STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COLLEGE OF THE REDWOODS FACULTY ORGANIZATION,	)	
Charging Party,	)	Case No. SF-CE-1583
v.	)	PERB Decision No. 1047
REDWOODS COMMUNITY COLLEGE DISTRICT,	)	May 26, 1994
Respondent.	)	

Appearances: Law Offices of Robert J. Bezemek by Katherine J. Thomson, Attorney, for College of the Redwoods Faculty Organization; School and College Legal Services by Robert J. Henry and Patrick D. Sisneros, Attorneys, for Redwoods Community College District.

Before Blair, Chair; Caffrey and Garcia, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Redwoods Community College District (District) to the proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District unilaterally and without notice to the College of the Redwoods Faculty Organization (CRFO) adopted and implemented a policy which limited the teaching hours of temporary instructors who were also classified employees of the District in violation of section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).[1]

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

The Board has reviewed the entire record in this case, including the proposed decision, the filings of the parties and the hearing transcript, and hereby reverses the ALJ's proposed decision and dismisses the unfair practice charge in accordance with the following discussion.

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540.1(k). CRFO is an employee organization and the exclusive representative of faculty employed by the District within the meaning of section 3540.1(d) and (e).[2] Classified

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> It shall be unlawful for a public school employer to do any of the following:
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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.

[2]EERA section 3540.1 states, in pertinent part:

> (d) "Employee organization" means any organization which includes employees of a public school employer and which has as one of its primary purposes representing those employees in their relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf.
>
> (e) "Exclusive representative" means the employee organization recognized or certified

employees are part of a bargaining unit exclusively represented by the California School Employees Association (CSEA). Temporary instructors are part of the unit represented by CRFO. The District and CRFO are parties to a collective bargaining agreement (CBA) which was in effect from September 1, 1991 through August 31, 1992.

The District produces a schedule of classes for the upcoming academic year, including both the Fall and Spring semesters, approximately six months before the beginning of that academic year. The schedule of classes lists courses the District anticipates it will offer based on its experience with course demand, the sequential nature of certain courses, and the availability of resources. The District employs part-time, temporary instructors, many of whom have served in that capacity for several years, to instruct in some of these courses. Part-time, temporary instructors are hired by the District on a semester-by-semester basis. Decisions on the hiring of these instructors are made by the District's division chairs (Science, Mathematics and Engineering Division, for example), in consultation with the department chairs within each division. One department chair testified that he distributed the

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> as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer.
>
> (k) "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

anticipated course instruction load among the part-time, temporary instructors in such a way as to balance the workload as evenly as possible. Another department chair testified that the hiring of temporary instructors had previously been restricted by a District policy which limited a temporary instructor to teaching no more than seven instructional days for an entire year. In other words, if a temporary instructor was hired to teach classes five days one semester, that instructor could be hired to teach no more than two days the next semester.

Some courses scheduled to be taught by part-time, temporary instructors have been cancelled by the District at the beginning of a semester based on financial considerations including the level of enrollment of any particular class.

Prior to the Fall semester of 1992, the District hired full- and part-time classified employees on a semester-by-semester basis to serve as part-time, temporary instructors, subject to the limitations contained in the Education Code and the CBA. Education Code section 87482.5 states, in pertinent part:

> Notwithstanding any other provision of law, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee. . . .

The CBA defines a full-time teaching load in the District as 22.5 teaching load units (TLU) per week. Each classroom instructional hour per week generally equals 1.5 TLUs, with the exception of laboratory class hours which equal 1 TLU. The CBA states that

part-time instructors in the District will not teach more than 60 percent of a full-time teaching load, or 13.5 TLUs per semester.

The parties' CBA also includes a provision (Article III, Section 3.10) that the District and CRFO will negotiate to designate certain positions as "Permanent Part-Time." The stated purpose of the provision is to provide permanency of employment to the part-time faculty who occupy the designated positions. The provision also states that it "is not intended to grant any rights to temporary certificated employees as that term is used in the California Education Code" unless they are provided permanency of employment under the terms of the provision.

In late 1991, the District became aware of a case involving the Monterey Community College District, which the District concluded subjected its faculty to the overtime provisions of the U.S. Fair Labor Standards Act (FLSA). The District concluded that FLSA required that part-time, temporary instructors whose combined work hours as instructors and as classified employees of the District exceeded the equivalent of 40 hours per week, had to be compensated at premium, overtime rates of pay for those hours in excess of 40 hours per week. Concerned about the additional cost involved, as well as the potential inequity of paying certain part-time, temporary instructors (those who were also classified employees) at a higher rate than other temporary instructors, the District considered several options. Among them were paying the premium, overtime pay to some part-time, temporary instructors; eliminating the practice of employing

classified employees as part-time, temporary instructors; and limiting the instruction hours for which classified employees could be hired to avoid exceeding the equivalent of a full-time workload.

Cathy Dellabalma (Dellabalma), Director of Personal Services for the District, discussed the matter and the options the District was considering with CSEA. CSEA expressed no concern with the District's options as they affected classified employees.

Dellabalma also discussed the issue with Mike Wells (Wells), CRFO President, in a December 1991 telephone conversation.[3] Dellabalma believed CRFO would share the District's concern over the potential inequity of paying some part-time, temporary instructors (those who were also classified employees) at a higher rate than others performing comparable duties. Wells, however, indicated that CRFO would not be concerned since he believed the part-time, temporary instructors were generally underpaid. Dellabalma did not indicate to Wells which option the District was likely to pursue.

After discussion of the options by the District, Dellabalma issued a memo to the District's management and supervisory personnel on February 18, 1992. The memo explained the potential impact of FLSA on part-time, temporary instructors who also served as classified employees of the District. The memo

[3]Wells testified that he had no recollection of the conversation.

announced that beginning with the Fall 1992 semester, the combination of classified employment hours and temporary-instructor hours could not be allowed to exceed a full-time workload for District employees. The memo indicated how the work hours of classified employees and the TLUs of those employees hired as part-time, temporary instructors would be combined to determine if a full-time workload had been exceeded. The memo indicated that "No full-time classified employee would be able to teach, unless and until their regular assignment has been reduced."

Marilyn Renner (Renner), a permanent, half-time classified employee who also taught science as a part-time, temporary instructor, discussed her concerns regarding the District's policy with CRFO and Wells. Renner met with Dellabalma on May 11, 1992, to discuss the new policy. Dellabalma indicated that the District could not handle the financial obligation of paying some of its temporary instructors at premium overtime rates.

On May 29, 1992, Wells wrote the District asking that it reconsider the policy. On July 30, 1992, Wells wrote to Dellabalma arguing that the policy should be modified or rescinded. Wells suggested several options that could allow classified employees to be hired for more part-time, temporary instruction hours than through the approach adopted by the District. He also demanded a modification of the policy by August 6 or CRFO would file "a Fair Labor Practices violation

suit." Dellabalma responded on August 6 that the deadline given by CRFO provided inadequate time for the District to consult its legal counsel.

On November 12, Renner, by then a representative of CRFO, met with Dellabalma again seeking modification of the policy. Dellabalma indicated she would consult with other District representatives, and subsequently advised Renner that the District would not modify the policy.

Prior to the change in policy Renner taught up to 13.5 TLUs per semester of biology and plant science courses. After adoption of the new policy, Renner, a permanent, half-time classified employee, could no longer teach 13.5 TLUs. Consequently, the District hired another part-time, temporary instructor to teach a class Renner would have been hired to teach if not for adoption of the new policy.

Judith Hinman (Hinman) is a permanent, half-time classified employee of the District. Prior to the change in policy and prior to the beginning of the Fall 1992 semester, Hinman had been scheduled to teach 12.5 TLUs in the Fall 1992 semester and 13 TLUs in the Spring semester. After the policy was adopted, Hinman actually taught 10.5 TLUs in both the Fall 1992 and Spring 1993 semesters. Other instructors were hired to teach the classes Hinman would have been hired to teach if not for adoption of the new policy.

David Tralle (Tralle) is a full-time classified employee of the District who served as a part-time, temporary instructor for

six years prior to the change in policy. Following the change Tralle was unable to reduce his classified work hours to accommodate any teaching assignment and, therefore, did not teach in the Fall 1992 semester. Tralle assisted the District in selecting another instructor to teach the courses Tralle would have been hired to teach if not for the adoption of the new policy.

Kerry Mayer (Mayer) is a full-time classified employee of the District. Prior to the change in policy and prior to the beginning of the Fall 1992 semester, Mayer had been scheduled to teach two public speaking classes. Following the change, Mayer was unable to reduce her classified work hours to accommodate any teaching assignment and, therefore, did not teach in the Fall 1992 semester. Other instructors were hired to teach the two classes Mayer would have been hired to teach if not for the adoption of the new policy.

CRFO filed its unfair practice charge on August 18, 1992. After investigation of the charge, on October 30, 1992, the PERB general counsel issued a complaint alleging that the District violated EERA section 3543.5(a), (b) and (c) when it adopted its policy with regard to the hiring of part-time, temporary instructors who were classified employees of the District without giving notice to and providing CRFO the opportunity to negotiate concerning the new policy.

The District filed its answer to the complaint on

November 20, 1992, denying any violation of EERA asserting, among other things, that CRFO had failed to allege facts sufficient to demonstrate violations of EERA section 3543.5(a), (b) and (c), and that CRFO was "attempting to claim a right to negotiate on a hiring decision."

A PERB-conducted settlement conference did not result in settlement, and a formal hearing was conducted by a PERB ALJ on March 29, 1993. In his proposed decision, the ALJ found that the District's policy constituted a limitation on the hours certain part-time, temporary instructors could teach. Since the subject of work hours is clearly within EERA's scope of representation, and part-time, temporary instructors are entitled to the rights guaranteed by EERA, the ALJ concluded that the District had the obligation to give notice to CRFO and offer it the opportunity to negotiate the decision to limit work hours for those instructors. Finding that the District had failed to fulfill this obligation, the ALJ concluded that it had violated EERA section 3543.5(a), (b) and (c) after rejecting the various arguments and defenses raised by the District.

POSITIONS OF THE PARTIES

CRFO alleges that the District unilaterally adopted a policy limiting the teaching hours available to part-time, temporary instructors who are classified employees of the District.

The District responds that CRFO is seeking to negotiate a hiring decision which is outside of the scope of representation. The District argues that the instructors in question are

temporary employees within the meaning of Education Code section 87482.5,[4] and that Education Code section 87665 provides that:

> The governing board may terminate the employment of a temporary employee at its discretion at the end of a day or week, whichever is appropriate. The decision to terminate the employment is not subject to judicial review except as to the time of termination.

Since temporary employees have no continuing rights to employment, the District argues that it is not required to negotiate over its hiring decisions affecting part-time, temporary instructors in future semesters. The District further asserts that part-time, temporary instructors have the status of applicants for teaching positions in subsequent semesters for which they have not yet been hired and, therefore, have no standing to allege a violation of EERA rights associated with employment for which they have not yet been hired.

The District also offers other arguments, including: that CRFO is attempting to represent both classified and certificated employees of the District in violation of EERA section 3545(b)(3); that CRFO has alleged conduct that arguably represents contract violations beyond PERB's jurisdiction under EERA section 3541.5(b) because at most the District's conduct is an isolated contract breach; that CRFO failed to request negotiations over the District's action; and, for the first time in its post-hearing briefs, that CRFO has waived its right to

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[4]Ante, page 4.

negotiate regarding the subject of its unfair practice charge by the terms of the CBA in effect between the parties.

CRFO disputes the District's assertion that the case involves the District's decisions to rehire or not rehire. CRFO reiterates that the instant case involves "allowable hours once hired." CRFO argues that the Board's finding in The Regents of The University of California (1983) PERB Decision 359-H (University of California) is analogous to the instant case. The Board held in that case that the University had violated the Higher Education Employer-Employee Relations Act (HEERA) when it unilaterally altered its policy governing the number of years for which full-time lecturers could be rehired on an annual basis because it affected a present term and condition of employment.

CRFO also asserts that it is representing only part-time, temporary faculty members in its unfair practice charge; that the complained of conduct is not a mere isolated contract breach and is, therefore, properly within PERB's jurisdiction (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant Joint UHSD)); and that CRFO did not fail to request negotiations over the District's action. CRFO also contends that the District's offering of a contractual waiver defense is untimely citing Beverly Hills Unified School District (1990) PERB Decision No. 789 in which the Board refused to consider an affirmative waiver defense raised late in the formal hearing in order to assure a fair litigation process.

DISCUSSION

EERA section 3543.5(c) requires an employer to meet and negotiate in good faith with an exclusive representative. A preimpasse unilateral change in an established policy affecting a matter within the scope of representation is a per se refusal to negotiate. (Grant Joint UHSD, supra, PERB Decision No. 196; Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro Valley USD); 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 charging party 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 amounts to a change of policy (i.e., has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint UHSD.)

An employer makes no unilateral change, however, where an action the employer takes does not alter the status quo. "[T]he 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment." (Pajaro Valley USD.)

A review of the CBA in effect between the parties reveals that they have agreed that part-time, temporary instructors will not be assigned to teach courses in excess of 60 percent of the 22.5 TLUs per semester (13.5 TLUs) which constitute a full-time teaching load (Article III, Section 3.9.1). While this provision sets a maximum TLU level for which part-time, temporary instructors will be hired, it does not establish that the parties have agreed those instructors will be hired for any minimum level, or for any continuing level from semester to semester.[5] Also, the CBA contains a provision in which the parties have agreed to negotiate to determine which part-time positions would be designated as "Permanent Part-Time" (Article III, Section 3.10.1). The intent of the provision is "to provide permanency of employment" to the instructors who fill those positions. However, the part-time, temporary instructors affected by the District's new policy had not been provided permanency of employment in accordance with this provision.

Therefore, we conclude that the parties' CBA does not contain provisions governing the conduct complained of by CRFO which were breached or altered by the District when it adopted a policy affecting the hiring of part-time, temporary instructors in future semesters.

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[5]CRFO's statement in its post-hearing reply brief that it seeks "to preserve the right that any part-time, temporary faculty member [has] to 60% of the load of a full-time faculty member" fails to cite the origin of this alleged "right."

We now assess whether the District altered its established past practice when it adopted this policy. Initially, the Board notes that the parties stipulated at the outset of the hearing that part-time, temporary instructors are hired "on a semester-by-semester basis." Also, the record indicates that the District produces a schedule of classes for the upcoming academic year approximately six months before the beginning of the year which lists the courses the District anticipated it would be offering. The District schedules instructors who it anticipates will be teaching those courses. While these actions indicate the potential assignments of the District's part-time, temporary instructors, it is clear that they are hired semester by semester based on a variety of academic, management and financial considerations. Among those considerations are the sequential nature of certain courses and series of courses, the level of enrollment and other cost-related factors of certain courses, and the desire to evenly distribute the instructional workload among the part-time, temporary instructors who are hired. These considerations have prompted the District to cancel scheduled courses at or near the beginning of a semester, thereby eliminating the need to hire part-time, temporary instructors to teach them. We conclude that the District's established practice is to make decisions involving the semester-by-semester hiring of part-time, temporary instructors based on its academic, management and financial considerations.

In this case, the District applied these considerations in adopting a policy affecting the hiring of part-time, temporary instructors in future semesters. The policy was designed to avoid what the District perceived as the additional cost and potential inequity of hiring certain part-time, temporary instructors, those who were also classified employees of the District, at a higher salary than others. The Board concludes that the District's action was consistent with its established past practice of applying academic, management and financial considerations in its semester-by-semester hiring decisions involving part-time, temporary instructors.

CRFO argues that a policy affecting part-time, temporary instructors "which limits their hours once hired is not a policy regarding hiring, but a policy regarding hours." In support of this argument, CRFO cites University of California asserting that the Board found in that case that a policy reducing the number of years full-time lecturers could be annually rehired was within the scope of representation because it affected a present term and condition of employment.

CRFO's reliance on University of California is misplaced. In that case, the University unilaterally changed provisions of its formal Academic Personnel Manual and reduced the time period over which lecturers, who were full-time employees, were considered for "security of employment" designation, a status akin to tenure. The Board determined that the University's unilateral action violated HEERA because it changed the

conditions and expectations surrounding the renewal of contracts and potential advancement to permanent, continuing employment status for full-time University lecturers.

The instant case is clearly distinguishable. Rather than full-time lecturers eligible for permanency of employment, this case involves part-time, temporary instructors who have no rights to continuing employment by terms of the CBA and the Education Code. Also, the Board specifically noted in University of California that the University's hiring decisions with regard to full-time lecturers were influenced by "class or program changes, poor performance or financial exigency." However, the Board concluded that the change in the policy in question in that case was not based on those considerations. In this case, the District's change in policy was based precisely on these types of considerations and was consistent with the District's established practice.

Furthermore, CRFO's assertion that the District adopted a policy limiting the hours of part-time, temporary instructors once hired is not persuasive. The District applied financial and management considerations and adopted a hiring policy,- specifically, a policy with regard to the hiring of part-time, temporary instructors in future semesters. The Board has long held that the organization and distribution of work, including decisions involving the hiring and laying off of employees, are matters of fundamental management concern which must be left to

the employer's prerogative. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223; see also Mt. Diablo Unified School District (1983) PERB Decision No. 373.)

In sum, the District's adoption of a policy affecting the hiring of part-time, temporary instructors in future semesters was consistent with its established past practice, and represented an exercise of its management prerogative concerning hiring, organization and assignment of work. Therefore, the Board finds that the District did not violate EERA section 3543.5(a), (b) and (c) when it adopted that policy without negotiating with the College of Redwoods Faculty Association. Accordingly, it is unnecessary to consider the alternative arguments raised by the District appeal.[6]

ORDER

The complaint and unfair practice charge in Case No. SF-CE-1583 is hereby DISMISSED.

Chair Blair joined in this Decision.

Member Garcia's dissent begins on page 19.

[6]PERB's jurisdiction in this case is clear. In Lake Elsinore School District (1987) PERB Decision No. 646 and Los Angeles Unified School District (1990) PERB Decision No. 860, the Board held that EERA section 3541.5(a)(2) denies PERB jurisdiction if the complained of conduct is arguably prohibited by provisions of the parties' CBA, and the CBA provides for a grievance procedure covering the issue and culminating in binding arbitration. These conditions are not met in this case, and neither party asserts that they are. The CBA provisions cited in Member Garcia's dissent do not arguably prohibit the conduct complained of in this case; CRFO does not have standing to file a grievance in its own name under the CBA grievance procedure (see Inglewood Unified School District (1990) PERB Decision No. 821); and the grievance procedure does not culminate in binding arbitration. For any and all of these reasons, the case may not be deferred and is properly before the Board.

GARCIA, Member, dissenting: The Public Employment Relations Board (PERB or Board) does not have authority to issue a decision in this case because the dispute is subject to an unexercised grievance procedure under the agreement between the parties. Therefore, I would reverse the administrative law judge's (ALJ) decision, remand the case for lack of PERB jurisdiction, and order the case to be placed in abeyance pending exhaustion of the contractual grievance procedure.

DISCUSSION

Jurisdiction

PERB does not have jurisdiction over matters involving conduct prohibited by a provision of the parties' collective bargaining agreement (CBA) until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted either by settlement or by binding arbitration.[1] As a matter of initial inquiry in this case, therefore, the Board must determine whether the College of the Redwoods Faculty Organization's (CRFO) charge of an unfair labor practice through a unilateral change to a negotiable term or condition of employment is based on facts or conduct which would be reviewed under a mutually agreed upon grievance process in the parties' contract. We considered the entire record in accord with PERB

[1]Educational Employment Relations Act (EERA) section 3541.5(a)(2); PERB Regulation 32620(b)(5); Lake Elsinore School District (1987) PERB Decision No. 646.

Regulation 32320 and found that the grievance process covers the matter at issue.[2]

Looking at the CBA introduced into the record, we find that in totality the contract provisions contained in Article III, section 3.10.1 (wages and working conditions for permanent part-time positions);[3] Article X, sections 10.1 through 10.6

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[2]PERB Regulation 32320 reads, in pertinent part:

> (a) The Board itself may:
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> (1) Issue a decision based upon the record of hearing, or
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> (2) Affirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper. [Emphasis added.]

[3]Section 3.10 of the CBA reads, in pertinent part:

> Permanent part-time positions: The district and CRFO will negotiate to determine which positions will be designated as Permanent Part-Time.
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> Purpose: The purpose of this policy is to provide permanency of employment after successful completion of a probationary period to part-time faculty in selected positions designated by the district.
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> The permanency given to certain part-time faculty pursuant to this policy is intended to operate independently of the classification scheme provided in State law for those faculty who are either contract or regular certificated employees, and is not intended to grant any rights to temporary certificated employees as that term is used in the California Education Code except to the extent that rights are granted to certain temporary employees by this policy.

(grievance process);[4] Article XVI, section 16.1 (administrative remedies);[5] Article XVII, section 17.1 (duty to consult);[6] and Article XVIII, section 18.1 (waiver)[7] cover the subject matter and raise defenses that should be considered in the dispute.

The CBA defines "grievance" as:

> A formal written allegation by a grievant that the grievant has been adversely affected by a violation of

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[4]Article X of the CBA provides for a three-step grievance process with levels of review and preserves the grievants' rights to pursue other relief in the event of dissatisfaction with a final decision.

[5]Section 16.1 of the CBA reads:

> CRFO agrees to exhaust any and all administrative remedies before filing any unfair labor practice charge, filing a complaint in a court, or seeking any outside assistance in resolving any type of labor dispute.

[6]Section 17.1 of the CBA reads:

> The district agrees to consult with CRFO on wages, hours of employment, health and welfare benefits, leave and transfer policies, safety conditions of employment, class size, employee evaluation procedures and grievance processing procedures.

[7]Section 18.1 of the CBA reads:

> During the term of this agreement both parties waive and relinquish the right to meet and negotiate and agree that neither shall be obligated to meet and negotiate with the other respecting any subject or matter, whether referred to or covered in this agreement or not, even though such subjects and matters may not have been within the knowledge or contemplation of either or both the district or CRFO at the time they met and negotiated on and executed this agreement, and even though such subjects or matters may have been proposed and later withdrawn.

a specific article, section or provision of this agreement.[8]

"Grievant" is defined in the CBA as "any member of the bargaining unit covered by the terms of this Agreement."[9] The CBA further provides that a grievant " . . . may be represented by a designee of CRFO at any step of this grievance procedure."[10]

Both parties, through their post-hearing briefs, acknowledge that the CBA covers the subject matter of this dispute.[11] The facts and circumstances which constitute the basis for CRFO's unfair labor practice charge are substantially the same as those which would be reviewed under the grievance procedure agreed to in the CBA.[12] Potential defenses against alleged grievances are contained in the CBA[13] and would have been reviewed in the grievance process.

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[8]CBA, Article X, section 10.2.1.

[9]CBA, Article X, section 10.2.2.

[10]CBA, Article X, section 10.4.

[11]For example, in its Opening Brief at pages 7-8, CRFO relies on Article III, section 3.9 of the CBA (dealing with limit on part-time faculty workload) as the basis for its claim that the Redwoods Community College District (District) had made a unilateral change to a mandatory subject of bargaining. Similarly, in its Opening Brief at pages 7-8, the District relies on various contract provisions (Article XVII, section 17.1 and Article XVIII, section 18.1) as support for its argument that the CRFO had waived any right it may have had to negotiate regarding teaching time.

[12]See CBA, Article X.

[13]CBA, Article XVIII; Article XVII; and Article III, section 3.10.1.

We must inquire whether the grievance machinery has been exhausted either by settlement or binding arbitration. The record indicates that the parties did not initiate the grievance process to review the dispute and thus did not exhaust that remedy.

Whenever PERB review reveals that the facts, contractual defenses or conduct which are the basis of an alleged unfair labor practice generally coincide with those which would be reviewed under the grievance machinery of the contract, PERB jurisdiction is suspended.[14] The statute compels the parties to use their negotiated grievance machinery to try to settle the dispute. Deferral may occur at any time in the PERB process and PERB jurisdiction re-attaches only in cases of futility or to review settlements or awards for repugnancy to the statute.[15]

In conclusion, under the particular set of facts in this case, EERA section 3541.5 and PERB precedent require deferral

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[14]See, e.g., Conejo Valley Unified School District (1984) PERB Decision No. 376 (overruled on other grounds in Lake Elsinore, supra. PERB Decision No. 646, p. 31, fn. 13), ordering deferral because:

> . . . the charge . . . raises a substantial question of contract interpretation which lies at the center of the parties' dispute. The parties have previously agreed that such matters may be resolved by a process of binding arbitration. . . . Under these circumstances EERA subsection 3541.5(a)(2) prohibits this agency from issuing a complaint. [P. 9.]

See also Roy Robinson Chevrolet (1977) 228 NLRB 828 [94 LRRM 1474].

[15]EERA section 3541.5.

and to the extent that prior cases imply that deferral only occurs when the grievance process results in binding arbitration, I would overrule them.[16]

CONCLUSION

Based upon EERA, pertinent case law, PERB regulations and the entire record in this case, I would reverse the ALJ's decision, remand the case for lack of PERB jurisdiction, and order it to be placed in abeyance pending exhaustion of the grievance process.

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[16]Member Caffrey's footnote 6 on page 18, added after the original opinion was signed and ready for issuance, is an afterthought to my original dissent, designed to bootstrap PERB jurisdiction over this case by ignoring the clear language of the statute (EERA sec. 3541.5(a)(2)) and manufacturing a subjective test of contract interpretation that was not adopted in Lake Elsinore School District (1987) PERB Decision No. 646.

Any person could review the parties' contract in this case and take a position that it "arguably prohibits" or "does not arguably prohibit" the conduct complained of, depending on the desired result. Both parties acknowledge that the contract covers the dispute. (See fn. 11 to my dissent.) My concurrence in State Center Community College District (1994) PERB Order No. Ad-255 explains the partiality of the "arguably prohibited" test.

The question of standing to file a grievance is to be determined by those who administer the grievance process. If standing is denied, PERB can take jurisdiction of the dispute.

Finally, the condition that only grievance machinery that culminates in binding arbitration requires deferral is a fictitious bootstrap that does not exist in the statutes. PERB has no authority to decide this case at this stage of the dispute.