

it unilaterally rescinded its settlement agreement with the University, which would have affected three PERB cases: SF-CE-272-H, LA-CE-235-H and SF-CE-287-H.² The Board has reviewed the entire record in this case, and finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

On appeal, the University filed numerous exceptions to the proposed decision. Most of these exceptions involve the ALJ's findings of fact and reliance on Lake Elsinore School District (1986) PERB Decision No. 603 (Lake Elsinore). In support of its exceptions, the University argues that the ALJ erroneously failed to find that the Federation violated HEERA by unilaterally rescinding its settlement agreement with the University.

DISCUSSION

Under HEERA section 3563.2(b),³ the Board has no authority to enforce agreements between parties and cannot issue a complaint on any charge based on an alleged violation of an agreement unless the violation would also constitute an unfair practice under HEERA.

²The Board notes that Case Nos. SF-CE-272-H and LA-CE-235-H were decided in PERB Decision No. 826-H and PERB Decision No. 907-H (review den.). Case No. SF-CE-287-H was resolved by settlement between the parties.

³Section 3563.2 states, in pertinent part:

(b) The Board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

To state a prima facie case of a unilateral change, the University was required to show that the Federation's breach of the settlement agreement was not merely an isolated breach of the contract, but amounted to a change of policy (i.e., has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment). (Grant Joint Union High School District (1982) PERB Decision No. 196.)

The University alleges that the Federation's actions amounted to a change in policy when it repudiated the settlement agreement. It is the University's position that the Federation's termination of the agreement had the effect of changing the criteria for the appointment of long-term lecturers, and that the newly negotiated definition of instructional need had a generalized effect in the appointment process. However, we agree with the ALJ that the Federation's action in terminating the settlement Agreement had no effect on existing terms and conditions of employment. The only obligation imposed upon the Federation by the settlement agreement was to withdraw pending PERB charges and to refrain from filing further charges or grievances regarding Article VII of the memorandum of understanding. The ALJ properly found that the University, as the employer of bargaining unit members, continued to exercise control over their reappointment both before and after the termination of the settlement agreement.

Finally, we agree with the ALJ's application of Lake Elsinore to this case. In Lake Elsinore the Board concluded

that under the Educational Employment Relations Act, an employer's demand that an employee organization withdraw an unfair practice charge is not a mandatory subject of bargaining. We see no reason for a different result under HEERA. As the Federation's refusal to withdraw unfair practice charges is not a mandatory subject of bargaining, the University has failed to state a prima facie violation of HEERA.

With regard to the University's numerous exceptions to the ALJ's findings of fact, the Board concludes that the ALJ's findings of fact are supported by the evidence on the record as a whole. Accordingly, these exceptions are without merit.

ORDER

The unfair practice charge and complaint in Case No. SF-CO-19-H is hereby DISMISSED.

Chairperson Hesse and Member Shank joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,)	
)	
Charging Party,)	Unfair Practice
)	Case No. SF-CO-19-H
v.)	
)	
UNIVERSITY COUNCIL-AMERICAN FEDERATION OF TEACHERS,)	PROPOSED DECISION
)	(1/31/91)
Respondent.)	
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Appearances: Marcia J. Canning, University Counsel, for the Regents of the University of California; Leonard, Carder & Zuckerman by William H. Carder for the University Council-American Federation of Teachers.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

The University of California (University) contends here that a union representing instructors failed to negotiate in good faith when it refused to carry out the terms of a settlement agreement. Under the agreement, the union was obligated to withdraw certain other unfair practice charges, but the union refused to do so.

The union replies that breach of a settlement agreement is not cognizable as an unfair practice and that the Public Employment Relations Board is without jurisdiction in the case. Moreover, the union continues, it was the University that first breached the agreement and the union acted only in response to the University's action.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

The University commenced this action on December 5, 1989, by timely filing an unfair practice charge against the University Council-American Federation of Teachers (Union or Council). The University filed a first amended charge on February 26, 1990, and then withdrew a portion of the amended charge on April 30, 1990. The general counsel of the Public Employment Relations Board (PERB or Board) followed on April 30, 1990, with a complaint against the Union.

The complaint alleges that the Union notified¹ the University that it considered the University to be in breach of the settlement agreement of August 17, 1989, and was terminating the agreement. The complaint alleges that the Union also stated that it would not withdraw any unfair practice charges² as required by the agreement. By this conduct, the complaint alleges, the Union failed to meet and confer in good faith as required under Higher Education Employer-Employee Relations Act (HEERA) section 3571.1(c).³

¹Notification was by letter of October 11, 1989.

²Under the agreement, the Union and the University were to withdraw their appeals to an administrative law judge's decision in unfair practice case nos. LA-CE-235-H and SF-CE-272-H and the Union was to withdraw unfair practice charge no. SF-CE-287-H.

³HEERA is found at section 3560 et seq. Unless otherwise indicated, all references are to the Government Code. Section 3571.1 provides as follows:

It shall be unlawful for an employee organization to:

(c) Refuse or fail to engage in meeting and conferring with the higher education employer.

The Union answered the complaint on June 4, 1990, asserting various affirmative defenses. Among these was a contention that the PERB is without jurisdiction to enforce the terms of the settlement agreement.⁴ The Union further alleged that the settlement agreement was not a mandatory subject of bargaining under HEERA⁵ and is therefore not enforceable other than contractually. In addition, the Union asserted that the University had itself materially breached the terms of the settlement, affording the Union the right to terminate.

A hearing was conducted into these matters on October 2 through 4, 1990, at the University headquarters in Oakland. With the filing of briefs, the case was submitted for decision on January 15, 1991.

FINDINGS OF FACT

The University is a higher education employer under HEERA. At all times relevant, the Union has been the exclusive representative of University unit 18, non-senate instructional employees. Employees in unit 18 are non-tenure track instructors

⁴Specifically, the Union argues that the settlement agreement is a contract and that under section 3563.2(b) the PERB is without authority to enforce the terms of a contract. In relevant part, section 3563.2 reads as follows:

(b) The Board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

⁵The scope of bargaining under HEERA for the University of California is set out at section 3562(q).

working on all nine campuses of the University. The unit is composed of some 2,000 individuals who hold the title of lecturer.

Lecturers are temporary faculty for the University who serve in a limited, substitute role. Often, they fill in for regular faculty members who are on sabbatical. They also teach in writing programs and foreign language instruction where tenure track faculty frequently are not used. Most appointments to unit 18 positions are for one year or less although there are 300 to 500 unit members teaching past their sixth year.

Litigation History

Under the memorandum of understanding (MOU) between the parties, the University has broad discretion in the appointment of lecturers during their first six years of employment. The University can appoint or reappoint them for one or two year terms or deny them reappointment altogether. However, lecturers with six or more years of service must be reappointed for three-year terms when the University determines that there is a demonstrated "instructional need" for their services and their performance is found in a department review to be "excellent."

The events of this case can be understood only in the context of a history of litigation between the parties about the "instructional need" provision of the MOU. Section VII.C.I.a.,⁶

⁶In relevant part, section VII.C.1. provides as follows:

- a) Reappointments which commence at or beyond six (6) years of service at the same campus can be made only when the following

the disputed provision, was written into the first MOU between the parties, which became effective on July 1, 1986, and has remained unchanged since then. Prior to the first MOU, lecturers were prohibited from employment for more than eight years if their appointments were for 50 percent or more of a full-time position.

The term "instructional need" is nowhere defined in the MOU and this deficiency has spawned persistent litigation⁷ between the parties. In 1988, the PERB consolidated for hearing two of these cases, SF-CE-272-H and LA-CE-235-H. The administrative law judge issued a proposed decision in those cases on February 24,

criteria have been met:

1) there is a continuing or anticipated instructional need as determined by the University; or, there is a need for teaching so specialized in character that it cannot be done with equal effectiveness by regular faculty members or by strictly temporary appointees; and, if so found,

2) the instructional performance appropriate to the responsibilities of the faculty/instructor in the unit has been determined by the University to have been excellent, based upon the criteria specified in Section E.

b) Provided that the criteria set forth in section C.I.a) continue to be met, reappointments shall be made for three-year periods

⁷PERB cases which have related in part or entirely to the definition of "instructional need" are: SF-CE-272-H, LA-CE-235-H, SF-CE-278-H and SF-CE-287-H.

1989. Portions of the proposed decision displeased both parties. Because of this, the University and the Union commenced a series of exploratory conversations about the possibility of a comprehensive settlement of their long-standing dispute.⁸

On April 10, 1989, the parties agreed to enter negotiations about the definition of instructional need, the long-term appointees section of the MOU, remedies for affected faculty members at the University's Los Angeles, Santa Barbara and Santa Cruz campuses, and a contractual exception for the UCLA School of Education.

Settlement Negotiations

Settlement discussions were held between the parties over a four-month period in mid-1989. Following a July 19th meeting, the fifth of six settlement conferences, there were several drafts of a settlement agreement in circulation. These drafts were discussed by Council members at a July 22 meeting where there were expressions of concern about proposed modifications to the definition of instructional need.

In particular, some Council members feared that the proposed new definition would allow the University to make capricious decisions about the mix of long-term and short-term lecturers. Those who expressed concerns about the modified definition

⁸During the long litigation over this matter, the PERB issued its own ruling, affirming in part and modifying in part the ALJ's proposed decision. See, Regents of the University of California (1990) PERB Decision No. 826-H.

contended that the University would not have to justify the mix of long and short-term instructors on an educational basis.

As a result of these expressions, the Union directed its negotiators to devise a way to ensure that the definition of instructional need be related to the educational mission of the University. The Council appointed Michael Rotkin, a lecturer at the Santa Cruz campus, to join its regular negotiator, Marde Gregory, at the final negotiating session of August 10th. Mr. Rotkin's primary focus was on the Santa Cruz campus.

Mr. Rotkin entered the August 10 meeting with a plan to somehow get the Academic Senate involved in the instructional need determinations at Santa Cruz. He believed Senate participation would minimize the possibility of capricious decision-making in need determinations.

Ultimately, the outline of a compromise developed at the meeting of August 10. The parties agreed that with some changes, the modified definition of instructional need which they had previously discussed would be written into a letter of understanding. Secondly, the University agreed to hold a meeting at Santa Cruz upon request of the Union whereby the campus need determination process would be reviewed.

With a tentative agreement on these and other points at the August 10 meeting, the University assumed responsibility for preparing a final draft. The draft was sent to the Union on August 14 but Council negotiators concluded it was incomplete and pressed for changes. The University agreed to certain of the

proposed changes, including a reference to an unspecified involvement of the Academic Senate at Santa Cruz. With the changes, Union negotiator Marde Gregory signed the agreement on August 17. By the settlement, the Union agreed to withdraw with prejudice its charge in PERB case no. SF-CE-287-H and both parties agreed to withdraw their exceptions to the proposed decision in PERB case nos. SF-CE-272-H and LA-CE-235-H.

Three elements of this settlement agreement are critical to this case: the revised definition of instructional need, the proposed meeting at the Santa Cruz campus, and the role of the Academic Senate in instructional need determinations at Santa Cruz.

Provisions regarding instructional need appear at two places in the settlement agreement: in a letter of understanding attached to the agreement and in the agreement's first paragraph. The letter of understanding provides that in making instructional need determinations, the University may consider budgetary resources as well as academic needs, including the relative need for faculty of various ranks.⁹

⁹The letter of understanding, found on the last page of University Exhibit 22, provides in its entirety as follows:

"Instructional Need" is a term used to describe the circumstances or set of circumstances that indicate that the University can make a commitment to a Faculty/Instructor in the unit for a post six-year three-year appointment [Article VII. Section C.1.a]. Decisions regarding: the allocation of financial/budgetary resources; curriculum; programmatic emphasis; and, the utilization of academic personnel vary from

The other reference to instructional need is found in the first numbered paragraph of the agreement. There, the parties agree that as a result of the factors listed in the letter of understanding, the University may impose a limit on the number of post six-year appointments.¹⁰ The parties also agree that the

campus to campus. Therefore a determination of "Instructional Need" cannot be a constant on a universitywide basis. Thus, each campus develops its own rationale for determining "Instructional Need." Decisions regarding the determination of "Instructional Need" will not be capricious or unreasonable.

With this understanding, the University and the UC-AFT agree that the determination of "Instructional Need" by a campus shall include, but is not limited to, the following:

1. The relative needs or demands of budgetary resources, as determined by the campus for the department, program or board; and/or
2. The review and assessment by the campus, based on its academic judgement, of curricular needs; program needs; and, relative need for faculty of various ranks.

¹⁰The first numbered paragraph of the settlement agreement, University Exhibit 22, reads as follows:

1. University and UC-AFT agree that the LETTER OF UNDERSTANDING [emphasis in original], dated August 14, 1989, which is attached to this Settlement Agreement and made a part of hereto, is the agreed-to operational definition of the term "instructional need" as it appears in Article VII. Section C. of the Memorandum of Understanding between University and UC-AFT covering the Non-Senate Instructional Unit. As a result, University and UC-AFT agree that the factors listed in the LETTER OF

definition may result in a mix of long-term and short-term lecturers. The exact nature of the mix is not specified.

In early drafts of the settlement agreement, the language on the mix of long-term and short-term lecturers was written into the letter of understanding. However, it was moved after the August 10 meeting at the request of Union negotiator Rotkin. University witnesses testified the change was made to accommodate Union requests to "bury" the provision. Mr. Rotkin testified that the language was moved to attenuate linkage between language on the mix of long and short-term lecturers and language on budget considerations.

The University considered the language on instructional need to be the key element of the settlement. In addition to permitting budgetary considerations in the hiring of post six-year instructors, the University believed the new language would permit hiring to bring "new blood" onto the faculty. Thus, post six-year appointments might be denied solely because the University determined that it needed new teachers to change the orientation or emphasis of a course.

UNDERSTANDING may necessitate, in any given Academic Year, a limitation on the number of post six-year three-year appointments that may be requested and/or allocated; or result in a mix of long-term and short-term lecturers. University and UC-AFT agree that the term "faculty" as used in LETTER OF UNDERSTANDING includes ladder rank faculty, and other teaching faculty and graduate students. Discussions regarding the determination of instructional need are not precluded by the LETTER OF UNDERSTANDING.

The second key element of the settlement was the provision for a meeting between the Union and the University to review the process for determining instructional need at Santa Cruz. The suggestion of a meeting was first raised at the July 19 settlement meeting. Union negotiators wanted the meeting to determine the University's position regarding what, in campus parlance, was known as the 60-40 split.¹¹ The meeting, from the Union's point of view, would permit consultation with the University before need determinations were made.

The language agreed to by the parties sets out a series of consultative meetings, the first in the fall of 1989 followed by additional meetings in the spring of 1990 and 1991.¹² The

¹¹The 60-40 split was a budgetary limitation imposed at Santa Cruz in 1987 fixing post six-year appointments at 60 percent of the temporary hirings. Appointments for persons who had been employed fewer than six years were fixed at 40 percent of the temporary appointments.

¹²In relevant part, the settlement agreement in paragraph 4 provides as follows:

- a. Upon request, University will meet during the 1989 Fall Quarter with up to four (4) representatives of UC-AFT. The purpose of this meeting will be for University to discuss its proposed 1989-90 instructional need determination for post six-year three-year appointments to be effective July 1, 1990 for members of the Non-Senate Instructional Unit for the Santa Cruz campus and to outline the process for consulting with appropriate Academic Senate Committees for the determination of instructional need as required to meet the educational objectives established by University for a particular course or group of courses.

Similar provisions are set out for the meetings in 1990 and 1991.

meetings were to be held "upon request" of the Union "for [the] University to discuss its proposed 1989-90 [and subsequent] instructional need determination for post six-year three-year appointments."

The language is somewhat vague and it is apparent that the parties had entirely different expectations about the proposed meeting. For the Union, the meeting would be an opportunity for significant input prior to need determinations at Santa Cruz. Union negotiator Rotkin testified that he believed the meetings would lead to a whole new instructional need determination process at Santa Cruz. He believed that with the settlement agreement the parties would be "starting from scratch, have a new relationship [and] listen to each other." He and other Union officers believed that the University would not make a final need determination prior to the meeting.

By contrast, University negotiators envisioned the proposed meeting as an informational session at which the University would describe its procedures for need determination. Since the meeting would be "upon request" of the Union, University negotiators believed there was no obligation to advise the Union prior to making a need determination at Santa Cruz. Further, University negotiators believed that they were not obligated to reach any agreement with the Union about subjects raised at the meeting.

A related issue, about which the parties are equally in disagreement, was the proposed role in need determinations the

agreement would afford to the Santa Cruz Academic Senate. Union negotiator Rotkin succeeded in pressing for a reference to the Academic Senate in the settlement agreement. The agreement provides that one purpose of the campus meetings would be for the University "to outline the process for consulting with appropriate Academic Senate Committees for the determination of instructional need" But, as with the language about the meeting itself, the reference to the role of the Academic Senate is vague and subject to differing interpretations.

The initial version of the agreement, prepared by the University after the August 10 meeting, contained no reference to the Senate. This omission occurred despite what Union negotiators believed to be University acquiescence to their request for a Senate role. Nevertheless, the University did agree to add a reference to the Senate after a series of telephone conversations following the August 10 meeting.

Despite extensive negotiations about a role for the Senate, the parties never agreed what that role would be. Union negotiator Rotkin tried various proposals, including participation by a vice chancellor with ties to the Senate in meetings between the Union and the University. The University rejected the suggestion. Mr. Rotkin made other specific suggestions about how the Senate could be brought into the need determination process but every suggestion was rejected. The constant response of University negotiators was that the

University could not and would not attempt to dictate to the Academic Senate.

Nevertheless, when the University agreed to include a reference to the Senate in the settlement agreement, Union negotiators were convinced that some way would be found for Senate participation. Mr. Rotkin testified that he anticipated that after the University rejected some Union proposals on instructional need, the Union would be able to convince the Senate to become involved. From the Union's perspective, Senate involvement would promote need determinations on academic rather than budgetary rationales.

University negotiators, although accepting a reference to the Senate in the settlement agreement, did not believe they had agreed to negotiations or to any bar to unilateral need determinations. University negotiators repeatedly told Union negotiators that the University would not ask the Senate to participate in need determinations or dictate a role to the Senate. Indeed, University negotiators repeatedly stated that they did not anticipate that the Senate would be involved in need determinations at Santa Cruz. All the University would concede was that if the Senate requested to become involved, the University would consider whatever the Senate requested.

As originally drafted, the settlement agreement set out a number of specific arrangements for individual unit members at the Los Angeles, Santa Barbara and Santa Cruz campuses. However, reference to individuals at Santa Barbara and Santa Cruz was

removed from the final agreement because the Union was unable to sign a hold harmless agreement on their behalf.

The settlement agreement did not provide for amendment to the MOU or for attachment of the new definition of "instructional need" to the MOU. It is not the practice of the parties to attach side letters to their MOU or otherwise incorporate them into the existing agreement.

Need Determinations at Santa Cruz

In September of 1989, Union representative Roz Spafford received copies of three documents which led her to conclude that the University had breached the newly signed agreement. Two of the documents were memoranda from Santa Cruz Humanities Dean H. D. Harootunian, dated September 13 and 26. Collectively, the Dean's memoranda stated that there would be no change the following year in need determination for temporary faculty.

The third document was a September 27 letter to Spafford from Santa Cruz labor relations analyst Susan Angstadt which declared that the Humanities Division intended to continue "the plan" for the 1989-90 school year. The "plan," to which Ms. Angstadt referred, was a requirement that unit members carry certain other duties in addition to teaching. The effect of these memoranda, in the view of the Union, was to continue the same numerical limitations on three-year appointments which had given rise to PERB case no. SF-CE-272-H.

The three letters also indicated to the Union that the University had made 1989-90 need determinations at Santa Cruz

prior to the proposed meeting between the parties. Because of the planned meeting and potential involvement of the Academic Senate, Union officials had expected the University to notify the Union prior to making any need determinations. Ms. Spafford and other Union officers considered the University's action to be a breach of the settlement agreement prior to "when the ink was dry."

Ms. Spafford's concerns were taken up by the Council at a meeting on October 7, 1989. Delegates to the Council meeting voted unanimously to declare the University in total breach of the agreement. The effect of the University's action in the Union's view was to set the agreement aside and to discharge the Union's obligation to perform under it. The Union followed the vote of Council delegates with an October 11 letter to the University declaring the breach and advising the University that it was terminating the agreement.¹³ The Union specifically advised the University that it would not withdraw any of its unfair practice charges filed with the PERB and it did not do so.

The University was surprised by the Union's action. The University did not believe it had violated either the spirit or letter of the agreement. After the Union declared the University in breach of the agreement, three University labor relations

¹³Except for the University's obligations under paragraph 4A of the settlement agreement, the Union makes no contention that the University has otherwise breached the agreement. See stipulation of the parties. R.T., Vol. 1, p. 68.

officers contacted different Union officials seeking further meetings. The Union rejected these overtures.

LEGAL ISSUE

Did the University Council-AFT, by refusing to honor the settlement agreement, make an unlawful unilateral change in a negotiable subject and thereby fail to meet and confer in good faith?

CONCLUSIONS OF LAW

This case presents the unusual situation of an employer accusation that an exclusive representative has made a unilateral change in a negotiable subject. As the Respondent notes, unions are seldom accused of this type of failure to negotiate in good faith "because of their relative inability to effect unilateral changes."¹⁴ Nevertheless, there are circumstances in which unions have been found guilty of carrying out unlawful unilateral changes.¹⁵

Rules for evaluating alleged unilateral changes by unions are the same as rules for evaluating alleged unilateral changes

¹⁴The Developing Labor Law. 2d edition, 1983, BNA, Vol I, Chapter 13, pp. 564-565.

¹⁵Associated Home Builders, Inc. v. N.L.R.B. (9th cir., 1965) 352 F.2d 745 [60 LRRM 2345] (union's unilateral imposition of production quotas, enforced by fines upon members); Plumbers Local 420 (Paragon Mechanical) (1981) 254 NLRB 445 [106 LRRM 1183] (union's coercion, enforced by strike, which compelled employer to abandon national agreement in favor of local agreement); Communications Workers (Chesapeake & Potomac Tel. Co.). (1986) 280 NLRB 78 [124 LRRM 1009] enf. (4th cir., 1987) 818 F.2d 29 [125 LRRM 2352] (union's unilateral refusal to agree to continued preparation, use, and sharing of costs of transcript in nonexpedited arbitration proceedings).

by employers. A pre-impasse unilateral change in an established, negotiable practice violates the duty to meet and negotiate in good faith. Such a unilateral change is a failure per se of the duty to negotiate in good faith and an unfair labor practice.¹⁶

Where, as here, a unilateral change allegation involves the alleged breach of an agreement, the statutory proscription against PERB enforcement of agreements becomes relevant. HEERA section 3563.2(b) provides:

(b) The Board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

The breach of an agreement will constitute an independent violation only where the breach amounts to a change in policy having "a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." Grant Joint Union High School District (1982) PERB Decision No. 196. The Board has interpreted section 3563.2(b) as applying to unfair practice settlement agreements as well as to memoranda of understanding. Thus, breach of an unfair practice settlement agreement, without more, does not constitute a failure to negotiate in good faith. Regents of the University of California

¹⁶Davis Unified School District, et al. (1980) PERB Decision No. 116; State of California (Department of Transportation) (1983) PERB Decision No. 361-S. These principles are applicable to cases decided under HEERA. Regents of the University of California (1983) PERB Decision No. 356-H. See also, NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

(1983) PERB Decision No. 362-H. The breach of a settlement agreement will constitute an independent violation only where the breach amounts to a change in policy having a generalized effect or continuing impact upon the terms and conditions of employment. See, Clovis Unified School District (1986) PERB Decision No. 597. In this regard, breaches of settlement agreements are treated exactly like breaches of contracts.

The University contends that the Union made a unilateral change when it abrogated the settlement agreement for unfair practice cases LA-CE-235-H, SF-CE-272-H and SF-CE-287-H. The University argues that the Union's action effectively set aside the revised definition of instructional need, a critical element in every appointment decision involving long-term unit members. This action, the University contends, had a generalized effect and continuing impact on appointments of long-term unit members.

The Union argues that the charge must be dismissed because the PERB has no jurisdiction to enforce the settlement agreement at issue. The Union contends that its repudiation of the settlement agreement did not separately constitute a unilateral change, as required in Grant. This is true, the Union asserts, for two reasons. First, repudiation of the agreement had no generalized effect or continuing impact, and second, the agreement does not involve a negotiable subject.

The Union's obligation under the agreement was limited to withdrawal of the unfair practice charges and restraint in future filings. Repudiation of those obligations, as the Union argues,

had no effect other than continuation of the PERB proceedings. It is not the case, as the University asserts, that the Union's action had the effect of changing the criteria for appointment of long-term unit members. The Union has no control over hiring. It is the University that makes the hiring decisions. The Union does not participate in the process.¹⁷

Moreover, as the Union argues, the key element of the agreement is withdrawal of the Union's previous unfair practice charges. The scope of representation for negotiations involving the University of California "means and is limited to, wages, hours of employment and other terms and conditions of employment."¹⁸ Under similar wording of the Educational Employment Relations Act,¹⁹ PERB has excluded from the mandatorily bargainable subjects an employer's demand that a union withdraw an unfair practice charge. Lake Elsinore School District (1986) PERB Decision No. 603. In support of this conclusion, the Board relied entirely upon holdings of the

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National Labor Relations Board.

¹⁷The University can apply whatever definition of instructional need it wishes. The Union, at most, can only challenge the University after the fact. This differs from the cases cited in footnote no. 15, supra. In those cases, it was the union that actually made or compelled the change in the negotiable subject.

¹⁸HEERA section 3562 (q).

¹⁹The Educational Employment Relations Act (EERA) is found at section 3540 et seq.

²⁰In particular, Kit Manufacturing Co., Inc. (1963) 142 NLRB 957 [51 LRRM 1224], enfd. (9th Cir. 1963) 335 F.2d 166 [53 LRRM 3010].

In the absence of any persuasive argument for why there should be a different result under HEERA, I conclude that the Lake Elsinore rationale is controlling. A higher education employer's proposal that a union withdraw an unfair practice charge is not a mandatory subject of bargaining.

Thus it is clear that the Union's refusal to withdraw its prior unfair practice charges did not constitute a unilateral change and failure to negotiate in good faith. The Union's refusal to withdraw was not a change in policy having a generalized effect or continuing impact upon a term and condition of employment. This is because the refusal to withdraw an unfair practice charge is not a mandatorily negotiable subject. The requirement that the Union withdraw the unfair practice charges is a contractual requirement, only. Since PERB is precluded from enforcing contractual agreements which do not separately constitute unfair practices, the agency is without jurisdiction in this matter.

Accordingly, I conclude that the University's charge and companion complaint must be dismissed for failure to state a prima facie violation of the HEERA. For these reasons, it therefore is unnecessary to consider the Union's defense that it was entitled to repudiate the agreement as a matter of contract law.²¹

²¹The only issue decided here is whether the breach of the agreement was an unfair practice. I conclude that it was not. Since it is unnecessary to reach the question of whether the Union was entitled to breach the agreement, this proposed decision makes no conclusion about the validity of the contract.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge SF-CO-19-H, The Regents of the University of California v. University Council-American Federation of Teachers, and companion PERB complaint are hereby DISMISSED.

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

Whether the agreement is legally binding and enforceable in court is an entirely different matter.

shall accompany each copy served on a party or filed with the Board itself. See California Code of Regulations, title 8, sections 32300, 32305 and 32140.

Dated: January 31, 1991

RONALD E. BLUBAUGH
Administrative Law Judge