

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



ASSOCIATION OF GRADUATE STUDENT )  
EMPLOYEES, )  
 )  
Charging Party, ) Case No. SF-CE-179-H  
 )  
v. ) PERB Decision No. 730-H  
 )  
REGENTS OF THE UNIVERSITY OF ) April 26, 1989  
CALIFORNIA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Appearances: Suzanne P. Marria, Attorney, for Association of Graduate Student Employees; Claudia Cate and Edward M. Opton, Jr., Attorneys, for the Regents of the University of California.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both parties to the proposed decision of the administrative law judge (ALJ). The case arose out of an unfair practice charge filed by the Association of Graduate Student Employees (AGSE) against the University of California at Berkeley (University or UCB) alleging violations of section 3571, subdivisions (a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA or Act).<sup>1</sup>

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<sup>1</sup>HEERA is codified at Government Code section 3560 et seq. All references are to the Government Code unless otherwise specified. Subdivisions (a) and (b) of section 3571 state:

It shall be unlawful for the higher education employer to:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

AGSE alleges that it attempted to negotiate with the University on behalf of various classifications of graduate students employed by the University regarding wages, hours and other terms and conditions of employment, and that it sought to have dues deductions implemented. AGSE further alleges that the University refused to recognize graduate students employed by the University as employees for purposes of the Act, and refused to implement dues deductions for graduate student employees. A complaint issued incorporating the allegations in the amended unfair practice charge.<sup>2</sup> The University asserts that the persons represented by AGSE are not employees within the meaning of HEERA<sup>3</sup> and, thus, the University has no obligation to deal with

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to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

<sup>2</sup>The University's exception that the ALJ erroneously stated on page 2 of his decision that the complaint incorporated the original unfair practice charge has merit. Rather, the complaint incorporated the amended unfair practice charge filed on March 27, 1984.

<sup>3</sup>HEERA section 3562(f) states:

"Employee" or "higher education employee" means any employee of the Regents of the University of California, the Directors of Hastings College of the Law, or the Board of Trustees of the California State University, whose employment is principally within the State of California. . . . 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

AGSE as an employee organization.<sup>4</sup>

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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.

<sup>4</sup>Originally, the University and AGSE entered into a stipulation wherein AGSE agreed to litigate fifteen designated classifications. (See Joint Exhibit No. 1, para. 11.) Of these classifications, only seven are before us; and are divided into two groups: (1) Teaching Assistant (Title Code 2310), Associate in \_\_\_\_\_ - Graduate Student (Title Codes 1501, 1506, and 1511), Teaching Fellow (Title Code 2300); and (2) Research Assistant (Title Code 3299), Junior Specialist - Graduate Student (Title Code 3331), Post-Graduate Research - Graduate Student (Title Codes 3241, 3244, and 3246), Assistant Specialist (Title Code 3320).

The remaining eight classifications were resolved as follows: (1) Four classifications were withdrawn without prejudice by AGSE during the hearing [Language Assistant (Title Code 2340), Research Associate (Title Code 3298), Research Fellow (Title Code 3296), and Physical Activities Assistant (Title Code 2330)]; (2) two classifications were deleted from Joint Exhibit No. 1 pursuant to an oral stipulation [Reader (Title Code 2850) and Tutor (Title Code 2860)]; (3) one classification was conceded to be employees by the University in its post-hearing brief [Acting Instructor (Title Codes 1401, 1407, and 1417)]; and (4) two classifications, found by the ALJ to be employees under HEERA, were not excepted to by either the University or AGSE [Nursery School Assistant (Title Code 2286) and Community Teaching Fellow (Title Code 2305)].

With regard to the exceptions to the ALJ's failure to include Readers, Tutors and Acting Instructors in his Order and Notice, we find that the ALJ was correct in not including the Readers and Tutors in the Order and Notice. The parties stipulated that these two classifications were to be deleted from paragraph 11 of Joint Exhibit No. 1, which specifically lists those classifications AGSE intended to litigate at the unfair practice hearing. We find that the parties, in effect, agreed not to litigate these two classifications.

As to the Acting Instructor classification, the University, in its post-hearing brief, states that it "hereby withdraws its opposition to the designation of Acting Instructor (Title Codes 1401, 1407, and 1417) as employees within the provisions of section 3562, subdivision (f)." Since the parties did not stipulate to exclude this classification, and it was fully

The ALJ found that graduate students appointed to the classifications of teaching assistant, teaching associate, teaching fellow, community teaching fellow, nursery school assistant and those research assistants paid hourly, are employees for purposes of HEERA. The ALJ further found that the graduate student classifications of nonhourly research assistant, research assistant specialist, junior specialist and postgraduate researcher are not employees. He concluded that the University did not violate HEERA in its implementation of work-study funding for the disputed classifications, but had violated HEERA by its refusal to deduct dues from those graduate students found to be employees.

The Board, after review of the entire record, affirms in part and reverses in part the ALJ's proposed decision, in accordance with the discussion below.

#### SUMMARY OF THE FACTS

The University of California is a public, state-supported institution. This case involves only the Berkeley campus, one of eight campuses within the system offering undergraduate and graduate instruction and professional education.

By statute, the University of California is designated as the primary state-supported academic agency for research with exclusive jurisdiction in public higher education over instruction in the professions of law, medicine, dentistry, and

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litigated, we conclude that the classification of Acting Instructor should be included in the Order and Notice.

veterinary medicine. Additionally, the University of California has sole authority to award doctoral degrees in all fields, either alone or jointly with the California State University. The University of California is also required to provide undergraduate education to the top one-eighth of the high school graduates in the state.

Consistent with its mission, UCB offers lower division, upper division, graduate, professional, and post-doctoral programs. The Graduate Division at UCB has 101 programs, 93 offering Masters (MA) and Doctor of Philosophy (Ph.D.) degrees, and 8 offering only the MA degree. Generally, the MA degree follows completion of a specified number of advanced courses and either a thesis or a comprehensive examination. The Ph.D. degree is primarily a research degree. The Ph.D. program trains graduate students in how to conceptualize research, develop a research problem, carry out the research project, and present the results of the extensive research in a dissertation.

Generally, a graduate student seeking a Ph.D. degree will complete a number of course requirements which vary among the departments. Some departments require completion of a series of predetermined courses, others direct students to courses to solidify knowledge in particular areas, and still others gear course requirements to the students' own particular interests. At the departmental level, there may or may not be a required written or oral examination preliminary to the Graduate Council's qualifying examination for the doctorate. Once the department

signifies that the student is ready, the student is scheduled to take and pass a series of qualifying examinations. Within one year of passing the qualifying examinations, the student must file an application for candidacy for the Ph.D. degree, complete a dissertation and defend the dissertation in an oral examination.

Graduate students are admitted to departments after a screening process in the Graduate Division and an intense review by the particular department. In some departments, the availability of positions in the disputed classifications within the department is a major factor in the number of students to be admitted. Competition with other institutions for the most-qualified students has resulted in some departments virtually guaranteeing financial support to admitted students by appointment to these classifications for the duration, or a portion of the duration, of their stay in the graduate program. In such departments, the decisions on the number of students is made only after available resources for teaching and research positions are identified. Students who have their own means of support, whether through a private source, a fellowship, or a scholarship, may also be admitted to the graduate program, aligned with an advisor, permitted to select their areas of interest and undertake research in the same manner as students in the disputed classifications.

#### I. GRADUATE STUDENT EMPLOYMENT

The disputed classifications are easily divided into two

groups. The classifications of teaching assistant, teaching associate, and teaching fellow require the graduate student to act in the role of an "instructor." The classifications of research assistant, junior specialist, assistant specialist and postgraduate researcher require the graduate student to act in the capacity of a "researcher." While the functions of the graduate student instructor (GSI) and graduate student researcher (GSR) may be different, as graduate student employees, they share several characteristics. This decision will address the common traits first, and then examine in more detail, the findings that are specific to the researcher and instructor groups.

As a basic rule, graduate student employees are to be employed, at a maximum, half-time. Some positions, however, are quarter-time and the actual number of hours worked varies, depending on a number of factors including the department and the classification. The evidence reflects various reasons for the half-time limitation. The University's witnesses testified that the limitation is grounded in a policy that a graduate student is a student first and foremost, and that employment in excess of half-time would detract from the student's academic pursuits. The record also reflects the fact that the University receives state funding on the basis of full-time enrollment and that students employed at the University more than half-time cannot be counted as full-time students.

Once admitted to a graduate degree program, the student must be continuously enrolled (registered) each semester until all

requirements are completed. To meet "academic residence," a graduate student must enroll for at least four units of upper division undergraduate or graduate degree course work. While some variation exists between departments and classifications, graduate students working as GSIs and GSRs generally must maintain full-time residency, eight units or more. Students not currently registered while appointed, such as those appointed in the summer term, are required to have been registered during the terms preceding and following their appointment.

Students receive unit credit towards the residency requirement not only for course work, but also for their work as graduate student employees. Thus, for example, teaching assistants (but not teaching associates or teaching fellows) receive unit credit for teaching or for taking a pedagogy course in conjunction with a teaching assistantship. Students working as researchers receive unit credits towards residency for their dissertation research work, whether or not they are employed in the disputed classifications. In some cases, the unit credit received may concurrently fulfill academic degree requirements. In other cases, unit credit may be awarded solely to allow the students to meet the residency requirement and does not count toward fulfilling academic degree requirements. Generally, a student receiving unit credit for graduate student employment also receives a grade of satisfactory or unsatisfactory.

The evidence in the record reflects that graduate students are treated as students in some respects and as employees in



others. Graduate students employed in the disputed classifications follow registration procedures and pay registration fees, educational fees, UCB fees and, if appropriate, nonresident tuition fees, on the same terms as other students. They complete student forms such as class matriculation forms, schedule request and change forms, and petitions to change grade option.

On the other hand, graduate student employees are also required to complete the same employment forms used by UCB for other employees, including, inter alia, a personnel action form, personal data form, State Oath of Allegiance, patent agreement, Employee Federal-State Withholding Allowance Certificate, academic biography personnel form, and ethnic identity form. They receive an employee identification number and identification card.

The employee benefits received by graduate student employees are fairly limited in nature. The graduate students do not participate in health benefits available to full-time UCB employees, but rather are eligible for the out-patient treatment available to all students. They do not receive UCB retirement benefits, dental insurance, short-term disability insurance, or paid life insurance. Social security payments are not deducted from their paychecks. Graduate students do not get paid vacation, nor do they formally accumulate sick leave, although some evidence suggests that their pay is not docked for absences. The students are exempt from unemployment insurance coverage but

are, at least in some instances, covered by worker's compensation.

Graduate students are not subject to the University's layoff policy because, according to an Office of the President memorandum:

Such student appointees are employed for specific periods and failure to reappoint is to be considered a termination rather than a layoff. Separate considerations, particularly relating to the quality of the student's academic work and his progress toward his degree objectives take precedence over the considerations of layoff policy. (UC Exhibit No. 14.)

According to the University's Academic Personnel Policies and Procedures Manual (APM), the grievance procedures applicable to UCB employees<sup>5</sup> generally are applicable to graduate student employees only insofar as grievances that affect their status as employees, as opposed to their status as students. Thus, for example, terminations resulting from scholastic deficiencies are not, according to the APM, subject to the grievance procedures. A termination based solely on poor job performance would be subject to the grievance procedures. Yet evidence adduced at the hearing indicated that, in practice, graduate students do not use these grievance procedures: graduate student grievances, including those relating to GSI and GSR appointments, are dealt with through a committee of the Graduate Council or through the

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<sup>5</sup>The APM sets forth a three-step procedure overseen by the chancellor, for resolution of grievances filed by academic appointees who are not members of the Academic Senate (regular faculty members).

Dean of the Graduate Division and not by the administration.

Most graduate student employees are paid a set monthly rate based upon the classification they hold and the number of months they work annually. The University attempts to equalize the amounts of pay accorded GSIs and GSRs to avoid one classification being preferable over another.

In classifications with salary steps, such as junior specialist, assistant specialist, and postgraduate researcher, the graduate student appointees are appointed to the first steps only, with the higher step positions being awarded to nonstudents. UCB does not move graduate students through the steps based upon length of time within the classification.

Graduate student salaries are based upon information provided by a network of universities and research laboratories and on results of consultations with the Coordinating Committee on Graduate Affairs and the Graduate Division. The amount of salary is also based on an assessment of the entire financial requirements of graduate students, such as tuition, fees, and stipends associated with research and teaching positions. Salary increases for graduate student employees have been based on increases in tuition and fees assessed by the University, and have, at times, exceeded raises given to other UCB employees.

All graduate student employees are paid monthly from the University's payroll office. With the exception of the hourly employees, graduate students are paid the full amount each month even though classrooms or laboratories may not be open because of

vacations or holidays. Federal and state taxes are withheld from pay warrants.<sup>6</sup>

The record supports the University's view that appointments to the disputed classifications are in the nature of "stipends" for the support of students during their graduate studies. Some departments, notably the sciences, provide a commitment of support through the use of teaching assistantships or research assistantships, or a combination thereof, to students admitted. Yet only, about 30 percent of the departments take financial need into consideration in making the appointments. Unlike fellowships, or other forms of financial aid available to graduate students, appointments to these disputed classifications are made primarily on merit and continued adequate progress towards a degree.

## II. GRADUATE STUDENT INSTRUCTORS

### A. GSI CLASSIFICATIONS

At issue herein are the GSI classifications of teaching assistant, teaching associate, and teaching fellow. While the use of different data bases by the University and AGSE produced different results as to the number of GSIs in the various classifications at issue, an averaging of the figures reveals

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<sup>6</sup>The record is unclear as to whether the graduate students in the disputed classifications actually received tax exemptions under the provision in the Internal Revenue Code (Section 117) that provides for exemptions for scholarships and fellowships. Post-hearing 1986 amendments to Section 117 specifically provide that such income is not excludable. In any event, we do not find the tax issue dispositive.

that approximately 1100 GSIs were teaching assistants in 1984, 570 were teaching associates, and 2 were teaching fellows.

1. Teaching Assistants (TAs)

TAs are used primarily in freshman and sophomore classes with large enrollments. TAs attend the lecture sessions given by a member of the faculty, up to four or five hours per week. They meet up to three times a week with 15 to 60 students for an hour discussion session. During the discussion sessions, the TA is often called upon to answer students' questions regarding the material presented during the course lectures and to expand on materials referred to in the lectures. The TA may be responsible for assigning, reading and grading student assignments. Typically, the TA has office hours at set times during the week for students to obtain additional help with course materials. In courses with laboratory sessions, TAs will lead undergraduates through the assigned experiments and the writing of reports. The TA will also be involved to varying degrees in preparing, reading and grading examinations, including mid-terms and finals.

Appointees to the TA positions are required to be registered graduate students in full-time residence and serve under the active tutelage and supervision of a faculty member. The faculty member in charge of the course selects the textbook or materials used in the course. In some courses, the supervising faculty member will share in conducting the discussion sessions or monitoring the progress of the laboratory operations, and will participate in the reading and grading of examinations.

The working relationship between the faculty member teaching the course and the TA varies from one where weekly meetings occur to review the substantive materials, schedules of exams, etc., to one where virtually no meetings occur, save for an initial orientation meeting of the instructor and all the TAs. Both the faculty and the TAs, in almost all cases, are evaluated by the students at the end of the course. In some departments, faculty members evaluate the TA as well. The evaluations, in some cases, are kept in the graduate student's academic file.

Teaching assistant appointments are made by a committee of faculty members, by preference of an individual faculty member who wishes a particular TA to assist him or her in teaching a course, by an administrative aide within the department, or by a head TA, another graduate student who is given administrative responsibility for assigning TAs and insuring class schedules and assignments are met.

Graduate students are often given a preference for classes they wish to teach as a TA. Some departments secure lists of preferences from students who rank courses they would accept for assignment: the departments then attempt to align the students' preferences with the departments' needs for staffing.

TAs may be appointed either quarter-time or half-time. Those students appointed quarter-time work only ten hours per week and receive one-half the compensation of the students employed half-time. Appointments generally may not exceed half-time. Exceptions to the half-time rule must be requested through

the student's graduate advisor, endorsed by the department head and, if applicable, the dean of the school or college, and then be submitted to the Graduate Division for approval. Typically, the work hours for a half-time TA are fifteen to twenty hours per week. Certain periods during the term may require more hours, i.e., when the TAs are grading or reading examinations.

Unlike funding for the other teaching classifications in dispute, the University receives funds directly from the state for salaries of TAs based upon a ratio of TAs to undergraduate enrollment. In recent years, the University has been attempting to lower that ratio and has made budget proposals to increase funding for additional TA positions.

## 2. Teaching Associates

The teaching associates are appointed temporarily, are not under consideration for appointment in the professor series, and provide, on a no more than half-time basis, independent instruction in lower division courses. Minimum qualifications are possession of a MA degree or equivalent training, and at least one year of teaching experience. In some circumstances, the Graduate Division waives the minimum qualifications. For example, if there is insufficient funding for TA positions, then the same graduate students can be appointed as teaching associates.

The teaching associate classification is supposed to be used for graduate students who are responsible for the entire instruction of a lower division course, including lecturing,

holding office hours, leading discussion sections, and reading and grading papers and exams. A teaching associate is not assigned to teach an upper division or graduate course or course section except with the approval of the Campus Committee on Courses of Instruction.

In practice, use of the associate title varies. In some departments, the appointment is a simple alternative to a TA position, where a lack of sufficient TA positions exists. In such cases, the duties of the teaching associate are exactly the same as a TA's duties. Generally, graduate students have served in TA positions before becoming teaching associates, although the same students may at a later time be again assigned a TA position.

Teaching associates earn a few dollars more per month than is earned by the TAs. The departments receive no state funding for these positions but must fund them from temporary academic savings resulting from allocated salary positions that are unfilled or for which the faculty member is on leave.

### 3. Teaching Fellows

The teaching fellow classification is for a registered graduate student in full-time residence who has advanced to candidacy for the doctorate degree, or otherwise has achieved appropriate professional maturity, and who has been chosen, because of competence, to conduct the entire instruction of a group of students in a lower division course under the general supervision of a regular faculty member. Appointment, as with



the other GSI classifications, is limited to half-time.

The term of appointment to a teaching assistant, teaching associate, and teaching fellow position is for one year or less and is self-terminating, unless the appointee is otherwise notified. The University takes several factors into account when it evaluates a graduate student's request to be reappointed to a particular position, including whether: the GSI has provided quality education to the undergraduates; the department needs the position to recruit new students into the department's program; the incumbent has alternative sources of support; the GSI will receive a greater educational benefit by assisting in the same course again, by assisting in a different course, or by concentrating on other parts of his or her educational experience; and the GSI is making appropriate progress towards a graduate degree and is in good academic standing. The total length of appointment may not exceed four years (including in the aggregate, employment as reader on annual stipend, TA, teaching fellow, and/or associate). As with the half-time rule, an exception to the length of appointment rule may be requested through the student's advisor, endorsed by the department head and the dean of the school or college, and submitted for approval by the Graduate Division. Even with such exceptions, appointment cannot exceed a total of six years.

No more than a handful of GSIs are hired into faculty positions at UCB after their degree work has been completed. Thus, once they have reached the maximum number of years of

appointment, the great majority have no expectation of continued employment.

#### B. SERVICES PROVIDED BY GSIs

The record reflects that, under the current arrangement, the University relies heavily on GSIs in providing undergraduate education at the UCB. The predominate work of GSIs is in the "service" courses, which are courses offered by a department for undergraduate students not enrolled in that department. The GSIs are responsible for 58 percent of the lower division class meetings.

The number of TAs each department obtains is set by the administration. The use of TAs within each department varies. Departments with high undergraduate enrollments use over half their graduate students as TAs in any particular semester. Some departments have more students interested than there are TA positions available. Some departments lack a sufficient number of students to meet their needs and may appoint graduate students from other departments to TA positions.

The Graduate Division does not require training for GSIs in any department, yet some departments offer courses or seminars in teaching methodology. The students receive unit credit for these methodology courses, which usually last one semester, and are often given simultaneously with the first teaching assignment.

Although the University's pervasive use of GSIs is extensively documented in the record, the record also supports a finding that the University could operate its undergraduate

program without them. Instead of specifically limiting GSI positions to registered students, the record indicates the University could replace GSIs with nonstudent instructors at a lesser cost. Many institutions of higher learning run full undergraduate programs without the use of GSIs.

#### C. RELATIONSHIP OF SERVICES TO EDUCATIONAL OBJECTIVES

Teaching as a formal requirement for the Ph.D. is set at the departmental level. Sixteen departments require teaching for the graduate degree. The record reveals several reasons why the other departments have limited or no teaching requirements. Some departments cannot provide all their graduate students teaching opportunities because they have only a small undergraduate program, no undergraduate program, or insufficient funds to provide teaching opportunities for all graduate students. Some graduate students have such limited fluency in the English language that they cannot teach in English. Some departments have such a tradition or policy of having graduate students teach that they have felt no need to impose a teaching requirement. Although teaching is required in only sixteen departments, nearly three-fourths of all graduate students serve as GSIs some time during their academic careers.

The reasons a student might apply for a GSI position, even though teaching is not a degree requirement for that student, are varied. Obviously, teaching experience is particularly valuable to those students seeking a teaching career. While the record evidences no exact figures as to the number of graduate students

pursuing careers in academia, the evidence does support a conclusion that teaching figures prominently in the career aspirations of a high proportion of graduate students. Job listings for teaching appointments at colleges and universities generally list teaching experience as a preference, if not a requirement. Letters of recommendation virtually always discuss teaching ability, either as the second topic, after research, or sometimes as the primary topic, when the letter is addressed to a non-research institution.

While many of the AGSE witnesses testified that their teaching work was of little value to them or had no relation to their dissertation or field of study, University witnesses stressed the educational value of teaching for all graduate students, whether or not they planned to pursue careers in academia. Many of the professors who testified extolled the benefits of the GSI experience in terms of its being a valuable tool of preparation for initially, the oral qualifying examinations and, later, the oral defense of the dissertation. By teaching a course, the GSIs not only come away with a firmer understanding of the basic course materials, but also with an increased ability to think on their feet, organize their thoughts, and communicate clearly and effectively, all skills befitting a scholar no matter what career path is taken. These skills are learned and then honed by: (1) attending lectures by the faculty members that enable the GSI to answer students' questions or to lead a discussion session; (2) the fielding of

questions in sessions or labs; and (3) the reading and grading of student assignments and examinations.

The graduate students called by AGSE testified extensively about conflicts that arose between the teaching duties and their own graduate work. The hours of class or sessions with students, laboratory duties, reading and grading papers, especially during examination time, resulted in less time devoted to their own course of study or research. They testified that while they might have been encouraged to teach for two or three terms, they were often discouraged by their faculty advisors who feared the teaching would delay progress on their dissertations. The evidence also shows, however, that the departments assess the students own degree progress in making assignments and renew appointments only if the graduate student is in good academic standing and making satisfactory progress towards the degree.

### III. GRADUATE STUDENT RESEARCHERS

#### A. GSR CLASSIFICATIONS

The second group of classifications in dispute are those of research assistant, junior specialist, assistant specialist and postgraduate researcher (GSRs). While the use of different data bases by the University and AGSE produced different results as to the number of GSRs in the various classifications at issue, an averaging of the figures reveals that approximately 1300 GSRs were research assistants in 1984, 64 were junior specialists, 515 were assistant specialists, and 280 were postgraduate researchers.

1. Research Assistants

A "research assistant" is defined in the Academic Personnel Policies and Procedures Manual (APM) as a graduate student in the University:

. . . with high scholarship standing who serves with or without salary but whose appointment must be part-time. The appointee does research under the direction of a faculty member and may or may not collaborate in the publication of research as determined by the faculty member directing the work.

2. Specialist Series

Assistant specialists and junior specialists are academic appointees who are engaged in research in specialized areas and who do not have teaching responsibilities. Criteria for appointment are performance of research in specialized areas, professional competence and activity, and University and public service.

3. Postgraduate Researcher

Although the postgraduate researcher title is used for students and nonstudents, the three title codes in dispute are limited to registered graduate students, whose appointments are limited to half-time. Appointments to these positions engage in research.

B. RELATIONSHIP OF SERVICES PROVIDED BY GSRs TO EDUCATIONAL OBJECTIVES

The University of California is the "primary State-supported academic agency for research." It is also, however, a research-educational institution: it exists also for the purpose of

producing researchers. The Ph.D. is essentially a research degree, granted upon fulfilling the department's requirement that the student demonstrates ability to conduct research. The degree is awarded upon the student's completion, submission and approval of a dissertation setting forth the student's identification of a problem, methods of examination, and the conclusions drawn from the research.

Research is funded by the University itself or by a grant obtained by a faculty member's direct application to outside agencies for extramural support. Extramural grants contain conditions that must be adhered to by the faculty member. Progress reports to the grantor are required periodically. The evidence indicates the granting agencies are aware that a direct by-product of these grants is the training of graduate students to do research.

The University oversees the appropriateness of the research-grant activity of the faculty. The University's regulations provide that the University's participation is limited to activities that lead to extension of knowledge or increase the effectiveness of teaching.

Research done by the graduate student contributes to the grant purposes and will often lead to interim publication that the graduate student coauthors with the faculty member securing the grant. The same research will often lead to discovery of and constitute the core of the student's dissertation.

The record reveals a wide variety of practices in the

utilization of GSRs in the various departments; therefore, our findings are limited to general observations. Generally, research employment opportunities are apportioned as a means of financial support to attract graduate students to UCB. A few departments combine teaching and research employment opportunities with a commitment of financial support. Such departments admit students with a guarantee of support for a period of time commensurate with the normative time identified by the department.<sup>7</sup> Other departments provide assurances that they will do everything possible to provide support to the students, either in the form of teaching assistantships or research assistantships, but make no guarantee that such support will be provided for the duration of the students' efforts towards their degrees. Some departments make assurances of support to a portion of the students who are admitted. For instance, the top candidates, varying in number depending on the size of the department, are given assurances of support for the duration of their candidacy, while others are admitted with no such assurances.

The amount of support varies among departments but are the same within each department. Typically, departments use a mix of grant funds, research assistantship funds, teaching assistantship

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<sup>7</sup>Normative time is that number of years a department establishes as the time within which a student should be able to complete the degree requirement. It differs from department to department. It insures that students will get their degrees without undue delay and will enable the department to take in new students.



funds and departmental discretionary funds to bring each supported student to the departmental level of support.

Generally, in the science and engineering departments,<sup>8</sup> admission of students is based on the department's ability to guarantee financial support for the students, and a determination that the department's ongoing research will be of benefit to the students. Upon admission, there is a systematic process of aligning each student with a particular faculty member to establish a one-on-one relationship. The alignment process varies, but the concept is that, through contact with the professors in the department, the student will select an area of interest for his or her individual pursuit of research. The student's preferences, along with the faculty member's objectives, will bring the student and faculty member together to work in a joint effort to accomplish both the faculty member's research interest and the student's research project leading to the dissertation.

The research undertaken by the student may be aligned with an ongoing research project or the pursuit of a new undertaking within the general area of the faculty member's research project. In any event, the work of the graduate student may ultimately constitute the essence of his or her own research leading to the dissertation upon which the degree is granted. The hours worked by the student bear no relationship to the percentage of the

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<sup>8</sup>Approximately two-thirds of the GSR positions are in the science and engineering departments.

appointment, and are left up to the student's own determination to accomplish the research. The student receives unit credit for the research work, which may satisfy the entire departmental residency requirement.

The disputed classifications also include students engaged in work that may or may not lead to their own dissertation work. Testimony suggested that, at the beginning of graduate school, students do not necessarily know what specific subject will evolve into a dissertation subject. Rather, through the process of study and discussion with faculty and with a research advisor, topics of interest begin to emerge. Even then, a topic may alter or change direction once undertaken.

A few research assistantships are also used for appointments in nonscience departments where the duties are unrelated to the graduate student's own research work. These appointments are on an hourly basis, and unlike the general appointment term of one academic year, are for less than a year or term. No academic credit or credit towards residence is accorded for these appointments.

Finally, some GSRs may be assigned to perform activities clearly unrelated to dissertation research, such as clerical tasks, manuscript reading, bibliography preparation, library errands or even, in one instance, chauffeuring.

All graduate students within each department, whether appointed to the disputed classifications or not, are treated precisely the same. Admission, orientation, alignment with a

research advisor and undertaking research with a faculty member, hours of work, and units of credit given are indistinguishable between students supported by these classifications and those who are not.

The record reflects several benefits to the University accruing from its appointment of GSRs. For example, the GSRs' contributions to the research projects in the form of actual hands-on research enables the principal investigator to complete the project and increases the likelihood that the faculty member's research will be funded again. Faculty members may include publications that were coauthored by graduate students on their own curriculum vitae. The research accomplishments themselves are a factor in the faculty members' own promotional aspirations. Grants often fund not only salaries for lab personnel, but the project equipment that is retained by the University after the research project is completed. Furthermore, grants generate income for the University in the form of overhead fees. Finally, UCB's reputation is enhanced in the academic community by the success it has in obtaining grants. UCB's reputation attracts more graduate student applications and potential faculty interest in a financially well-supported institution. While the contribution of GSRs to the University cannot be minimized, the faculty and University benefit in the same way from the research of graduate students not in the disputed classifications.

## DISCUSSION

### I. THE STATUTE AND CASE LAW

This is the first case before the Board considering the status of graduate students at the University.<sup>9</sup> The Board is asked to determine whether the classifications litigated herein are entitled to the protection accorded employees under HEERA. Government Code section 3562 subdivision (f) of HEERA (hereafter subdivision (f)), commands that we apply a two-prong balancing test to determine if graduate student employees are covered under

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<sup>9</sup>In New Haven Unified School District (1977) EERB Decision No. 14, the Board considered the status of student intern teachers who were pursuing their education at the same time they were hired as interns by the New Haven Unified School District. The interns had baccalaureate degrees but no educational teaching credentials. The interns performed all of the regular functions of a teacher and had complete responsibility for the classes taught, but were closely monitored by teachers. The Board held that although they were paid at least a minimum wage and functioned as teachers, the duties were incidental to their status as students and they could not be included in a bargaining unit.

In Modesto City Schools (1984) PERB Decision No. 384, the Board found the classification of a Psychologist-Intern was appropriately placed in the certificated unit. The Psychologist-Intern was not enrolled at the University, but worked full-time for Modesto City Schools under minimal supervision; performed the same duties as the other school psychologists; and received the same benefits as other certificated employees, but was paid 50 percent of a psychologist's wage. While interns had no guarantee of continued employment, the district had hired former interns as regular psychologists. The Board held that participation in an internship required to qualify as a school psychologist was not, in and of itself, determinative and found that the educational concerns in this instance were secondary to the services performed.

Both cases were decided under the Educational Employment Relations Act, and are inapplicable to the present case due to HEERA's unique statutory language in section 3562(f).

the Act. That provision reads as follows:

(f) "Employee" or "higher education employee" means any employee of the Regents of the University of California, the Directors of Hastings College of the Law, or the Board of Trustees of the California State University, whose employment is principally within the State of California. However, managerial, and confidential 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.)

The ALJ found that GSIs, community teaching fellows, nursery school assistants, and research assistants, when paid and employed on an hourly basis,<sup>10</sup> are employees under HEERA. The ALJ further found that nonhourly GSRs are not employees.

The University excepts to the ALJ's interpretation of subdivision (f) and application of The Regents of the University of California v. Public Employment Relations Board (1986) 41 Cal.3d 601 (Regents).<sup>11</sup> The University argues that the ALJ

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<sup>10</sup>These "hourly paid" research assistants can be further identified as research assistants who (1) are paid hourly for hours actually worked and reported; (2) average less than 20 hours per week; (3) are appointed for periods less than an academic year; and (4) do not receive credit for their work.

<sup>11</sup>Specifically, the University asserts that the ALJ (1) misinterpreted and misapplied the Board's position on the quantity of time spent by GSIs providing services; (2) failed to give proper weight to the evidence that learning to teach is crucial to graduate student careers; (3) incorrectly assumed that teaching lacked important educational value unless it was required by the department; (4) incorrectly focused almost exclusively on services performed while dismissing educational

shifted the burden of proof in this case to the University by engaging in the presumption that all graduate students are employees unless the University establishes that the students should be excluded from protection under the Act. Secondly, the University contends the ALJ wrongly required educational objectives to predominate over services provided in order for the students to be excluded.<sup>12</sup>

AGSE refutes the University's arguments and urges the Board to affirm the proposed decision on the graduate student instructors and those graduate student researchers found to be employees.<sup>13</sup> Additionally, AGSE excepts to the ALJ's conclusions that: (1) those graduate student researchers whose work is

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objectives in a few paragraphs; (5) failed to accord appropriate weight to the GSIs' status as students; (6) failed to consider decisions of other jurisdictions; and (7) incorrectly relied on only one of HEERA's purposes.

Additionally, with regard to the GSRs, the University argues that the GSR classification should not be divided into two groups with different status under HEERA. The University excepts to the ALJ's finding that the group of hourly-paid research assistants are employees under HEERA, and asserts that the ALJ erroneously focused on the dissertation, rather than the total graduate program, in concluding that services predominate over educational objectives.

<sup>12</sup>To the extent that the ALJ's proposed decision can be construed to impose a burden of proof upon the University, we agree with the University's exceptions that the proper construction of the statute requires the party seeking to establish coverage under HEERA to show that the educational objectives are subordinate to the services.

<sup>13</sup>We disagree with AGSE's contention that the ALJ decision is inconsistent regarding employee benefits and incomplete regarding indicia of employment. Any such inconsistencies or omissions, if they exist, are inconsequential.

related to an academic discipline but does not contribute to completion of a dissertation or degree are students; and (2) those graduate students performing research services on sponsored research projects which are directly related to the students' degree or dissertation are students.

In construing a statute, we begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230.) Further, a fundamental maxim of statutory construction is that, where no ambiguity exists, the intent of the Legislature in enacting a law is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed. In other words, where the language of a statute is clear and unambiguous, case law holds that the construction intended by the Legislature is obvious from the language used. (Noroian v. Department of Administration. Public Employees' Retirement System (1970) 11 Cal.App.3d 651, 654, hg. den.; McQuillan v. Southern Pacific Co. (1974) 40 Cal.App.3d 802, 805-806; Hoyme v. Board of Education (1980) 107 Cal.App.3d 449, 452; Great Lakes Properties, Inc. v. City of El Segundo (1977) 19 Cal.3d 152, 155; People v. Boyd (1979) 24 Cal.3d 285, 294.)

To find that a student whose employment is contingent on his or her status as a student is an "employee" and covered by HEERA, the Board must find either that the services rendered are unrelated to the student's educational objectives, or that those

educational objectives are subordinate to the services performed and that coverage under this chapter would further the purposes Of HEERA.

The only discussion of the legislative history of subdivision (f) is contained in the Regents case decided by the California Supreme Court. However, for the reasons stated below, we find that the factual backdrop of Regents is so unique that it severely limits Regents' application to the instant case. In Regents, the California Supreme Court considered the status of individuals who had graduated from medical school with a doctor of medicine (M.D.) degree and who worked at hospitals owned or operated by the University. The employees in question in Regents, unlike here, worked full-time and engaged in no academic course work. To qualify to practice medicine in California, these individuals (housestaff) must participate in an approved residency program. Generally, housestaff rotate through the different hospital services relevant to their specialty. The residency program requires extremely long hours, usually 80 to 100 hours per week, and lasts two to six years depending on the specialty. From the first year of residency, housestaff are involved in all aspects of direct patient care with little or no supervision, and are even required to supervise other hospital personnel, such as nurses and technicians. Housestaff salaries vary, but they receive annual step and cost-of-living increases. Housestaff also receive fringe benefits, including medical coverage, medical malpractice insurance, workers' compensation



insurance and paid vacation.

In addressing the status of housestaff, the court engaged in an extensive analysis of, and comparison to, National Labor Relations Board (NLRB) precedent and found that, unlike the National Labor Relations Act (NLRA), HEERA expressly permits PERB to find that students who render services related or unrelated to their educational objectives are entitled to collective bargaining rights in appropriate circumstances.<sup>14</sup>

In determining the status of housestaff, the Supreme Court noted that the Legislature has not confined PERB to limit its inquiry to the students' subjective state of mind. PERB must look further, to services actually performed "to determine if the students' educational objectives take a back seat to their service obligations."<sup>15</sup> (Regents. supra, 41 Cal.3d 601 at p. 614.) In affirming the Board's decision that housestaff are

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<sup>14</sup>The NLRB first addressed the issue of housestaff status in Cedars-Sinai Medical Center (1976) 223 NLRB 251 [91 LRRM 1398] and held that housestaff were not employees under the NLRA, since they are primarily engaged in educational training and thus are in an educational rather than employment relationship with the hospital. The NLRB focused mainly on the purpose of housestaff participation and paid little attention to the actual services performed. In St. Clare's Hospital and Health Center (1977) 229 NLRB 1000 [95 LRRM 1180], the NLRB adopted a "primary purpose" test which gave primary consideration to the students' subjective intent in participating in the housestaff program. The NLRB found that the individual's interest in rendering services is more academic than economic and concluded that the students were not covered by the NLRA.

<sup>15</sup>The court provides no reasonable guidance by which to interpret the "back seat" test mentioned above, although a review of the facts would indicate the court put emphasis on the economic impact of the services rendered upon the operation of the hospitals by the University.

employees under HEERA, the court placed considerable emphasis on the degree to which the University must rely on housestaff in order to operate the hospitals, concluding it would not be possible to do so without their services.<sup>16</sup> Furthermore, the court acknowledged that PERB's determination of whether granting collective bargaining rights would further the purposes of HEERA involves questions of fact and policy and recognized PERB's expertise in this area.

## II. UCB'S GRADUATE STUDENT EMPLOYEE PROGRAM

In contrast to the facts in Regents, where the housestaff work at the hospital constituted 100 percent of their studies, the present case involves students who work as GSIs and GSRs in addition to their own studies. Where as only those individuals who have completed their studies and graduated from medical school with a M.D. can participate in a residency program, those individuals appointed to a GSI and GSR position must be registered graduate students. To assure that the student's academic progress is not impeded, the GSI and GSR positions are generally limited to a maximum of half-time. Although the supervision varies in each department, the emphasis is on the one-on-one relationship between the faculty member and the GSI or GSR. Significantly, appointment and reappointment to a

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<sup>16</sup>Lucas, (Campbell) J., in his dissent, not unfairly characterized the majority's conclusion as holding that the "University has established its program as a device for procuring a cheap source of skilled medical labor to work in its hospitals." (Regents: supra. 41 Cal.3d 601 at p. 625)

particular GSI or GSR position is based on several factors, including whether the graduate student is making appropriate progress towards a graduate degree and is in good academic standing.

In terms of salary, the GSIs and GSRs receive a fixed stipend based on the financial requirements of the graduate students and the amount of the stipends offered by competitive universities and research laboratories. Step increases are not available to the students in either the GSI or GSR positions, and cost-of-living increases are not automatically granted each year. The stipends are more in the nature of a living expense as opposed to compensation for services rendered.

Although the GSIs and GSRs complete both student forms and employment forms, the employment benefits received by the GSIs and GSRs are limited. Unlike full-time UCB employees, the students do not receive retirement benefits, medical or dental benefits, short-term disability insurance, paid life insurance, paid vacation, or paid sick leave. The students are exempt from unemployment insurance, and only in some instances are covered by workers' compensation. Finally, unlike housestaff, who do not pay tuition or student fees and do not receive grades or a degree upon completion of the residency program, GSIs and GSRs do pay the required tuition and student fees, receive credit for their teaching and research positions, and receive a graduate degree upon completion of their research dissertation.

In further contrast to Regents, where there were substantial employment concerns in the area of wages, hours, and working conditions (i.e., salary, hours, fringe benefits and vacation time) which had a direct impact on housestaff, those concerns are of a more limited nature for students pursuing their graduate degrees in a wholly academic environment. The GSI and GSR positions enable the students to acquire and develop the necessary educational skills to achieve their educational objectives. The indicia of employment present in the housestaff positions are lacking in the GSI and GSR positions. The focus of the graduate student program is not on the amount of the stipend, hours, or fringe benefits, but, rather, on the educational program, which includes research and teaching. The students' choice of graduate school is based on the quality of the educational program, including the prestige of the educational institution, the reputation of the individual faculty members, the opportunity for research in a particular specialty, the availability of financial support, and the opportunity for extensive training in both research and teaching.

### III. APPLICATION OF THE STATUTORY TEST

As the facts in our case are distinguishable from Regents, the Board must exercise its jurisdiction and expertise to further interpret subdivision (f) and the court's application of that provision in Regents.

Our analysis is consistent with the statutory language and existing precedent. According the language of subdivision (f)

and the California Supreme Court's interpretation of that statute in Regents, in determining whether graduate student employees are entitled to HEERA protection, we must first examine the student's educational objectives and the services they actually provide.

A. THE EDUCATIONAL OBJECTIVES

The phrase "educational objectives" is not defined in either the statute or in the Regents case. AGSE argues that graduate degree requirements should be used to define "educational objectives"; the University favors a broader definition that encompasses career goals. As more fully explained below, we believe that the term "educational objectives" encompasses more than just the desire to get a degree, and even more than career goals. Therefore, we reject the ALJ's conclusion that GSIs and selected GSRs are entitled to collective bargaining under HEERA. The record supports a conclusion that the students derive an educational benefit from their appointments. Although the ALJ and even AGSE do not deny that the teaching and research experience is educational, they do not equate "educational" with "educational objectives." Defining educational objectives to mean attainment of a degree and focusing upon student testimony that the teaching experience does not further, and may at times interfere with, the students' own progress towards their degrees, AGSE argues and the ALJ finds that educational objectives are subordinate to services.

The California Supreme Court notes that: "The Legislature has clearly not instructed PERB to confine its inquiry to the

students' state of mind." (Emphasis in original.) We agree that in ascertaining "educational objectives," we cannot confine ourselves to looking solely at subjective opinions. Graduate students questioned on the subject expressed their personal opinions as to whether the teaching experience or research experience was valuable, meaningless, or repetitious. The many professors questioned were also asked their personal opinions on the same subject, and almost uniformly reached the conclusion that the teaching and research experiences were valuable to the students' educational objectives. While such subjective evaluations have some value, to base a decision solely on subjective judgments is to invite re-examination of the issue each time the cast of characters changes.<sup>17</sup> Thus, neither the opinions of the students nor the opinions of the professors on educational objectives, expressed over 32 days of hearing and memorialized in approximately 7,000 pages of transcript, can be considered in a vacuum, but must be analyzed within the framework of what the University requires and provides.

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<sup>17</sup>Taken to the extreme, a reliance on subjective judgments of the individual would necessitate that the students be asked individually whether they think their particular appointment furthers their personal educational objectives—only then could a determination be made as to whether that individual is an employee or student. The Legislature surely could not have intended such an absurd result. It is well settled that a statute must be given reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. DeYoung v. City of San Diego (1983) 147 Cal.App.3d 11.

The issue in this case is how the academic considerations of student, faculty, and administration are to be weighed against the kind of services the student is performing within the context of the University's entire graduate student program. For example, a student aspiring to a career as a professor might want to teach beyond the four year maximum. Although the student may apply for an exception to the four-year rule, the University has discretion to deny any extension. Similarly, a particular student may plan to procure an industry or other non-teaching research position: yet, if teaching happens to be a requirement of obtaining his or her degree, that student must complete the required number of terms as a GSI. In fact, some of the students who testified stated that they considered teaching assignments an "annoyance"; even so, they were bound to complete the assignment.

The record supports a conclusion that the University structures the graduate program with an eye toward producing "scholars" who will be able to use the knowledge they are acquiring to further their own career aspirations and, at the same time, the reputation of the University. Thus, the term "educational objectives" encompasses far more than the attainment of a degree. The GSRs, as they progress towards their own degrees, bestow benefits upon the University by helping to complete grant-funded projects which enhance the reputation of the GSR, the faculty and the University. The GSIs, while providing a service that helps the University fulfill its mission to educate undergraduates, are, at the same time, acquiring

teaching experience and other benefits that accrue from that experience and that will assist them in attaining their career goals.

Thus, while the statutory language supports a conclusion that it is the students' educational objectives that are to be considered in applying the balancing test, in practical effect, those objectives are the mutual objectives of UCB and the students. To assure fulfillment of these mutual objectives, the University provides the students with a mentor-apprentice relationship, whether or not the students are in one of the disputed classifications. In the case of the majority of the GSRs, the student works closely with the faculty advisor on either the faculty advisor's research project or the student's dissertation research. In some cases, the faculty advisor's project may yield a dissertation topic. In others, the research experience may fulfill other educational objectives. This process is excellently described in Leland Stanford Junior University (1974) 214 NLRB 621 [87 LRRM 1519], wherein the NLRB held research assistants were not employees within section 2(3) of the NLRA since the salaries they received constituted a stipend and not wages within the meaning of the NLRA. The NLRB states at page 622:

Each student's graduate career usually involves progression from fairly carefully supervised research problems designed to acquaint him or her with research techniques, through graduate-student classroom work where a definite answer exists to the research project undertaken, and then to Ph.D.-thesis research into problems where the answer is



unknown or uncertain or there may be no answer at all. The exercises prepare the student for selection of a topic for a dissertation and serve as a trial period for both the student and the faculty adviser to determine the student's interest and ability. The preliminary training and research may or may not be related to or be included within the topic ultimately selected for the dissertation, and it appears that a candidate may work on various projects before finding one suitable for a thesis. Thus, the student may work on a practice problem to acquaint him with research, may start to research in one direction and learn there is not enough material for a thesis, or may find something different that interests him or her more. Or, the subject of the research may exceed the capabilities of the student or of his advisor to assist him; the early research may not fit into the thesis; the subject may have been treated by someone else; or there may be no space or equipment available to accommodate the project selected by the student. It is clear, however, that all steps lead to the thesis and are toward the goal of obtaining the Ph.D. degree.

The GSIs also work under the general direction of a prominent faculty member who, to a greater or lesser extent depending on the particular classification and the individuals involved, guides and supervises the course content and direction. Thus, while the GSI might be given a great deal of independence in preparing and presenting the educational materials, it is the professor who selects the text and course materials.

Whether working as an instructor or a researcher, or both, the graduate student is engaged in a professional, academic relationship with a member of the faculty as he or she progresses towards a graduate degree. The mutual goals of the individual

and the University can, in this way, be attained to the benefit of all parties involved.

B. THE SERVICES PROVIDED

The Supreme Court in Regents instructs us that our inquiry must not end upon reaching a conclusion as to educational objectives—we must also examine the services actually performed. Addressing first the quantity of services rendered, we note the difficulty in generalizing. While the great majority of graduate student employees are formally limited to half-time, the actual time worked varies depending upon the individual classification, the department, the time of the school year, etc. Thus, some GSRs work far more than the allotted hours should their research projects require it, while the workload of the GSIs varies depending upon the course syllabus. Similarly, although the general rule is that GSIs cannot serve in GSI classifications for more than four years, the number of terms a student spends teaching may depend upon: (1) the GSI's past performance as an instructor; (2) whether the department needs the position to aid in recruiting new students into the department's program; (3) whether the incumbent has alternative sources of support; (4) whether the GSI will benefit educationally by assisting in the same course again, assisting in a different course, or concentrating on other parts of his or her educational experience; and, (5) most importantly, whether the GSI is making appropriate progress towards a graduate degree and is in good academic standing. Clearly, the quantity of services rendered is

dependent upon, and affected by, the climate of the graduate student employee's academic environment. While the parties and the ALJ seem to focus primarily upon the quantity of services rendered in terms of hours of work and years of service, our examination cannot end there. We must also examine the nature of the services rendered and the context within which they are provided. As to the nature of the services rendered, what GSIs and GSRs actually do is not really in dispute: generally, the GSIs perform teaching functions and the GSRs perform research functions.

What we find persuasive is that the University framework for provision of these services places great emphasis upon the academic environment in which they are provided and de-emphasizes the employment aspect of the relationship from the time of the student's admission through graduation. Most obviously, positions in the disputed classifications are reserved for registered graduate students. During the admission process, competition with other institutions for the most qualified people results in some departments virtually guaranteeing financial support to admitted students by appointments to these positions. Compensation for the appointments is not based upon the market value of the student's work, but instead is related to a number of factors unconnected with the labor market as such. The stipend or compensation is established at a level that will both attract students who will make the greatest contribution academically, and sustain those students without exhaustion of

the resources of the department. While the principle in the market place is to accomplish the most work with the least resources so as to maximize profit, the University attempts to spread the available finances as far as possible to sustain as many students as possible.

Once appointed as a GSI or GSR, the students are generally limited to working a maximum of half-time. At least one reason for this limitation is a concern on the part of the University that the students' academics do not suffer. Similarly, one of the purposes of the four-year limitation on GSI appointments is to assure that the opportunity to teach is available to a large number of graduate students. Each appointment is limited to one year to allow for evaluation of the student's academic progress. As noted above, reappointment to a specific classification is based almost primarily on academic considerations.

Paramount concern for the student's academic progress is further demonstrated by the fact that the layoff policy that applies to other University employees is not applicable to the graduate students working in the disputed classifications. As was noted in a University memorandum (See Summary of the Facts), considerations relating to the quality of the student's academic work and progress toward degree objectives take precedence over the considerations of layoff policy. Similarly, while formally the APM's three-step grievance procedure applies to all individuals employed at the University in any capacity, in

practice, graduate student grievances are resolved not through the chancellor's office but through the graduate department.

Finally, we note that only a handful of graduate student employees are hired to work at the University after having received their degrees. The University is not, through appointments to the disputed classifications, grooming these students for employment within its own walls as does the typical employer in the market place--the University is grooming scholars who have only a transitory interest in the appointments themselves.

C. INTERRELATIONSHIP OF EDUCATIONAL OBJECTIVES AND SERVICES PROVIDED

Having examined the educational objectives of the graduate student employees and the services actually performed, we are next directed to ascertain whether the students' "educational objectives are subordinate to the services they perform." The test is not an easy one to apply in that it enjoins us to balance a seemingly subjective element,<sup>18</sup> educational objectives, against an objective one, services. As the dissent in Regents aptly notes, "One cannot 'balance' apples and oranges without calibrating the scale." The majority in Regents answered the dissent by explaining its interpretation of the relevant statutory language as follows:

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<sup>18</sup>As explained above, we do not believe the "educational objective" side of the scale is totally subjective - yet, much of the record consists of testimony of students and professors regarding their opinions of the educational value of the appointments in question.

The Legislature has clearly not instructed PERB to confine its inquiry to the students' state of mind. . . . The Legislature has instructed PERB to look not only at the students' goals, but also at the services they actually perform, to see if the students' educational objectives, however personally important, are nonetheless subordinate to the services they are required to perform. Thus, even if PERB finds that the students' motivation for accepting employment was primarily educational, the inquiry does not end here. PERB must look further--to the services actually performed--to determine whether the students' educational objectives take a back seat to their service obligations. . . . (41 Cal.3d at p. 614.)

The "scale" was more easily read in Regents. however, than it is in the instant case. In Regents, the housestaff were no longer students but were graduate M.D.s. They received no grades, took no examinations, and did not obtain a degree at the end of the residency. As the Supreme Court pointed out, indicia of student status was almost completely lacking.

In contrast to Regents, in the instant case, as pointed out above, the graduate student employees have indicia of both employee and student status. While we believe indicia of student status outweigh indicia of employee status, in fact, the students are treated as students in some respects and as employees in others. The services rendered, especially on the part of the GSIs, are only one part of a varied educational program: the students not only work on their dissertations, but may have their own classes to attend as well. Additionally, the educational objectives in this case are so entwined with the services

rendered, to evaluate fairly each interest and to reach a correct result is an extremely frustrating endeavor. Thus, to apply the balancing test to the facts of this case, the scale must be recalibrated.

Instead of looking at each side of the scale and weighing each interest (academic and employment) independently, a more helpful approach is to examine how the two interests interrelate and determine which side ultimately prevails when the two interests conflict. The result of such an approach sheds light on which of the two interests is "subordinate" or, in the words of the Supreme Court, which "takes a back seat." Furthermore, by examining the balancing test from this new perspective, we avoid having to weigh subjective against objective factors in reaching our conclusion.

For example, although the students testified that their appointments sometimes interfered with their own courses or research, the University's policy of not approving reappointments in cases where the students were not making adequate progress towards their own degrees assures that ultimately academic interests prevail. Furthermore, the record reflects that the faculty actually discouraged the students they were advising from continuing to teach if the teaching appointment was substantially slowing or interfering with their academic progress. Academics also prevail over employment in the formulation, implementation and/or application of the University's policies regarding grievance resolution, layoff, admission and compensation.

Weighing the facts of this case on our newly calibrated scale, we find that in cases of conflict between academic and employment considerations, academic considerations ultimately prevail. We therefore conclude, based upon the record as a whole, that the students' educational objectives are not subordinate to the services they actually perform as GSIs and GSRs. As to the handful of GSRs who perform tasks that are unrelated, or only peripherally related, to their educational objectives and who have been identified by the ALJ in this case as hourly employees, we are convinced that, as more fully set forth below, the purposes of the Act would not be furthered by severing them from the larger whole and granting them collective bargaining rights.

#### IV. THE PURPOSES OF THE ACT

Even if the Board was to find that the services provided by the GSIs and GSRs outweigh the educational objectives, under the language of subdivision (f), the Board must still determine whether finding these GSIs and GSRs to be employees under HEERA would further the purposes of the Act.

Section 3561 of HEERA states its purposes:

(a) It is the further purpose of this chapter to provide orderly and clearly defined procedures for meeting and conferring and the resolution of impasses, and to define and prohibit certain practices which are inimical to the public interest.

(b) The Legislature recognizes that joint decisionmaking and consultation between administration and faculty or academic employees is the long-accepted manner of governing institutions of higher learning and



is essential to the performance of the educational missions of these institutions, and declares that it is the purpose of this chapter to both preserve and encourage that process. Nothing contained in this chapter shall be construed to restrict, limit, or prohibit the full exercise of the functions of the faculty in any shared governance mechanisms or practices, including the Academic Senate of the University of California and the divisions thereof, the Academic Senates of the California State University, and other faculty councils, with respect to policies on academic and professional matters affecting the California State University, the University of California, or Hastings College of the Law. The principle of peer review of appointment, promotion, retention, and tenure for academic employees shall be preserved.

(c) It is the policy of the State of California to encourage the pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the faculty, students, and staff of the University of California, Hastings College of the Law, and the California State University. All parties subject to this chapter shall respect and endeavor to preserve academic freedom in the University of California, Hastings College of the Law, and the California State University.

In essence, the Act protects the academic or education process in order to preserve and encourage excellence in research, teaching, and learning. While the ALJ focused on the "development of harmonious and cooperative labor relations between the public institutions of higher education and their employees," he did not address the academic nature of the professor-student relationship.

While we abide by the Supreme Court's rejection of the NLRB "primary purpose" test, we nonetheless find the NLRB's discussion

of labor policy pertinent to the present case. As the NLRB adeptly stated in St. Clare's Hospital and Health Center, supra, 229 NLRB 1000:

It is important to recognize that the student-teacher relationship is not at all analogous to the employee-employer relationship. The former is predicated upon a mutual interest in the advancement of the student's education and is thus academic in nature. The latter is largely predicated upon conflicting interests of the employer to minimize cost and the employees to maximize wages and is thus economic in nature. This is, in our judgment, an extremely important distinction because the collective-bargaining process is itself fundamentally an economic process. From the standpoint of national labor policy, subjecting academic decision-making to collective bargaining is at best of dubious value because academic concerns are largely irrelevant to wages, hours, and terms and conditions of employment. From the standpoint of educational policy, the nature of collective bargaining is such that it is not particularly [sic] well suited to academic decision making. The inevitable change in emphasis from quality education to economic concerns which would accompany injection of collective bargaining into the student-teacher relationship would, in our judgment, prove detrimental to both labor and educational policies.

The importance of the mentor relationship between the professors and their students in the pursuit of educational excellence cannot be understated. The record is replete with testimony from both professors and graduate students which describe the professor-student assistant relationship as including many more hours than the required minimum, one-on-one interaction, mutual collaboration on lectures and research papers, participation in seminars, and constructive comments on each other's written work.

The testimony also establishes that the GSI and GSR positions are part of the University's means of guaranteeing financial support to its graduate students. The students' purpose in applying for these positions is twofold: (1) to acquire and develop the necessary educational skills to achieve their educational objectives; and (2) to receive a living expense to enable them to financially support themselves while they continue their degree program. Stipends for these academic appointments are not based upon the market value of the students' work, but are established based on information provided by a network of universities and research laboratories and an assessment of the entire financial requirements of graduate students (i.e., tuition, student fees). The stipend is set at a level which will attract the most-qualified students and will sustain as many students as possible without the exhaustion of the department's resources. Unlike the employer-employee relationship where salary and promotion are the major goals, the graduate students' major goal is to secure a graduate level education that will serve their career aspirations. Collective bargaining would emphasize economics, which would become the primary goal at the expense of the academic goals of the GSI and GSR programs.

Regardless of whether a graduate student has financial support in the form of a research assistantship, grant, or fellowship, all graduate students pursuing their Ph.D. degree engage in extensive research. In fact, the Ph.D. degree is

primarily a research degree. Often, it is impossible to distinguish between those graduate students working on research for the grant or fellowship and those engaging in their own research for their dissertation. All work extensive hours on research projects, and each have their own faculty advisor. Consequently, it would be arbitrary to designate the GSRs as employees and exclude all other graduate students performing research under essentially the same conditions from coverage under HEERA. Carving out some or all of the GSRs and designating them as employees would not encourage the pursuit of excellence in research or promote harmonious and cooperative labor relations among all the graduate students and the University.

With regard to the GSIs, there are sixteen departments that require their graduate students to be GSIs during their education in order to complete the Ph.D. degree. In some departments, there is a general policy that their graduate students serve as GSIs. Even if no such policy exists, the record reveals that most graduate students serve as GSIs at some time during their graduate education. Although it could be argued that including GSIs under the coverage of HEERA could promote harmonious and cooperative labor relations among the GSIs, there is no evidence that collective bargaining would encourage the pursuit of excellence in teaching. Like the GSR program, the GSI program is also a means of financial support necessary to enable the graduate students to continue their graduate education. Additionally, testimony demonstrates that the selection process

for GSIs is a mutual process whereby the departments try to accommodate the professors' and graduate students' choices. GSI choices are based on the graduate students' desire to learn a particular subject, refresh their background in fundamentals, or learn a different approach or perspective to a topic through a particular professor or course. This selection process emphasizes the academic nature of the GSI program. The GSI program is an educational experience wherein the GSI learns from the professors and the students. This type of relationship is not analogous to an employer-employee relationship, but involves the mutual goal of learning. Imposing the economic goals of collective bargaining on the GSI program would not promote or encourage the pursuit of excellence in teaching and learning.

Further consideration is the fact that graduate students may serve as both GSIs and GSRs during their graduate education, and sometimes serve in both capacities at the same time. The continuous movement among graduate students in and out of the GSI and GSR programs does not make collective bargaining a feasible alternative. Instead of promoting harmonious and cooperative labor relations among the GSIs and GSRs, finding that the GSIs and GSRs are employees under HEERA would split the graduate students into two groups, whose members would change each quarter or semester depending on the current available GSI and GSR appointments. Such instability does not promote harmonious or cooperative labor relations.

Finally, in some instances, it is virtually impossible to separate academics from economics. For example, the overlapping concerns in the selection and retention of GSIs and GSRs, hours of work, salary, and job security would involve the parties bargaining over the current academic practices. Thus, the academic nature of the GSI and GSR appointments, which promotes the free exchange of ideas necessary for the graduate students to become scholars and achieve their educational objectives, would be sacrificed for the economic nature of collective bargaining. This result is contrary to the purpose of HEERA to encourage the "pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the faculty, students, and staff. . . ."

#### CONCLUSION

For the reasons stated above, we find that subject to the exceptions noted below, none of the disputed classifications are employees for purposes of coverage under HEERA.<sup>19</sup> Therefore, we find that the University did not violate sections 3571(a) and (b)

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<sup>19</sup>As the Board finds that the GSIs and GSRs are not employees under HEERA, the parties' exceptions regarding the Order and Notice are no longer relevant. However, as this case only involves the University of California, Berkeley, the University's exception to limit the Order and Notice to the Berkeley campus has merit.

Additionally, the exceptions to the ALJ's factual statements on pages 103, 110-111, 116, and 120 and AGSE's exception that the ALJ misstated and misunderstood AGSE's argument regarding the services performed on grant-funded research projects do not need to be considered by the Board as these exceptions do not affect the Board's findings and conclusions.

of the Act by failing to recognize AGSE as an employee organization or graduate student employees in the disputed classifications; and by failing to implement dues deduction for the disputed classifications.

As for the Community Teaching Fellow, Nursery School Assistant, and Acting Instructor classifications, we find that the employees in these classifications are entitled to coverage under HEERA. We further find that the University violated sections 3571(a) and (b) of the Act by failing to recognize and implement dues deductions for the graduate student employees in these classifications and by failing to recognize AGSE as an employee organization representing these employees.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, we find that the Regents of the University of California has violated sections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act.

It is hereby ORDERED that the Regents and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to recognize graduate student employees employed at the University of California at Berkeley in the classifications of Community Teaching Fellow (Title Code 2305), Nursery School Assistant (Title Code 2286), and Acting Instructor (Title Codes 1401, 1407, and 1417) as employees within the meaning of section 3562(f) of HEERA; and Association of Graduate

Student Employees as an employee organization representing these employees.

2. Refusing to implement payroll deductions of dues for AGSE from such employees, upon request.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

1. Implement payroll deduction of dues for the Association of Graduate Student Employees upon request of the above-mentioned employees within the meaning of section 3562(f).

2. Within thirty-five (35) days following the date the Decision is no longer subject to reconsideration, post at all locations at the University of California, Berkeley where notices to student employees are customarily placed, copies of the Notice attached, signed by an authorized agent of the Regents of the University of California. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered, or covered by any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

Chairperson Hesse joined in this Decision.

Member Craib's concurrence and dissent begins on page 57.



Member Craib, concurring and dissenting: I concur in the majority's conclusion that graduate students in the disputed research classifications are not "employees" within the meaning of Higher Education Employer-Employee Relations Act (HEERA). As explained below, I would reach that result without resorting to the majority's flawed analysis. I must dissent from the majority's holding that those in the disputed teaching classifications are not "employees." The majority reaches that result through two major means. One, it effectively refuses to apply the analysis of HEERA section 3562, subdivision (f) (hereafter subdivision (f)) set forth in The Regents of the University of California v. Public Employment Relations Board (1986) 41 Cal.3d 601 [224 Cal.Rptr. 631] (hereafter Regents). That case, of course, is binding upon this Board. Two, in order to reach the conclusion it does, the majority presents a highly distorted view of the record, essentially parroting the University of California at Berkeley's (University) arguments in its brief in support of its exceptions. In fact, I believe the University presents a more evenhanded view of the record than does the majority.

The Proper Statutory Test

Subdivision (f) states, in pertinent part:

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

this chapter would further the purposes of this chapter.

In a thorough and well-reasoned proposed decision,<sup>1</sup> the administrative law judge (ALJ) concluded that graduate student researchers in the disputed classifications (GSRs) were not "employees" within the meaning of subdivision (f), while he found that graduate student instructors (GSIs) in the disputed classifications were "employees." The ALJ's analysis is not only true to the interpretation of subdivision (f) set out by the California Supreme Court in Regents, but also implicitly recognizes that the language of the statute clearly reflects the Legislature's intent that some student employees would be covered and some would not. As will be explained later, the majority's analysis effectively precludes the coverage of any group of student employees.

In Regents, the court concluded that subdivision (f) represents a compromise between the majority and dissenting opinions expressed in seminal National Labor Relations Board (NLRB) cases. (Cedars-Sinai Medical Center (1976) 223 NLRB 251 [91 LRRM 1398]; St. Clare's Hospital and Health Center (1977) 229 NLRB 1000 [95 LRRM 1180].) The NLRB has adopted a "primary purpose" test, in which the central focus is on the student employees' motivation for performing the services at issue. Thus, the NLRB has found that housestaff are not "employees"

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<sup>1</sup>The ALJ's proposed decision can be found at 11 PERC 18054. It is a good example of a thoughtful, fair and impartial decision.

because their primary motivation in entering a housestaff program is educational rather than economic. The dissenting view of Member Fanning focused instead on the services actually performed and found the students' subjective motivation irrelevant. The court in Regents found that the language of subdivision (f) reflects the California Legislature's intent to combine the NLRB's majority and minority approaches: "HEERA took a middle road, requiring both factors to be considered." (Regents, supra. 41 Cal.3d at p. 615.)

Thus, Regents instructs that the student employees' educational objectives, or primary purpose, must be weighed against the services provided. If the former are subordinate to the latter, PERB may find that such individuals are covered by HEERA. While admittedly not easy to apply, this test is relatively straightforward. While the facts surrounding the employment of GSIs and GSRs are very different than those surrounding housestaff, the basic analytical framework remains the same. Yet, the majority immediately goes awry in its analysis by claiming that a different factual scenario requires further interpretation of subdivision (f): "As the facts in our case are distinguishable from Regents, the Board must . . . further interpret subdivision (f) and the court's application of that provision in Regents." (Majority decision, at p. 36.) This is where the majority begins to reveal its thinly veiled disagreement with the Regents decision and its consequent refusal to apply it to the instant case without first twisting it beyond

recognition. The majority's antipathy toward the result in Regents is apparent given its penchant for citing approvingly the dissenting opinion in that case (see majority opinion at pp. 33, 44).

The following passages epitomize the majority's analytical sleight of hand. At pp. 37-38, the majority states:

The California Supreme Court notes that:  
"The Legislature has clearly not instructed PERB to confine its inquiry to the students' state of mind." (Emphasis in original.) We agree that in ascertaining "educational objectives," we cannot confine ourselves to looking solely at subjective opinions.

Having purportedly justified its diversion away from the subjective views of the student employees,<sup>2</sup> the majority goes on to state, at p. 39:

The issue in this case is how the academic considerations of student, faculty, and administration are to be weighed against the kind of services the student is performing

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<sup>2</sup>The majority's criticism of the use of subjective views of witnesses in determining educational objectives is not without some validity. That is one reason why the NLRB has been so heavily criticized for its housestaff decisions. Nevertheless, the use of such a subjective factor in determining the status of student employees is not only widespread in other jurisdictions, but we are bound by the Legislature's command that "their [the student employees'] educational objectives" be one of the two main factors to be weighed.

The majority's argument that the use of subjective criteria would, if taken to the extreme, require that each employee be questioned as to his or her educational objectives in order to determine if he or she is covered by HEERA is grossly overstated (majority opinion, fn. 17). No court or board which has applied some form of the primary purpose test has had any difficulty recognizing that the test is applied in order to determine the primary purpose (or educational objectives) of the student employee classification as a whole.

within the context of the University's entire graduate student program.

First of all, the majority's quotation from Regents is taken out of context. The court's statement that the inquiry is not limited to the students' state of mind is merely a prelude to its notation that the services actually performed must also be considered (see Regents, supra, 41 Cal.3d at p. 614). The court was not, as implied by the majority, expanding the inquiry into educational objectives beyond the parameters of the primary purpose test as established by the NLRB. The two sentences which directly follow the passage quoted by the majority demonstrate vividly the majority's error:

Moreover, nothing in the language of subdivision (f) even hints that the University's subjective perceptions of the functions of housestaff duties should be taken into consideration.

The Legislature has instructed PERB to look not only at the students' goals, but also at the services they actually perform, to see if the students' educational objectives, however personally important, are nonetheless subordinate to the services they are required to perform.

(Emphasis in original.) (41 Cal.3d at p. 614.) Thus, the majority has ignored the clear command of the California Supreme Court by considering the University's subjective view of the students' educational objectives. Moreover, as will be explained more fully below in discussing GSIs, the majority has focused primarily on the University's subjective views and has given

little weight to those of the student employees. This flawed view of Regents pervades the majority's analysis.

Another major analytical flaw the majority exploits on its march to its desired result is its definition of "educational objectives." While recognizing that employment in the disputed classifications is of educational value, the ALJ correctly concluded that the completion of degree requirements and, in particular, the dissertation, was the primary educational objective of those enrolled in doctorate (Ph.D.) programs. It is important to remember that the Ph.D. is a research degree and the dissertation is the necessary focus of each Ph.D. candidate. As the majority states, at p. 5:

The Ph.D. is primarily a research degree. The Ph.D. program trains graduate students in how to conceptualize research, develop a research problem, carry out the research project, and present the results of the extensive research in a dissertation.

The majority adopts a definition of educational objectives that is so broad that nearly any endeavor even remotely related to an academic discipline would be included. That, in itself, is not analytically incorrect as long as the primacy of degree requirements is recognized within a hierarchy of "educational objectives." However, the majority instead emphasizes the purported value of more attenuated educational benefits and attributes little importance to degree requirements. This misdirected emphasis, as well as its importance to the majority's

analysis, is reflected by the following passage from p. 37 of the majority decision:

. . . we believe that the term "educational objectives" encompasses more than just the desire to get a degree, and even more than career goals. Therefore, we reject the ALJ's conclusion that GSIs and selected GSRs are entitled to collective bargaining under HEERA.

Before applying the proper statutory test to the disputed classifications, I believe a few reflections on the Regents decision are in order. At first glance, the instant case appears to be a more difficult one. After all, in Regents the evidence in support of the service side of the balancing test was very strong. 80-100 hour weeks serving ever-changing patient needs with little supervision weighed heavily against the notion that educational objectives predominated.

On the other hand, housestaff have an obvious and vital educational objective because participation in a residency program is a requirement for both the right to practice medicine and certification in a specialty. At first glance it may appear that if anybody is an "employee," a member of the housestaff surely is. However, in reality, that case was more difficult because the evidence in support of both prongs of the statutory balancing test was strong. In contrast, the instant case does not present such weighty evidence on both sides of the equation. In fact, a comparison to the Regents case virtually dictates the result herein. As discussed below, that result is very different depending on whether GSIs or GSRs are at issue.

Application of the Proper Test

GSRs

As noted above, I concur that GSRs are not covered by HEERA. However, I would employ the analysis outlined above, which is truer to both Regents and the language of subdivision (f) than is the majority's analysis. In other words, the result is not preordained.

Turning first to the educational objectives of the GSRs, there is one characteristic of the work in these classifications which I believe is key. The vast majority of GSRs are either working on a research project that is directly related to their dissertation topics or they are doing research in their general field of study in exploration of a dissertation topic. Even where the research job turns out to be unrelated to the eventual dissertation topic (which also may change based upon research experiences), the GSRs are developing research skills that will enable them to successfully pursue their dissertation research. As the ALJ succinctly explained:

As the findings have expressed, the doctoral candidate's research endeavor cannot be depicted as a single concrete undertaking of research pursuant to a prescribed topic. Rather, there is exploration into areas under the direction of the research advisor until both the graduate student and the advisor are satisfied of the feasibility and worthiness of the research topic. That approach to ascertaining a topic must entail circumstances, such as presented by Friedman and Wurl, where time is spent by the graduate student as a research assistant in identifying, pursuing, or changing topics for a dissertation subject.



(Proposed dec. 11 PERC at p. 304.)

Thus, for the vast majority of the GSRs, their educational objectives are heavily intertwined with their paid research work. Unlike the situation in Regents, the work is not only a formal requirement of the educational program, but part and parcel of it.<sup>3</sup> This is further demonstrated by the fact that graduate students often perform indistinguishable tasks, whether or not they are in the disputed classifications. For example, within any research group there may be one or more graduate students who perform their research in a paid status through one of the disputed classifications, while there are others in the group who are not paid because they are recipients of grants or fellowships. Having concluded that GSRs' educational objectives are normally a central aspect of their work in the disputed classifications, I now turn to the services themselves, as required by subdivision (f).

It is undisputed that the University's research mission is furthered by the work of GSRs. While the contribution of the GSRs is substantial, as the ALJ pointed out, it is not readily susceptible to measurement as are the contributions of the housestaff in Regents or of the GSIs in the instant case. Moreover, the evidence supports the University's position that outside funding agencies (which fund much of the University's

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<sup>3</sup>While service in one of the disputed classifications is not formally a degree requirement, the research activity itself is necessary to the completion of the dissertation.

research) are not securing a pre-described product from the University, but rather are funding research primarily for the expansion of knowledge in particular areas. Additionally, the ALJ noted that various federal grant descriptions introduced into evidence include explicit acknowledgment by the federal funding agencies that research training of graduate students is a product of the funding. Thus, unlike housestaff (or GSIs for that matter), GSRs are for the most part not fulfilling quantifiable service obligations on behalf of the University.

GSRs also differ from housestaff in the amount of supervision they receive. While the record reflects that the amount of supervision varies with the research project, research advisor and previous research experience of the GSR, it is clear that GSRs receive more supervision than did the housestaff in Regents. Though the majority errs by lumping the GSIs with the GSRs, GSRs and their faculty research advisors do have the kind of mentor relationship that militates against characterizing the work of a typical GSR as a "job."

In addition, though GSRs, like housestaff, often put in long hours (up to 80 hours a week), this superficial similarity actually reflects a profound distinction between the two kinds of services. While housestaff put in the long hours because it is required both by the residency program and by the unpredictable demands of patient care, the evidence reveals that GSRs voluntarily put in such hours in order to fulfill their personal

goals in the furtherance of the research project. As the ALJ observed:

The nature of the service, unlike that of residents in Regents, or graduate student instructors in this case, is reflective more of the individual student's pursuit of his/her own research project and not reflective of a 20-hour-per-week job. The hours served - up to 80 hours a week - are a result of the graduate student's interest in completing the research. Graduate students who are not within the disputed classifications devote the same number of hours towards the research as the students who receive this financial support. Very little evidence suggests that those hours are delivered because of the principal investigator's grant timelines.

(Proposed dec , 11 PERC at p. 303.)

In sum, I have found that the educational objectives of GSRs are significant, if not central to their entry into the disputed research classifications. Moreover, I have concluded that the nature of the services provided make it difficult to characterize these positions as "jobs" in the normal sense of that term. In any event, I do not believe the services provided compare at all to those involved in Regents (or with the services of GSIs). Consequently, I cannot conclude that the GSRs' educational objectives are subordinate to the services provided and I would, therefore, exclude them from coverage of HEERA in accordance with subdivision (f).

As is necessary in applying subdivision (f), I have made several generalizations in characterizing the GSR classifications. While those generalizations are, I believe,

accurate with regard to the vast majority of GSRs, some particular positions do not fit neatly into that description. Nevertheless, a system whereby each individual appointment is examined to see if the work involved qualifies the incumbent for employee status is unworkable. Though a small percentage of GSRs, if viewed in isolation, would meet the statutory test for coverage, it is necessary to "paint with a broad brush" so that there is some predictability and certainty to the parameters of a bargaining unit. For that reason, I would reverse the ALJ's decision to carve out those research assistants who have been found to be doing work unrelated to their educational objectives.

The ALJ concluded that it would be appropriate to split the research assistant classification so as to provide coverage to those whose work was found to be unrelated to their educational objectives. The ALJ found that these individuals could be described as those who are (1) assigned the position for less than a year, (2) are paid hourly and on the basis of hours actually worked, and (3) receive no academic recognition for such work.

From my reading of the record, I am not as confident as the ALJ that these people can be easily identified. The record shows a great variety of practices among the various departments with regard to employment of GSRs. After reviewing the record, I am simply not convinced that the employment characteristics listed by the ALJ will, in practice, accurately identify all those, and only those, whose work is unrelated to their educational

objectives. Inevitably, I am afraid, their inclusion or exclusion from the unit will be the subject of constant dispute between the parties. Such a magnet for dispute cannot but interfere with HEERA's stated goal of the development of harmonious and cooperative labor relations (see HEERA section 3560).<sup>4</sup> For that reason, I would not split the class and would exclude all research assistants.<sup>5</sup>

### GSI's

The evidence concerning GSI's differs in many critical respects from that concerning GSR's. These differences are so significant that they compel the conclusion that GSI's are covered by HEERA. The majority ignores these differences and repeatedly makes broad assertions applying to all the disputed classifications, when in fact they apply only to GSR's. I will first outline what I believe to be the critical evidence with respect to GSI's, then I will detail the majority's many misstatements of the record.

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<sup>4</sup>I note that subdivision (f) is not cast in mandatory terms; therefore, I believe it is appropriate to consider the purposes of the Act even where the work is found to be unrelated to educational objectives.

<sup>5</sup>While I find the majority's discussion of why inclusion of GSR's in general would not effectuate the purposes of the Act to be vastly overstated, I do find some merit in the discussion of the potential interference with the mentor relationship between research advisors and GSR's. The entanglement of the research work with the graduate students' dissertation work is another reason why it might be inappropriate to include GSR's. Nevertheless, I do not rely on these additional arguments in deciding to exclude the GSR's the ALJ had carved out for coverage, because those factors are of little or no relevance with regard to those whose work is unrelated to their educational objectives.

With regard to educational objectives, the critical distinction between GSIs and GSRs is that the work of the GSIs is (with the exception of a small percentage of departments) not related to their dissertations or other required degree work. The 16 departments that require some teaching experience require only 2 or 3 semesters, while the evidence shows that many GSIs in those departments teach in excess of that requirement. The GSIs themselves consistently testified that they sought the teaching positions primarily for economic reasons. In short, they needed the money to support themselves so that they could remain in school. If the teaching positions were not available, they would instead have to seek employment elsewhere.

Moreover, the testimony revealed that most students would not teach (or would teach very little) if not for economic considerations and would instead use the extra time to work on their dissertations. The record reflects that those with other sources of income (grants, fellowships, savings, support from parents, etc.) do not often seek GSI positions. Testimony also consistently revealed that, though the GSIs saw some educational benefit in the teaching positions, they found that the work sometimes interfered with their dissertation work, which is clearly the educational focus of anyone seeking a Ph.D. In addition, the value of the teaching experience from the graduate students' perspective was restricted to the teaching experience itself, because the subject matter was inevitably basic in nature and had already been mastered by that point in their academic

careers. The level of knowledge involved in their dissertation research was by definition far more advanced than the material they were required to teach as GSIs.

I feel it important to note at this point in my discussion that it is beyond dispute that being exposed to teaching furthers the educational goals of those graduate students who seek careers in academia. That, of course, does not end the analysis. First, it must be remembered that the Ph.D. is a research degree and that the dissertation is the educational focus of every Ph.D. candidate. Those who testified that they seek academic careers almost universally aspire to a professorial position at a research institution like the University of California, Berkeley. This is consistent with University testimony that the departments seek to groom their graduates for such positions.

While the emphasis on research as opposed to teaching at such institutions is the subject of some criticism, the record clearly establishes that the subject and quality of a graduate student's research is by far the most important measure of future employability. The evidence established that, though universities are not disinterested in teaching experience (particularly if the student had complete responsibility for teaching the course, which few GSIs have), their primary concern is the dissertation research. And once hired, it is the professors' continued research which is the major factor in their career advancement.

While the educational value of the GSI positions cannot be denied, it simply pales in comparison to the dissertation and other required degree work in terms of the students' educational objectives. The evidence is overwhelming that the students' motivation in taking these positions is primarily economic. To them, it is a job. These jobs do have the added benefit of providing some relevant training (as would any job related to the subject matter of their field of study), but also have the convenience of being on campus and half-time (obviously, full-time work would make degree progress very difficult and off-campus half-time work is certainly not readily available).

When properly focussing on the students' objectives, and recognizing that in accordance with Regents the first prong of the required balancing test is akin to the NLRB's primary purpose test, it is abundantly clear that the evidence in favor of the predominance of educational objectives is weak. In comparison, the evidence of educational objectives in Regents, where housestaff were found to be covered, was stronger in two fundamental respects. One, the residency program was required, whereas GSI positions are normally voluntary. Two, the services provided by housestaff were more directly related to their future careers as doctors than the services provided by GSIs. Not all GSIs will seek academic positions that will require teaching, and of those who do, for most, their research will be the focus of their careers.



Since the students' primary purpose is not educational, but economic, it is questionable whether it is even necessary to address the services side of the equation before concluding that GSIs meet the statutory test for inclusion under HEERA (subject to considerations of effectuating the purposes of the Act). Nevertheless, I now turn to the services performed.

There is no dispute that the contribution of GSIs to undergraduate teaching is substantial. As the majority notes, GSIs are responsible for 58 percent of the lower division class meetings and are also involved in the teaching of some upper division courses. While the majority makes a point of stating that the University could instead hire nonstudent instructors, I fail to see what particular relevance that has. The fact is that the University has structured its provision of undergraduate teaching to rely heavily on GSIs and the testimony of both Association of Graduate Student Employees (AGSE) and University witnesses confirms that a major restructuring of the University's undergraduate program would be necessary if GSIs were no longer utilized. Thus, as now structured, GSIs are critical to the fulfillment of the University's undergraduate teaching mission. As the ALJ noted, the Graduate Division dean's introduction to the Handbook on Teaching acknowledges that undergraduates have more contact with GSIs than with regular faculty and states that teaching assistants are the "single most important link the undergraduates have to Berkeley in the first years."

The critical nature of the GSIs contribution to undergraduate teaching is not unlike that of the housestaff's contribution to patient services. Both provide a significant amount of the services required to be provided by the institution, with little supervision. While housestaff work many more hours than do GSIs, as the ALJ astutely observed, when comparing hours one must consider the nature of the underlying mission. Housestaff are contributing to the operation of hospitals where patient care is provided 24 hours a day 7 days a week. The teaching mission of the University in this case does not involve such hours of coverage. Thus, measured against that educational mission (or, in other words, once the scale is recalibrated), the contribution of GSIs is comparable to that of housestaff.

In sum, when the proper test is used and the relevant factors considered, the educational objectives of GSIs in their work in the disputed classifications are of lesser magnitude than those found in Regents, and certainly pale in comparison to those of GSRs'. When viewed in terms of the GSIs' primary motivation, it is clear that economic considerations control. This, coupled with the undisputed evidence of the vital contribution GSIs make to the provision of undergraduate education, makes it rather easy to conclude that the educational objectives of the GSIs are subordinate to the services they perform. In fact, a comparison of the findings in Regents with the evidence in this case compels

the conclusion that, if housestaff are covered by HEERA, then GSIs must be as well.

Before addressing the issue of whether inclusion of GSIs would effectuate the purposes of HEERA, I will comment on the factors the majority has relied on in excluding GSIs. In my discussion above, I have addressed only the key factors that I consider to be dispositive. In examining the majority's view of the record, I will discuss how various other factors either fail to support the majority's view or in fact support mine.

#### The Majority's View of the Record

In concluding that the educational objectives of GSIs predominate over the services provided, the majority relies on the following major findings: (1) the educational objectives (of the students, faculty and administration) are substantial; (2) GSIs are closely supervised by faculty members with whom they have a mentor relationship; (3) the indicia of student status outweigh the indicia of employee status; (4) the money paid to GSIs is really a stipend or a form of financial aid, and not a salary; and (5) when there is a conflict, academic interests ultimately prevail over employment interests. I will address each in order.

As discussed above, the majority improperly focuses on the University's subjective view of the educational objectives of GSIs rather than putting the required emphasis on the views of the GSIs. I have also previously pointed out the danger of applying the majority's expansive definition of educational

objectives without recognizing the relative importance of different objectives. After noting briefly that most of the GSIs testified that their teaching work was of little value to them and in fact interfered with their dissertation work, the majority then goes on to recount, at length, the testimony of University witnesses who extolled the virtues of the GSI experience. Thus, rather than giving credence to the GSIs' testimony concerning their main educational and career goals (in which teaching was a small part), the majority instead relies on others' opinions of the value of the GSI experience.

The majority summarized the non-GSI testimony at p. 20:

Many of the professors who testified extolled the benefits of the GSI experience in terms of its being a valuable tool of preparation for initially, the oral qualifying examinations and, later, the oral defense of the dissertation. By teaching a course, the GSIs not only come away with a firmer understanding of the basic course materials, but also with an increased ability to think on their feet, organize their thoughts, and communicate clearly and effectively, all skills befitting a scholar no matter what career path is taken.

This testimony not only fails to reflect objectives of the GSIs, but merely concerns the kind of peripheral benefits that accrue from any expressive activity. The only benefit of any significance is the exposure to teaching. While that benefit is undeniable, the record clearly reflects that that is not what

usually motivates students to take GSI positions.<sup>6</sup> Therefore, under the analysis of Regents, it cannot be given great weight.

The majority makes much of the mentor relationship that purportedly arises in the supervision of GSIs by faculty members. This is a classic example of the majority's habit of attributing to all classifications characteristics that apply only to GSRs. GSRs, it is true, have a close working relationship with their research advisor and/or principal investigator that can be fairly termed a mentor relationship. The supervision of GSIs by faculty is, however, of a very different nature.

The supervision of GSIs varies, depending on the faculty member and the course. In a few cases, weekly meetings are held where the professor and the GSIs discuss the progress of the course. In other cases, no meetings are held except for an initial orientation meeting at the beginning of the term. In most instances, the interactions between GSIs and faculty arise in response to a particular problem or issue that may surface during the term. Some faculty members will also sit in on a GSIs discussion or lab section if invited to do so. GSIs who teach language courses are provided with standard course materials, but are otherwise fully responsible for the teaching of the course, with essentially no supervision. It is also important to note that teaching associates and teaching fellows,

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<sup>6</sup>The predominance of research over teaching, both in the graduate students' pursuit of a Ph.D. and in their pursuit and furtherance of academic careers, is discussed above in my analysis of the educational objectives of GSIs.

as opposed to teaching assistants, are often responsible for an entire course, including both its instruction and its content. These GSIs also receive little or no supervision.

Unlike GSRs, whose paid research is often coextensive or related to their dissertation work, GSIs are merely aiding in the instruction of material which is to them very basic (and in most cases, long since mastered). Their supervisor is not their research advisor (nor a pedagogical analog), but simply the faculty member who has overall responsibility for the course. The evidence clearly demonstrates that the faculty's, as well as the University's, primary aim in the use of GSIs is the provision of undergraduate education, not the training of graduate students. To say that the infrequent contacts between GSIs and faculty, which do not often directly touch on the development of the GSIs' teaching prowess, create a "mentor" relationship is a gross mischaracterization of the record. In reality, faculty members' relationship to GSIs is much more akin to that of a supervisor and an employee.

The majority also puts great emphasis on the indicia of student status in the present case that were not present in Regents. While it is true that in Regents indicia of student status were mostly lacking, that was an unusual case in the context of subdivision (f). Subdivision (f), by its terms, only applies to students. Therefore, in the typical case there will, by definition, be substantial indicia of student status. That, in itself, is not very probative of the issue at hand. As in

most cases arising under subdivision (f), there are also significant indicia of employment.

GSI's fill out the same array of employment forms as other employees. Like other employees, their salaries are administered by the administration's payroll office (and not through the financial aid office, as are true sources of financial aid). They are also covered by the grievance procedure applicable to other employees (though there is evidence that the University has mistakenly routed some grievances through the Dean of the Graduate Division).

Appointments are limited to half-time, but unlike the majority I find little or no significance in this fact. While the limit is designed, in part, to accommodate graduate students' need to also complete their degree work, this again is the type of characteristic that is a virtual given under subdivision (f), which applies only to "student employees whose employment is contingent on their status as students." Moreover, the evidence also shows that the half-time limit is also motivated by the fact that those who work more than half-time cannot be counted as full-time students (which has an impact on state funding). Similarly, the University's four-year limit on GSI services is of no great significance. Not only are such limits commonplace among non-tenured academic employees, but readers and tutors are subject to the same rule; yet, the University has conceded that they are covered by HEERA.

While GSRs normally receive residency units<sup>7</sup> for their paid research, GSIs receive that credit only where fulfilling the teaching requirement (in one of the 16 departments that require some teaching) or for taking the pedagogy course offered by some departments. Thus, as a general rule, GSIs receive no unit credit for their services. While the University's layoff policy does not apply to GSIs, ostensibly because academic considerations are viewed as taking precedence, it is also true that GSI appointments are made on a limited-term basis, which would make "layoffs" inapplicable anyway (the University may instead simply not reappoint the GSI).

GSIs do not receive the same array of benefits as do other employees. They are not provided health benefits (they already receive limited coverage through their status as students), vacation, sick leave, retirement benefits, short-term disability insurance or life insurance. It is not clear from the record if this is true only of the disputed classifications, or is also typical of other part-time or limited-term appointments. Moreover, this is an issue on which the GSIs may appropriately seek to bargain.

The majority concludes that the salary received by GSIs is really just a stipend (or a form of financial aid). This characterization is used as a buzzword throughout the majority

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<sup>7</sup>Residency units count only toward the 12-unit requirement for full-time student status and do not count toward degree requirements.



opinion in an attempt to bolster the analysis. The majority bases its characterization on three main factors: (1) the use of GSI positions as a recruitment tool; (2) the basis for fixing salary levels; and (3) the criteria used for appointment and reappointment.

A few departments, particularly the sciences, use appointments to the disputed classifications as a recruitment tool to attract highly sought after students. While mostly it is done with GSR positions, which I have agreed should be excluded from coverage, it is sometimes done with GSI positions as well. Unlike the majority, I fail to see any significance in this occasional practice. Most graduate students do not have the necessary independent wealth or grants or fellowships to allow them to avoid at least part-time work while enrolled. A guarantee of such a job would certainly be attractive to such a prospective student. However, this hiring practice, which applies, in any event, to only a tiny fraction of GSIs, does not transform what is otherwise a job into a form of financial aid.

The majority also goes to great lengths to establish that GSI salary levels are set in a manner inconsistent with the notion of compensation for services. This argument is based on the assertion that non-market factors are used in setting the salary levels. Yet, the majority admits that the major criterion is what competing institutions are paying. Is that not a "market"-related criterion? The majority also notes that the University considers the cost of living in the area, including

the cost of tuition and fees. Moreover, the majority finds it significant that the University does not operate from a profit motive, but seeks to efficiently direct its resources so as to attract the best candidates while, at the same time, spread those resources around so as to maximize the number it can employ. Are these not the same kinds of considerations that go into any academic employment at a public institution? The majority's attempt to draw distinctions with employment in the private sector is simply misplaced.<sup>8</sup>

Lastly, the majority puts great weight on its assertion that the manner in which GSIs are hired militates against calling their salary a salary. The record shows that only 30 percent of departments take financial need into account at all. By far, the two most significant criteria are merit (the applicant's familiarity with the subject matter and prior experience) and the department's staffing needs. In characteristic fashion, the majority lists all the criteria mentioned by all witnesses without bothering to distinguish which are the most important.

It is critical to remember that not all those who apply receive GSI positions. Reappointment is also based primarily on merit, with consideration given to the evaluations GSIs receive from the students. While, in theory, graduate students' continued satisfactory progress toward their degree is also taken

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<sup>8</sup>The majority also relies on the fact that the level of compensation does not relate neatly to the number hours worked. This, of course, is true of most kinds of professional employment.

into account, the record established that this criterion is rarely applied. I do not want to overstate my point. Academic considerations do sometimes come into play in hiring GSIs, but the record reflects that this happens primarily in extreme cases. Several GSIs testified that they continued to teach on a regular basis despite cautions from their research advisors that it was interfering with their dissertation work, yet there was no evidence that these individuals had any difficulty getting reappointed.

Relying on its view of the use of academic criteria in appointing GSIs, the majority asserts that this demonstrates that, when in conflict, academic interests prevail over employment interests. This inquiry, the result of the majority's "recalibration of the scale," is purported to hold the key to determining whether educational objectives or the services provided predominate. Assuming, for the sake of argument, that this approach accurately reflects the interpretation of subdivision (f) set out in Regents, the majority's application of this approach is seriously flawed.

When comparing educational and employment interests, the majority mistakenly focuses its inquiry on a theoretical conflict between the graduate students' degree progress and their application for employment as a GSI. No one would dispute that graduate students' primary aim while enrolled at the University is to get their degree. If push came to shove between completing

degree work and seeking or accepting a GSI position, there is no question that the degree would come first.<sup>9</sup>

The proper comparison would be to examine what would happen when a conflict arose between degree work and the duties of a GSI who is already in that position. The record contains abundant evidence relevant to this inquiry. It is undisputed that GSIs are expected to competently complete their duties in a timely manner. It is also undisputed that, where there is a conflict between degree work and GSI duties, the GSI duties take precedence. Testimony revealed that, when faced with such a conflict, GSIs put off their degree work temporarily. This was the very basis for the overwhelming body of testimony that GSI work interfered with degree work.

In fact, the evidence shows that when GSIs are faced with strict deadlines for both types of work, they go to their professors (from whom they are taking classes) or their research advisors and seek an extension of time to complete their work. The deadlines for GSI work (for example, the submitting of grades) are, in contrast, viewed as immutable. It is rather obvious that GSIs must prepare for and teach their classes at the scheduled time and cannot put off these duties if it will interfere with degree work. Thus, assuming that the majority's "recalibrated" balancing test is probative of the issue before

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<sup>9</sup>Of course, if the student could not afford to stay in school without working, what would probably happen would be that he or she would drop out temporarily, in the hope of working and saving enough money to return at a later date.

us, a proper application of the test unequivocally results in the conclusion that educational objectives of GSIs are subordinate to the services provided.

#### The Purposes of the Act

Lastly, having found that the GSIs' educational objectives are subordinate to the services provided, I now turn to the final inquiry: whether coverage of GSIs would effectuate the purposes of the Act. I conclude that it would. I find the majority's rationale for concluding otherwise to be without foundation.

First, the majority asserts that collective bargaining will interfere with the purported mentor relationship between faculty and graduate student employees. As I explained above, this argument has some validity with regard to GSRs, but no such relationship is created by the limited nature of the contacts between faculty and GSIs. The majority also repeats its strained characterization of GSI and GSR salaries as stipends. I will not repeat my discussion above as to why this characterization is inaccurate; however, there is an additional comment the majority has added that requires a response. The majority states, at page 51, that, because "the graduate students' major goal is to secure a graduate level education that will serve their career aspirations," the focus of collective bargaining on economic issues would interfere with those goals. As the record clearly demonstrates, GSI work (unlike most GSR work) is usually unrelated to degree work. Therefore, it is difficult to see how the GSIs' goal of completing their degree work will conflict with

collective bargaining restricted to issues involving GSI work. In other words, this is but another example of the majority mixing apples and oranges (GSIs being the apples and GSRs being the oranges).

In attempting to stress the academic nature of GSI employment, the majority badly misstates the record by claiming that GSIs apply for these positions, generally, to acquire and develop the necessary educational skills to achieve their educational objectives and, specifically, to learn a particular subject, refresh one's background in fundamentals, or learn a different approach or perspective to a topic through a particular professor or course. These motivations were not expressed by GSI witnesses, but instead represent the subjective views of University witnesses. The record is clear that the GSIs' primary motivation is economic, i.e., they need a part-time job in order to stay in school. Moreover, the record shows that the substantive material of the courses taught is of a very basic character that has already been mastered by the GSIs by the time they are graduate students. Consistent with this basic truth is the evidence which shows that a factor considered in hiring GSIs is their familiarity with the subject.

The majority claims that "continuous movement" among graduate students in and out of the disputed classifications would make collective bargaining unfeasible due to the instability it would cause. Though the majority does not explain itself fully on this point, two simple observations should

dispose of this argument. One, the majority fails to recognize that most GSIs appointments are for a full academic year and that other limited term employees are covered by the Act. Two, as the ALJ so cogently observed, the same argument would apply to readers and tutors, who the University concedes are covered by the Act.

Lastly, the majority warns of the interference with educational policy matters that would result from the injection of collective bargaining into the GSI program. This is the same "Chicken Little"-type argument that the California Supreme Court so resoundingly rejected in Regents:

Moreover, the University's argument is premature. The argument basically concerns the appropriate scope of representation under the Act. (See sec. 3562, subd. (q).) Such issues will undoubtedly arise in specific factual contexts in which one side wishes to bargain over a certain subject and the other side does not. These scope-of-representation issues may be resolved by the Board when they arise, since it alone has the responsibility "[t]o determine in disputed cases whether a particular item is within or without the scope of representation." (sec. 3563, subd, (b).)

(41 Cal.3d at p. 623.)

The key point made by the court in Regents is that the University is not obligated to bargain over matters of educational policy, thus, collective bargaining need not cause any interference with those matters. HEERA contains very specific limitations upon scope which address much of what the

majority claims to be concerned about. Section 3562, subdivision (q) states, in pertinent part:

For purposes of the University of California only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment. The scope of representation shall not include:

(1) Consideration of the merits, necessity, or organization of any service, activity, or program established by law or resolution of the regents or the directors, except for the terms and conditions of employment of employees who may be affected thereby.

(2) The amount of any fees which are not a term or condition of employment.

(3) Admission requirements for students, conditions for the award of certificates and degrees to students, and the content and supervision of courses, curricula, and research programs, as those terms are intended by the standing orders of the regents or the directors.

. . . . .

All matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring, provided that nothing herein may be construed to limit the right of the employer to consult with any employees or employee organization on any matter outside the scope of representation.

As the majority points out, HEERA expressly states that "it is the policy of the State of California to encourage the pursuit of excellence in teaching, research, and learning through the free exchange of ideas . . ." (HEERA sec. 3561, subd. (c)).

However, the majority fails to mention that HEERA also reflects the Legislature's finding that collective bargaining in higher



education is consistent with that policy. HEERA section 3560, subdivision (e) states:

It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them. It is the intent of this chapter to accomplish this purpose by providing a uniform basis for recognizing the right of the employees of these systems to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select one of these organizations as their exclusive representative for the purpose of meeting and conferring.

While the majority may disagree, the Legislature has found that collective bargaining for academic employees is consistent with the educational policies of this state. Nevertheless, subdivision (f) of section 3562 does provide the Board with the authority to exclude from coverage those student employees whose employment is of a particular nature that makes collective bargaining inappropriate despite the Legislature's findings. However, as pointed out above, the majority has failed to cite legitimate reasons why GSI employment is of such a nature. Since my review of the record has revealed no additional reasons, the inescapable conclusion is that coverage of GSIs would effectuate the purposes of the Act.

## Conclusion

In sum, I would affirm the ALJ's conclusion that GSRs should be excluded from coverage due to the strong evidence that educational objectives predominate in the vast majority of such positions. I would not, however, carve out those whose work has been shown to be unrelated to their educational objectives, due to the infeasibility of accurately and consistently identifying such individuals.

I would also affirm the ALJ's finding that GSIs are covered by the Act. The evidence showed unequivocally that the GSIs' motivations (which is the proper inquiry pursuant to Regents) were primarily economic and that educational objectives played a small part in their GSI work. This, coupled with the undisputed evidence of the substantial, if not critical, contribution of GSIs to the provision of undergraduate education, dictates the conclusion that the GSIs' educational objectives are subordinate to the services provided. In fact, the evidence in favor of this conclusion is even stronger than that in Regents. Thus, if housestaff are covered by the Act, then GSIs must be as well.

The majority reaches a different conclusion as to GSIs through several basic analytical flaws. First, the majority misconstrues Regents and improperly emphasizes the University's subjective views of the purposes of the GSI work. Secondly, the majority badly misstates the record, often citing evidence in support of its conclusion concerning GSIs which, in fact, pertains only to GSRs. Ironically, a more logical application of

the majority's own analysis concerning the need to "recalibrate the scale" and examine which duties prevail when there is a conflict emphatically demonstrates the predominance of the GSI duties (over degree work).

Lastly, the majority warns of the danger to educational interests that would result from collective bargaining. As discussed above, these are essentially arguments about the scope of representation that are not only premature and unfounded (given the specific scope language in the statute), but were rejected in Regents. The majority's analysis is so broad that it would encompass all conceivable student employees. This simply does not comport with the plain language of subdivision (f), which reflects the Legislature's view that some such employees would be covered and some would not. The ALJ struck the proper balance, but the majority rejects his proposed decision. The majority's hostility to the result in Regents is only thinly-disguised. The majority's opinion clearly sends the signal that the Board is drawing the line on the coverage of student employees. Given the abundant evidence that the educational objectives of GSIs are subordinate to the services provided, one must ask the question, if they are not covered, then who would be? The answer is, clearly, no one. The majority has thus frustrated legislative intent as found by the court in Regents and has effectively rewritten subdivision (f) to prohibit coverage of student employees whose employment has any relation to their educational objectives.



APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-179-H, Association of Graduate Student Employees v. Regents of the University of California, in which all parties had the right to participate, it has been found that the Regents of the University of California has violated sections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA) by refusing to recognize certain classifications of graduate student employees at the University of California at Berkeley as employees for purposes of HEERA, and by refusing to provide payroll deductions for union dues for such employees.

As a result of this conduct, we have been ordered to post this Notice, and will abide by the following, we will:

A. CEASE AND DESIST FROM:

1. Refusing to recognize graduate student employees employed at the University of California at Berkeley in the classifications of Community Teaching Fellow (Title Code 2305), Nursery School Assistant (Title Code 2286), and Acting Instructor (Title Codes 1401, 1407, and 1417) as employees within the meaning of section 3562(f) of HEERA; and Association of Graduate Student Employees as an employee organization representing these employees.

2. Refusing to implement payroll deductions of dues for AGSE for such employees, upon request.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

1. Implement payroll deduction of dues for the Association of Graduate Student Employees upon request of the above-mentioned employees within the meaning of section 3562(f).

Dated: \_\_\_\_\_ THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: \_\_\_\_\_  
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED BY ANY MATERIAL.