STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PASADENA CITY COLLEGE CHAPTER OF THE CALIFORNIA TEACHERS ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-3271
v.	)	PERB Decision No. 1098
PASADENA COMMUNITY COLLEGE DISTRICT,	)	May 3, 1995
Respondent.	)	

Appearances: California Teachers Association by Charles R. Gustafson, Attorney, for Pasadena City College Chapter of the California Teachers Association; Liebert, Cassidy & Frierson by Larry J. Frierson, Attorney, for Pasadena Community College District.

Before Blair, Chair; Carlyle, Garcia, Johnson and Caffrey, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Pasadena City College Chapter of the California Teachers Association (Association) of a PERB administrative law judge's (ALJ) proposed decision (attached hereto). In the proposed decision, the ALJ dismissed the Association's unfair practice charge which alleged that the Pasadena Community College District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it unilaterally changed the rate at

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

which instructors were compensated for teaching not-for-credit classes in the contract education program and refused the Association's demand to negotiate over the change.

The Board has reviewed the entire record in this case, including the Association's exceptions[2] and the District's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2]The Association, on appeal, raises the argument that the ALJ allowed the District to improperly question an Association witness in an attempt to show the witness's hostility or bias. The Association makes the statement that "[u]ncalled for harassment of witnesses should not be permitted." A review of the transcript and the record does not support the Association's contention that the "tenor" of the District's questions was prejudicial.

ORDER

The complaint and unfair practice charge in Case No. LA-CE-3271 are hereby DISMISSED.

Chair Blair and Member Carlyle joined in this Decision.

Member Garcia's dissent begins on page 4.

Member Caffrey's dissent begins on page 8.

GARCIA, Member, dissenting: The charge in this case should have been held in abeyance in deference to the parties' contractual grievance procedure. The Public Employment Relations Board (PERB or Board) should hold the case until the grievance procedure is exhausted or pursuit is shown to be futile.

Judicial policy in California directs courts to refrain from considering disputes until the parties to the dispute have exhausted internal remedies under the terms of their grievance agreement. For example, in Cone v. Union Oil Co. (1954) 129 Cal.App.2d 558 [277 P.2d 464], the Court of Appeal held that:

> It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. [Citations.] . . . Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies. [Id. at pp. 563-564.]

That policy has been codified by Educational Employment Relations Act (EERA) section 3541.5(a)(2)[1] and as early as 1982,

[1]EERA section 3541.5 provides, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . . .
>
> (2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and

in Chaffey Joint Union High School District (1982) PERB Decision No. 202, the Board held that:

> EERA clearly indicates that the Legislature intended the grievance procedure to be a preferred method of settling job disputes and improving employment relations [Id. at p. 8, citing EERA section 3541.5(a)(2)].

The file shows that the charge acknowledges a grievance procedure exists, that the process ends in binding arbitration, and that the parties did not use the grievance process. The statement of the charge refers to the existing collective bargaining agreement (CBA) and complains that the Pasadena Community College District (District) unilaterally changed the compensation called for in the contract through the overload schedule. The District answers that its actions were consistent with the CBA.

CBA PROVISIONS

Pertinent provisions of the CBA include Article 11.2.1, which provides that:

> A "grievance" is an alleged violation, misapplication or misinterpretation of a specific provision of this Agreement.

Article 11.2.2 provides that:

> A "grievant" is a member of the unit covered by this Agreement who claims to have been adversely affected; or the Association, which

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> covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary.

> may only grieve sections dealing with rights of the Association.

Article 1.2 provides that:

> The District recognizes the Association as the exclusive representative of those employees of the District delineated as the bargaining unit as set forth in the May 17, 1979 Public Employment Relations Board Certification of Representative in Case Number LA-R-745, as amended on July 14, 1981 and further amended on June 7, 1982.

Article 12 provides that the salary schedules contained in the Appendix of the CBA are used to identify the rate of pay for teachers of not-for-credit courses.

Article 11.3.10 provides that:

> The decision of the Arbitrator . . . shall be final and binding upon all parties to the contract.

My view of the CBA is that the dispute is covered by the CBA, and that the dispute was grievable and arbitrable, since a key alleged violation is the District's denial of the Pasadena City College Chapter of the California Teachers Association's (Association) rights to represent members in connection with bargaining unit work. Furthermore, a prior PERB decision on the parameters of the unit is incorporated into the CBA by reference and is viewed by the Association as critical to the support of its case. The Board agents at the initial and hearing stages should have addressed the jurisdictional question and deferred (delayed) issuing a complaint until the grievance agreement was exhausted.[2] The six-month statute of limitations on bringing

[2]Ante, footnote 1.

charges would have been suspended while the parties pursued the grievance process. This case should be dismissed without prejudice, since there is no evidence that the parties' grievance procedure was exhausted.

Caffrey, Member, dissenting: I dissent. The Pasadena Community College District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA) when it unilaterally changed the rate at which certificated instructors were compensated for teaching not-for-credit classes in the District's contract education program, without meeting and conferring in good faith with the Pasadena City College Chapter of the California Teachers Association (Association). Accordingly, I would order the District to make affected bargaining unit members whole for compensation lost as a result of the District's unlawful action.

BACKGROUND

The faculty bargaining unit exclusively represented by the Association originally excluded part-time instructors who did not teach more than 60 percent of a full-time teaching load, and instructors paid on an hourly basis. Through a series of unit modifications, the bargaining unit was substantially expanded, concluding with a 1982 change to the unit that is key to the resolution of the dispute in this case. On June 7, 1982, following a consent election, the Public Employment Relations Board (PERB or Board) certified the addition of the following employees to the bargaining unit:

> All certificated personnel paid on an hourly basis; teachers of non-credit and adult education; part-time teachers with assignments of 60% or less; and certificated employees holding a temporary contract.

The 1982 election resulted from an agreement between the

District and the Association to add faculty in certain job groupings to the bargaining unit. The election agreement included a description of the bargaining unit which the parties agreed would result from the unit modification. The agreed upon description provided that the modified unit would include:

> Certificated employees holding a contract and status as a "contract" or "regular" employee of the District and who are employed as: Teachers of credit classes, Counselors, Librarians, Teacher/Coordinators, School Nurses, Teachers of credit classes who are in the Optional, Pre-Retirement Program. All certificated personnel paid on an hourly basis; teachers of non-credit and adult education; teachers of Summer Inter-Session; and part-time teachers.

The agreed upon unit description provided that the resulting bargaining unit would exclude:

> Superintendent-President, Vice Presidents; Deans; Department Chairpersons; Assistant Department Chairpersons; Supervisors of: Media Services, Computer Resource Center, Community Adult Training, Coordinators of: Manpower Programs, Cooperative Education and Placement, Scholarships and Financial Aids, Printing Services, Parent Education; Psychologists; General Manager-KPCS; Special Projects Development Officer (Grants); Accreditation Officer. All Classified Employees; Consultants; Head Librarian; All Temporary and Substitute Certificated Employees; All Employees who are Management, Supervisory or Confidential within the meaning of the EERA.

The District and the Association are parties to a collective bargaining agreement (CBA) having a negotiated term of July 1, 1991 through June 30, 1994. The CBA makes specific reference to the 1982 amendment to the bargaining unit.

In 1987, the Legislature authorized community college

districts to establish self-supporting contract education programs.[1] In 1990, the District decided to offer contract education services to business and government in the District's service area. Under the contract education program, the District provides a specific educational program to employees of the contracting entity, which pays the full cost of the educational program. While contract education courses may provide credit toward a degree, the state provides no funding for them because the classes are not open to the general public. "Not-for-credit" classes are contract education program classes which do not offer credit toward a degree. At the time of the PERB hearing in this case, the District was offering 11 contract education courses, 8 of which were credit courses counting toward a degree, and 3 of which were not-for-credit courses.

Education Code section 78022 addresses the compensation of faculty in the contract education program. Section 78022(b) states that:

> Faculty teaching credit and noncredit contract education classes shall be compensated in the same manner as comparable faculty in the regular, noncontract education program. . . .

And Section 78022(d) states that:

> Faculty teaching not-for-credit contract education classes shall be compensated in the same manner as faculty in the regular, noncontract education program if the course meets the same standards as a course in the credit curriculum. . . .

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[1]Statutes of 1987, Chapter 493. Education Code 78020 et seq.

Whether the instructor of a particular contract education course must meet minimum academic qualifications, be certificated, or possess a credential,[2] depends upon the nature of the course. Instructors of credit courses in the contract education program must meet minimum qualifications, just as instructors of credit courses in the regular program. Instructors of not-for-credit courses in the contract education program are not required to meet minimum qualifications.

In 1991-92, the first year of operation for the District's contract education program, certificated instructors from the District's regular education program also taught contract education classes and were paid in accordance with the parties' CBA. The same CBA salary schedule was used to compensate all certificated instructors teaching in the contract education program, regardless of whether they were teaching credit or not-for-credit courses.

In the fall of 1992, the District changed the rate of pay for certificated instructors teaching not-for-credit classes in the contract education program.[3] In an August 24 memo, the

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[2]With the enactment of AB 1725 in 1988 (Stats, of 1988, Ch. 973) there is no longer a requirement that community college instructors possess "credentials." Instead, a system has been established which requires community college instructors to meet certain specified minimum qualifications. (See Ed. Code sec. 87355 et seq.) For purposes of this case, the term "certificated" or "credentialed" personnel can be interpreted to mean those instructors who meet minimum qualifications established pursuant to the Education Code.

[3]A11 contract education program instructors are paid on an hourly basis. The issue in this case involves the District's unilateral change in the amount of that hourly pay.

District advised faculty members that salaries for teaching not-for-credit contract education classes would be paid on "a flat fee per hour" basis, and not according to any salary schedule included in the CBA. The stated reason for the change was to make the contract education program "self supporting, cost effective, fair, and competitive for services requested by employers and agencies in our community." The District made no change in the rate of pay of certificated instructors teaching credit courses in the contract education program, which continued to be in accordance with a CBA salary schedule.

Subsequently, the Association demanded that the District meet and negotiate over the change in pay for certificated instructors teaching not-for-credit courses in the contract education program. The District rejected the demand to negotiate in a January 5, 1993, memorandum, stating:

> As you know, contract education faculty are not in the CTA bargaining unit. Consequently, the compensation and working conditions of those employees would not be an appropriate subject for negotiation. If, however, you believe that there are issues which are within the scope of negotiation between the District and PCC/CTA, please provide us with a statement to that effect and it will be considered by the District.

As a result, the Association filed the instant unfair practice charge on February 2, 1993.

DISCUSSION

EERA section 3543.5(c) requires an employer to meet and negotiate in good faith with an exclusive representative. A pre-impasse unilateral change in an established policy affecting

a matter within the scope of representation is a per se violation of the duty to bargain in good faith. (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant Joint UHSD); Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

To establish a unilateral change, the Association must show that: (1) the employer breached or altered the parties' written agreement or established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but has a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members; and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint UHSD.)

At the hearing before a PERB administrative law judge (ALJ), the District joined a stipulation that it had unilaterally changed the salaries of certificated instructors of not-for-credit courses in the contract education program. The subject of wages is expressly within EERA's scope of representation. Therefore, the issue presented by this case is whether certificated instructors of not-for-credit courses in the contract education program are members of the bargaining unit agreed to by the parties in the 1982 unit modification. If so, the District's unilateral change in the salaries of those bargaining unit members was unlawful and in violation of EERA

section 3543.5(a), (b) and (c).

EERA section 3545(b)(1) provides specific direction with regard to bargaining units of classroom teachers. It states that in all cases:

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

In Peralta Community College District (1978) PERB Decision No. 77 (Peralta), the Board considered EERA section 3545(b)(1) and concluded that it establishes a presumption that all teachers are to be placed in a single bargaining unit. The Board in Peralta placed the burden of proving that a comprehensive teacher unit is inappropriate on those opposing it.

The Board has considered circumstances in which a faculty unit description did not specifically include certain categories of instructors. In Davis Joint Unified School District (1984) PERB Decision No. 474 (Davis), the Board considered a unit described as "all certificated employees excluding those excluded by law." At issue was the status of summer school teachers, adult education teachers, driver training instructors and others whom the parties had not discussed or agreed upon as included in the bargaining unit. While noting this lack of specific agreement, the Board found the language describing the unit to be "quite clear in its description of a comprehensive unit." The Board noted that the District in recognizing the bargaining unit had been "very scrupulous" to exclude managers, supervisors and

confidential employees, "but never made any effort to exclude others." Since the disputed teachers had not been excluded, the Board stated:

> . . . we read the language of the unit description precisely as it is written and we therefore find that the unit as originally recognized did include the disputed classification of teachers.

In reaching this conclusion, the Board referred to the Peralta presumption that all teachers are appropriately placed in a single bargaining unit.

In the 1982 unit modification at issue in this case, the bargaining unit was expanded to include:

> All certificated personnel paid on an hourly basis; teachers of non-credit and adult education; part-time teachers with assignments of 60% or less; and certificated employees holding a temporary contract.

The parties agreed to a description of those instructors included in the unit. The parties also agreed to specifically exclude certain positions and employees from the unit, most notably managerial, supervisory and confidential employees, and substitute certificated instructors. Consistent with EERA section 3545(b)(1), I conclude that the 1982 unit modification established a comprehensive faculty unit within the District. The only exceptions to the comprehensive faculty unit were those specifically enumerated.

As in Davis, the instant case involves a category of instructor not specifically agreed to by the parties as included in the bargaining unit, since the contract education program, and the not-for-credit courses within it, did not exist at the time

of the 1982 unit modification. The parties agreed to a comprehensive faculty unit specifically excluding managers, supervisors, confidential employees and others., In addition to specifically including certain employees, the unit description includes a general category of "all certificated personnel paid on an hourly basis" as members of the bargaining unit. This general category underscores the comprehensive nature of this unit: it includes all certificated, hourly-paid instructors not specifically excluded. While the inclusion of instructors of not-for-credit classes in the contract education program was never discussed by the parties, the precise language of the unit description here, as in Davis. and the Peralta presumption that all classroom teachers are in a single bargaining unit, incorporates certificated instructors of these courses in the unit, unless they are specifically excluded. They are not. Therefore, certificated personnel paid on an hourly basis to teach not-for-credit courses in the contract education program are bargaining unit members.[4]

The District's argument that the Association must pursue a unit modification to include in the unit certificated instructors of not-for-credit contract education classes is inconsistent with the presumption and burden established in Peralta, and with the

[4]I reject the District's assertion that this interpretation of the unit description language "all certificated personnel" could lead to non-faculty employees who happen to possess a teaching certificate being included in the unit. The unit described here is a comprehensive, faculty bargaining unit. Employees who are not members of the District's faculty are not members of this unit.

Board's holding in Davis. It is also inconsistent with EERA's express preference for comprehensive teacher bargaining units.

I disagree with the ALJ's conclusion, supported by the majority, that the statement "all certificated personnel paid on an hourly basis" within the unit description "means, obviously, all instructors, paid on an hourly basis, who must have a credential to perform their duties." This interpretation simply does not "read the language of the unit description precisely as it is written." (Peralta.) Instead, it incorrectly infers an exclusion to which the parties did not agree, and which the unit description does not include. The parties did not agree to a bargaining unit described as "all certificated personnel paid on an hourly basis who instruct courses requiring possession of minimum qualifications." Instructors of not-for-credit courses in the contract education program are not among those specifically excluded from this comprehensive faculty bargaining unit. Consequently, in accordance with the precise language of the unit description and the Board's holding in Peralta, they are presumed to be members of the comprehensive faculty bargaining unit. The District has not met its burden of proving that such a unit is inappropriate here.

The District also offers community services program courses which are funded entirely by the students enrolled in them. Instructors of those courses are not required to be certificated or to meet minimum qualifications. The ALJ finds support for his interpretation of the unit description in the fact that the parties have conducted themselves as if instructors in the

community services program are not members of the bargaining unit. I do not agree. The record is unclear as to whether the District employs certificated instructors to teach courses in the community services program. It is clear that the issue of whether community services program instructors are members of the bargaining unit has not been addressed by the parties and is not before the Board at this time. For these reasons, I find the treatment of community services program instructors in the District to be unhelpful in resolving the issue presented by this case.

I note that in its January 5, 1993, memorandum rejecting the Association's demand to negotiate, the District asserts that "contract education faculty are not in the CTA bargaining unit." The record is clear, however, that teachers of credit classes, including instructors of 8 of 11 contract education program courses offered at the time of the hearing, are expressly included in the unit. Accordingly, the District at all times has compensated faculty who teach contract education credit courses as bargaining unit members, paying them in accordance with a CBA salary schedule. This conduct is contrary to the District's January 5, 1993, statement, but is consistent with the interpretation that instructors in the contract education program, which did not exist at the time of the 1982 unit description, may nonetheless be covered by terms of that

description and be members of the bargaining unit.[5]

As concluded above, certificated instructors of not-for-credit courses in the District's contract education program are members of the bargaining unit described in the 1982 unit modification. Therefore, since the District stipulated that it unilaterally changed the compensation level of these bargaining unit members, the District violated EERA section 3543.5(c) when it took this unilateral action. By this same conduct, the District denied the Association its right to represent its members in violation of EERA section 3543.5(b), and interfered with the rights of individual employees in violation of EERA section 3543.5(a).

Remedy

EERA section 3541.5(c) gives the Board the power to issue a decision and order directing the offending party to cease and desist from the unfair practice, and to take such affirmative action as will effectuate the policies of EERA. In a long line of cases, the Board has ordered a make whole remedy for employees

[5]The Association presented testimony that the not-for-credit contract education courses offered by the District meet the same standards as courses in the regular curriculum, requiring instructors to be compensated in the same manner as regular program instructors pursuant to Education Code section 78022(d). I find it unnecessary to make a finding on the comparability of the standards of these courses. The certificated instructors of not-for-credit classes in the contract education program are members of the bargaining unit by the terms of the 1982 unit description. I note, however, that Education Code section 78022(d) clearly indicates the Legislature's intent to extend to instructors of not-for-credit contract education program courses, under certain circumstances, the same wages and benefits provided to regular program faculty through collective bargaining pursuant to EERA.

affected by a unilateral change (Rio Hondo Community College District (1983) PERB Decision No. 292; Oakland Unified School District (1980) PERB Decision No. 126; Compton Unified School District (1989) PERB Decision No. 784.)

The compensation of bargaining unit members instructing not-for-credit courses in the contract education program was unilaterally and unlawfully reduced by the District. Therefore, I conclude that the appropriate remedy is to order the District to make those employees whole for compensation lost as a result of the District's unlawful action, including interest on the lost wages.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

PASADENA CITY COLLEGE CHAPTER OF THE CALIFORNIA TEACHERS ASSOCIATION, Charging Party, v. PASADENA COMMUNITY COLLEGE DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-3271 PROPOSED DECISION (5/27/94)

Appearances: Charles R. Gustafson, Esq., for the Pasadena City College Chapter of the California Teachers Association; Liebert, Cassidy & Frierson by Larry J. Frierson, Esq., for the Pasadena Community College District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A union representing college instructors here contends that a community college district unilaterally changed the rate of pay for unit members teaching not-for-credit classes. The District replies that teaching not-for-credit classes is not bargaining unit work and it therefore had the right to change the payment level unilaterally.

The Pasadena City College Chapter of the California Teachers Association (Union) commenced this action on February 2, 1993, by filing an unfair practice charge against the Pasadena Community College District (District). The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) followed on June 17, 1993, with a complaint against the District.

The complaint alleges that under the past practice unit members were compensated at their regular hourly rates for

teaching not-for-credit classes on an "overload" basis. The complaint alleges that during or about the month of September 1992, the District unilaterally ceased to count the hours as "overload" and compensated unit members at a flat rate far below their hourly rate. As a separate cause of action, the District was accused of refusing to negotiate about the change. These actions were alleged to be in violation of Educational Employment Relations Act (EERA) section 3543.5(c) and, derivatively, (a) and (b).[1]

The District answered the complaint on June 25, 1993, with general and specific denials. A hearing was conducted in Pasadena on March 2, 1994. At the hearing, the District joined a stipulation that it had changed the salaries unilaterally. It defended on the theory that the work at issue was not bargaining

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at Government Code section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

unit work. Both parties agreed that the result here would be dictated by a determination of whether the work in question was that of the bargaining unit. With the filing of briefs, the matter was submitted for decision on May 17, 1994.

FINDINGS OF FACT

The District is a public school employer under the EERA. The Union at all times relevant has been the exclusive representative of the District's certificated employees. The Union first was certified as exclusive representative on December 12, 1977. Originally, the bargaining unit excluded, among others, part-time instructors who did not teach more than 60 percent of a full-time teaching load and all instructors paid on an hourly basis.

Through a series of unit modifications, the bargaining unit was substantially expanded during the first years of collective bargaining. In 1981, instructors of summer inter-session classes were added to the bargaining unit. Then, in the following year, came the change that is key to the resolution of the dispute here. On June 7, 1982, following a consent election, the PERB certified the addition of the following employees to the bargaining unit:

> All certificated personnel paid on an hourly basis; teachers of non-credit and adult education; part-time teachers with assignments of 60 percent or less; and certificated employees holding a temporary contract.

The 1982 election was the product of an agreement between the District and the Union to add certain job groupings to the

bargaining unit. Attached to the election agreement was a description of the bargaining unit which the parties agreed would result from the unit modification. The attachment, which was signed by representatives of both parties, provided that the modified agreement would include:

> Certificated employees holding a contract and status as a "contract" or "regular" employee of the District and who are employed as: Teachers of credit classes, Counselors, Librarians, Teacher/Coordinators, School Nurses, Teachers of credit classes who are in the Optional, Pre-Retirement Program. All certificated personnel paid on an hourly basis; teachers of non-credit and adult education; teachers of Summer Inter-Session; and part-time teachers.

The agreed unit description provided that the modified unit would exclude:

> Superintendent-President, Vice Presidents; Deans; Department Chairpersons; Assistant Department Chairpersons; Supervisors of: Media Services, Computer Resource Center, Community Adult Training, Coordinators of: Manpower Programs, Cooperative Education and Placement, Scholarships and Financial Aids, Printing Services, Parent Education; Psychologists; General Manager-KPCS; Special Projects Development Officer (Grants); Accreditation Officer. All Classified Employees; Consultants; Head Librarian; All Temporary and Substitute Certificated Employees; All Employees who are Management, Supervisory or Confidential within the meaning of the EERA.

Edward Ortell, the Union's long-time chief negotiator, was a participant in the negotiations that led to the consent election agreement. He testified that the parties had an understanding that the unit modification would result in a

"wall-to-wall" certificated unit. The District's representative during those discussions was attorney Larry Curtis, now deceased.

To date, there is one group of instructors that neither party has treated as members of the bargaining unit. These are teachers in the community services/skills program, persons Mr. Ortell described as instructors of "ouija board reading" and "belly dancing." He said the Union had little concern about those types of activities. Persons teaching in the community services program are not required to have credentials or to meet minimum qualifications. Community services courses are funded entirely by the students who enroll in them.

The present dispute grows out of a District decision in 1990 to offer contract education services to business and government in the District's service area.[2] Under a contract education program, the District provides a specific educational program to employees of the contracting entity. The contracting entity pays the full cost of the educational program. No State of California or District funds are used. This contrasts with the regular District instructional program where state funds are provided for both credit and non-credit courses.[3] However, even where contract education courses are regular college courses which provide credit toward a degree, the state provides no funding.

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[2]The Legislature, in 1987, authorized community college districts to provide self-supporting contract education programs. (See Education Code section 78021.)

[3]Credit courses are funded by the state at approximately twice the level of non-credit courses.

This is because contract classes are not open to the public generally but only to students sent by the contracting entity.

In addition to credit classes, contract education classes also may be not-for-credit[4] classes designed to provide students with a particular proficiency needed by the contracting entity. At the time of the hearing, the District was offering 11 contract education courses, eight of which were credit courses counting toward a degree. In the first year of the program, one witness estimated, 90 to 95 percent of the contract education classes were in academic subjects, as contrasted with vocational or occupational subjects.

Contract education classes have included such subjects as proficiency in English, basic arithmetic, business English and computer skills. The classes have been taught in facilities provided by the contracting entity and by the District. The length of the classes has ranged from a few days to a full semester. The dates of instruction have had no necessary relationship with the regular District calendar. Among the contracting entities have been Pacific Bell, the City of Pasadena, Home Savings and Loan and Security Pacific Bank. Other contracting entities have included an engineering company, a school of cosmetology and a data processing company.

To teach the contract education classes, the District has used its regular faculty who have taught the classes in addition

[4]The terms "credit," "non-credit" and "not-for-credit" are defined in Education Code section 78020.

to their ordinary full load. It has employed part-time faculty members who are fully-qualified under state law to teach in a community college. It has employed persons who have the expertise to teach a particular subject but who do not meet the minimum qualifications that would be needed to teach in the regular program. Most of the instructors in the contract education program have been members of the District's regular full-time and part-time staff.

Whether the instructor of a particular contract education course must meet minimum academic qualifications, or have a credential, depends upon the nature of the course. Instructors who teach credit courses must meet minimum qualifications or have a credential, just as in the regular program. However, instructors teaching not-for-credit contract education courses are not required to meet minimum qualifications or have a credential.[5]

The first year of operation for the contract education program was the 1991-92 school year. In that year, regular instructors who taught contract education classes were paid on schedule B-l from the agreement between the parties. This schedule sets the rate for contract instructors teaching credit classes on an overload basis. The schedule is a typical faculty pay schedule whereby an instructor's rate of pay increases

[5]This is in contrast with instructors who teach non-credit courses that are partially funded by the state. Teachers of non-credit courses must meet minimum qualifications or have a credential.

according to years of service and academic degree and/or number of units above a bachelor's degree. On this schedule the rate of an instructor's pay could range from $16.47 to $63 per hour. Part-time instructors hired from the outside were paid a flat fee from the beginning. The classes taught in the contract education program were counted toward the seven hour maximum overload regular instructors are permitted to teach under the agreement between the parties.

In the fall of 1992, the District changed the manner of pay for instructors in the contract education program. In an August 24 memo, Dean Betty R. Kisbey advised faculty members that salaries for teaching not-for-credit classes would be paid on "a flat fee per hour." The reason for the change, she wrote, was to make the contract education program "self supporting, cost effective, fair, and competitive for services requested by employers and agencies in our community." The rate schedule attached to the memorandum set the pay at $25 per hour for a bachelor's degree, $35 per hour for a master's degree and $45 per hour for a doctorate. The District made no change in the rate or method of payment of contract education instructors who teach credit bearing courses.

Subsequently, the Union demanded that the District meet and negotiate about the change in pay for faculty members who teach contract education. District Superintendent-President Jack Scott rejected the demand to negotiate in a January 5, 1993, memo to

Union President Gary Woods. In relevant part, Superintendent Scott's memo reads:

> As you know, contract education faculty are not in the CTA bargaining unit. Consequently, the compensation and working conditions of those employees would not be an appropriate subject for negotiation. If, however, you believe that there are issues which are within the scope of negotiation between the District and PCC/CTA, please provide us with a statement to that effect and it will be considered by the District.

LEGAL ISSUES

1) Is the instruction of not-for-credit courses within the bargaining unit represented by the Union?

2) If it is, did the District make a unilateral change in pay for regular faculty who teach not-for-credit courses and thereby fail to meet and negotiate in good faith?

CONCLUSIONS OF LAW

It is axiomatic that the bargaining obligation of a public school employer extends only to the positions within the bargaining unit. Thus, for a unilateral change to be in violation of the obligation to bargain, it must have "a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." (Grant Joint Union High School District (1982) PERB Decision No. 196, emphasis supplied.) Since an employer has no obligation to bargain about conditions affecting non-unit employees, the employer does not violate the EERA when it acts unilaterally toward non-unit workers.

Where the parties are in dispute about the configuration of the bargaining unit, an employer may test the appropriateness of a bargaining unit by engaging in an outright refusal to bargain. Where the unit is found appropriate, an outright refusal to bargain is per se a failure to negotiate in good faith in violation of EERA section 3543.5(c). (El Monte Union High School District (1982) PERB Decision No. 220; Redondo Beach City School District (1980) PERB Decision No. 140.) Similarly, as here, an employer can test whether certain individual job classifications are within the bargaining unit by making a unilateral change in working conditions. If the job classes are found to be within the bargaining unit, the employer's unilateral change will be a per se failure to negotiate in good faith.

The key to this case, therefore, is the unit description to which the parties agreed in the 1982 unit modification. Following an election, the PERB regional director certified the addition to the bargaining unit of "All certificated personnel paid on an hourly basis; teachers of non-credit and adult education; part-time teachers with assignments of 60 percent or less; and certificated employees holding a temporary contract." There were no teachers of contract education at that time because the District had not yet instituted the program.

The Union contends that the 1982 unit modification had the effect of establishing a "wall-to-wall" bargaining unit. The Union argues that such an intent is apparent from the unit modification language itself. In addition, the Union cites the

testimony of Mr. Ortell who participated in the discussions that led to the unit change. The Union acknowledges that the category of not-for-credit instruction did not exist at that time. It argues, however, that instructors of such classes would be covered by the inclusion in the unit description of instructors of "non-credit" classes[6] and/or "certificated personnel paid on an hourly basis."

The District replies that the unit description documents do not include instructors of not-for-credit classes. The District argues that the inclusion of "all certificated personnel" within the unit does not pertain to instructors of not-for-credit classes. Since there is no requirement that instructors of such classes be certificated, the District continues, they are not included within the unit description. While there are persons holding credentials who teach not-for-credit classes, the District observes, the courses taught were not courses for which employees must be certified.

The PERB previously has considered the meaning of language similar to the unit description here. (See Davis Joint Unified School District (1984) PERB Decision No. 474.) In that case, the Board concluded that the language "all certificated employees excluding those excluded by law," was clearly intended to describe a comprehensive unit. The Board held that the

[6]The contention that the work at issue is "non-credit" and therefore bargaining unit work can be rejected out of hand. "Non-credit" and "not-for-credit" classes are not the same thing. (See Education Code section 78020.) It is clear that the issue here is the instruction of "not-for-credit" classes.

employer's recognition of the union as "the representative agent for certificated employees, excluding those designated as management, supervisory, and confidential employees" described a unit "which includes all certificated teachers." (Ibid.)

A unit description that includes "[a]11 certificated personnel paid on an hourly basis" means, obviously, all instructors, paid on an hourly basis, who must have a credential to perform their duties.[7] What is critical, as the District notes, is not that the individual holds a credential but that a credential is required for the particular duties that the individual performs. Thus, on its face, the language of the unit description would sweep into the unit all instructors who are required to have a credential to teach.

Such a reading is consistent with the testimony of Mr. Ortell, the long-time Union activist who participated in the negotiations that led to the unit modification. Mr. Ortell described the purpose of the final unit modification as the creation of a "wall-to-wall" certificated unit. I find that the 1982 unit modification achieved this goal and in fact created a comprehensive unit of all teaching positions which require a credential.

Until the present dispute, the conduct of the parties was consistent with a joint belief that the unit contained all

[7]All contract instructors are paid on an hourly basis. The dispute that gave rise to this case was about the amount of that hourly pay.

instructional positions required to have a credential. All instructors were treated as unit members except for teachers in the community services/skills program, instructors of "ouija board reading" and "belly dancing," as Mr. Ortell put it. Community services/skills instructors are not obligated to have a credential or meet minimum standards.

Changes in state law largely have rendered anachronistic a reference to "certificated personnel" in a community college unit description. With the enactment of AB 1725 in 1988[8] there no longer is a requirement that community college instructors have credentials. In place of that system, the Legislature established a system whereby community college instructors are required to meet certain specified minimum qualifications.[9] Persons previously employed under the credential requirement are exempt from meeting minimum qualifications so long as their credentials remain valid.

Notwithstanding the change in the law, the language of the unit description easily translates into current terminology. The words "all certificated personnel" mean simply "all personnel required to meet minimum qualifications." The unit thus includes all contract education instructors who are required to meet minimum qualifications.[10] Contract education instructors who are

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[8]Statutes of 1988, chapter 973.

[9]See Education Code section 87355 et seq.

[10]It is clear from the record that contract education instructors who teach credit courses are required to meet minimum qualifications. There was no unilateral change in the rate of

not required to meet minimum qualifications are not included within the unit.

The teaching of not-for-credit courses in the contract education program is not, therefore, bargaining unit work because the instructors are not required to meet minimum qualifications. When the District reduced the pay for teaching the not-for-credit classes it did not make a change affecting bargaining unit work and did not fail to negotiate in good faith. Similarly, the District did not fail to negotiate in good faith when it refused the Union's request to negotiate about the rate of pay for instructors of not-for-credit classes.

The burden of proof for showing a change in the past practice is that of the charging party. (Oak Grove School District (1985) PERB Decision No. 503.) This includes a showing that the change had a generalized effect or continuing impact upon the terms and conditions of employment of "bargaining unit members." (Grant Joint Union High School District, supra, PERB Decision No. 196.) Since the showing of an impact on the bargaining unit is the responsibility of the charging party, I do not find that the District asserted an affirmative defense by raising this issue. I therefore reject the Union's argument that the unit question must be rejected as an untimely raised affirmative defense.

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pay for instructors teaching for credit classes in the contract education program. The District has continued to compensate them in the same manner as before.

Accordingly, the allegation that the District violated EERA section 3543.5(c), (a) and (b) must therefore be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge LA-CE-3271, Pasadena City College Chapter of the California Teachers Association v. Pasadena Community College District, and companion PERB complaint are hereby DISMISSED.

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

filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: May 27, 1994

Ronald E. Blubaugh
Administrative Law Judge