

**OVERRULED IN PART by Hartnell Community College
District (1979) PERB Decision No. 81**

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

LOS RIOS COMMUNITY COLLEGE DISTRICT, Employer)	
)	
and)	
)	Case No. S-R-438
LOS RIOS TEACHERS' ASSOCIATION, CTA/NEA, Employee Organization)	EERB Decision No. 18
)	
and)	6/9/77
)	
LOS RIOS FEDERATION OF TEACHERS, LOCAL 2279, AFT/AFL-CIO, Employee Organization)	
)	

Appearances: Lee T. Paterson, Attorney (Paterson & Taggart) for Los Rios Community College District; Coleman A. Blease, Attorney (Blease, Vanderlaan & Rothschild) for Los Rios Teachers' Association, CTA/NEA; Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg & Roger) for Los Rios Federation of Teachers, Local 2279, AFT/AFL-CIO.

Amici Curiae: John L. Bukey, Attorney (Biddle and Walters) for Association of California Community Colleges; Jeffrey L. Kerwin and Janette Golds, California Association of Part-Time Instructors and Peralta Federation of Teachers; Clifton B. Gordon, Chairman, Los Rios Community College District Division Chairpersons' Association.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

On April 21, 1976, the Los Rios Teachers' Association, CTA/NEA (Association) filed a request for recognition as the exclusive representative of all certificated employees of Los Rios Community College District (District).¹

¹The Association requested recognition for all certificated employees of the District including, but not limited to the following: Colleges: instructors full-time and part-time, counselors, college nurses, librarians, division chairpersons, department chairpersons, directors of athletics, financial aids coordinators (ARC, CRC, SCC), coordinator of special programs - SCC, audio-visual officer, work experience coordinator, college public information officer, veterans affairs coordinator, coordinator-enabler for the handicapped, placement specialist.

On May 5, 1976, the Los Rios College Federation of Teachers, Local 2279,

2

AFT/AFL-CIO (Federation) filed an intervention.

On June 7, 1976 the District notified the Educational Employment Relations Board (EERB) that it doubted that the Association represented a majority of employees in an appropriate unit, that the Federation had intervened, and that a representation election was requested. Also on June 7, 1976 the Association requested a representation hearing. A hearing was held on September 1, 2, 3 and 17, 1976.

ISSUES

There are several issues presented in this case: (1) whether part-time instructors should be included in the same negotiating unit as full-time instructors; (2) whether day-to-day substitutes should be included in the negotiating unit; (3) whether division chairpersons are supervisors; (4) whether athletic directors are managerial or supervisory employees; (5) whether financial aids coordinators are management employees; (6) whether public information officers are confidential employees; (7) whether summer school instructors should be included in the negotiating unit; and (8) whether the coordinator of special programs is a management or supervisory employee.

DISCUSSION

Los Rios Community College District consists of three separate colleges: American River College with a total enrollment of approximately 16,000 students

(continued)

The Association's request for recognition specifically excluded the following: District: chancellor/superintendent, assistant superintendents, director of personnel, director of planning and construction, administrative assistant-studies and insurance, administrative assistant-personnel, employer/employee relations assistant, presidents, deans, associate deans, assistant deans, director (head)-library services, admissions and records officer-CRC.

² The unit sought by the Federation included, but was not limited to, full-time instructors, part-time instructors, counselors, librarians, financial aids coordinators, placement specialists, division chairpersons, department chairpersons, audiovisual officers, directors of athletics, college nurses, veterans' affairs coordinators, work experience coordinators, coordinators of special programs, college public information officers, and coordinators for the handicapped.

at the main campus in Sacramento and 1,200 students at its Placerville location; Sacramento City College with a total enrollment of approximately 12,000 students; and Cosumnes River College with a total enrollment of approximately 8,000 students. The community college program includes a two year academic transfer program into the university and state college systems, a vocational education program and certain community services and non-credit courses.

Part-time Instructors

The District urges the exclusion of part-time instructors from the negotiating unit. The District's argument is essentially three-fold: first, that the language of Section 3545(b)(1),³ which requires that all classroom teachers be included in the same negotiating unit was not intended by the Legislature to apply to community colleges since community college teachers are referred to as "instructors" or "faculty" but not as "classroom teachers"; second, that part-time instructors lack a sufficient community of interest with full-time instructors to be included in the same negotiating unit; and third, that the inclusion of part-time and full-time faculty in the same negotiating unit will impede the efficient operation of the District because the inherently divergent interests of these two groups of employees necessarily provoke internal instability and strife.

The Association and the Federation, conversely, urge that part-time faculty be included with full-time faculty in a single unit. The Association argues that reading the language of Sections 3545 (a) and 3545 (b) (1) together mandates that the appropriate unit should be the "largest appropriate unit" and that part-time instructors share a community of interest with full-time instructors. The Federation argues that part- and full-time instructors share a community of interest and further contends that both are "classroom teachers" within the meaning of Section 3545(b)(1) because their functional relationship proscribes any meaningful distinction.

We conclude that a single unit composed of both full-time instructors and part-time instructors who have taught the equivalent of three or more of the last six semesters is appropriate.

I

The District employs approximately 740 full-time day instructors, 48 part-time day instructors and 1100 part-time evening instructors. Approximately 370 of the evening instructors are also full-time day instructors for the District.

³All statutory references are to the Government Code unless otherwise noted.

Of the remaining 730 part-time evening faculty, 200 teach full-time in another school district and approximately 530 have no other employment or have additional non-teaching employment.

A full-time teaching assignment is 15 formula hours of instruction. One formula hour is defined as one lecture hour or one and one-half laboratory hours. A full-time instructor must carry more than 60 percent of a full-time instructional load (more than nine formula hours) and work at least 75 percent of the teaching days in the school year. A part-time instructor is one who teaches not more than 60 percent of an instructional load or less than 75 percent of the days in a school year.

The nomenclature applied to community college faculty is confusing and overlapping. In addition to the part-time/full-time distinction, community college instructors are designated as either day or evening, contract, regular or temporary.

A day instructor may be either part-time or full-time, contract, regular or temporary. Day instructors normally teach between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday, although some also teach during the evening hours as part of their day assignment. There are approximately 48 part-time day instructors; the remainder are full-time. The term "day instructor" appears to be used most frequently to designate full-time contract or regular instructors. An evening instructor also may be either part-time or full-time, contract, regular or temporary. All but five or six of the evening instructors are part-time. Evening instructors generally teach between the hours of 5:00 and 10:00 p.m. Monday through Friday and anytime on Saturday.

A contract instructor is a probationary employee in the first two years of employment with the district. A regular instructor is a permanent employee, generally full-time. A temporary instructor is a full- or part-time employee replacing an instructor who is on a long-term leave of absence, a long-term substitute or a person employed in a special federally funded project. Temporary instructor is also used by the District to designate evening division instructors.

With minor exceptions, all community college instructors are required to hold a community college teaching credential. Approximately 80 to 90 percent of the District's full- and part-time instructors have a master's degree.

There are somewhere between 300 and 500 applicants for each full-time position in the district. Many full-time day instructors had originally been hired as evening instructors. Each college's dean of instruction, the appropriate

division chairperson and perhaps division faculty representatives review the applications and select those persons they wish to interview individually. Apparently the division chairperson and faculty representatives interview the applicants individually and compile a reduced list of the top applicant or applicants. This list, which designates a recommended applicant, is forwarded to the dean. The dean, in turn, interviews the top applicant or applicants and makes a recommendation to the college president.

Hiring of full- and part-time evening instructors is also performed essentially at the individual college level by the college assistant or associate evening college dean. First preference for evening college instruction is given to day instructors. All applicants for full-time day instructor positions are also asked to indicate if they are interested in part-time, full-time substitute or evening instruction. Those interested in evening instructor positions are requested to apply to the evening dean at the individual college campus. It is unclear on the record how various individuals are selected from among the applicants for part-time evening positions. At least one part-time person was screened and selected through the same process utilized in selecting full-time faculty.

Full-time day and part-time evening instructors sign different employment contracts. The most significant distinction in the contracts signed by part-time instructors is that the offer of employment is dependent upon an enrollment of at least 20 students at the end of the registration period for each class offered. However, both testimony elicited at the hearing and the District's Administrative Regulation 7131 provide exceptions to this requirement. The vice chancellor of personnel services testified that the 20 student requirement was not rigidly followed. District Administrative Regulation 7131 governing class size states, in pertinent part:

3.0 Exceptions

- 3.1 A class that meets any of the following exceptions may be continued: courses required for graduation, courses required in a major or in career subject areas, courses offered irregularly based on enrollment and need, combined courses meeting at the same hour with the same instructor.
- 3.2 Exceptions to minimum class size guidelines may also be based upon the following: limited classroom or laboratory facilities, campus size and geographical location, experimental or pilot programs, and statutory and state regulations mandating class size.

Many of the courses offered are taught in both the day and evening programs. Equal credit is given the same course whether it is taught in the day or evening divisions. All instructors are expected to be equally prepared.

The responsibility of both full- and part-time instructors is primarily teaching assigned classes. In conjunction with this responsibility, both must prepare for classes, write and grade exams, evaluate student projects, and maintain and submit attendance records. Both are required to provide conference time for students, although the requirement of one office hour per day does not apply to part-time evening instructors.

Part-time day and evening instructors participate fully in the academic senates at each college. Participation on faculty committees is expected but not mandatory for full-time instructors. Part-time evening instructors may and do serve on faculty committees; they have participated on advisory, affirmative action, budget, curriculum, commencement, art exhibit, and evening college advisory committees. Full-time faculty are required to attend division and department meetings, but are not penalized for failing to attend. Part-time evening faculty are encouraged to, and do, attend these division and department meetings.

Full-time day instructors report to and are evaluated by the division chairperson. They may also be evaluated by students and peers. At Cosumnes and Sacramento City Colleges contract instructors are evaluated at least once a year and regular instructors are evaluated at least once every two years. At American River College contract and regular instructors are evaluated every other year. Part-time evening instructors report to the assistant or associate dean of the evening college. They are evaluated each semester during their first year of teaching and annually thereafter. They are often evaluated by the division chairperson on the same forms used to evaluate full- and part-time day instructors; they may also be evaluated by a member of their department. Part-time evening instructors who are also full-time day instructors are not separately evaluated for their evening work.

While Education Code Section 87449 delineates tenure rights, various courts have rendered contradictory interpretations. The most definitive comment

⁴All references to the Education Code contained in this Decision are to the Reorganized Education Code as enacted by Chapter 1010, and amended by Chapter 1011, Laws of 1976, effective April 30, 1977.

regarding the tenure rights of part-time evening faculty at the moment is that they are in a state of flux. All certificated employees are eligible for paid industrial accident and illness leave. While both full- and part-time instructors are eligible for research grant leave it is unclear whether part-time instructors must be employed full-time when they are actually on grant leave. Full-time instructors receive partially or fully paid sick, critical illness, exchange teaching, sabbatical and conference attendance leaves. Part-time instructors receive pro rata paid sick leave; some have received paid conference leave, Unpaid long term personal, child care, educational improvement and foreign educational employment leaves are available only to full-time instructors.

Medical and dental insurance valued at approximately \$900 per year is provided only for full-time day and part-time day instructors who teach more than 50 percent of a full-time load. However, at least one part-time evening instructor who taught more than 50 percent of a full-time load has been awarded medical and dental benefits. The District's grievance procedure is not available to part-time evening faculty, nor are they entitled to a retention hearing.

The full-time day salary schedule has five classes based on educational attainment⁵ and 16 steps based on length of service with the District. The part-time evening salary schedule contains the same five classes based on educational attainment but only one step. Since 1968 the full- and part-time salary schedules have been related; part-time instructors receive roughly 78 percent of the first step of the full-time salary schedule. Full-time instructors are paid on the first of each month while part-time instructors are paid on the fifteenth.

Both full- and part-time day and evening instructors have the same library cards and privileges. They request and select textbooks in the same manner. They have the same student assistance and supervise instructional assistants in their classes in the same fashion. All have equal access to audiovisual facilities. They enjoy the same parking facilities. Both have mailboxes, although in different locations. Both have listed telephone numbers, although in separate directories. Full-time day instructors are provided with office space; part-time evening instructors generally are not.

⁵ Class I (9070) : Those without a master's or equivalent degree.
Class I: BA or equivalent plus 30 hours.
Class II: MA or equivalent plus 24 hours.
Class III: MA or equivalent plus 48 hours.
Class III plus Doctorate: earned doctorate (appropriate Class III step rate plus 10 percent of Step I, Class III).

Finally, the evening college curriculum and purposes at all three district colleges are substantially in accord with those of the day colleges. Specifically, the 1976-1977 catalog of American River College provides, in pertinent part,

Evening College is an integral part of the instructional program of American River College, providing quality educational services at hours convenient for adults working toward certificates and degrees or looking for self-enrichment.

The certificate of achievement and associate degree may both be earned by evening attendance _____

Similar sentiments are expressed in the Sacramento City and Cosumnes River College catalogs. An examination of the 1975-1976 American River College class schedules discloses that of the 67 departments offering courses, 52 departments offered both day and evening courses. Four departments offered only evening courses: administration housekeeping management, behavioral science, construction supervision and inspection, and dactylology. Eleven departments offered only day division courses: French, German, interdepartmental studies, interdisciplinary studies, Italian, military science, nursing, physical education-women, respiratory, therapy, Russian, and student government.

II

This is the first case involving community college certificated employees to come before us.⁶ Section 3545(a) provides:

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

⁶ We have previously debated the meaning of "classroom teachers" contained in Gov. Code Sec. 3545(b)(1) of the Educational Employment Relations Act (EERA) and the interplay between Secs. 3545(a) and 3545(b)(1). See Belmont Unified School District, EERB Decision No. 7, December 30, 1976, at pp. 3, 9-12 and 13; Petaluma City Elementary and High School Districts, EERB Decision No. 9, February 22, 1977, at pp. 2, 8-12 and 12-14; and Oakland Unified School District, EERB Decision No. 15, March 28, 1977, at p. 24.

We have previously indicated that we will take cognizance of National Labor Relations Board (NLRB) cases, where appropriate, in determining community of interest between and among employees.⁷ The lead NLRB case dealing with the unit placement of higher education faculty is New York University, 205 NLRB 4, 83 LRRM 1549 (1973). In that case the NLRB reversed its prior position and excluded part-time instructors who were not employed in "tenure track" positions. The NLRB held that there were four factors which precluded any mutuality of interests between part-time and full-time instructors: compensation; participation in university government; eligibility for tenure; and working conditions.

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

The NLRB has strictly adhered to this approach in subsequent cases. See University of San Francisco, 207 NLRB 12, 84 LRRM 1403 (1973); University of Miami, 213 NLRB 634, 87 LRRM 1634 (1974); and University of Vermont, 223 NLRB 47, 91 LRRM 1507 (1976).

We do not find this approach applicable to the context of California's community college system. The NLRB cases deal with four-year universities

⁷Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976.

⁸See University of New Haven, 190 NLRB 478, 77 LRRM 1273 (1971); and Long Island University, 189 NLRB 904, 77 LRRM 1001 (1971).

⁹Thoughtful analysis of the policy implications of the effect of the unit structure on institutions of higher education has been largely confined to four-year private universities. See Kahn, The NLRB and Higher Education: The Failure of Policy-Making Through Adjudication, 21 U.C.L.A. L. Rev. 63 (1973).

which place an emphasis on research and writing not found in the community college system. The community colleges are primarily teaching institutions which offer instruction through the second year of college.¹⁰ In fact, while the Education Code specifically authorizes research components for both the state college and university systems, there is no such authorization for the community colleges.¹¹

We find significant distinctions between the facts in this case and those in New York University. Unlike New York University, the compensation of part-time faculty here is directly related to that of full-time faculty. While part-time faculty do not receive additional compensation for longevity of service, they do receive additional compensation for increased educational attainment in the same way as full-time faculty. In addition, part-time faculty participate in the faculty governance functions of the colleges in the same manner as full-time instructors by serving in the faculty senates and on various advisory committees.

The question of tenure rights of part-time community college instructors, a factor heavily relied upon by the NLRB, is one which the California courts will ultimately have to resolve. The most recent published decision, specifically affecting Los Rios Community College District, accords -tenure to a part-time instructor.¹² However, like Balen v. Peralta Junior College District,¹³ the only case on the tenure issue to yet reach the California Supreme Court, the Court held that the 1967 and 1972 amendments to the Education Code¹⁴ could not be applied retroactively to deprive a part-time instructor of eligibility for tenure. Other court decisions subsequent to Balen have both awarded and denied

¹⁰See Ed Code Sec. 66701.

¹¹See Ed. Code Sec. 66000 et seq., known as the Donahoe Higher Education Act.

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Annette M. Deglow v. The Board of Trustees, Los Rios Community College District et al., 69 Cal.App.3d (1977).

¹³ 11 Cal.3d 821 (1974).

¹⁴See Ed. Code Sec. 87482.

tenure to part-time instructors.¹⁵ The uncertainty presently existing on this issue precludes us from according tenured status any controlling weight in reaching our decision about the community of interest of these employees. If anything, the viable possibility that part-time instructors may ultimately and unequivocally attain tenure rights argues for their inclusion in the same unit as full-time instructors. Moreover, tenure is but one factor for consideration in determining community of interest.

Finally, while differences do exist in the working conditions of full- and part-time instructors, their job duties and responsibilities are virtually identical. In many cases, both teach identical courses; both counsel students in the same fashion. Both are evaluated in a similar fashion, often by the same people, and enjoy many of the same benefits and privileges. Many of those fringe benefits not shared with full-time instructors are legitimately the subject of negotiations. Moreover, while some of the part-time instructors have their primary employment relationship elsewhere, many have their primary employment with the District either as full-time instructors or solely as part-time instructors.¹⁶ We do not believe that the mere fact that some part-time instructors are employed elsewhere, standing alone, negates their interest in those matters within the scope of representation at this District for the time they are employed by the District.

We are mindful, however, that including in the negotiating unit persons with only a passing interest in community college teaching would likely be disruptive. While most jurisdictions have approached this ticklish problem by looking to the percentage of full-time hours taught by part-time faculty.¹⁷

¹⁵ Compare Ferner v. Harris, 45 Cal.App.3d 363 (1975); Coffey v. Governing Board of San Francisco Community College District, 66 Cal.App.3d 279 (1977); California Teachers Association v. Santa Monica Community College District, L.A. County Superior Court, Case No. C 169 979, February 7, 1977; and Peralta Federation of Teachers v. Peralta Community College District, 69 Cal.App.3d 281 (1977).

¹⁶ The record does not disclose how many of the approximately 530 part-time instructors who have no other employment or have additional non-teaching employment fall into which category.

¹⁷ See Community College of Philadelphia, 7 Paper 116 (1976); OSEA v. Eastern Oregon State College, 1 Ore PECBR 681 (1976).

it has not been a particularly satisfying solution. Rather, we think that persons who continually, semester after semester, teach in the community college have demonstrated their commitment to and interest in its objectives. It seems unlikely that persons who have only a minimal interest in the community college will continually seek or obtain employment there. Accordingly, we include in the negotiating unit only those part-time instructors who have taught the equivalent of three or more semesters during the last six semesters inclusive.¹⁸

While we have concluded that full-time and part-time instructors possess a community of interest which mandates their inclusion in a single unit, we must also consider whether either the established practices of these employees or the efficient operation of the district would warrant a contrary conclusion.

Since the meet and confer sessions of the 1968-1969 school year, proposals have been offered by the CEC on behalf of part-time instructors. Furthermore, the salary of part-time faculty has historically been related to that of full-time faculty. Thus, while we have previously held that we would give little weight to the established practices of employees which antedated the passage of the EERA,¹⁹ that evidence offered supports the inclusion of part-time faculty in a single unit with full-time faculty.

Finally, we find without merit the District's argument that a single unit composed of both full- and part-time faculty would impair its efficient operation because of the inherently divergent interests of these two groups of employees. As we have previously set forth, we think their similarities far outweigh their differences. Moreover, the trend toward prescribing a unit criterion which specifically countenances the efficient operation of an employer is generally understood to be designed to avoid excessive fragmentation of units.²⁰ No evidence was offered with respect to the inefficiency of a single unit. The evidence offered related to community of interest, which we have found supports the single unit.

¹⁸ See Board of Trustees, University of Massachusetts, 3 Mass LC 1179 (1976).

¹⁹ ~~Sweetwater Union High School District~~, EERB Decision No. 4, November 23, 1976.

²⁰ See Shaw & Clark, Jr., Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems, 51 Ore. L. Rev. 152 (1971).

Day-to-Day Substitutes

The District seeks to exclude day-to-day substitutes from the negotiating unit. The positions of the Association and Federation are unclear from the record; neither offered any evidence to rebut the District's contention or any post-hearing argument on this issue although they petitioned for "all certificated employees." We conclude that in this case day-to-day substitutes should be excluded from the negotiating unit.

The testimony does not augment District Regulation 5162, which defines a day-to-day substitute as "one who is employed to fill the position, on a day-to-day basis, of a regular or contract or temporary employee who is absent from service." Day-to-day substitutes do not receive any leave benefits, nor do they receive retirement benefits. They are not assigned office space, are not provided secretarial assistance, are not required to keep office hours, and are not required to attend division or department meetings. They are not formally evaluated.

There was no evidence offered about the frequency of their employment nor their interaction with any other unit personnel. In these circumstances, there is no evidence which would support their inclusion in the negotiating unit.²¹

Division Chairpersons

The District contends that division chairpersons are supervisors and should be excluded from the negotiating unit, while both the Association and the Federation would include them.

We agree with the District that division chairpersons are supervisors within the meaning of the Act and should be excluded from the negotiating unit.

I

There are 31 division chairpersons in the District. Each college has one position titled "division chairperson/counseling;" in addition, Sacramento City College has 11 teaching division chairpersons; American River College has 10 teaching division chairpersons; and Cosumnes River College has seven teaching division chairpersons. Chairpersons work approximately seven hours a day. Between 60 and 90 percent of their time is assigned to performing administrative duties; the remainder is spent teaching or counseling. They are paid on the regular faculty schedule plus an annual stipend of between \$1,957 and \$2,260. They work five days a year more than regular faculty.

²¹Cf. Belmont Elementary School District, supra; Petaluma City Elementary and High School Districts, supra; and Oakland Unified School District, supra.

Each college is headed by a president, to whom the dean of instruction and the dean of student personnel services report. At American River College, the 10 teaching division chairpersons report directly to the dean of instruction; the one chairperson/counseling reports to the associate dean of counseling and admissions, who in turn reports to the dean of student personnel services. The 11 teaching chairpersons at Sacramento City College and the seven at Cosumnes River College report to the associate dean of instruction, who reports to the dean of instruction; the one counseling chairperson at each college reports directly to the dean of student personnel services.

Division chairpersons are selected by the president of each college from a list submitted by the division faculty. The president may reject all of the nominees; at least one president has done so in one division. Chairpersons serve for a three year term and may be reappointed. District policy does not require that they hold a supervisory credential; however, Sacramento City requests that they have a supervisory or administrative credential and American River requires that all chairpersons except counseling have a supervisory credential.

Chairpersons are not permitted to belong to the faculty senates. They belong to the college division council, composed of all division chairpersons and chaired by the associate dean of instruction. The council meets at least every two weeks to discuss the instructional programs.

Chairpersons participate on faculty selection committees. The committee screens, interviews and recommends applicants to the dean of instruction. Chairpersons may recommend termination or transfer of faculty; however, the recommendations are not always followed. They are responsible for forwarding faculty evaluations to the dean of instruction. Faculty may be evaluated by their peers, students, department heads or division chairpersons. Chairpersons are responsible for resolving disciplinary problems. Under the District's existing grievance procedure, grievances are filed in the first instance with the chairpersons, who maintain the records of the grievance process. Chairpersons are responsible for faculty attendance and forward attendance forms to the dean of administration. They may recommend loss of pay for unexcused faculty absences. They determine when a substitute is required and select the substitute.

Chairpersons are responsible for coordinating the division's curriculum. They assign classes through consultation with the faculty. They assign classroom and laboratory facilities to instructors and determine the appropriate class size. In conjunction with the dean or associate dean of instruction, they determine the number of sections or classes to be offered. They meet with evening faculty to assure that comparable day and evening courses correspond in content.

Chairpersons are responsible for the preparation and disbursement of the division's budget. While the recommended division budget may be reviewed and modified, apparently by both the dean of instruction and the budget committee, there is very little review of expenditures approved by chairpersons. Chairpersons allocate funds for supplies, travel and equipment; they may transfer funds from one category to another. While only the superintendent of the District may authorize out-of-state travel and only the college president may authorize travel more than 100 miles from the college, all travel requests must be initially approved by the chairperson. Chairpersons also authorize all purchase orders, supply requests, time sheets and pay vouchers.

II

This is the first case in which we have applied Section 3540.1(m) of the 22 Act, which defines supervisors, to certificated community college employees. This definition as applied to certificated college employees must be viewed in light of long-standing traditions of collegiality and shared authority within institutions of higher education.²³ In the instant case, however, it is clear

²²Section 3540.1(m) states:

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

²³ Compare Rosemary Hill College, 202 NLRB 1137, 82 LRRM 1768 (1973); Syracuse University, 204 NLRB 1144, 83 LRRM 1716 (1973); and New York University, supra with Rensselaer Polytechnic Institute, 218 NLRB 1435, 89 LRRM 1844 (1975); Fairleigh Dickinson University, 205 NLRB 673, 84 LRRM 1033 (1973).

that their job duties require an allegiance with the administration not required of other faculty. They are selected by the administration, rather than elected

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by the faculty to serve as its spokesperson to the administration. They are paid a substantial stipend in addition to their regular salary.

Chairpersons exercise substantial control over critical aspects of faculty teaching responsibilities. They alone determine class size and location. Their approval is required for travel, supplies and absences from assigned duties. They are the first step in the grievance procedure and responsible for maintaining the records of grievances and attendance. They are precluded from participation in the faculty senate.

Under the meet and confer provisions of the Winton Act²⁵ chairpersons were represented by the Certificated Employees Council (CEC). Prior to the passage of the EERA, no criteria or procedures for determining appropriate units existed. Furthermore, the EERA explicitly defines supervisors, which the Winton Act did not. Thus, the relevant section of the EERA to be applied in instances where supervisory status is at issue is Section 3540.1(m). In these circumstances and given the clear exercise of supervisory authority by chairpersons, we do not view the prior representation of chairpersons by the CEC as dispositive of their unit placement. ^{9ft}

Athletic Director

The District argues that athletic directors are managerial or supervisory employees and therefore seeks to exclude them from the certificated unit. Both the Association and Federation seek to include them in the unit. We conclude that athletic directors are supervisors and should be excluded from the unit.

There are three athletic directors in the District. The athletic director at American River College is a full-time position. At Sacramento City and Cosumnes River Colleges the position of athletic director is combined with that of division chairperson/physical education.

Athletic directors are responsible for the intercollegiate athletic program. They coordinate the sports program by establishing schedules for the various sports, assigning facilities, assigning the coaching staff, ordering supplies,

²⁴See New York University, supra; Yeshiva University, 221 NLRB 1053, 91 LRRM 1017 (1975).

²⁵Formerly, Ed. Code Secs. 13080 et seq., repealed by Stats 1975, Ch. 961, Sec. 1.

²⁶See Sweetwater Union High School District, supra; and Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976.

developing the budget, coordinating the campus program with the other colleges in the state involved in the same sports league, enforcing the rules and regulations of the athletic program, and making travel arrangements for students involved in intercollegiate sports. Athletic directors allocate the budget to the various sports activities and may make some direct purchases from outside suppliers of their choice without review by others.

Athletic directors interview the candidates for coaching positions and make recommendations regarding hiring to the dean; the recommendations are generally followed. They may recommend termination of an employee through the evaluation process or grievance procedure. The athletic director of American River College may determine whether a coach should continue with a particular sport, be transferred, be promoted or be relieved of his coaching duties. These decisions are not generally independently reviewed. Athletic directors at all three colleges are involved in the first step of the grievance procedure.

Athletic directors assign work to and develop the class and coaching schedules of the coaches. Such assignments are generally adopted by the supervising dean without independent investigation. The athletic director also schedules the extra coaching assignments of the coaching staff. In this connection, the athletic director can allocate a fixed amount of overtime hours among the various coaches.

Athletic directors attend supervisory meetings conducted by the dean of student personnel services. They also meet together to set up rules and regulations by which they operate the various athletic programs. In addition to these meetings, the athletic director may require the coaches reporting to him to attend special meetings he may call.

Athletic directors possess a standard teaching credential and do not have an administrative credential. All three athletic directors are paid on the faculty salary schedule plus the division chairperson stipend.

Athletic directors clearly act in a supervisory capacity. They effectively recommend the hiring, firing and discipline of unit employees and are the first step in the grievance procedure. They make coaching assignments which are generally not subject to further review.

Accordingly, we conclude that athletic directors are supervisors within the meaning of the EERA and should be excluded from the negotiating unit at issue.

Financial Aids Coordinator

The District seeks to exclude financial aids coordinators from the unit as management employees. Both the Association and the Federation would include this classification. We conclude that financial aids coordinators are not managerial employees and should, therefore, be included in the negotiating unit.

There are three financial aids coordinators in the District, one at each college. In addition, a District coordinator of financial aids and a vice chancellor are responsible for the overall coordination of the various financial aid programs. Financial aids coordinators are paid on the administrative salary schedule. The financial aid program is funded through a combination of state, federal and local funds. The annual financial aids budget is approximately one half million dollars at Cosumnes River College and one million dollars at American River College. Financial aids coordinators distribute these funds to eligible students in accordance with the rules and regulations of the funding sources.

The financial aids coordinator initially prepares a budget which is subject to several levels of review at the college level, first by the associate dean of special programs, then by the dean of student personnel services, the associate dean of administration and finally, the college president.

Financial aids coordinators must keep abreast of the various federal, state and local programs which provide financial assistance funds in order to ensure that proper application for available funds is timely made. They must comply with extensive rules and regulations both in soliciting and distributing funds. They meet regularly with the district coordinator of financial aids to update the District's regulations. At these meetings individual coordinators may recommend programs for adoption; they have no authority either individually or collectively to adopt federal or state sponsored special programs.

In interpreting Section 3540.1(g) of the EERA²⁷ which defines management employee, we concluded that a person must possess both of the functions delineated

27

Gov. Code Sec. 3540.1(g) states:

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

in that section in order to be excluded from negotiating rights as a management employee.²⁸ In the instant case, financial aids coordinators possess neither function. We conclude that they are not management employees within the meaning of Section 3540.1(g).

While the record establishes that financial aids coordinators participate in discussions where policy alternatives are apparently aired, we do not view such participation as equivalent to possessing "significant responsibilities for formulating" that policy. Mere participation, even on a regular basis, does not vest the participant with significant responsibility.

Neither do financial aids coordinators have significant responsibilities for administering district programs within the meaning of the EERA. It appears that their administrative duties consist primarily of assuring compliance with voluminous and detailed instructions prepared by the various funding sources and subject to regular and rigorous review. They apparently possess no discretion to deviate from District policy.²⁹

Accordingly, we conclude that financial aids coordinators are not managerial employees within the meaning of the EERA and should be included in the negotiating unit.

Public Information Officer

The District seeks to exclude the campus public information officers from the unit as confidential employees. The employee organizations seek their inclusion in the unit. We find their responsibilities do not render them confidential employees.

Each college employs a full-time public information officer who reports directly to the college president. The district also employs an administrative assistant/management information who reports directly to the chancellor and serves as the public information officer for the district.

The campus public information officers act as each president's communications officer to the campus and community and assist with intercampus communications necessary for the day-to-day operation of the colleges. Each college public information officer is primarily responsible for releasing "news events, coming events, accomplishments of students and staff, and other matters of interest on their respective campuses...."³⁰

²⁸Lompoc Unified School District, EERB Decision No. 13, March 17, 1977.

²⁹See Eastern Camera and Photo Corp., 140 NLRB 569, 52 LRRM 1068 (1963).

³⁰Los Rios Community College District Administrative Regulation 1111.

The public information officer attends administrative council meetings with administrators and the admissions officer (at Cosumnes River College) or the various deans (at American River and Sacramento City Colleges). The primary purpose of these meetings is the dissemination of information from the chancellor's meetings and discussion of campus regulations. On occasion employer-employee relations of an unspecified nature are discussed. The campus public information officer may also attend district-wide meetings chaired by the chancellor, but nothing in the record indicates that matters concerning employer-employee relations are discussed at these meetings.

At American River College, the president has on occasion discussed disciplinary actions with the public information officer in order to ascertain his opinion of faculty reaction. The president has also discussed grievances with the public information officer. The president of Cosumnes River College intends to meet regularly with his public information officer to discuss such matters as negotiations, grievances and strike plans. However, the president was not at the time involved with District negotiations and testified that such plans for his public information officer were for some time in the future and had not yet become a regular practice. Through attendance at various administrative meetings, and in service as an aide to the president, the public information officers are sometimes privy to information which the District would not want released to employee organizations.

Government Code Section 3540.1(c) defines a confidential employee as one "...who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations." Confidential employees are not employees within the meaning of the EERA and are thus precluded from exercising the rights granted by the Act to other employees.³¹ Since exclusions from a broad grant of rights by the legislature must be strictly construed,³² we view the language of Section 3540.1(c) narrowly.

³¹Gov. Code Sec. 3540.1(j).

³²City of National City v. Fritz, 33 Cal.2d 635 (1949); Valdez v. Federal Mutual Insurance Co., 272 Cal.App. 2d 223, 77 Cal.Rptr. 411 (1969).

In order to be designated as confidential, an employee must function in that

33

capacity for more than a "fraction" of the time. Further, where an employee is not presently engaged in duties warranting exclusion from the unit as confidential, but merely faces that possibility in the future, the employee will be included in the unit.³⁴

There is no mention of any responsibility even arguably within the ambit of employer-employee relations contained in the job description of public information officer. The mere assertion that the president of one college has elected to utilize the public information officer as a "sounding board" does not invest the public information officer with job responsibilities of a confidential nature. Moreover, since negotiations occur on a district-wide basis, articulation of the District's position must necessarily be performed at the District level rather than at the campus level by the public information officer.

In sum, the evidence does not convince us that the public information officers at the campus should be designated confidential employees. While at times these individuals may have tangential contact with certain confidential matters concerning employer-employee relations, the evidence suggests that the bulk of the public information officer's time is spent on the accumulation, preparation and dissemination of information to the public concerning campus events at each of the colleges. We therefore include such persons in the unit.

DISSENT

Summer School Instructors

I disagree with the majority's exclusion of the classification of summer school instructors from the negotiating unit. The factors relied upon by the majority to exclude summer faculty are almost uniformly true of those part-time

³³See Meramec Mining Company, 134 NLRB 1675, 49 LRRM 1386 (1961); Swift & Company, 129 NLRB 1391, 47 LRRM 1195 (1961).

³⁴See American Radiator and Standard Sanitary Corp., 119 NLRB 1715, 1719, 41 LRRM 1416 (1958).

faculty we have included in the unit. As the majority notes, summer faculty are selected by the dean of the evening college, just as are part-time evening faculty. Similarly, first preference is given to those who teach full-time during the academic year. Second preference is given to "off-campus" (i.e. evening division) faculty. In fact, when asked how summer session instructors were recruited, the vice chancellor of personnel testified, "Very similar fashion as to the Evening College instructors...."

The employment contract signed by summer session instructors is virtually identical to that signed by part-time evening instructors. The district policy regarding exceptions to the 20 student minimum contained in both contracts is equally applicable to summer and evening courses. Like evening instructors, summer faculty sign a new contract for each term employed. Further, the majority's assertion that "summer session instructors have no expectation of future employment as summer session instructors" is contradicted by the faculty manuals. The American River College Faculty Manual cogently states:

...The [American River College] day instructor who has taught summer session at least five hours a week (semester basis) in two consecutive summer sessions drops to the lowest recruitment priority for one summer.

A similar statement is contained in the Cosumnes River College Faculty Handbook. Such statements are obviously unnecessary unless faculty regularly seek to teach summer courses. Furthermore, a comparison of the regular day 1975-1976 faculty directory with the 1976 summer session schedule at American River College reveals that approximately 110 of the 203 summer session instructors were day faculty.³⁵ This leaves undocumented the number of summer session faculty drawn from the group given second preference in employment, part-time evening faculty.

It is also true, as the majority notes, that the summer session salary is related to the regular day salary schedule. In fact, summer faculty are paid from the evening college salary schedule. They receive 93% percent of the first step of the full-time salary schedule. Like part-time evening instructors, they are paid on the 15th of each month.

35

I have taken official notice of the 1976 summer class schedule directory.

Like the evening program, sunnier school is an integral part of the District's educational program. The Sacramento City College Catalog states, "A balanced offering of Sunnier Session classes, both day and evening, enables students to accelerate their academic programs or to satisfy course or curriculum prerequisites." Similar expressions are contained in the catalogs of the other two colleges. A comparison of the 1975-1976 American River College class schedules with the 1976 summer school offerings discloses that of the 67 departments offering courses during the regular academic year, 44 offer summer school classes. There was no department which offered only summer school courses.

Accordingly, I would include the classification of summer school instructors in the negotiating unit.³⁶

Coordinator of Special Programs

I also disagree with the majority's finding that the coordinator of special programs is a supervisory employee. I would find this person to be a managerial employee.

The coordinator of special programs, a position which exists only at Sacramento City College, is responsible for the Educational and Opportunity Programs and Services (EOPS), which apparently include a College Awareness Program, an Alpha or ex-felon Program, a tutorial program and an Oak Park Outreach Center. EOPS are apparently funded primarily by the state pursuant to a 1969 statute; however, the College Awareness Program is funded by the District. Although the program is not district-wide, all students in the district may avail themselves of EOPS funds. The program is designed to recruit and retain educationally and financially disadvantaged students. Its annual budget is approximately \$375,000.

The coordinator of special programs designs a program, prepares the application for state funds in accordance with the objectives of the program, and directs the expenditure of those funds.

While the dean of student personnel services, to whom the coordinator of special programs reports, reviews both the programs and the budget, disagreements between the dean and the coordinator are apparently resolved by the college president. The coordinator of special programs apportions the budget between payment to recruited students directly for books and subsistence, student tutors and counselor-aides, and clerical support. There are state-wide financial

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See Belmont Elementary School District, *supra* at pp. 13-15.

eligibility requirements for recruited students. The coordinator of special programs applies the eligibility requirements and selects from among possible students; his selections are not reviewed.

The coordinator of special programs supervises eight classified employees: one coordinator and assistant of the Alpha (ex-felon) Program, three student personnel assistants, and three clerical employees. In addition, there are approximately four part-time student employees who work about 15 hours a week who report to the coordinator of special programs. While the coordinator of special programs discusses the work performance and any problems of those who report to him with the dean of student personnel services, the coordinator ordinarily handles these matters, including disciplinary action, without prior review by the dean. Other employees, such as the work experience and veteran affairs coordinators, included by agreement of the parties in the unit, possess similar authority over persons who report to them.

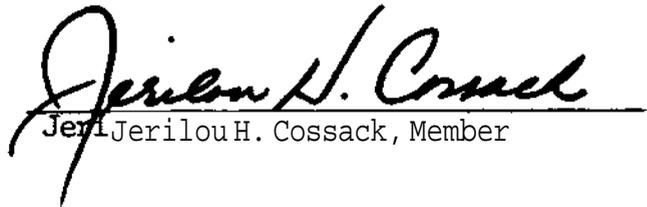
All of the non-student employees, not just the clerical employees, under the authority of the coordinator of special programs are classified. There is no evidence that this person exercises any supervisory authority over certificated employees. I find it extremely disconcerting that the majority casually excludes from the certificated unit as a supervisor a person whose only authority is over classified employees. This is particularly true here where there is clear evidence that the coordinator of special programs is a managerial employee.

The coordinator of special programs possesses both of the criteria enunciated in Section 3540.1(g) of the EERA and should, therefore, be excluded from the negotiating unit as a management employee. The coordinator of special programs has significant responsibility for formulating the policy for the educationally and financially disadvantaged program. He establishes the policy and articulates its dimensions; his role is essential to the promulgation of the policy.

In addition, the coordinator of special programs has significant responsibility for administering the program. He apportions the budget with little or

no direction from his superiors; his selection of eligible participants in the program is not reviewed.

Accordingly, I would exclude the coordinator of special programs from the negotiating unit as a management employee.


Jerilou H. Cossack, Member

Coordinator of Special Programs

The District seeks to exclude the coordinator of special programs from the unit as a management employee or, in the alternative, as a supervisory employee. The Association and the Federation would include the position in the unit. We conclude that the coordinator of special programs should be excluded from the unit as a supervisory employee within the meaning of Government Code Section 3540.1(m). Having so concluded, we need not determine whether he is a management employee within the meaning of the EERA.¹

The position of coordinator of special programs exists only at Sacramento City College. The coordinator of special programs develops educational opportunity programs, prepares an application for program funds, submits the application for funds and directs the expenditure of those funds. He reports to the Dean of Student Personnel Services at Sacramento City College. Eight nonstudent employees report to the coordinator of special programs, a coordinator and an assistant coordinator of the ex-offender program, three student personnel assistants, and

¹See Lompoc Unified School District, n. 24 and accompanying text, EERB Decision No. 13, March 17, 1977.

three clerical employees. In addition, four student employees report to the coordinator of special programs. They are student directors of tutorial centers who work about fifteen hours per week.

The coordinator of special programs directs all of these employees.² In respect to the nonstudent employees, the coordinator of special programs exercises independent judgment in hiring by selecting from a list of qualified applicants the name of a person to recommend to the President of the College. The four student employees are finally selected by the coordinator of special programs with the assistance of a student selection committee. He also has the authority to reprimand and discharge student employees.

Government Code Section 3540.1(m) defines supervisory employee as:

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

We have decided in previous decisions that the satisfaction of any one of the criteria listed in Government Code Section 3540.1(m) is sufficient to make an individual a supervisor under the EERA.³

Since the coordinator of special programs directs employees, makes effective recommendations on the hiring of employees and has the power to discharge some employees, all of which authority is exercised "in the interest of the employer," more than one of the statutory criteria for supervisor is satisfied.⁴

⁴In relying upon the extent to which the coordinator of special programs directs employees, we do not rely upon his direction of clerical employees, since the record does not indicate whether they receive any more than routine clerical directions.

³Sweetwater Union High-School District, EERB Decision No. 4, November 23, 1976; San Diego Unified School District, EERB Decision No. 8, February 8, 1977; Oakland Unified School District, EERB Decision No. 15, March 28, 1977.

⁴The fact that the coordinator of special programs is a certified employee and the supervised employees are not, is immaterial. Gov. Code Sec. 3540.1(m) only requires the supervision "in the interest of the employer" of "other employees." See Boston Herald-Traveler Corp., 70 NLRB 651, 657, 18 LRRM 1429, 1430 (1946).

Sunnier Session Instructors

Approximately 600 summer session instructors are hired by the District to teach the sunnier session. The two employee organizations seek to include summer session instructors in the overall unit. The District opposes their inclusion.

Summer session instructors are recruited primarily from the regular full-time staff and secondarily from what was described by a witness for the District as "walk-ins." Summer session instructors are selected by the Evening College Dean and report to the Associate or Assistant Dean of Evening and Summer Session. They are hired on a one-summer basis and sign contracts with the District each summer they work. Their positions are dependent on sufficient student enrollment. If the enrollment in the sunnier session class is less than twenty, the class is cancelled and the instructor is not paid. Thus, summer session instructors have no expectation of future employment as summer session instructors.

The sunnier session salary schedule is related to the regular day salary schedule, but unlike regular full-time instructors, who receive full fringe benefits and part-time instructors, who receive some fringe benefits, summer school instructors receive no fringe benefits. Summer school instructors are not entitled to use the District's grievance procedures.

To the extent that most sunnier session instructors are regular full-time or part-time instructors who are in the negotiating unit deemed appropriate in this decision and order, they are already eligible to vote for or against representation by an employee organization. Other sunnier session instructors have no other employment with the District and would not even be eligible to vote in a representation election, since the EERB normally conducts none during the sunnier, and all eligible voters must at least be employees of the District at the time of the representation election.

No evidence was presented on established practices or the effect of the unit inclusion or exclusion of summer session instructors on efficiency of operations in the District. We accordingly rely exclusively on the community of interest criterion in resolving this issue. Accordingly, for the foregoing reasons, we find lacking a community of interest between summer session instructors and

regular full-time and part-time instructors. We therefore exclude summer session instructors from the unit.⁵

Reginald Alleyne, Chairman, concurring:

I concur in all aspects of the order.

In the principal opinion explaining the order, I agree with the analysis of the following issues: division chairpersons, athletic directors, public information officers, summer school instructors, coordinator of special programs, and day-to-day substitutes.

Part-time/Full-Time

I do not agree with all of the part-time instructor portion of the opinion. It does not come to grips with and reach a conclusion concerning the state of current case law on the tenure issue.

I think it is undisputed that California law recognizes a part-time regular status in community colleges.⁶ The circumstances under which one may acquire that status is a matter very much in dispute, and on that issue court cases are in conflict, as the principal opinion notes. But the fact that a part-time regular status exists, apart from the question of how one achieves it is a

⁵In Belmont Elementary School District, EERB Decision No. 7, December 30, 1976, Petaluma City Elementary and High School District, EERB Decision No. 9, February 22, 1977, and New Haven Unified School District, EERB Decision No. 14, March 22, 1977, the Board excluded summer school teachers from units of regular, full-time teachers in elementary and secondary schools. Nothing in the present case suggests that the community of interest between summer session instructors and regular instructors is any greater than it was in the foregoing decisions.

⁶See Ed. Code Sec. 87612; Peralta Federation of Teachers v. Peralta Community College District, 69 CA3d 281, 285 (1977), Ferner v. Harris, 45 C.A.3d 363 (1975), Vittal v. Long Beach Unified School District, 8 C.A.3d 112 (1970). I agree generally with the analysis of the relevant judicial precedents on community college tenure made by the hearing officer in San Joaquin Delta Community College District, Case No. S-R-549, April 29, 1977, pp. 17-20 (unappealed proposed decision).

Los Rios Community College District Regulation No. 5231 provides that a regular certificated employee may use the District's grievance procedure. Since part-time instructors may be regular certificated employees, it is not apparent to me that part-time instructors may not use the District's grievance procedure, as the principal opinion states.

factor, among others, in favor of finding a community of interest between part-time and full-time instructors in the District. I would so find, rather than include this as an "uncertainty," as does the principal opinion.

Also, in reaching the conclusion described in the order, the opinion, after first indicating that negotiating history pre-dating the EERA will be given little weight, considers and gives weight to the fact that "proposals have been offered by the [Certificated Employees Council] on behalf of the part-time instructors." I would consider that evidence inconclusive, in accordance with our prior decisions.⁷ Under the Winton Act, the CEC represented both part-time and full-time instructors in no designated units, since the Winton Act contained no reference to units of any kind. It follows that past Winton Act practice should continue to be regarded as inconclusive in respect to present EERA unit issues.

Financial Aids Coordinator

I agree with most of the reasoning in support of the conclusion that the financial aids coordinators are not management employees within the meaning of the EERA. But I do not join my colleagues to the extent that they interpret the

word "or" in the definition of "management employee" to mean "and." No party in this case argues that "or" should be read to mean "and" in the management-employee definition.

The Legislature, in enacting that definition, surely knew the distinction between the disjunctive and the conjunctive and the different consequences flowing from the use of one over the other. Since the finding in this case is that the financial aids coordinators "possess neither function" of formulating nor administering with significant responsibility, it is not even necessary to consider judicially amending the word "or" to mean "and."

⁷E.g., Los Angeles Unified School District, EERB Decision No. 5, n.5 and accompanying text, November 24, 1976.

⁸Gov. Code Sec. 3540.1(g) provides:

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

In interpreting the word "or" to mean "and," the opinion cites the Board's decision in Lompoc Unified School District.⁸ In that case, the concurring opinion by Member Gonzales cites Houge v. Ford,¹⁰ a California Supreme Court decision, for the proposition that "the disjunctive particle 'or' should be construed as 'and' in cases where such construction is necessary to carry out the obvious intent of the Legislature." But that misinterprets what the Court said on the issue.

Actually, Houge v. Ford was a contract Interpretation case in which the contract clause "protect or collect" was in dispute. The Court stated:

The cases cited by plaintiff to sustain his claim that the word "or" should be construed here as meaning "and" do not sustain his position. Resort to such unnatural construction of the word "or" is sanctioned only when such construction is found necessary to carry out the obvious intent of the Legislature in a statute or the obvious intent of the parties in a contract, when such intent may be gleaned from the context in which the word is used. . . , In its ordinary sense, the function of the word "or" is to mark an alternative such as "either this or that". . . and such was the plain meaning of the word "or" as used by the parties here in the phrase "protect or collect." [Emphasis added.]

Thus, the Board's interpretation of "or" to mean "and" is a departure from the general rule and not the general rule, as the quote from the Lompoc decision suggests.

To the unwary reader, it might appear that an argument over the distinction between "or" and "and" is an example of a lawyer's exaggerated concern for technicalities. Actually, the distinction holds important consequences for those involved in disputes over the important and frequent question of who is a management employee under Government Code Section 3540.1(g).

Some school and community college employees will be found to have significant responsibilities for formulating district policies, but with no significant responsibilities for administering district programs; others will be found to have significant responsibilities for administering district programs but with no responsibilities for formulating district policies. Reading "or" to mean "and"

9

EERB Decision No. 13, March 17, 1977. In a concurring opinion, Member Cossack agreed with Member Gonzales' "rationale concerning the construction of 'management employee'. . ." No party in the Lompoc case asked the EERB to interpret "or" to mean "and."

¹⁰44 C.2d 706, 712 (1955).

in Government Code Section 3540.1(g) will mean that those employees are not management employees; only employees found to formulate district policies and administer district programs will qualify as management employees.

That is not what the Legislature intended, as nothing in the EERA, remotely suggests that the word "or" in Government Code Section 3540.1(g) should be given any meaning other than its ordinary meaning. Indeed, the legislative history on the general subject of collective bargaining in public employment demonstrates that the use of "or" in the EERA definition of management employee followed attempts to use "and" rather than "or" in bills preceding the bill that became the EERA.¹¹

Finally, the opinion offers no reason why the word "or" is given its ordinary meaning in the EERA definition of supervisor¹² but not in the EERA definition of management employee.

We should follow legislative commands.

Reginald Alleyne, Chairman

Raymond J. Gonzales, dissenting in part:

I am in accord with the order in this case and supporting analysis in all respects except that pertaining to part-time evening faculty. I agree with both my colleagues that the division chairpersons are supervisors, that

¹¹E.g. AB No. 1243 (1973) and AB No. 119 (1974), as introduced, using "and" rather than "or" in the definition of management employee. See Final Report: Assembly Advisory Council on Public Employee Relations (March 15, 1973), p.90, recommending the use of "and" rather than "or" in the management definition. The use of "or" was thus not a word accident but a conscious choice of the Legislature.

12

~~Sweetwater Unified School District~~, EERB Decision No. 4, November 23, 1976; ~~San Diego Unified School District~~, EERB Decision No. 8, February 8, 1977; ~~Oakland Unified School District~~, EERB Decision No. 15, March 28, 1977; and the majority opinion in this case on coordinator of special programs.

the athletic directors are supervisors, that the financial aids coordinator is not a management employee, that the public information officer is a non-confidential employee, and that day-to-day substitutes should be excluded from the unit. I agree with Chairman Alleyne that the coordinator of special programs is a supervisor and that summer school instructors should be excluded from the overall unit.

Part-Time Faculty

I continue to subscribe to the majority definition of "classroom teacher" put forth in the Belmont Elementary School District¹ decision. In that decision I wrote for the majority that:

...the legislature limited the language "classroom teachers" only to the regular full-time probationary and permanent teachers employed by a district rather than to the variety of types of employees who might literally be described as classroom teachers.

No one disputes the fact that the primary function of part-time evening instructors is to teach, but just as in Belmont Elementary School District,² Lompoc Unified School District,³ New Haven Unified School District,⁴ and Petaluma Elementary and High School District,⁵ where long-term substitutes, adult education teachers, home bound teachers and summer school teachers also taught, we nevertheless excluded them from the overall unit of classroom teachers on the basis of the community of interest standard because they were not "classroom teachers" within the meaning of the Act.

On this point, community of interest, I find the position of the majority concerning the part-time evening instructors in the Los Rios Community College District to be totally inconsistent with the Board's application of this standard in previous cases. Such factors as different salary schedule, different hours, different teaching load, no fringe benefits, different recruitment procedure, hourly as contrasted to salaried compensation, employment contingent on sufficient student enrollment, different supervision,

¹EERB Decision No. 7, December 30, 1976.

²Id.

³EERB Decision No. 13, March 17, 1977.

⁴EERB Decision No. 14, March 22, 1977.

⁵EERB Decision No. 9, February 22, 1977.

little or no job security and no required performance of extracurricular activities have been the bases for this Board's previous exclusion of summer and adult school staff from units composed primarily of full-time regular teachers.

In Belmont, the majority found that summer school teachers should not be included in the unit because they were hired on a one-summer basis. Also they were on a separate salary schedule and received no fringe benefits. In Petaluma, summer school teachers were excluded because they had no written contracts; they were on a different salary schedule; their employment was dependent upon sufficient student sign-up; and they received no fringe benefits.

Adult education teachers in Lompoc were excluded because they had different hours and teaching loads; they received no fringe benefits; they possessed a different tenure system; they performed no extracurricular assignments; they were not covered by layoff provisions; and their employment was conditioned on sufficient student enrollment. In New Haven, the Board found that adult education teachers were excluded because they received no fringe benefits; they were paid on an hourly basis; they received no written contract; and their employment was contingent on student sign-ups. In Petaluma, adult education teachers were excluded because they were recruited differently; they were dependent upon sufficient student enrollment for their employment; they were under different supervision; and they had only a modicum of job security. All of these factors cited by the majority in Belmont, Petaluma, Lompoc and New Haven, as they relate to the exclusion of summer school and adult education teachers exist to an equal or even greater degree in the Los Rios Community College District in respect to the part-time evening school instructors.

For example, in the Los Rios District, part-time evening school instructors are under a separate recruitment and hiring procedure, including the fact that they fill out separate application forms which are filed only with the Office of the Evening College Dean and that they are screened separate and apart from full-time applicants and in a different manner by the District;⁶

⁶The Faculty Manual of Sacramento City College for the 1976-77 school year describes the selection of evening college instructors as follows:

(continued)

they are not given a regular contract, as they are dependent on sufficient student enrollment for employment; they work different and comparatively fewer hours; they do not receive major fringe benefits;⁷ they are paid on an

(continued)

1. Based on the recommendation of Division Chairs and/or authorized designee in consultation with the Associate Dean and/or Assistant Dean, the most qualified instructor will be assigned to teach the class. Final approval of staff will be recommended by the Associate Dean of the Evening College and Summer Session to the Dean of Instruction and the President of the College.
2. Regular Sacramento City College day instructors will have first consideration in filling vacant teaching positions.
3. A Sacramento City College instructor will be assigned to teach a class outside his regular teaching field and division only upon recommendation of the Division Chairs of both divisions involved. Exception: Assignment will be made by the Associate Dean of Evening College and Summer Session when Division Chairs are not available.
4. As a rule, regular day instructors NEW to Sacramento City College will not be considered for extra service teaching assignments in the Evening College until they have completed at least one semester of satisfactory teaching service. Exceptions may be recommended by the President or the Dean of Instruction.
5. Factors considered for employment of off-campus instructors will include, but will not be limited to: educational qualifications, recommendations, teaching experience, and evaluations of prior service in the Evening College when available.

In sum, there is no faculty participation in the interviewing and screening process as with full-time faculty and, apparently, if any day administrative staff is involved in the general selection of evening staff it is only vis-a-vis the Associate Evening College Dean.

Thus, the fact that the majority finds that "one part-time person was screened and selected through the same process utilized in selecting full-time faculty" hardly demonstrates that this has been the District policy applied to the other 1,099 part-time instructors.

⁷All that is clear by way of fringe benefits is that part-time evening instructors get pro rata sick leave. They do not get medical and dental benefits which amount to approximately a \$900-per-year value to the full-time instructors. Industrial accident and illness leave is mandatory under state law (Ed. Code Secs.¹ 87042 and 87781, formerly 13010 and 13468 respectively). Impressive testimony regarding fringe benefits for evening part-time instructors was given by Bernard Flanagan, Vice-Chancellor, Personnel Services. He testified as follows:

(continued)

hourly basis which is substantially less than pro rata pay; they are not expected to engage in extracurricular activities with students; they have different supervision, reporting to the assistant or associate dean of the Evening College; and quite significantly, they are not on a tenure track.

In addition to these aforementioned facts that they share with summer school teachers and adult education teachers whose status was at issue in previous Board cases, the part-time evening teachers in Los Rios have different working conditions. They have no grievance procedure; they are provided no office space; they are subject to a different evaluation procedure;

(continued)

Q. Okay. And you've defined full-time employees, the question now is if a part-time Evening Division instructor taught more than 50% of a full load, 50% of 15, but less than 60% of a full load, 15, would he receive any fringe benefits?

A. No.

Q. And by fringe benefits what do you mean?

A. The medical and dental program and any other insurance program that is available to day, regular day instructors.

Q. All right. Are part-time Evening Division instructors entitled to Critical Illness Leave?

A. No.

Q. Are part-time Evening Division instructors entitled to Exchange Teaching Leave?

A. No.

Q. Are part-time Evening Division instructors entitled to Educational Improvement Leave?

A. No.

Q. Are part-time Evening Division instructors entitled to take Research Grant Leave?

A. No.

Q. Are part-time Evening Division instructors entitled to take Long Term Personal Leave?

A. No.

Q. Are part-time Evening Division instructors entitled to take Conference and Meeting Attendance Leave?

A. No.

Q. Are part-time Evening Division instructors entitled to use the District grievance procedure?

A. No.

they have no guarantee of reemployment nor rights to a retention hearing; they are not required to hold specific office hours; they have no expected role in faculty government; they are not required to attend regular faculty

meetings; and they are not required or expected to participate on the college advisory committees. For these reasons their exclusion from the regular unit of day school teachers is as compelling, if not more so, than it was for summer school and adult education teachers in Petaluma, Belmont, Lompoc, and New Haven.

And while it is true that in our prior Belmont decision we included two part-timers within a unit of other certificated staff, there existed distinguishable bases for doing so. In that case the record showed that part-timers received pro rata salary and fringe benefits and enjoyed the same reemployment rights as did the regular teachers. I think that it is also significant to note that in Belmont the two part-timers constituted less than 1.3% of the teachers while in the Los Rios District they constitute more than 60% of the instructors in the District. At this rate, the appropriate question should really be whether or not full-time teachers should be included in a unit of part-time evening instructors.

Even more ludicrous is the fact that one member of the majority in this case agrees with me as to the exclusion of summer school teachers, as

8 The extent to which part-time evening instructors are involved in meetings with other faculty, I think, is best captured by the testimony of one part-time evening instructor:

Q. Do you attend any division or departmental meetings?

A. I have.

Q. What, under what circumstances do you attend those meetings?

A. In the spring of 1972 I attended a departmental meeting on request of the departmental chairman or the division meeting on the request of the division chairman. And since then it's been on a drop-in basis. I don't get announcements of their meetings.

Q. Are there department meetings?

A. Occasionally, once or twice a year.

Q. Do you attend such meetings?

A. No.

this member has previously done in Belmont and Petaluma. I find it inconceivable that a Board member would, in the same decision, exclude summer school teachers while including part-time evening instructors since the record in this case clearly shows that the employment relationship between summer school instructors and the District is basically the same as that between the part-time evening instructors and the District; As the record shows, summer session instructors are hired along with evening college instructors through the Evening College and Summer Session program. They are recruited like the evening instructors, chosen first from day instructors, second from walk-ins, and then from District files. And the actual selection is ultimately made. They receive no fringe benefits. They are evaluated in a manner similar to the evening part-time instructors both as to the frequency of evaluation and as to the designated evaluators. They are not entitled to use the grievance procedure. And lastly, like the evening part-time faculty, summer school instructors receive no monetary credit for length of service which on the day faculty schedule amounts to 16 automatic steps of salary increment. Further, like the part-timers, they are paid on an hourly basis only. It seems, therefore, inconsistent under these circumstances that a Board member would vote to include in the same unit one and not the other classification of instructors in dispute in this case.

A further inconsistency concerns the matter of remuneration for part-time evening instructors as contrasted to full-time instructional staff. The majority attempts to overcome the significant difference in compensation between the two groups by arguing that a relationship between the day faculty pay schedule and the evening faculty pay schedule exists. This so-called relationship exists by virtue of the fact that the part-time evening instructor's pay schedule relates to the summer faculty pay schedule and the summer faculty pay schedule, in turn, relates to the day faculty pay schedule. Therefore, the evening faculty pay schedule relates to the day faculty pay schedule. This simplistic syllogism fails, not only because it is far-reaching but because the Board has determined that summer school staff are to be excluded in this case. Similar though less compelling reasoning applies regarding the division chairpersons' stipend. The record shows that it is also "tied" to the day schedule. Yet the Board has determined that these individuals

should not be part of the overall unit.

In addition to the factual justifications for excluding the part-time evening instructors from the regular unit of classroom instructors, there are other compelling reasons of a broad policy nature for doing so.

The majority has adopted a formula with a view towards including "persons who continually, semester after semester, teach in the community college [because they] have demonstrated their commitment to and interest in its objectives." In fact, the majority's formula is inconsistent with this purpose. There is nothing in the majority's formula that guarantees a part-time evening teacher's "commitment to and interest in [the] objectives" of the community college. The formula does not require teaching "semester after semester." Rather the formula would permit a part-time instructor to be absent from the campus for three consecutive semesters and still be in the unit with full-time instructors, since the formula only requires that the part-time instructor be teaching in the current semester and to have taught for two semesters in the previous 2% years.

Also under the formula established by the majority that would allow part-time instructors who taught any number of units during three semesters of the previous three years, it is conceivable that an individual could teach as few as nine (9) units in the three-year period and be allowed in the same certificated unit as a regular teacher who would be required to teach ninety (90) units during the same period of time. Additionally, full-time instructors are required to spend five hours per day on campus five days a week. Over a three year period this equals 2,550 hours on

campus, while the instructor teaching only nine units during the three year period would be required to spend only 153 hours on campus during this same three year period. On the basis of documentary evidence, this

These calculations are determined by multiplying twenty-five hours per week times the total number of weeks of instructional time over a six semester period (102 weeks). While a semester is considered to be 18 weeks, I have excluded from these calculations one week per semester allowed for final examinations and grading. The five hours per day requirement is established by Governing Board policy presented in the record.

¹⁰The part-time teaching load in this example is determined by multiplying the three hours per week times the total number of weeks of instructional time over a three semester period (51 weeks). Again weeks of final examinations and grading are excluded.

observation is all the more impressive when one considers that during the 1975-76 semesters at American River College and Sacramento City College, between 55 to 60 percent of the evening instructors taught one to three units which is generally equivalent to one to three formula hours.¹¹

Further, if the number of units in the above illustration were translated into dollars paid for teaching, even taking the highest possible amount paid to part-time instructors (\$426.24 per unit) and to full-time instructors (\$833.33 per unit),¹² the result would be that those part-time instructors who are paid a total of \$3,836 by the district in a three year period would be placed in the same unit as the full-time instructors who are paid \$74,999 during the same three year period. This does not include an estimated 11.7% of additional salary costs that the District pays in traditional fringe benefits to full-time teachers beyond their regular salaries.

To allow part-time evening teachers equal status in a unit with regular day instructors is the grossest exaggeration of the community of interest standard established by this Board in previous decisions. It is an exaggeration not because salary alone should be used as a standard for determining who should be in a given unit, but because teaching is clearly a full-time employment interest of one set of individuals and is obviously only a supplemental activity for t

Only six of the 1,100 evening division instructors teach full time. Conceivably these instructors would not be eligible to be in the unit if they had not taught at Los Rios for at least two semesters within the previous three years, but were teaching full time in the evening school at the time of the election. Two hundred instructors are full-time teachers in other districts and 370 are full-time day instructors in the Los Rios Community College District. A total of 570 (51.8%) are regularly employed

¹¹Class schedules from this time period did not differentiate between evening instructors per se and day instructors teaching evenings as part of their full-time assignment. A statewide survey which did effectively do so, however, produced similar results, namely that part-time instructors teach approximately 4.5 hours per week. California Community and Junior Colleges Assoc, Report on a Statewide Survey About Part-time Faculty in California Community Colleges 11 (March 1976).

¹²Calculations are based on the current District salary schedule for certificated employees.

as teachers and are "moonlighting" for extra pay in the evening program at Los Rios Community College District. The remaining 530 have no connection with any educational institution other than the Los Rios Community College District and are quite likely employed full time at other jobs or may depend only on their part-time pay at Los Rios Community College District.

The fact that 200 part-time evening instructors are regularly employed as full-time teachers in other districts can lead one to conclude that they are most likely already in a certificated unit in those districts. It is fair to assume that these teachers are employed in those districts that are generally coterminous or contiguous with the boundaries of Los Rios Community College District.¹³ What the majority position does in this case is to allow these 200 individuals potential inclusion in units covering all regular teachers in two districts. This results in an inequitable situation that would permit these teachers to have "two full bites" at the taxpayers' apple, since the same taxpayers are being assessed for the K-12 districts and then separately for the Los Rios Community College District.

The ramifications of this go far beyond the Los Rios case. Statewide there are approximately 27,532 part-time community college positions as contrasted with 14,273 full-time teachers.¹⁴ It would appear that the percentage of those individuals teaching full time in one district and "moonlighting" in a community college district is elsewhere about the same percentage as the figure cited in this case.¹⁵ In addition, many of the other individuals employed part time may also be employed by government entities other than teaching institutions. Given the emergence of employee unions in the public sector, it hardly seems fair that the taxpayer should be forced to go to two separate negotiating tables for the same individual.

¹³As demonstrated in the EERB files, of the 31 feeder districts that are contiguous or coterminous with the Los Rios Community College District boundaries, 28 have certificated units in place. The three districts that do not have a certificated unit are Indian Diggings Elementary, Latrobe Elementary and Silver Fork Elementary. These three districts together have an average daily attendance of only 76 and constitute basically the "one room school house."

¹⁴Supra note 11, at 5.

¹⁵The percentage of part-time teachers that are employed full time in other teaching positions and are "moonlighting" at Los Rios is 51.8%. The statewide figure is 47.8% of teachers "moonlighting" in community college districts. Id. at 8.

This is not to say that public employees should not have full collective negotiating rights; rather it seems that the public should not be required to give them full negotiating rights twice.

An equally significant point is the location of instruction done during the evening program in the Los Rios Community College District and by extension in the other districts are taught off the main campuses at such places as Mather Air Force Base, Davis, Oak Park, El Dorado High School, South Tahoe High School, Placerville High School and other off campus locations. This hardly leads to the conclusion that there is significant interaction between the full-time day faculty and the evening faculty.

In addition, I feel we would do well to profit from the experience of other jurisdictions, both federal and state, in dealing with the problem of part-time faculty in higher education. Preliminarily, I note the total reversal of the National Labor Relations Board (NLRB) in New York University from its own precedents, the ultimate result being the exclusion of part-timers from a unit composed of full-time and other professional staff,¹⁶ Critical of the NLRB's initial approach to the part-time faculty issue, one writer observed:

A detailed analysis of the part-time issue by the Board in University of New Haven, Inc., where the Board began its precedent of including part-time faculty in the bargaining unit, might have lead¹⁷ to a different conclusion, e.g., the creation of a separate unit for regular part-time faculty.

In a comprehensive recitation of NLRB case law, the same writer noted the details:

Superficially, adjunct faculty perform the same work as full-time faculty classroom teachers. However, upon closer examination, there are substantial differences between the two groups which include wages, fringe benefits, duties, education, working conditions, bargaining history, extent of participation in institutional governance, and organizational treatment by the university.

¹⁶205 NLRB No. 16, 83 LRRM 1549 (1973).

¹⁷Kahn, The NLRB and Higher Education; the Failure of Policymaking through Adjudication, 21 U.C.L.A. L. Rev. 63, 114 (1973).

These differences could be sufficient to allow the NLRB to exclude adjunct faculty from a full-time unit.

Moreover, the salary schedules of the part-time and full-time faculty are quite disparate. The full-time professor receives substantially more remuneration for teaching the same course than an adjunct professor. See University of New Haven, Inc., 190 NLRB No. 102, at 3 (1971). In the vast majority of institutions, part-time faculty are not eligible for fringe benefits accorded the full-timers. Fordham Univ., 193 NLRB No. 23, at 21 (1971); University of New Haven, Inc., 190 NLRB No. 102, at 3 (1971). A similar disparity in wages and fringe benefits has contributed to Board findings that part-timers should not be included in a full-time unit. See NLRB v. WGOK Inc., 384 F2d 500 (5th Cir. 1967); Bowman Transp., Inc., 166 NLRB 982 (1967); Central Mut. Tel. Co., 116 NLRB 1663 (1956). In Mon-Clair Grain & Supply Co., 131 NLRB 1096 (1961), the Board found an insufficient community of interest with respect to a part-time worker on the sole basis of a disparity in fringe benefits.

Although the full- and part-time faculty both perform the same basic teaching and grading function, full-time faculty are generally expected to perform additional duties which may include counseling, advising, and registering majors in their department; participating in departmental and school meetings; serving on committees; proctoring examination; maintaining fixed office hours; and recommending candidates for degrees. See Record at 51, 53, Fairleigh Dickinson Univ., 205 NLRB No. 101 (1973); Record at 67, 70, 75, 77, 113, 138. University of New Haven, Inc., 190 NLRB No. 102 (1971).

There can be no reasonable expectation of permanent employment by the vast majority of part-time faculty. Their employment is expressly conditioned upon the momentary need for their services and they have no reasonable expectation of being continued from semester to semester. If enrollment in a course taught by a part-time faculty member falls below a university's minimum standard, the course is usually dropped. See Record at 69-70, Fairleigh Dickinson Univ., 205 NLRB No. 101 (1973). The general experience in higher education is that the turnover rate among part-timers is significantly greater than full-time faculty. In Central Mut. Tel. Co., 116 NLRB 1663 (1956), the Board excluded a part-time employee from the unit as a "temporary or casual" employee because he lacked such reasonable expectancy, even though

he had continuously worked in his part-time capacity for three years. See also *NLRB v. W30K, Inc.*, 384 F2d 500 (5th Cir. 1967).

In addition, the working conditions for part-time and full-time faculty usually differ substantially. This difference ranges from the workload and the availability of secretarial help and office space to the availability of tenure and the expectancy of permanent employment.

The NLRB has, in the past, noted that one indication of a separate community of interest is that "the Employer treats this group both in its organizational framework and in fact as a separate group." *ITT Fed. Elec. Corp.*, 167 NLRB 350, 351 (1967). A college or university clearly distinguishes between full-time and part-time faculty. For one, the hiring procedure is completely different for part-time and full-time applicants. Compare the description of full-time hiring in *T. Caplow and R. McGee, the Academic Marketplace*, (1965) with *Adelphi Univ.*, 195 NLRB No. 107, at 10-11 (1972). There are also differences in contract handling, salary increases and promotions and salary payments.

When all of the differences between part-time and full-time faculty are considered and the percentage of the unit constituted by part-timers is examined, there appears a substantial conflict of interest between the two groups which was not adequately considered by the NLRB.¹⁸

Similarly, several public employee relations boards or commissions have excluded or approved exclusions of part-time faculty from a unit of full-time faculty. In the Board of Higher Education of the City of New York, in which the jurisdiction of the employer extended to seven senior colleges and to six community colleges, New York's Public Employee Relations Board upheld the original decision of its Director of Representation which separated the permanent instructional staff from the nonannual lecturers for purposes of collective negotiations.¹⁹ The PERB reasoned as follows:

¹⁸

~~Id.~~ Decisions subsequent to ~~New York University~~ reflect continuing adherence by the NLRB to its ruling in that case. See e.g. ~~University of San Francisco~~, 207 NLRB 12, 84 LRRM 1403 (1973); ~~Point Park College~~, 209 NLRB 1064, 85 LRRM 1542 (1974); ~~University of Miami~~, 213 NLRB 634, 87 LRRM 1634 (1974); ~~Remsselear Polytechnic Institute~~, 219 NLRB 712, 89 LRRM 1879 (1975); ~~Yeshiva University~~, 221 NLRB 64, 91 LRRM 1017 (1975).

¹⁹PERB Case No. f-0008, 2 PERB 3467 (N.Y. 1968).

We believe that differences between faculty-rank-status employees and non-annual lecturers - whether they teach more or less than six hours a week - are of sufficient magnitude to preclude their being placed in the same negotiating unit. Faculty-rank-status personnel are all permanent staff in that they are tenured or hold positions leading to tenure. Non-annual lecturers, on the other hand, are appointed and reappointed for only one semester at a time. Faculty-rank-status employees receive many and various fringe benefits, the cost and value of which are considerable. Non-annual lecturers, on the other hand, do not receive these fringe benefits. Faculty-rank-status personnel exercise important responsibilities regarding the operation of the University by their service on departmental committees. Non-annual lecturers on the other hand, rarely serve on departmental committees. Faculty-rank-status personnel have their primary personal commitment to the City University: non-annual lecturers, on the other hand, are likely to be full-time high school teachers working at the University at night, or businessmen, accountants, lawyers, or graduate students whose primary professional commitments are elsewhere.²⁰

Focusing on primary commitment, the New Jersey Public Employees Relation Commission affirmed a hearing officer's recommendation regarding exclusion

²⁰Id. Subsequent to the formal hearing, the Director of Representation summarized his reasons for excluding part-time faculty as follows:

At the formal hearing it was made clear that, whereas the permanent staff had tenure, temporary staff do not and thus may be "dropped" for any reason. Much of the temporary staff has full-time employment elsewhere and, generally, considers employment at universities as a secondary source of income. Thus, only the permanent staff is expected to participate in committee work, conferences, research and writing, and in the development and administration of teaching policies. Further, the wages of the permanent staff are determined in a different manner than the wages of a temporary staff, and fringe benefits for the two groups are quite different with much of the temporary staff not being entitled to most of them. The desire of many of the temporary staff to initiate fringe benefits seems to me to create a clear conflict with the desire of the permanent staff to improve them, in terms of competition for available funds. While these two groups, as teachers, have some interests in common, I felt that the major differences in important terms and conditions of employment create a sharp

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of part-time Instructors in State Colléges of New Jersey;

In my opinion, the part-time teachers should be excluded. Those who are also full-time teachers, will have their interests represented in the full-time unit. The others have a less vital interest in representation. Their earnings as part-time teachers are usually not the principal source of their livelihood and those who are adjunct appointees have only a temporary interest. It would be unfair to the full-time teachers if part-time or temporary employees have an equal voice in choosing a representative.²¹

And in other jurisdictions, the overseeing boards or commissions of public employer-employee relations have approved stipulations to exclude part-time faculty.²²

In sum, while the majority might point to some factors which distinguish other jurisdictional case law, primarily NLRB precedent, from the present case, those distinctions do not outweigh the many factual similarities between such cases and the one we decide today. New York University²³ and its progeny as well as public sector case law have primarily focused on tenure, benefits, governance, primary work commitment, compensation, and general work conditions. Los Rios is distinguishable only on the question of governance where the facts

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conflict of interest which mandate separate representation. Klein, Unit Determinations in New York State under the Public Employees Fair Employment Law, in Proceedings of New York University 21st Annual Conference on Labor 495 (Christensen ed. 1968) as cited by Kahn, supra, note 17, at 113.

²¹Report and recommendations of the Hearing Officer at 8, State Colléges of New Jersey, PERC No. 1 (New Jersey PERC, April 9, 1969). See also Southwestern Community College, PERB Case No. 308 (Iowa 1975) and Northwest Iowa Vocational-Technical School, PERB Case No. 228 (Iowa 1975) in which part-time faculty in both districts were excluded.

²²See e.g. Community College of Philadelphia, 7 PPER 116, Case No. PERA-R-7258-1 (Penn., 1976), where the PERB in that state approved a stipulation to exclude all part-time faculty teaching less than nine hours; Bucks County Community College; 1 PPER 91, Case No. PERA-R-943-E (Penn., 1971), where the PERB approved the exclusion of all part-time faculty; State University System, Case No. 8H-RC-745-0002 (Fla., 1975), where the Florida Public Employee Relations Commission approved the exclusion of all part-time instructors who had not been employed at least half-time in three of the preceding four quarters.

23

Supra note 16.

show some measure of participation by part-time faculty in committee-work and college governance. Query, however, as to the comparative significance of this factor in view of various Education Code provisions which preclude faculty participation in matters deemed important in New York University?²⁴ Similarly, in view of the fact that the parties have failed to present us with sufficient evidence to allow us to ascertain the extent to which the faculty senate and committees play a key role in ultimate policymaking and to ascertain the degree of involvement by the overall faculty let alone the part-time faculty, in such matters, I place little weight on this factor.

Further, while several cases have been filed with the courts of this state concerning the issue of part-time tenure in community colleges relative to Education Code Section 87482 (formerly Section 13337.5), in which the results have been conflicting,²⁵ I feel that we are compelled to follow the facts as they exist in this case.²⁶ Therefore, we should not presume the ultimate resolution of this issue by either the Judiciary or Legislature.

Conclusion

Public education and its administration will be ill-served by allowing part-time evening instructors in the same unit with regular full-time staff.

First, the grouping together of employees with such disparate interests is contrary to the overall purpose of this Act as stated in Government Code Section 3540, namely "to promote the improvement of personnel management and employer-employee relations," in that it jeopardizes the possibility of smooth collective negotiations for all concerned parties. It is quite likely that in comparison to the 740 full-time instructors, the part-time staff will constitute the voting majority and thus dominate the unit. Thus, in contrast to Belmont where two part-time teachers in the day school were granted inclusion in the unit of certificated employees on the basis of different and compelling facts, the significant number of 1,100 part-time evening teachers in Los Rios cannot easily be overlooked.

²⁴Ed. Code Secs. 72285 (1010.6) and 72283 (1010.4).

²⁵See e.g. Ferner v. Harris, 45 Cal. App. 3d 363 (1975); Coffey V. Governing Board of San Francisco Community College District, 66 Cal. App. 3d 279 (1977); Peralta Federation of Teachers v. Peralta Community College District, 1 Civil 38508 (April 25, 1977).

²⁶See Ed. Code Sec. 87742 with reference to part-time employees as temporary instructors. It states:

Governing boards of community college districts may dismiss temporary employees at any time at the pleasure of the board.

Second, because of the different employment interests of these two groups, I would not so easily dismiss the argument that to include both groups of employees in the same unit would impair the efficiency of the District's operation. Clearly, the District has seen fit in the past to administer two separate programs which almost totally correspond to the employment conditions of both groups, the day program employing the full-time faculty and the evening program employing the part-time faculty.

The majority's reference to excessive fragmentation is misplaced. No separate unit of part-time teachers is being sought here. But even if it were, it would hardly seem consistent to argue excessive fragmentation here, in light of our decision in Sweetwater Union High School

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District where we established three units from a group of 672 employees. In this vein I note that, in one case, ~~Oakland Unified School District~~,²⁷ the Board not only excluded children center teachers from the unit on the basis of their not being "classroom teachers," but it also allowed for a separate unit of children center teachers. The majority in that case held:

Our decision to allow a separate unit of children's center employees is determined primarily by the community of interest criterion. We find compelling those facts which clearly indicate the separate and distinct nature of the children's center program.²⁸

Thus, if the part-time faculty in this case had been separately sought, there is no assurance that the Board would not find a sufficient and distinct community of interest among the part-time faculty to justify a separate unit. On this basis alone, I think this case is distinguishable from future cases concerning part-time faculty in California's community colleges that may have occasion to be reviewed by this Board. Consequently, while I oppose the inclusion of part-time faculty in the overall unit of certificated employees and reject their legal definition as "classroom teachers," I do feel that a case might be made for a separate unit of part-time evening employees.

²⁶ ~~EERB~~ Decision No. 4, November 23, 1976.

²⁷ ~~EERB~~ Decision No. 15, March 28, 1977.

²⁸ Id. at 25.

Lastly, while it is true that community college districts throughout the state have in recent years seemingly conducted questionable employment practices regarding part-time teachers in order to meet their own fiscal needs, resulting in a 150 percent increase of part-time teachers over the last four years, in my view, the elimination of this problem does not lie in including part-time faculty in an overall unit with full-time faculty. I have indicated that the taxpayers should not be placed in the position of having to give public employees "two full bites" of the apple, I do not, however, reject the possibility of giving employees perhaps a "bite-and-a-half." Or to put it in less simplistic terms, commensurate with their status, part-time employees could conceivably be granted the right to negotiate with the employer over strictly part-time issues. But to allow, as the majority has done in this case, part-time faculty to participate equally with the regular full-time faculty of the District, is to totally disregard the community of interest standard so well established in our previous decisions.

Raymond J. Gonzales Member V

ORDER

The Educational Employment Relations Board directs that:

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

All certificated employees, including full-time instructors, part-time instructors who have taught at least the equivalent of three semesters of the last six semesters inclusive, financial aids coordinators and campus public information officers; excluding day-to-day substitutes, division chairpersons, athletic directors, the coordinator of special programs, and summer school instructors.

2. Division chairpersons are supervisory employees within the meaning of Section 3540.1(m) of the EERA.

3. Athletic directors are supervisory employees within the meaning of Section 3540.1(m) of the EERA.

4. Financial aids coordinators are not management employees within the meaning of Section 3540.1(g) of the EERA.

5. Campus public information officers are not confidential employees within the meaning of Section 3540.1(c) of the EERA.

6. The coordinator of special programs is a supervisory employee within the meaning of Section 3540.1(m) of the EERA.

7. Within 10 workdays after the employer posts the Notice of Decision, the employee organizations shall demonstrate to the Regional Director at least 30 percent support in the above unit. The Regional Director shall conduct an election at the end of the posting period if: (1) more than one employee organization qualifies for the ballot, or (2) if only one employee organization qualifies for the ballot and the employer does not grant voluntary recognition.

Educational Employment Relations Board

by

Stephen Barber
Executive Assistant to the Board

66/9/77

Dated