

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



IN THE MATTER OF:

UNIT DETERMINATION FOR TECHNICAL,)
SKILLED CRAFTS, SERVICE AND)
PROFESSIONAL EMPLOYEES OF THE) Case Nos.
UNIVERSITY OF CALIFORNIA (LAWRENCE) SF-RR-1002-H et al.
LIVERMORE NATIONAL LABORATORY)
CASUAL EMPLOYEES) PURSUANT TO)
CHAPTER 744 OF THE STATUTES OF 1978) PERB Decision No. 290-H
(HIGHER EDUCATION EMPLOYER-EMPLOYEE)
RELATIONS ACT))
March 4, 1983

Appearances: Jerrold C. Schaefer, Judith Droz Keyes and Bonnie K. Gibson, Attorneys (Corbett, Kane, Berk & Barton) and James N. Odle, Associate Counsel for the Regents of the University of California; Philip E. Callis, Attorney for the California State Employees Association; Thomas Rankin, Attorney for Laborers International Union, Local 1276; Vincent Harrington, Attorney (Van Bourg, Allen, Weinberg & Roger) for the Printing Trades Alliance and the Alameda and San Francisco Building and Construction Trades Councils.

Before Tovar, Jaeger, Morgenstern and Burt, Members.*

DECISION

The Higher Education Employer-Employee Relations Act (HEERA)¹ became effective July 1, 1979. The legislation granted jurisdiction over HEERA to the Public Employment Relations Board (PERB or Board). Its terms extend the opportunity for collective bargaining to, among others, the

*Chairperson Gluck did not participate in this Decision.

¹The HEERA is codified at Government Code section 3560 et seq. All statutory references hereafter are to the Government Code, unless otherwise indicated.

University of California (UC) and its employees at the Lawrence Livermore National Laboratory (LLNL or laboratory). As an initial step in the representational process, PERB has the authority to determine the appropriate representational units for employees of UC.²

Pursuant to rules and regulations adopted by the Board,³ various employee organizations filed petitions with the Board describing the units they believed to be appropriate. Parties to the instant case then participated in unit determination hearings conducted by PERB which resulted in decisions creating appropriate bargaining units including, among others, LLNL technical, skilled crafts, service and professional units.⁴

2subsection 3563 of HEERA provides, in pertinent part:

This chapter shall be administered by the Public Employment Relations Board. In administering this chapter the board shall have all of the following rights, powers, duties and responsibilities:

(a) To determine in disputed cases, or otherwise approve, appropriate units

³PERB rules and regulations regarding HEERA are codified at California Administrative Code, title 8, section 31001 et seq.

⁴Unit Determination for Technical Employees of the University of California (9/30/82) PERB Decision No. 241-H; Unit Determination for Skilled Crafts Employees of the University of California (9/30/82) PERB Decision No. 242-H; Unit Determination for Service Employees of the University of California (9/30/82) PERB Decision No. 245-H; Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California (9/30/82) PERB Decision No. 246-H.

During the unit determination hearings, exclusionary issues were raised by the parties with respect to the alleged casual status of several thousand employees. The hearing on these exclusionary issues began on July 14, 1982. See Unit Determination for Employees of the Regents of the University of California (9/4/81) PERB Order No. Ad-114-H and (4/20/82) PERB Order No. Ad-114a-H.

On the first day of the hearing, evidence was taken on the status of alleged casual employees at the laboratory. The record reveals that the parties agreed to exclude employees who were UC students and whose employment was contingent upon their continued status as students.⁵ No other resolution on the status of alleged LLNL casual employees was reached. The Board

⁵The stipulation was adopted in Unit Determination for Employees of the Regents of the University of California (8/4/82) PERB Order No. Ad-114b-H. It reflects the limited statutory exclusion for students found in subsection 3562(f) of HEERA, which provides in pertinent part:

. . . The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter.

Since the employer does not argue that this language applies to other than UC students, we find it unnecessary to decide that issue here. The effect of the stipulation is to exclude those students in the Department of Applied Sciences at the UC Davis

herein determines the status of the remaining casual employees in the various LLNL units.

DISCUSSION

Casual employees are those who, due to their sporadic or intermittent relationship with the employer, lack a sufficient community of interest with regular employees to be included in the representational unit. Unit Determination for Employees of the California State University and Colleges Pursuant to Chapter 744 of the Statutes of 1978 (Higher Education Employer-Employee Relations Act) (9/22/81) PERB Decision No. 173-H; citing Mission Pak Co. (1960) 127 NLRB 1097 [46 LRRM 1161]. In considering the status of alleged casual employees and the appropriateness of excluding them from the various LLNL units, we are required to consider the following criteria set forth in section 3579 of HEERA which, in pertinent part, provides:

(a) In each case where the appropriateness of a unit is an issue, in determining an appropriate unit, the board shall take into consideration all of the following criteria:

(1) The internal and occupational community of interest among the employees, including, but not limited to, the extent to which they perform functionally related services or work toward established common goals, the history of employee representation with

campus who work at LLNL full-time during the summer and half-time during an academic year. Employment of these students is contingent upon their remaining students in good standing in the Department of Applied Sciences at Davis.

the employer, the extent to which such employees belong to the same employee organization, the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements, and the extent to which the employees have common supervision.

In addition to the above statutory criteria, the Board has consistently held, in accordance with other jurisdictions, that such things as qualifications, job function, compensation, hours of work, fringe benefits, integration of work function, and interchange between employees are relevant in determining community of interest.⁶ As stated in Monterey Peninsula Community College District, supra;

. . . community of interest is not determined by going down a check list of these factors. The point of the comparison is to reveal the interests of employees and ascertain whether they share a substantial mutual interest in matters subject to meeting and negotiation. (citation omitted) The interests of included employees must be mutual not distinct, and substantial not tenuous. Thus, employees may be excluded from a particular unit either because their interests are separate and apart from those of the employees in that particular unit, (citation omitted) or because their interest in negotiable matters subject to the control of the employer is so insubstantial that they do not share mutual interests with other unit employees. (PERB Decision No. 76 at p. 13.)

⁶Hartnell Community College District (1/2/79) PERB Decision No. 81; Monterey Peninsula Community College District (10/16/78) PERB Decision No. 76. See also Kalamazoo Paper Box Corp. (1962) 136 NLRB 134 [49 LRRM 1715].

The casual employee controversy at LLNL centers primarily around two broad categories of employees. Those two classes are indeterminate-time employees and temporary employees. Within each category are employees with several different positions and interests which must be individually examined.

Indeterminate-Time Employees

Indeterminate-time employees are those who are hired by LLNL to work on an intermittent basis during peak workloads or when there is a need for their specialized skills. Many indeterminate-time employees are former LLNL employees who have retired. Others are college students who have worked as full-time temporary employees in the summer and thereafter as indeterminate-time employees during school breaks and holidays. Still other indeterminate-time employees are recruited from the scientific public at large as the need arises.

The first category of LLNL indeterminate-time employees is comprised of students.⁷ These employees were originally hired into temporary summer positions.⁸ Students unable to complete their projects in the summer sometimes return to finish their research at the laboratory whenever they are free from their academic duties. Upon return to the laboratory,

⁷The exclusionary language of HEERA subsection 3562(f) for student employees does not apply to these employees since their employment is not contingent upon their continued status as students.

⁸Their status as temporary employees is discussed, infra.

they are reclassified as indeterminate-time employees. It is unclear from the record whether the return of these students to the laboratory is always motivated by career goals or is simply incidental to their educational objectives. However, it appears that most students return to the laboratory for the purpose of completing their academic projects. We therefore conclude that they should be excluded from the units.

Undoubtedly, these students have interests in wages, hours and working conditions that overlap with those of regular full-time employees. Nevertheless, because their primary focus is on education rather than on vocation, we conclude that their interest in bargaining matters is so limited and insubstantial as to warrant their exclusion from the units.

The second category of LLNL indeterminate-time employees is comprised of individuals who are recruited from the scientific community at large to work in the laboratory when there is a demand for extra employees. Most of these employees are hired in "floater" positions of either short or intermittent duration. They typically have the same job titles, rates of pay and working conditions as full-time employees. Their benefits differ in that they are not eligible to participate in a retirement system, and that they accrue vacation, sick leave and holiday pay only if they should happen to work half the working hours of a given month.

The circumstances here are roughly analogous to those found in San Diego Unified School District (6/25/81) PERB Decision

No. 170. In San Diego the question was whether to include part-time bus drivers in a unit of regular full-time drivers. All of the drivers worked at the same location, received the same training, were under the same supervision (except the trainees), and performed the job of transporting pupils. All drivers were paid at the same rate, although part-time drivers received no fringe benefits, sick leave or vacation. The Board found that the interests of part-time and full-time bus drivers overlapped so substantially that they indisputably shared a community of interest. The same logic applies in the case at hand. When the overall function of these indeterminate-time employees is compared with that of full-time LLNL employees, we find no significant differences. The fact that their fringe benefits differ does not negate the fact that many of these benefits are legitimately the subject of negotiation and that the two groups have a shared mutual interest in the bargaining process that determines how these benefits are awarded.

Los Rios Community College District (6/9/77) EERB Decision

No. 18⁹ and Redwood City Elementary School District

(10/23/79) PERB Decision No. 107. Since these indeterminate-time employees share with full-time employees a substantial mutual interest in matters subject to meeting and

⁹Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

negotiation, we conclude that it is appropriate to include them in the various LLNL units.

The third, and perhaps largest, category of indeterminate-time employees at LLNL is retirees. At the time of the exclusionary hearing the status of these employees was actively contested. The parties, however, in their post-hearing briefs, mutually agree that retirees should be excluded from the various LLNL units.¹⁰ Although not formalized in a written agreement, the employee organizations now apparently would stipulate to the exclusion of retirees. The Board has held that it will accept a stipulation in a unit determination matter only when the stipulation does not contravene the Act or established Board policies. Centinela Valley Union High School District (8/7/78) PERB Decision No. 62.

Upon examination of the record, it appears that indeterminate-time retired employees have the same benefits and working conditions as the indeterminate-time employees recruited from the scientific community discussed above. There appears to be a single difference in that, as a result of their

¹⁰In unit determination matters the Board has held that a party in its post-hearing brief may urge any position or alternative it desires on the basis of the record as a whole. Re: Joint Hearing Order (7/16/80); HEERA - UC Unit Determination (9/29/80) PERB Order No. Ad-101-H. Inasmuch as the employee organizations have reviewed the record and now concur that retirees do not share a sufficient community of interest with full-time career employees, we recognize this as their final position.

past employment at LLNL, all of the retirees receive pension and/or social security benefits. The retirement programs restrict retirees' work eligibility to 90 days of employment in any one year at the risk of losing retirement benefits. However, the record in this case as to this difference is not sufficient to distinguish the two types of indeterminate-time employees and exclude the retirees from the unit. Indianapolis Glove Co. v. NLRB (6th Cir. 1968) 400 F.2d 363 [69 LRRM 2261]; Holiday Inns (1969) 176 NLRB 939 [71 LRRM 1333]; Noesting Pin Ticket Co. (1974) 214 NLRB No. 153 [87 LRRM 1588].

Although a stipulation to the exclusion of retirees cannot be approved based on the current record, the Board is reticent to include retirees in the units when the parties have expressed their preference for exclusion. Thus, the Board construes the parties' positions as expressed in their briefs as tantamount to an amendment of their initial unit petitions to exclude retirees. As such, although the parties' stipulation regarding unit placement cannot be approved, the Board will accept the parties' constructive deletion of retirees from their petitions. Thus, indeterminate-time retirees are not included in the appropriate unit.

Temporary Employees;

A temporary employee is one who is hired to work a fixed term of less than one year. Most temporary employees are participants in one of a number of special laboratory academic

training programs.¹¹ The parties in their post-hearing briefs now express a mutual agreement that employees in these programs should be excluded from the various LLNL units. In accordance with Centinela, supra, we look to the record for support of this position.

The record reveals that many of the temporary employee positions at LLNL are filled by student and faculty employees who are hired for the primary purpose of providing them with an opportunity to enhance either their education or teaching abilities. One such program employing temporary employees is the student/faculty summer program. These employees, who must be college or university students or faculty members, are employed for a summer in positions related to their field or course of study. They are placed in the same title code as full-time employees and are paid according to the same salary range. While the laboratory uses this program in part as a recruiting device, there is no promise of continued employment after the summer ends.

A similar program using temporary employees is the Plant Engineering Experience Program (PEEP). Here, the laboratory's plant engineering department employs high school students to

¹¹Students in these programs are not covered by the stipulation adopted in PERB Order Ad-114b-H. (See footnote 5.) The record reflects that nearly all individuals in these programs are not University of California students.

work part-time during the school year. Employees in the PEEP program receive a lower wage rate than other LLNL employees, and their employment is contingent upon their remaining high school students.

Under the laboratory's Office of Equal Opportunity (OEO) several programs exist which employ students on a temporary basis. One such program is the Student Technical Experience Program (STEP). Here, local high school and non-UC college students are hired to work full-time at the laboratory during the summer and part-time during the academic year. Employees at STEP are paid at a special rate and their employment is contingent upon their continued status as students.

Another OEO program is one which involves the summer employment of faculty members from colleges and schools which have a high percentage of minority, female, or handicapped students. The purpose of the OEO Summer Faculty Program is to provide these instructors with supplemental, specialized scientific knowledge which they can use in teaching at their institutions.

Finally, a similar OEO program is the Summer Student Internship Program (SSIP). The SSIP program employs students during the summer from colleges and universities which have a high percentage of minority, female or handicapped students. The purpose of the program is to give these students an opportunity to obtain additional experience in the fields of science and engineering.

At the core of each of the above-described programs is an educational purpose. Each program is designed for one of two reasons: (1) to give students or faculty an opportunity to improve their academic skills, or (2) to provide students with employment and encouragement to stay in school. There is no evidence that any of these programs provides an expectation of continued employment for the student or faculty member who participates in them. Indeed, those faculty members who participate in the laboratory's summer programs can have no expectation of continued employment with LLNL for, by definition, they would be ineligible for summer employment if they did not retain their positions elsewhere during the academic year. We conclude, therefore, as do the parties, that participants in the above programs should not be included in the bargaining units. Their divergent employment interests and tenuous employment relationship with the laboratory require a finding that no community of interest exists between them and regular, full-time career employees.

A second group of LLNL temporary employees is comprised of women who participate in the Women's Re-Entry Program. Once again, all parties now indicate in their briefs that these employees should be excluded from the LLNL units. The record supports this position.

The Women's Re-Entry Program is administered by the laboratory's OE0 office and is designed to retrain women who

have been out of the work force for an extended period of time. The program's goal is to provide women with the skills needed to reenter the labor market and once again find employment. The laboratory hires these women at 50 percent time for a period of six months. The six-month period cannot be extended. Participants in this program may not be rehired by the laboratory as regular employees after the six-month period.

The record reveals that during their employment these women work alongside and under the same supervision as regular, full-time employees. This alone, however, does not demonstrate that these women have a substantial and continuing interest in subjects of negotiation that concern regular employees. Their position is similar to that of those temporary CETA trainees who were deemed casual employees in New Haven Unified School District (3/22/77) EERB Decision No. 14. Because of the limited nature of the program, and its emphasis on retraining women for nonlaboratory employment, exclusion of these employees is appropriate.

The third category of temporary employees at LLNL is generally made up of individuals who are hired for a period of less than one year to perform a task which for one reason or another requires additional help to complete. The UC argues that because these employees are hired for a limited definite term, they have neither a sufficiently significant employment

interest nor a sufficient community of interest with bargaining unit employees to warrant their inclusion in the units. The UC cites National Labor Relations Board authority for the proposition that employees who lack a reasonable expectation of continued future employment should be excluded from bargaining units.

Upon examination of the record we find that temporary employees who are hired in this capacity do share a sufficient community of interest with employees in the bargaining unit, and do have a reasonable expectation of continued employment. Temporary employees in these positions do the same work as regular employees, have the same supervisors, work the same hours, are paid at the same rate as regular employees in comparable classifications, and generally work under the same physical conditions. Further, temporary employees are subject to performance evaluations and disciplinary procedures.

We find unpersuasive UC's argument that temporary and regular employees do not share a community of interest because they receive and accrue sick leave, holiday pay and vacation at different rates. The determination as to whether these temporary employees share a community of interest with others in the unit is not based on a threshold requirement that they receive benefits which are roughly equivalent, but rather that there exists a cohesive commitment to and mutual interest in those matters of negotiation relevant to the apportionment of

benefits. Redwood City Unified School District, supra, PERB Decision No. 107. There is nothing in the record which persuades us that inclusion of these temporary employees will undermine the basic community of interest which defines the units.

Further, we find unpersuasive the argument that these temporary employees do not have a reasonable expectation of continued employment. The record reveals that there is no prohibition in the LLNL's policies and procedure which prevents the rehiring of a temporary employee after the appointment expires. Further, extensions of up to one year on a temporary appointment are possible. The extent to which this happens is unclear. Yet, since the potential is there, we find that temporary employees may hold, to one degree or another, some expectancy in continued employment.

We conclude, therefore, that temporary employees who are hired in a position for less than one year, and who are not a part of the above mentioned academic or retraining programs, should be included in the units.

ORDER

Based upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

(1) For the reasons stated in the foregoing Decision, employees who are designated by the Lawrence Livermore National Laboratory (LLNL) as indeterminate-time employees shall be

included in the established LLNL units, except those who are students or retirees.

(2) For the reasons stated in the foregoing Decision, employees who are designated by the Lawrence Livermore National Laboratory as temporary employees shall be included in the established LLNL units, except those who are hired directly into the following laboratory programs: Student/Faculty Summer Program; Plant Engineering Experience Program; Student Technical Experience Program; OEO Summer Faculty Program; Summer Student Internship Program; and the Women's Re-Entry Program.

(3) Any technical errors in this Order shall be presented to the director of representation who shall take appropriate action thereon in accordance with this Decision.

By the BOARD