as an affirmative defense, but did not specifically overrule the principle of equitable tolling. The implication is clear, however, that said principle will no longer be applied.

bring the charge to within the six-month period. With respect to the grievances in the other fields of instruction, the Association has failed to establish how long those grievances took to process, when those alleged unilateral changes were made, when it gained knowledge thereof and whether those changes were based on the same rationale as the writing program reductions. In addition, it is well established that unilateral changes are not continuing violations, and cannot be considered to fall within the six-month period on that basis. San Dieguito Union High School District (1982) PERB Decision No. 194. Therefore, to establish a violation for the writing program at UCLA, the Association is required to establish that the charge was timely filed with respect to Respondent's conduct which pertained to that program.

Accordingly, it is concluded that the charge and complaint in Case No. LA-CE-235-H must be dismissed.[19]

Respondent's argument, that the statute of limitations commenced by virtue of the publication of the October 1986 edition of The Call, or alternatively by virtue of pronouncements made by its representatives earlier in 1987, is rejected. As noted above, Respondent's publications and representations were inconsistent, general in nature and were not addressed to actions perceived by the Association as repudiations of the agreement. In this regard, the Association was not obligated to file a charge every time a representative of Respondent took a position inconsistent with what the parties agreed to at the bargaining table. It is also noted that the early 1987 meetings primarily concerned changes in course offerings and increases in the number of tenure-track faculty teaching courses, which the Association concedes are valid components of the term, "instructional need."

The Unilateral Changes at U.C. Santa Cruz:

Respondent does not dispute that the appointments article pertains to matters within the scope of representation, and Article VII clearly relates to such in-scope subjects as job security, length of employment, hours of employment, wages and job performance evaluations. 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.[20] 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. It is particularly appropriate in this case to hold the parties to the apparent language of their memorandum of understanding, given the length of the negotiations, the sophistication of the

[20]Respondent argues that it did not violate the HEERA because its past practice had been to consider general financial projections in appointment decisions, and that it merely continued that practice. This argument clearly misses the point given the intervening event of the collective bargaining agreement. In agreement with the Association, past practice prior to a contract is irrelevant where the parties contractually agree to change the practice which is the subject of the dispute. Lake Elsinore School District (1986) PERB Decision No. 563; Eureka City School District (1985) PERB Decision No. 528.

negotiators, and the multitude of review levels and sources of input which were utilized prior to execution of the agreement. As noted above, it is also appropriate, to the extent that any interpretation of the agreement is necessary, to focus on the conduct of Gregory and Bickal, as lead negotiators, rather than on the statements and opinions expressed by their supporting casts.

It has been found herein that Article VII is clear and unambiguous in that it sets forth mandatory criteria which, if satisfied, require three-year appointments. The only potentially ambiguous term among those criteria is the phrase, "instructional need," and to the extent that said term may be ambiguous, the credited evidence establishes that the parties adopted the dictionary definition of that term, e.g., that Respondent anticipated that courses taught by a lecturer under review would continue to be taught by a lecturer for the relevant three-year period. Respondent's contention that the Association agreed or understood that financial resources could be considered, at least beyond the decision as to whether the specific courses in question (as opposed to overall departmental, college or campus-wide financial planning) would continue to be taught, has been rejected, notwithstanding the possibility that such considerations may have been mentioned at various mid-points in the negotiating process. While this conclusion is based on a number of factors contained in the record, the omission of such financial factors from Article VII, the history of the layoff

article and Bickal's statements when the parties reached tentative agreement on February 7, 1986, are the most persuasive factors in this determination.

With respect to Article VII (C)(l)(b), the percentage level of three-year appointments, it is concluded that the parties agreed that Respondent could assign reduced three-year appointments, but only on the basis of the same considerations contained in Article VII (C)(l)(a). While Article VII (C)(l)(b) does not expressly adopt those criteria, it does not add any additional standards, and since it is part of the same article, dealing with the same group of employees, the logical interpretation would be that no additional standards were contemplated. Any ambiguities raised on this issue were resolved by Bickal's testimony, near the conclusion of the hearing, that he intended, and told Gregory, that the percentage of long-term appointments would be based on the anticipated workload. That, in essence, is what the term, "instructional need," has been found to mean.

Based on the foregoing, it is concluded that Respondent repudiated Article VII at the Santa Cruz campus. It is undisputed that Respondent had determined an anticipated instructional need for the courses in question for the relevant three-year periods, and that lecturers who were rated as excellent instructors through the normal review process received reduced appointments.

At the Santa Cruz campus, overall College of Letters and Science financial considerations, and highly conservative ones at that, clearly impacted on the levels of employment offered to lecturers in several departments. Dean Cowan's claim that a "mix" of temporary lecturers, teaching assistants and tenure-track faculty would be appropriate, at least in the writing program, is highly suspect in light of the evidence presented that, in fact, most of those courses will continue to be taught only by lecturers. Even crediting such a generalized preference, two witnesses credibly testified that Cowan admitted that his decision regarding the "mix" of instructors was influenced by the financial constraints placed on him. Therefore, it is apparent that, absent those constraints, more long-term commitments would have been made, resulting in higher percentage level appointments at Santa Cruz.

Accordingly, it is concluded that Respondent has engaged in, and intends to continue engaging in, a material repudiation of the agreement in violation of sections 3571(a),[21] (b) and (c) of

[21]It is clear that many, if not most, of the unit employees at Santa Cruz are aware that Respondent has imposed impermissible restrictions on long-term appointments resulting, at least, in reduced levels of appointments. It is reasonable to assume that such conduct would tend to cause employees to lose confidence in the Association's ability to protect their negotiated wages, hours, and other terms and conditions of employment. Said conduct, therefore, constitutes interference with the exercise of protected employee rights and violated section 3571(a). San Francisco Community College District (1988) PERB Decision No. 703; San Francisco Community College District (1979) PERB Decision No. 105; cf. Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.

the HEERA.[22]

THE REMEDY

Where an employer unilaterally changes terms and conditions of employment, the PERB typically orders the employer to cease and desist from its unlawful action, to restore the status quo ante, to comply with its bargaining obligations with the exclusive representative and to make employees whole for any damage they suffered as a result of the unlawful unilateral change. Rio Hondo Community College District (1983) PERB Decision No. 292. The Association requests a system-wide remedy in this case, generally alleging, but not having produced any evidence, that similar conduct has occurred at other campuses. Given the wide discretion Respondent has given its administrators

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[22]The foregoing findings and conclusions necessarily reject Respondent's argument that the Association, by its conduct during negotiations, waived Respondent's right to consider overall financial resources as part of its instructional need. With respect to instructional "mix", it is concluded that Article VII clearly prohibits the hire of new lecturers or reappointment of lecturers with less than six years of employment in lieu of granting three-year appointments to lecturers otherwise eligible for such appointments. If Article VII established nothing else, it gave eligible post-six-year lecturers a preference in hire over these other employees. Respondent also unconvincingly argues that the general management rights and waiver articles establish a waiver by the Association. Where the parties have negotiated specific provisions covering a subject within the scope of representation, as is the case here, such provisions are not defeated by general reservations of authority in management rights clauses. Thus, by its terms, Article VII specifically limits Respondent's discretion in the appointment process, and clearly takes precedence over those portions of the agreement which generally delineate Respondent's authority. The waiver article does not establish a defense for the simple reason that the parties did, in fact, negotiate the subject of the instant dispute.

at each campus to implement the agreement, and the lack of evidence of unlawful conduct other than at the two campuses, the remedy will be limited to the Santa Cruz campus.[23]

With respect to that campus, a cease and desist order is appropriate. No bargaining order shall issue because the Association was not obligated to bargain concerning changes in Article VII. As part of the restoration of the status quo ante, Respondent shall be ordered, effective at the commencement of the academic year after this Decision becomes final, to increase the percentage level of any three-year appointments made in violation of the agreement at the Santa Cruz campus to at least the percentage level the lecturers held during the year prior to their three-year appointments. In this regard, it is not appropriate to speculate as to what the percentage of those appointments would have been absent the influence of impermissible considerations.

A back-pay order is appropriate to remedy the violations. Respondent will be ordered to reimburse all lecturers who suffered monetary losses as the result of its unlawful conduct at the Santa Cruz campus, to the date that Respondent complies with its increased appointment level obligations. Such losses will be

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[23]The Association cites The Regents of the University of California (1983) PERB Decision No. 359-H, a decision which was subsequently vacated by the PERB, for the proposition that a system-wide order is appropriate. As a vacated decision, that case does not establish a binding precedent. It is further noted that the evidence in that case established a centrally-directed, system-wide change in policy, which is exactly what the Association has failed to establish herein.

reduced by any interim earnings by the employees, whether by employment elsewhere, or by supplemental annual appointments at that campus. Interest on these amounts shall be paid at 10% per annum.

It is appropriate that Respondent be required to post a notice at its Santa Cruz campus incorporating the terms of this order. The notice should be subscribed by an authorized agent of Respondent indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that Respondent has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy, and the posting will announce Respondent's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeal approved a similar posting requirement. See also NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to HEERA section 3563.3, it is hereby ORDERED that the Regents of the University of California and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the exercise of rights guaranteed under the Higher Education Employer-Employee Relations Act by the University's employees in the non-senate instructional unit by unilaterally changing the criteria for post-six-year appointments contained in the collective bargaining agreement (hereinafter Agreement) between the University and University Council-American Federation of Teachers (hereinafter Association) during its term, without the Association's consent.

2. Denying the Association 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, without the Association's consent.

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

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

1. Effective at the commencement of the academic year following the date this Order becomes final, offer all unit lecturers at the University's Santa Cruz, California campus who received post-six-year appointments at reduced percentage levels, in violation of the Agreement, appointments for the remainder of their three-year terms of at least their pre-existing levels of employment, displacing, if necessary, any lecturers appointed for

less than a three-year term subsequent to the end of the 1986-1987 academic year to conduct their courses.

2. Make all unit lecturers at the Santa Cruz, California campus who received reduced post-six-year, three-year appointments in violation of the Agreement whole for any monetary losses and losses in other benefits they suffered as the result of the University's unilateral change in the provisions of Article VII of the Agreement, together with interest at the rate of 10% per annum.

3. Within ten (10) workdays from service of the final decision in this matter, post at all work locations at the Santa Cruz, California campus where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of Respondent. 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.

4. Upon issuance of a final Decision in this matter, written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

C. It is further ordered that the charge and complaint in Unfair Practice Case No. LA-CE-235-H are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, 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, part III, 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, part III, 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, part III, sections 32300, 32305 and 32140.

Dated: February 24, 1989

Douglas Gallop
Administrative Law Judge