



STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY,

Employer,

and

CALIFORNIA FACULTY ASSOCIATION,

Exclusive Representative.

CALIFORNIA ALLIANCE OF ACADEMIC
STUDENT EMPLOYEES/UAW,

Joined Party.

Case No. LA-UM-723-H

Administrative Appeal

PERB Order No. Ad-342-H

September 29, 2004

Appearances: Joel Block, Labor Relations Manager, for Trustees of the California State University; Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for California Faculty Association; Schwartz, Steinsapir, Dohrmann & Sommers, by Margo A. Feinberg, Attorney, for California Alliance of Academic Student Employees/UAW.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Faculty Association (CFA) of a Regional Director's determination (attached). The Trustees of the California State University (CSU) and CFA filed a petition for unit modification seeking unit clarification regarding composition of Unit 3-Faculty represented by CFA. The unit was determined appropriate in Unit Determination for Employees of the California State University and Colleges (1981) PERB Decision No. 173-H. It was then modified to exclude students from Unit 3 in PERB Case No. LA-UM-514-H in 1991.

The California Alliance of Academic Student Employees/UAW (UAW) was joined as a party in this case by the Board agent on July 14, 2004, under PERB Regulation 32164.¹

In the petition, the original parties noted that there "has been some dispute between [them] regarding the application of the definition of excluded employees [in the prior unit modification agreed to in 1991] and that dispute will require resolution as part of this clarification."

On appeal, CFA alleges that certain graduate students are included within a bargaining unit represented by CFA and that only statutory non-employees were excluded from the unit and a degree requirement of instructional employment must exist for a student to be excluded. It is the position of CSU and UAW that statutory employees were excluded as well and no degree requirement is necessary for exclusion.

The Board agent found that the statutory employees were in fact excluded as well and that no degree requirement is necessary for exclusion.

The Board has reviewed the entire record in this case, including the Regional Director's determination, CFA's appeal, and responses from CSU and UAW. The Board finds the Board agent's July 14, 2004, decision to be free of prejudicial error and adopts it as the decision of the Board itself.

¹PERB regulations are codified at California Code of Regulations, title 8, section 31001, et. seq. PERB Regulation 32164 states, in pertinent part:

(d) The Board may order joinder of an employer, employee organization or individual, subject to its jurisdiction, on application of any party or on its own motion if it determines that:

(2) The . . . employee organization . . . has an interest relating to the subject of the action and is so situated that the disposition of the action in their absence may:

(A) as a practical matter impair or impede their ability to protect that interest;. . .

ORDER

Clarification of the 1991 unit modification is as follows:

Students are excluded from Unit 3 in accordance with the Order issued in PERB Case No. LA-UM-514-H, which provided:

1. They are degree-seeking graduate students in the academic department in which they are employed to perform instruction; and
2. They are employed because they are degree-seeking students in that department.

Members Whitehead and Neima joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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July 14, 2004

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Re: California State University
Case No. LA-UM-723-H

Dear Interested Parties:

The California State University (Employer or University) and the California Faculty Association (CFA) jointly filed the above-referenced unit modification petition on February 25, 2004.¹ The petition seeks clarification by the Public Employment Relations Board (PERB or Board) regarding the composition of Unit 3 - Faculty, represented by CFA.

In the petition, the parties noted that there "has been some dispute between the parties regarding the application of the definition of excluded employees [in a prior unit modification agreed to in 1991], and that dispute will require resolution as part of this clarification process." The parties then describe the unit modification requested as follows:

Clarification regarding the inclusion/exclusion of students who are employed to perform instructional activities, whose employment is not solely and exclusively dependent upon their status as degree seeking students in the department in which they are employed.

On May 25, relying on information obtained from PERB case records and the parties, I wrote to the parties (see attached letter) and indicated that (1) that no material facts are in dispute that would necessitate a hearing in this matter (Los Angeles Community College District (1983) PERB Decision No. 331; Los Angeles Unified School District (1993) PERB Order No. Ad-250.); and (2) that the proposed order language submitted by the University in its letter dated May 12 is consistent with the parties' agreement from 1991 and the Order issued in LA-UM-

¹ All dates are in the calendar year 2004 unless otherwise specified.

LA-UM-723-H
July 14, 2004
Page 2

514-H, but that the additional language submitted by CFA is not. CFA was afforded an opportunity to SHOW CAUSE as to why PERB should not issue an Order consistent with the University's request.

CFA submitted a timely response to the "show cause" letter on June 14. On June 25, both CSU and the California Alliance of Academic Student Employees/UAW (UAW) filed responses to CFA's submission.²

CFA

The only new evidence offered by CFA is a declaration by Paul Worthman, who was formerly employed by CFA and who negotiated on their behalf the unit modification agreement that the current petition seeks to clarify. The key point in Mr. Worthman's declaration references discussions held involving himself, CFA's then General Manager Ed Purcell and the two negotiators representing CSU:

In those discussions, we all agreed that the exclusion of a graduate student who was performing instruction would require that the student's graduate program include a teaching experience requirement. In other words, we agreed that it was not sufficient that the student perform instruction in a class offered by the department in which he or she was pursuing a graduate degree; rather, exclusion would be permissible only if the particular graduate program within that department had a component necessitating teaching experience, consistent with the defined mission of the University for, and the educational objectives of, its graduate programs.

The primary argument made by CFA in its June 14 letter is that the 1991 unit modification stipulation and PERB's subsequent Order are ambiguous and that unit clarification is an appropriate vehicle to resolve the ambiguity. CFA relies in part on Union Electric Co. (1975) 217 NLRB 666 [89 LRRM 1535] (Union Electric) for the position that unit clarification is appropriate concerning unit placement of newly created positions or ones whose duties have undergone substantial change.

In this same vein, CFA further argues that prior unit modification decisions may be revisited and the passage of time does not obviate the need for clarification. However, CFA also argues that the parties' prior stipulation, ambiguous or not, is not conclusive and does not relieve PERB of its duty to apply statutory presumptions regarding unit placement. (State of California. Department of Personnel Administration (1989) PERB Decision No. 727-S (State

² Though not previously designated as such, the parties and PERB have treated UAW as an interested party in this matter, as the issues in this case overlap those raised by the UAW petition for recognition in PERB Case No. LA-RR-1099-H. Accordingly, UAW is hereby formally joined as a party in this matter, pursuant to PERB Regulation 32164.

of California).) Thus, CFA asks PERB to revisit the issue of the appropriateness and extent of the unit exclusion agreed to by CFA and CSU in 1991.

In the alternative, CFA requests that PERB simply dismiss the instant petition rather than adopt the clarification sought by CSU. This would allow the parties, according to CFA, to litigate the issue in another forum (grievance arbitration).

CSU

CSU contends that CFA failed to demonstrate that a evidentiary hearing is necessary in this matter or that PERB should not issue the order described in the May 25 show cause letter. With regard to the Worthman declaration, CSU characterizes it as merely the subjective opinion of Mr. Worthman and CFA, and notes that no evidence from 1991 of actual statements made by the parties or of documents exchanged by the parties is offered in support of the conclusions alleged in the declaration.

CSU rejects CFA's reliance on Union Electric, arguing that the classification of Teaching Associate, established 13 years ago, cannot be considered "newly established" within the meaning of that decision and that CFA fails to demonstrate substantial changes in the duties of graduate students employed in the classification. CSU further argues that Union Electric supports an opposite result from that favored by CFA. CSU also argues that State of California and other PERB cases cited by CFA do not support CFA's position.

Finally, CSU opposes CFA's alternative request that PERB dismiss the instant petition. CSU contends that dismissal would be inconsistent with PERB's statutory authority and responsibility over unit determination issues, as well as inconsistent with CFA's own arguments that unit clarification by PERB is necessary and proper in this instance.

UAW

UAW renews its position, first expressed by letter dated March 9, that the CSU/CFA joint unit modification petition should be dismissed as untimely, as it was not filed during the intervention period in Case No. LA-RR-1099-H, and it was filed without any evidence of proof of employee support for CFA. This argument relies on the holdings of Arcadia Unified School District (1979) PERB Decision No. 93 (Arcadia).

If the petition is not dismissed, UAW alternatively argues that CFA's position in the matter be rejected. UAW argues that CFA is attempting to rewrite the 1991 unit modification rather than clarify it. In summary, UAW contends that the exclusion agreed to in 1991 was not as narrow as CFA now argues, that CFA has never represented graduate students holding teaching positions, that the Teaching Associate classification created by CSU in 1991 accurately reflected the parties' exclusion agreement, and that PERB should not defer the issues in this case to grievance arbitration.

Discussion

For the reasons that follow, I conclude that dismissal of the unit modification petition filed by CFA and CSU is neither required nor appropriate under the circumstances of this case. Further, the additional information and argument submitted by CFA is not sufficient to change the conclusions stated in my May 25 letter.

Proposed Dismissal

This petition was filed pursuant to PERB Regulation 32781(b)(2), which allows an employer, an exclusive representative, or both jointly, to petition to "make technical changes to clarify or update the unit description." No provision of PERB's regulations imposes time constraints on this type of petition. The Arcadia case cited by UAW is factually distinguishable from the instant case, as it involved an effort to add classifications to an established unit and not the clarification of an earlier unit exclusion. UAW's arguments do not persuade me that this petition should be dismissed.

CFA's alternative proposal of dismissal is tantamount to an effort to unilaterally withdraw a jointly filed petition, and will not be granted.

Unit Clarification

As discussed more thoroughly in the show cause letter, the parties stipulated to the exclusion of certain students employed to teach in 1991 and PERB approved a unit modification Order memorializing that change in the unit description. CSU then established a new classification, Teaching Associate, for use with graduate students employed to teach who were excluded from Unit 3. As CSU noted in its argument, the Union Electric decision contains considerable discussion that runs counter to CFA's position. For example, the decision includes the following:

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category-excluded or included-that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

The corollary conclusion to this analysis, in Union Electric, was that the union's attempt to include classifications or positions that had been excluded "for substantial periods of time" through unit clarification must be rejected.

CFA has not demonstrated either that the Teaching Associate classification is "newly established," nor that there has been a substantial change in the duties of the positions, within the meaning of those terms as discussed in Union Electric. Further, the Worthman declaration is not sufficient to demonstrate that the CSU's establishment of the Teaching Associate classification failed to comport with the terms of the parties' 1991 stipulation or was overbroad in its coverage. Thus, CFA's attempt to "clarify" the 1991 unit modification so as to bring back under Unit 3's coverage a substantial number of employees now classified as Teaching Associates is contrary to the holdings of Union Electric.

That said, the instant petition does present a bona fide dispute that is within the scope of PERB's unit clarification regulation (32781(b)(2)), and it is appropriate that PERB rule on the dispute presented therein. As set forth more fully in the show cause letter, the CSU and CFA have proposed clarifications of the exclusion agreed upon in 1991 that differ in only one, albeit significant respect. The essential difference between the proposed order language submitted by CFA and the University concerns whether the exclusion of student employees is contingent on the instructional employment being a requirement for the student to obtain a graduate degree in his or her academic department. CFA says it is so contingent and the CSU disagrees. For the reasons set forth above as well as in my May 25 letter, I conclude that CSU's characterization of the exclusion is correct.

One aspect of the CFA argument remains to be addressed. Relying on State of California, CFA argues that PERB should not rely on party stipulations as conclusive regarding the inclusion or exclusion of positions from the unit, and should revisit the student employee exclusion in this case.

This argument and the holdings of State of California do not lead to a different outcome than that described above because of significant differences in the two cases. In State of California, the dispute did not concern whether certain positions had previously been excluded; rather, the case proceeded from the basis that they had been excluded. In that case, the union sought expressly to add these unrepresented positions to the established unit, arguing that the duties of the positions did not warrant continued exclusion as supervisory. The Board correctly rejected the position of the State employer that the doctrine of res judicata, based on the initial unit determination decision, barred consideration of the petition.

However, in the instant case, no party argues for application of the doctrine of res judicata and the instant petition does not seek to add excluded classifications or positions; instead, the parties seek to clarify an exclusion earlier stipulated to.

Conclusion

For the reasons set forth above and in my May 25 letter, an Order shall issue clarifying the 1991 unit modification as follows:

Students are excluded from Unit 3 in accordance with the Order issued in PERB Case No. LA-UM-514-H provided:

1. They are degree-seeking graduate students in the academic department in which they are employed to perform instruction, and
2. They are employed because they are degree-seeking students in that department.³

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (Regulation 32360.) To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95814-4174
FAX: (916) 327-7960

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulation 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Regulation 32360(c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (Regulation 32370).

³ While this matter is not being deferred to arbitration, as noted in my May 25 letter this determination does not address the merits of any grievances that have been or may be filed by CFA challenging the proper classification of any individual position.

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (Regulation 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the Sacramento Regional Office regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Regulation 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (Regulation 32132).

Sincerely,



Les Chisholm
Regional Director

Attachment

cc: Mike Miller
Margo Feinberg

PUBLIC EMPLOYMENT RELATIONS BOARD



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May 25, 2004

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Re: California State University
Case No. LA-UM-723-H

Dear Parties:

The California State University (Employer or University) and the California Faculty Association (CFA) jointly filed the above-referenced unit modification petition on February 25, 2004. The petition seeks clarification by the Public Employment Relations Board (PERB or Board) regarding the composition of Unit 3 - Faculty, represented by CFA.

In the petition, the parties noted that there "has been some dispute between the parties regarding the application of the definition of excluded employees [in a prior unit modification agreed to in 1991], and that dispute will require resolution as part of this clarification process." The parties then describe the unit modification requested as follows:

Clarification regarding the inclusion/exclusion of students who are employed to perform instructional activities, whose employment is not solely and exclusively dependent upon their status as degree seeking students in the department in which they are employed.

I have spoken with both parties concerning this matter by telephone, including a conference call on April 22, 2004, and have received supplemental information, per my request, in writing from both parties. This letter incorporates the information obtained through these communications as well as information obtained from PERB case records.

Background

In Unit Determination for Employees of the California State University and Colleges (1981) PERB Decision No. 173-H (173-H), the Board determined, inter alia, that Unit 3 is an appropriate unit for purposes of collective bargaining. In so ruling, the Board concluded that the purposes and policies of the Higher Education Employer-Employee Relations Act (HEERA or Act)¹ are "best served by placing all instructional faculty, full-time and part-time, tenured and non-tenured, including coaches and librarians, together in a comprehensive unit." (*Ibid.*)¹ The Board's decision does not contain any mention of the inclusion or exclusion of students employed to instruct students. Attached to the Board's decision (and attached to this letter) is an appendix listing the classifications included in Unit 3 or specifically excluded from Unit 3. CFA was subsequently certified, on March 1, 1983, as the exclusive representative of Unit 3.

On March 19, 1991, CFA and the University entered into a memorandum of understanding that provided as follows:

The California State University and the California Faculty Association agree that they will immediately submit a joint petition to the California PERB seeking the exclusion from bargaining Unit 3 of all temporary faculty whose employment is solely and exclusively dependent upon their status as degree seeking graduate students in the department in which they are employed. One basis of the request shall be the fact that such persons employment with the university is primarily as a student rather than as an employee.^[2]

It is intended that the decision to use graduate students to perform instruction, and the portion of instruction performed by such persons, be decisions based upon the needs of the program and the stated mission of the university. The California Faculty Association agrees that should it believe that graduate students are being used in an inappropriate manner, the California Faculty Association will seek resolution of the issue by a meeting of the parties to discuss administrative action prior to taking action through other agencies or forums.

On March 20, 1991, CFA and the University filed a joint unit modification petition (PERB Case No. LA-UM-514-H) seeking to delete certain positions from Unit 3. The petition described the unit modification requested as to "Exclude students from Unit 3." The statement of reasons for the modification request read as follows:

¹ HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov

² The parties' agreement does not describe or identify what other bases were present for the request.

Individuals serving in bargaining unit classifications who are students and whose employment is solely and exclusively dependent upon their status as degree seeking graduate students in the department in which they are employed are involved with the University primarily as students rather than as employees. [Emphasis added.]

Attached to the unit modification petition in Case No. LA-UM-514-H was a description of the established unit that differed little from the appendix to 173-H listing the classifications included in Unit 3.

On April 5, 1991, PERB approved the unit modification requested in LA-UM-514-H, issuing an Order that excluded individuals from the unit in language that was identical to that quoted above from the statement of reasons for the petition.

On June 1, 1991, the University established a new classification, titled Teaching Associate, to include those student employees that were excluded from Unit 3.³ The new classification was described as follows:

The Teaching Associate classification provides currently enrolled or admitted CSU graduate students with part-time employment offering practical teaching experience in fields related to their advanced study. They teach university courses and may also assist faculty or teaching staff with various professional and technical activities.

The Teaching Associate classification has never been included in Unit 3 or any other University bargaining unit, nor has any petition been filed seeking to add the classification to an established unit. However, currently pending before PERB is a representation petition (PERB Case No. LA-RR-1099-H) filed on January 8, 2004, by the California Alliance of Academic Student Employees/UAW (UAW). In its petition, UAW seeks recognition for a proposed appropriate unit that would include Teaching Associates and other classifications used to employ students who teach, grade or tutor.

Though the issue of student employee inclusion/exclusion was not raised at PERB again prior to the filing of the instant petition, CFA filed with the Employer, beginning in 2002, several grievances that relate to its belief that the University, in at least some instances, has improperly assigned Unit 3 work to positions outside the bargaining unit.⁴

³ These student employees were previously classified as lecturers, a classification that remains in use in Unit 3.

⁴ This letter does not address the merits of these grievances or the question of the proper classification of any individual position.

CFA's Position

CFA requests that PERB modify the unit description for Unit 3, in order to clarify the placement of student employees, as follows:

Instructional faculty includes graduate students employed to perform instruction, unless such students:

- (1) are degree-seeking graduate students in the academic department in which they are employed to perform instruction,
- (2) are employed because they are degree-seeking graduate students in the department in which they are employed;
- (3) are pursuing a graduate degree that requires the teaching of department-offered courses; and
- (4) the instructional employment is necessary in order to receive the graduate degree.

To bring the issue into "sharp focus" vis-à-vis the UAW petition pending in LA-RR-1099-H, CFA asserts that the "vast majority" of graduate student employees petitioned for by UAW are

statutory employees who should be included in the faculty unit under proper construction of Government Code § 3562(e) - the HEERA definition of "employee," PERB's 1981 decision creating an all-inclusive faculty unit, or the 1991 stipulated modification of the faculty unit, or all three.

In so arguing, CFA notes correctly that the Board's decision in 173-H included the finding that instructional faculty constitute an "occupational group" within the meaning of HEERA section 3579(c), thus requiring the Board to give weight to that statutory provision's presumption against splitting occupational groups.⁵ The Board further concluded in 173-H that community of interest criteria supported finding in favor of a comprehensive faculty unit, even without the section 3579(c) presumption.

⁵ HEERA section 3579(c) provides:

There shall be a presumption that all employees within an occupational group or groups located principally within the State of California shall be included within a single representation unit. However, the presumption shall be rebutted if there is a preponderance of evidence that a single representation unit is inconsistent with the criteria set forth in subdivision (a) or with the purposes of this chapter.

CFA next asserts that the parties' side letter agreement and joint unit modification request in 1991

. . . resulted from a dispute - similar to that which now exists - over which instructional faculty are excluded from the unit because their employment is an element of their graduate degree program, on the one hand, and which instructional faculty are included in the unit because, although they are students, their employment is unconnected to any such graduate degree program, on the other hand.

In this context, CFA contends that it can present testimony that, in referencing a "solely and exclusively dependent" test for student status in 1991, such status "was a limiting refinement of the broader, more ambiguous statutory provision describing the test for student employee status set forth" at HEERA section 3562(e).⁶

Finally, CFA contends that the only persons performing instruction who fail to qualify as an "employee" under section 3562(e), i.e., that are "students" within the meaning of both 3562(e) and the 1991 unit modification, are those in graduate degree programs "whose requirements include the teaching of CSU-offered course[s]." Thus, according to CFA, even graduate degree-seeking students teaching in their own academic department are "employees whose only permissible bargaining unit location is the all-inclusive faculty unit," unless the teaching experience is itself a requirement of the degree the person seeks to obtain.

Employer's Position

The University's position and proposed outcome depart from that of CFA in one significant respect. The University contends that a requirement of instructional employment in order to

⁶¹ HEERA section 3562(e) defines "employee" for purposes of the act as follows:

"Employee" or "higher education employee" means any employee of the Regents of the University of California, the Directors of the Hastings College of the Law, or the Trustees of the California State University. However, managerial and confidential employees and employees whose principal place of employment is outside the State of California at a worksite with 100 or fewer employees shall be excluded from coverage under this chapter. 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. [Emphasis added.]

obtain a degree was not a factor in the 1991 unit modification excluding students from Unit 3, and should not be a component of a unit modification order clarifying the unit now. In this context, the University asserts that the Teaching Associate classification, used since June 1991, has never included a requirement that instructional employment is necessary in order to receive a graduate degree.

Thus, the University's proposed order in this case would read as follows:

Students who meet both of the following criteria are excluded from the established bargaining unit under the terms of the 1991 unit modification order whether or not their instructional employment is necessary in order to receive their graduate degree in that department:

1. They are degree seeking graduate students in the academic department in which they are employed to perform instruction, and
2. They are employed because they are degree-seeking students in that department.

Discussion

The dispute between the University and CFA, on one level, is as simple as it appears; that is, its resolution turns on the question of whether the parties agreed in 1991 to exclude student employees from the unit only if their graduate degree requirements included a requirement that they engage in instructional employment in their field at the University. However, CFA's argument actually frames the issue differently, asserting that students engaged in instructional employment are only excluded from Unit 3 if they are excluded from the definition of employee under the HEERA.

For the reasons that follow, I conclude that CFA has failed to present information to support either the conclusion that only non-employees were excluded from the unit by the 1991 petition or the conclusion that a degree requirement of instructional employment must be extant in order for a student employee to be excluded from Unit 3.

Exclusion of Students from Unit 3

It is important to note that, while the PERB Order issued in LA-UM-514-H contains language from the statement of reasons submitted by the parties, the unit modification requested by the parties stated simply that they desired to "Exclude students from Unit 3." CFA now argues that this language, in effect, should be construed to mean that the parties sought only to exclude persons who were not employees within the meaning of the Act. However, non-employees could not be included in the unit to begin with, by definition, and so this

construction is so circular as to render the language of the Order meaningless.⁷ In interpreting the language of parties' agreements, PERB eschews interpretations that would render a provision meaningless (Antelope Valley Union High School District (1998) PERB Decision No. 1287) or lead to an absurd result (State of California (Department of Corrections) (1999) PERB Decision No. 1317-S).

Thus, in order to give meaning to the parties' 1991 agreement, their subsequent unit modification and the PERB Order, it must be assumed that the exclusion was intended to exclude persons who might at least arguably be included under the coverage of the Act.⁸

CFA contends that exclusion of instructional personnel who are covered by the HEERA could not have been approved by PERB, as such a modification of the unit would violate HEERA's presumption in favor of keeping occupational groups together and the statutory preference to avoid the proliferation of units. However, this argument is not persuasive. Rather, in units established under HEERA for the University of California, PERB specifically approved party stipulations excluding students from broad, systemwide units without finding that the persons being excluded were not employees within the meaning of the Act. (See, e.g., Regents of the University of California (1982) PERB Order No. Ad-114b-H; Unit Determination for Technical Employees of the University of California (1983) PERB Decision No. 241c-H.)

Further, there is no language in the parties' 1991 agreement or petition referencing the definition of "employee" under HEERA or its applicability to that agreement. Rather, the language used, referring to students "whose employment is solely and exclusively dependent upon their status" as students, is not materially different from language used by the Board in describing the student stipulation approved in University of California cases (student employees excluded where their employment is "contingent on their status as students of the university" (Unit Determination for Technical Employees of the University of California, supra, PERB Decision No. 241c-H)).

Finally, it is also noted that the parties' 1991 agreement indicates that the subject employees' "involvement with the university is primarily as a student rather than as an employee" was only one basis of the request. While the other basis or bases have not been identified, the fact that there were other, albeit unstated, reasons argues against concluding that employee status was the definitive factor in the parties' agreement.

⁷ Confidential employees are excluded from coverage under the Act but I am unaware of any unit modification petitions filed to modify a unit to exclude, generically, confidential employees. Rather, unit disputes over the inclusion or exclusion of confidential employees address the status of a particular position or classification.

⁸ This letter does not address any potential disputes between the University and UAW over the employee or non-employee status of any persons petitioned for in PERB Case No. LA-RR-1099-H.

Instructional Employment as a Graduate Degree Requirement

As noted above, the essential difference between the proposed order language submitted by CFA and the University concerns whether the exclusion of student employees is contingent on the instructional employment being a requirement for the student to obtain a graduate degree in his or her academic department.

As with the "non-employee" issue discussed above, I find nothing in the parties' 1991 agreement or the PERB Order issued in LA-UM-514-H that references such a condition or requirement. The requirement is not expressly contained in any of the documentation, and reading it into the agreement by inference is contrary to other explicit provisions of the agreement. The agreement, on its face, empowers the University, based on its mission and "needs of the program," to make a "decision to use graduate students to perform instruction." CFA, by arguing that the agreement applies only to students who are required to teach in order to obtain their graduate degree, asks PERB to impose a condition that is more properly decided by the University in considering how best to achieve its mission and what the needs of various academic programs are.

Conclusion

For the foregoing reasons, I have determined that no material facts are in dispute that would necessitate a hearing in this matter. (Los Angeles Community College District (1983) PERB Decision No. 331; Los Angeles Unified School District (1993) PERB Order No. Ad-250.)

Further, based on the above, I have concluded that the proposed order language submitted by the University in its letter dated May 12, 2004, is consistent with the parties' agreement from 1991 and the Order issued in LA-UM-514-H, but that the additional language submitted by CFA is not.

In light of the above, CFA is afforded this opportunity to SHOW CAUSE as to why PERB should not issue an Order consistent with the University's request. Factual assertions must be supported by declarations under penalty of perjury by witnesses with personal knowledge and should indicate that the witness, if called, could competently testify about the facts asserted. If the facts asserted are reliant on a writing, the writing must be attached to the declaration and authenticated therein. Legal argument and supporting materials must be filed with the undersigned no later than June 7, 2004. Service and proof of service pursuant to PERB Regulation 32140 are required.

LA-UM-723-H

May 25, 2004

Page 9

Upon receipt of CFA's argument and factual assertions, or the expiration of the time allowed for same, the undersigned shall contact each of the interested parties regarding further case processing steps, including a deadline for responses to the CFA's submittal, if requested.

Sincerely,

A handwritten signature in black ink, appearing to read "Les Chisholm". The signature is fluid and cursive, with a prominent initial "L" and a long, sweeping underline.

Les Chisholm
Regional Director

Attachment

cc: Mike Miller

Unit 3 - Faculty

Shall INCLUDE:

<u>Class Code</u>	<u>Class Title</u>
2356	Substitute Instructional Faculty - Summer Session
2357	Instructional Faculty - Summer Session
2358	Lecturer - Academic Year
2359	Lecturer - 12-month
2360	Instructional Faculty- - Academic Year
2360	Department Chair (Program Coordinator, Program Director)
2361	Instructional Faculty - 12-month
2361	Department Chair (Program Coordinator, Program Director)
2362	Demonstration Instructional Faculty
2363	Instructional Faculty, Extension
2364	Instructional Faculty, Overseas Contract Assignment
2365	Music Studio Instructional Faculty
2368	Instructional Faculty, Extra Quarter Assignment, QYSRO
2369	Lecturer, Overseas Contract Assignment - 12-month
2373	Head Coach - 12-month
2374	Head Coach - 10-month
2375	Head Coach - Academic Year
2376	Coach - 12-month
2377	Coach - 10-month
2378	Coach - Academic Year
2379	Coaching Specialist - 12-month
2380	Coaching Specialist - 10-month
2381	Coaching Specialist - Academic Year
2382	Coaching Assistant - 12-month
2383	Coaching Assistant - 10-month
2384	Coaching Assistant - Academic Year
2385	Department Chairman - 12-month
2386	Administrative Faculty - 12-month
2387	Grant Related Instructional Faculty - Academic Year
2388	Grant Related Instructional Faculty - 12-month
2390	Instructional Faculty - Summer Quarter Assignment
2394	Instructional Faculty, Executive Committee, Academic Senate
2395	Instructional Faculty, Chairman, Academic Senate
2399	Instructional Faculty - Academic Year
2399	Department Chair (Program Coordinator, Program Director)

Unit 3 - Faculty (Continued)

Shall INCLUDE (Continued):

<u>Class Code</u>	<u>Class Title</u>
2462	Vocational Instructor, Academic Year
2463	Vocational Instructor - 10-month
2464	Vocational instructor - 12-month
2466	Vocational Instructor, Overseas Contract Assignment
2909	Assistant Director of the Library - 10-month
2913	Supervising Librarian - 10-month
2914	Supervising Librarian - 12-month
2919	Librarian - 10-month
2920	Librarian - 12-month

Shall EXCLUDE:

All employees found to be managerial, supervisory or confidential within the meaning of Government Code section 3560 et seq., including:

<u>Class Code</u>	<u>Class Title</u>
2320	Resident Director International Programs - Academic Year
2321	Resident Director International Programs - 12-month
2370	Director of Athletics - 12-month
2371	Director of Athletics - 10-month
2372	Director of Athletics - Academic Year
2396	Academic Specialist - Academic Year
2397	Academic Specialist - 12-month
2468	Vocational Instructor, Building Program, Academic Year
2469	Vocational Instructor, Building Program - 12-month
2910	Associate Director of the Library - 12-month
2925	Associate Director of the Library - 10-month Coordinator, Area and Interdisciplinary Programs Director, Southern California Ocean Studies Consortium