STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and UNIVERSITY COUNCIL-AMERICAN FEDERATION OF TEACHERS, Exclusive Representative.	Case No. SF-UM-730-H PERB Decision No. 2422-H May 7, 2015

Appearances: Otis J. Crockett, Labor Relations Advocate, for Regents of the University of California; Leonard Carder by Andrew J. Ziaja, Attorney, for University Council-American Federation of Teachers.

Before Winslow, Banks and Gregersen, Members.

DECISION

BANKS, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by the University Council-American Federation of Teachers (UC-AFT) to a proposed decision (attached) by a PERB Hearing Officer. The proposed decision denied UC-AFT's petition to modify Unit 18, the Non-Academic Senate Instructional Unit at the University of California (University), of which UC-AFT is the exclusive representative, to include the professor of practice and visiting professor of practice job titles, which were established in 2012 at the University's San Diego campus (UCSD).

The Board has reviewed the entire record in this matter, including the pleadings, the hearing transcript and the exhibits thereto, UC-AFT's exceptions, the University's responses, and the parties' supporting and supplemental briefs. Except where noted below, we find the Hearing Officer's factual findings are adequately supported by the record and we adopt them

as the findings of the Board itself, as modified. Except where noted below, the proposed decision is well-reasoned and in accordance with applicable law and we therefore adopt it as the decision of the Board itself, subject to the following discussion of UC-AFT's exceptions.

PROCEDURAL BACKGROUND[1]

Following a two-day formal hearing, and the submission of post-hearing briefs, the Hearing Officer issued his proposed decision on October 6, 2014. The proposed decision concluded that, pursuant to the Higher Education Employer-Employee Relations Act (HEERA),[2] PERB regulations,[3] and PERB decisional law, UC-AFT had not demonstrated that the three professor of practice positions at UCSD currently held by Leonard Srnka (Srnka), Nancy Binkin (Binkin) and Nathan Fletcher (Fletcher) share a sufficient community of interest with the University's Non-Academic Senate instructional employees to warrant their inclusion in Unit 18. Although the Hearing Officer considered the criteria set forth in HEERA section 3579, subdivision (a), including shared goals, training, working conditions, interaction with other employees, and so forth, he focused primarily on differences in the assigned and/or actual duties performed by Srnka, Binkin and Fletcher versus the duties encompassed by Unit 18. With respect to the positions held by Srnka and Binkin, because the evidence was undisputed that they had performed no teaching duties whatsoever during their first year of employment, the Hearing Officer concluded that their duties were inconsistent with the

[1] A more detailed factual and procedural history is set forth in the proposed decision. We identify the central issues and summarize the proposed decision's findings and conclusions here simply to provide context for our discussion of UC-AFT's exceptions.

[2] HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

primarily instructional duties traditionally performed by Unit 18 members. (See *Unit Determination for Professional Non-Academic Senate Instructional and Research Employees of the University of California* (1982) PERB Decision No. 270-H (*Unit Determination for Professional Non-Academic Senate Instructional and Research Employees*), pp. 9-10.)

By contrast, the evidence was undisputed that Fletcher was engaged primarily in instructional duties, as he had spent most of his first year designing and preparing course offerings that were not part of the routine curriculum in the UCSD Political Science Department. However, based on the testimony of Jeffrey Elman (Elman), UCSD's Dean of the School of Social Sciences,[4] the University's offer letter to Fletcher, and UCSD's Policy and Procedure Manual (PPM), the Hearing Officer found that, in addition to his teaching duties, Fletcher was also assigned to and/or actually performed "research" duties consisting of meeting with faculty members in the Political Science Department on a weekly basis to discuss the formation of a future research institute focused on issues of politics and governance in California.

[4] The proposed decision incorrectly identifies Elman as "Ellman," and his title as Dean of Social *Services*. We disregard these errors as non-prejudicial, as Elman's name and title are not in dispute and the correction of these errors will not affect the outcome in this matter.

Similarly, the proposed decision found, at page 11, that "UCSD has several fieldwork programs on its campus . . . ." However, it appears that this finding pertains to the University's *Santa Cruz* campus, as no evidence was presented regarding fieldwork programs at UCSD, and the proposed decision next discusses the duties performed by Michael Rotkin, who has never worked at UCSD. We therefore do not adopt the proposed decision's finding with regard to fieldwork programs at UCSD. However, to the extent this finding was in error, we disregard it as non-prejudicial.

The Hearing Officer also concluded that, because the visiting professor of practice series remains vacant, there was insufficient factual basis to find a community of interest with Unit 18 employees.[5]

UC-AFT has asserted 21 exceptions to the proposed decision and filed a supporting brief, in which it challenges several of the Hearing Officer's factual findings and legal conclusions. The University has submitted responses to UC-AFT's exceptions and filed its own supporting brief in which it urges the Board to adopt the proposed decision.

Following publication of *Regents of the University of California* (2014) PERB Decision No. 2398-H (*Regents*), a separate unfair practice decision involving the same parties, the Board granted a motion by UC-AFT to reopen filings in the present matter to permit supplemental briefing on any common or related issues addressed by the Board's decision regarding the University's employment of adjunct faculty at the University's Los Angeles campus (UCLA).[6] UC-AFT submitted a supplemental brief in which it argued, among other things, that the Board's interpretation of the so-called "Switkes Letter," a negotiated side letter to successive memoranda of understanding (MOU) between the University and UC-AFT, determined the resolution of issues in the present dispute. The University also filed a supplemental brief in

[5] UC-AFT has not asserted any errors of law, fact or procedure in the proposed decision that are specific to the visiting professor of practice title. To the extent UC-AFT excepts to the Hearing Officer's disposition of any issues common to the professor of practice and visiting professor of practice titles, those issues are addressed in the discussion below. Moreover, we find no error in the Hearing Officer's denial of UC-AFT's petition with respect to the vacant visiting professor of practice title. Because unit placement determinations are based largely on the actual duties assigned and performed, PERB has generally refused to determine the appropriate unit for a vacant classification. (*Mendocino Community College District* (1981) PERB Decision No. 144a, pp. 1-2.)

[6] *Regents* concerned the University's misclassification of part-time instructors as adjunct professors instead of lecturers at the University's Los Angeles campus and the alleged repudiation of a side letter agreement on this subject.

which it argued that the Board's decision concerning the employment of adjunct faculty at the UCLA campus presented different factual and legal issues and was therefore of no significance to the present dispute.

DISCUSSION

Whether the Hearing Officer Followed the Correct Legal Standard for Unit Determinations

In Exception No. 18, UC-AFT argues that the Hearing Officer failed to fully take into account *all* of the unit determination factors required by HEERA, because he focused primarily on the community of interest factors, while relegating other criteria, including the impact on the current classification system on the meet and confer relationship, to secondary status under the heading "Other Criteria." We disagree.

HEERA section 3579, subdivision (a), requires the Board to consider a number of factors when making unit determinations, including: (1) the internal and occupational community of interest among the employees; (2) the effect that the projected unit will have on the meet and confer relationships, (3) the effect of the proposed unit on efficient operations of the employer and the compatibility of the unit with the responsibility of the higher education employer and its employees to serve students and the public; (4) the number of employees and classifications in a proposed unit, and its effect on the operations of the employer, on the objectives of providing the employees the right to effective representation, and on the meet and confer relationship; and (5) the impact on the meet and confer relationship created by fragmentation of employee groups or any proliferation of units among the employees of the employer.

Although the statutory language mandates consideration of all of the statutorily-enumerated criteria when making unit determinations, a Board agent retains some flexibility to weigh and balance the various factors to achieve the objectives of the statute. Some criteria may

receive different weight and consideration in different factual settings in order to further the purposes of the statute. (PERB Reg. 32781; *Unit Determination for Technical Employees of the University of California* (1982) PERB Decision No. 241-H (*Unit Determination for Technical Employees*), p. 6.)[7] No one criterion in the community of interest analysis is determinative. The point in comparing these factors "is to reveal the interests of employees and [to] ascertain whether they share substantial mutual interests in matters subject to meeting and negotiating." (*Center Unified School District* (2014) PERB Decision No. 2379, p. 2, citing *Monterey Peninsula Community College District* (1978) PERB Decision No. 76.)

In the present matter, the Hearing Officer focused primarily on the community of interest factors, including the job requirements and actual work performed by Fletcher or other professors of practice, to determine whether their positions share a community of interest with employees in Unit 18. In accordance with Board precedent, other relevant factors were considered but grouped under the catch-all heading "Other Criteria." (*Regents of the University of California* (2010) PERB Decision No. 2107-H, pp. 26-29.) Regardless of how the other relevant statutory criteria were organized and presented in the proposed decision, they were considered and we therefore reject this exception.

Whether the Hearing Officer Improperly Refused to Consider Evidence of Animus

Related to the above exception is Exception No. 19, in which UC-AFT argues that the Hearing Officer improperly refused to consider email correspondence between Elman and UCSD

[7] Additionally, not all of the statutorily-enumerated criteria are applicable to every case. Some of the criteria are obviously inapplicable to the present cases, such as the impact on the meet and confer relationship created by fragmentation of employee groups or any proliferation of units among the employees of the employer; the presumption in favor of state-wide units including all employees in the same occupational title or group; or the appropriateness of units including skilled crafts employees, members of the academic senate or peace officers at the University.

Assistant Vice Chancellor for Academic Personnel Kristina Larsen (Larsen) concerning the establishment of the professor of practice titles and the desire of these officials to avoid "trigger[ing] a complaint to PERB from the AFT on the grounds that the university is using the [professor of practice] title to avoid hiring in a category that is covered by collective bargaining." In one email message, Larsen observed that, "in order to assure the long term success of this series it is going to require a great deal of self-discipline and strategy (like not appointing anyone in the series who has ever been a Unit 18 lecturer)." In another message, Elman wrote, "The person should not have already been hired as a Lecturer when they are proposed for [the professor of practice position]."

The Hearing Officer refused to consider these emails, reasoning that unfair practice allegations may not be resolved in representation proceedings. UC-AFT contends that these emails, while certainly probative of unlawful motive, were not offered in support of unfair practice allegations, but because of their relevance to the unit determination inquiry, which requires consideration of how a unit determination will affect the meet and confer process. Thus, while no separate unfair practice charge was filed, UC-AFT argues that the views expressed in these emails demonstrate the likely harm on the meet and confer relationship if UCSD is permitted to use the professor of practice classification to undermine the integrity of Unit 18.

We find it unnecessary to decide this issue. Assuming without deciding that the emails should have been considered in a unit determination proceeding for the intended or likely effect of the professor of practice positions on the meet and confer relationship, their consideration would still not alter the result in this case. The evidence was not necessarily proof of anti-union animus or an intent to undermine the University's meet and confer obligations. Rather, it

was equally susceptible to an inference that the University simply wished to avoid litigation with UC-AFT.

The Significance of the Switkes Letter to the Present Unit Determination Decision

Several of UC-AFT's exceptions and its supporting and supplemental briefs concern the Switkes Letter and the significance of the Board's interpretation of that document in separate unfair practice proceedings for the present controversy. Specifically, UC-AFT argues that, in *Regents, supra*, PERB Decision No. 2398-H, the Board held that the Switkes Letter requires the University to treat lecturers as the default classification for Non-Senate faculty who primarily teach. According to UC-AFT, PERB determined in *Regents* that the University may only exclude instructors from Unit 18 and classify them as adjunct faculty if they are required to perform the kind of academic, peer-reviewed research, or its equivalent, that is required of Academic Senate faculty members. Moreover, by recognizing the lecturer classification as the default title, the *Regents* decision requires the University to prove that an adjunct professor appointment, rather than a Unit 18 lecturer, is the appropriate classification for a given appointee. Under UC-AFT's interpretation, unless the University can show that an instructor actually performs academic, peer-reviewed research or its equivalent, the instructor must be classified as a Unit 18 lecturer.

This interpretation of the Board's decision in *Regents, supra*, PERB Decision No. 2398-H underlies several of UC-AFT's exceptions. For example, UC-AFT's Exception No. 3 excepts to the Hearing Officer's finding that the definition of the term "research" was not memorialized in a writing between the parties which would restrict the meaning of that term to published peer-reviewed academic research.

We find partial merit in this exception. While the Switkes Letter itself does not include a definition of the term "research," both its references to various University policies and the parties' bargaining history demonstrate that, *as applied to adjunct faculty*, the term "research" was intended to encompass the kind of academic, "cutting-edge" and peer-reviewed research required of Academic Senate faculty members. (See *Regents, supra*, PERB Decision No. 2398-H.) However, we do not regard the Switkes Letter or the meaning of the term "research" it incorporates as controlling for whether the professor of practice classification belongs in Unit 18. Unlike *Regents,* the present dispute does not involve the alleged misclassification of Unit 18 members as adjunct professors, as prohibited by the Switkes Letter, but whether *new* classifications, the professor of practice and visiting professor of practice titles, appropriately belong in Unit 18 based on the statutory "community of interest" criteria.

In *Regents, supra*, PERB Decision No. 2398-H, the Board determined that, "lecturer is the default classification for instructors who perform *only teaching duties*." (*Id.* at p. 30, emphasis added.) In that case, the "research" and "service" contributions, however defined, were *not required* at all as part of the incumbent's work for the University; rather they were already part and parcel of the instructors' pre-hire resume or, to the extent they continued to be performed during the incumbent's University employment, they were not specifically required by the University and, for the most part, consisted of "research" or "service" duties that the individual would have performed anyway as part of his or her separate practice or employment *outside* the University.

UCSD's 2013 "Professor of Practice Implementation Guidelines" admit that the professor of practice series "has been established within the framework of the Adjunct Professor series," and that, "appointments are made using the Adjunct Professor title code." However, the

University acknowledged at the hearing that the professor of practice and visiting professor of practice titles do not belong in the adjunct series. UCSD's Director of Academic Policy Development Kelly Lindlar (Lindlar) explained that the positions needed to be coded according to *some* existing title within the University's system to ensure that the incumbents were paid, but that, once separate, system-wide pay codes had been developed for the professor of practice titles, they would no longer even be coded as adjunct faculty for strictly payroll purposes. PERB may interpret University policies, including the provisions of collective bargaining agreements and side letters, where necessary to decide an unfair practice issue. (*City of Riverside* (2009) PERB Decision No. 2027-M, p. 10; *Fresno Unified School Dist. v. National Education Assn.* (1981) 125 Cal.App.3d. 259, 271-274; *State of California (Departments of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S, pp. 14-16.)[8] However, unlike unfair practice cases, in unit determination proceedings, there is no adjudication of an alleged violation of HEERA against a respondent. Because unit determination proceedings lack the kind of notice or due process protections necessary for a finding of liability against a party, they are ill-suited to determining the lawfulness of an assigned duty or resolve an unfair practice allegation. (*Antioch Unified School District* (1984) PERB Decision No. 415, pp. 5-6; see also *City & County of San Francisco* (2014) PERB Order No. Ad-415-M, p. 14.)

[8] Although the above decisions interpreted the Meyers-Milias-Brown Act (§ 3500 et seq.), the Educational Employment Relations Act (§ 3540 et seq.), and the Ralph C. Dills Act (§ 3512 et seq.), rather than HEERA, where California's public-sector labor relations statutes are similar or contain analogous provisions, agency and court interpretations under one statute are instructive under others. (*Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 623-624.)

Whether Implementation of the Professor of Practice Positions Violated the Switkes Letter

In Exception Nos. 10, 11 and 13, UC-AFT also argues that the professor of practice series, as described and implemented by UCSD, violates the terms of the Switkes Letter, and that the Hearing Officer improperly failed to draw this conclusion from the record evidence and the Hearing Officer's own factual findings. Exception No. 10 notes that the Hearing Officer found that "most of [Fletcher's] efforts at UCSD were, to a large extent, spent lecturing political science courses and meeting with students during office hours," and that such "instructional" duties are typically performed by Unit 18 members. Exception No. 11 similarly excepts to the Hearing Officer's failure to find a violation of the Switkes Letter, since Fletcher was coded as an adjunct professor but was not required to perform research of the kind expected from ladder-rank faculty. In Exception No. 13, UC-AFT argues that, if the research requirement for professors of practice is not the same as that assigned to adjunct and senate professors, then the Switkes Letter is not satisfied and the current classification system is eroded.

As explained above, representation proceedings are ill-suited for determining issues of liability. However, even assuming these issues were properly before the Hearing Officer in a unit modification proceeding, they would not alter the result in this case for reasons that were also explained above. The Switkes Letter was designed to police the boundaries between lecturers and adjuncts, not between lecturers and newly-created positions, which, as the Hearing Officer correctly determined, should be determined under a community of interest standard, as set forth in HEERA section 3579, subdivision (a). We therefore reject UC-AFT's exceptions concerning alleged violations of the Switkes Letter.

Exceptions Concerning the Scope and Nature of Duties Performed by Unit 18 Members.

UC-AFT also excepts to the Hearing Officer's findings regarding the duties assigned to and performed by Unit 18 members. For example in Exception No. 1, UC-AFT contests the Hearing Officer's finding that Unit 18 members have heavy teaching loads and mainly provide instruction in a classroom setting. UC-AFT contends that the Hearing Officer erroneously assumed that Unit 18 members are synonymous with lecturers, when, in fact, the bargaining unit encompasses employees performing a broader range of duties, including fieldwork coordinators, consultants and supervisors, who supervise student fieldwork outside the classroom, and part-time lecturers who do not carry a full-time teaching load.

In Exception No. 17, UC-AFT excepts to the Hearing Officer's conclusion that, generally, Unit 18 employees have heavier teaching loads and are expected to teach three quarters per year. UC-AFT argues that the Hearing Officer failed to identify which job title within Unit 18 was being used as the basis for this comparison and failed to recognize that Unit 18 members perform a range of duties that does include teaching but not uniformly enough to draw the "gross overgeneralization" reached by the Hearing Officer. Exception No. 8 similarly asserts that the Hearing Officer ignored the fact that Unit 18 members perform "nontraditional" research as a core component of their duties which, according to UC-AFT, are arguably comparable to the relaxed "research" duties expected of Fletcher.

Each of these contentions is beside the point. Unit 18 was established as an instructional unit consisting of lecturers and related teaching classifications. (*Unit Determination for Professional Non-Academic Senate Instructional and Research Employees, supra*, PERB Decision No. 270-H, p. 17.) In concluding that the University may not use the adjunct title for employees who are hired to teach but who are not required to perform research

or service duties, the Board recently affirmed the instructional nature of Unit 18. (*Regents, supra*, PERB Decision No. 2398-H.) The role of Unit 18 members who supervise student fieldwork is also instructional. Although this duty bears a superficial resemblance to Fletcher's weekly brainstorming sessions with faculty members regarding the scope and purpose of the future Institute for California Studies, as explained at the hearing, the University does not regard student coursework, including fieldwork, to be a part of its research mission.

By contrast, Fletcher *was required* to perform "research" by assisting ladder-rank faculty in identifying and narrowing the scope and purpose of the future research Institute. While some Unit 18 members had established internships or practicum coursework *for students*, there was no evidence in the record to suggest that they are hired to define or implement the University's research mission and the fact that Fletcher's "research" was not the traditional, academic, peer-reviewed research required of adjunct or ladder-rank faculty is not determinative of whether his position shares a community of interest with Unit 18 members.

The distinction between instructional and research positions held by non-Academic Senate personnel goes back to PERB's original unit determinations under HEERA. (*Unit Determination for Professional Non-Academic Senate Instructional and Research Employees, supra*, PERB Decision No. 270-H.) Unit 18 members are not required as part of their employment to conduct "research," even in the relaxed sense applicable to Fletcher and other professors of practice. While the record demonstrates that Unit 18 members may perform nontraditional research as a core component of their duties and are effectively rewarded for authoring or contributing to the publication of academic, peer-reviewed research, particularly during their six-year "eye of the needle" review, the record was insufficient to demonstrate that they are *required* to perform such duties. While PERB may determine the boundaries of

appropriate bargaining units based on the duties assigned to and actually performed by higher education employees (HEERA, § 3579, subd. (a); *State of California, Department of Personnel Administration* (1991) PERB Decision No. 871-S (*DPA*), p. 8), we are without authority to dictate to the University whether to create new classifications that may share characteristics of both the professor of practice classification and Unit 18, or in the words of the University, classifications that are "neither fish nor fowl.'" PERB's task in unit determination proceedings regarding a newly-established classification is to determine if the actual duties performed by the incumbents warrant inclusion in the petitioned-for unit. (HEERA, § 3561, subd. (b).[9])

In this regard, UC-AFT's Exception No. 16 excepts to the Hearing Officer's conclusion that, "[a]lthough there is scant evidence that [Fletcher] actually performed 'research' work expected of him, his research contributions to the Institute are reasonably comprehended within both his appointment letter and reappointment and evaluation criterion [*sic*]." Where the record includes no evidence of duties actually performed because the position is newly established,

[9] HEERA section 3561, subdivision (b), provides:

> 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.

PERB may rely more heavily on evidence from written job descriptions or similar employer-prepared documents purporting to demonstrate the *expected* duties of the position. (*Calexico Unified School District* (1990) PERB Decision No. 800, pp. 4-6.) We therefore find no error in the Hearing Officer's finding that Fletcher was assigned and performed at least some form of "research."

UC-AFT's Exception No. 6 similarly challenges the relevance of the Hearing Officer's finding that, while Unit 18 members teach courses both at the undergraduate and graduate levels, professors of practice "may teach undergraduate core courses," but are not mandated to do so. UC-AFT argues that neither Unit 18 members, nor professors of practice (nor, for that matter, ladder-rank faculty) are required to teach undergraduates and that it is therefore not a valid basis for distinction between professors of practice and Unit 18 members.

Again, we find partial merit in this exception. UCSD PPM section 230-20, which includes the criteria for appointment to the professor of practice series, states that, "[n]ormally, the candidate [for professor of practice or visiting professor of practice] will teach at least at the upper-division level and generally at the graduate level," but also notes that the teaching requirements for the position "may be satisfied by meaningful engagement in and significant contributions to the graduate or undergraduate instructional program, including efforts in the research and professional training of students." Similarly, although UCSD PPM section 230-28 acknowledges that "the Professor of Practice series teach primarily at the graduate level," and that "it is not expected that Professors of Practice teach core courses at the undergraduate level," the document also states that "[i]nstruction at the undergraduate level is permissible when an appointee's individual expertise and professional skills warrant such a teaching assignment."

We therefore do not adopt the proposed decision to the extent it relies on teaching undergraduate versus graduate courses as a distinguishing feature between Unit 18 members and employees in the professor of practice title. However, we find it unnecessary to decide whether Fletcher's teaching assignments were or were not permissible under the exception for undergraduate teaching stated in the PPM, because, in addition to his teaching duties, he is also expected, as part of his required duties, to contribute to the "research" and/or creative mission of the University, albeit not necessarily in the form of academic, peer-reviewed research.

We likewise agree with UC-AFT's Exception No. 9, which challenges as unsupported and "wholly irrelevant" the Hearing Officer's conclusion that Unit 18 employees do not have similar levels of education as ladder-rank faculty and adjunct professors. We agree that this finding is not supported by the record and is at odds with the Hearing Officer's own factual findings, as the record demonstrated that Unit 18 includes members with a range of educational levels, some of which are comparable to Fletcher's. However, because of the relatively minor role played by educational levels in the proposed decision's overall community of interest analysis, we do not regard this error as grounds for reversing the ultimate conclusion that Unit 18 members do not share a sufficient community of interest with the current Professors of Practice to warrant the latter's inclusion in Unit 18.

In Exception No. 4, UC-AFT similarly argues that nothing in the record supports the Hearing Officer's conclusion that "placing a distinguished practitioner into a Unit 18 classification was . . . not a viable alternative, since the MOU does not mandate peer-reviewed research as a component for a continuing appointment." We also find partial merit to this exception. Whether an individual is regarded as "distinguished" in his or her field has no bearing on what duties may be assigned and performed, which is the relevant inquiry when

considering whether employees have sufficiently similar job duties to share a community of interest. (*Regents, supra,* PERB Decision No. 2398-H, p. 30; *DPA, supra,* PERB Decision No. 871-S, p. 8; see also *Hemet Unified School District* (1990) PERB Decision No. 820.)

We also agree with UC-AFT that there was nothing in the record to suggest that a "distinguished practitioner" could *only* be appointed if his or her job duties included peer-reviewed research. However, even assuming, as UC-AFT argues, that the Hearing Officer's analysis conflated these differently relevant criteria, it would not alter the result in this case, which is based on the conclusion that UC-AFT failed to satisfy its burden as the petitioner in unit modification proceedings that the newly-established classifications professor of practice and visiting professor of practice share a sufficient community of interest with Non-Academic Senate instructional employees to be included in Unit 18. (*Unit Determination for Technical Employees, supra,* PERB Decision No. 241-H, p. 20.) Central to that determination was the factual finding that professors of practice are expected to perform some form of "research" and "service" duties, whereas Unit 18 members are not.

Although not discussed in the proposed decision, the record contains a similar distinction with respect to Fletcher's obligation to complete some form of University and public service that go beyond merely holding office hours. According to UCSD PPM 230-28, to continue as a professor of practice beyond his three-year appointment and to be eligible for a pay increase, Fletcher must be evaluated based not only on his teaching quality and effectiveness, but also on his contributions to research and/or the creative mission of the University, *and on his service activities related to his professional expertise and achievements.*

In addition to holding office hours, Elman testified that Fletcher "gives advice" to graduate students and "discusses their research projects." More importantly, according to

Elman, Fletcher is eligible to serve on graduate students' dissertation committees. Although there was no evidence that Fletcher had served on any such committees, Elman testified that, *unlike Fletcher*, advising graduate students on their dissertation research is "not what [Unit 18 members are] hired to do."[10]

Although some Unit 18 members supervise student fieldwork, as noted already, the University does not consider student coursework or internships to be part of its academic research mission. While admittedly instruction of graduate students begins to blur the line between teaching and research, because of the crucial role graduate students may play in designing and carrying out original research for their doctoral dissertations, the record includes no evidence that Unit 18 members have served on dissertation committees or similar groups overseeing the original research of graduate students.

Whether the Hearing Officer Improperly Considered Issues Not Raised by the Petition

UC-AFT also excepts to the Hearing Officer's conclusion that the professor of practice titles may be more appropriately placed in the University's Organizational Research Units, an option that was not sought by UC-AFT's petition nor raised or briefed by the parties in these proceedings. We are not persuaded. PERB unit placement determinations are not confined to the particular unit configurations petitioned for by any party. (*Sweetwater Union High School*

[10] Although the record includes no evidence regarding the criteria that will be used to evaluate Fletcher's research and service contributions, UC-AFT may petition PERB again for inclusion of Fletcher's position or any other professor of practice position, at such time as it has evidence that no such duties are in fact assigned or performed by employees in those classifications. (*Regents of the University of California* (1993) PERB Decision No. 993-H, adopting administrative law judge's proposed dec. at pp. 8-9.)

District (1976) EERB[11] Decision No. 4.) Moreover, the proposed decision does not purport to place the professor of practice titles in an Organized Research Unit; rather, in finding an insufficient community of interest between Unit 18 members and the current professors of practice, the Hearing Officer simply observed that the professor of practice research requirement may make their inclusion in a research unit more appropriate than in either Unit 18 or an adjunct title. We therefore reject this exception as meritless.

UC-AFT's Request for Oral Argument

UC-AFT has also requested oral argument before the Board itself to explain or clarify the record evidence relating to the technical aspects of highly specialized job classifications at issue in this case, to facilitate full consideration of the Board's original unit determination decision for Unit 18, as it has been implemented in the decades since at the University, and to allow for a fuller consideration of the multi-factor analysis for HEERA unit determination issues than would otherwise be possible. UC-AFT contends that oral argument is appropriate because the integrity of the Board's unit determination regarding Unit 18 is at stake. The University opposes this request.

The Board has historically denied requests for oral argument when the record is adequate, the parties have had an opportunity to fully brief the matter, and the issues are sufficiently clear to make oral argument unnecessary. (*Los Angeles Community College District* (2009) PERB Decision No. 2059; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Over the course of two days of hearing, the parties had the opportunity to examine and cross-examine each witness and to present more than 20 exhibits, which were

[11] Prior to 1978, PERB was known as the Educational Employment Relations Board or EERB.

received into the record. They also filed post-hearing briefs with the Hearing Officer in which they argued various points and authorities, followed by the extensive exceptions, responses to exceptions, briefing and supplemental briefing submitted to the Board itself. Although the Board considers the record less than satisfactory in several respects, particularly with regard to the absence of any testimony by employees in the professor of practice classification, their immediate supervisors or any other witnesses with first-hand knowledge of the duties assigned to and actually performed by the employees, oral argument before the Board is not well-suited to supplementing the factual record with sworn testimony or cross-examination of witnesses. In any event, because the issues are sufficiently clear to make additional argument unnecessary, we deny UC-AFT's request for oral argument.

ORDER

For the foregoing reasons, and based on the entire record in this case, the University Council-American Federation of Teacher's unit modification petition to include the professor of practice and visiting professor of practice classifications in Unit 18 is hereby DENIED.

Members Winslow and Gregersen joined in this decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and UNIVERSITY COUNCIL-AMERICAN FEDERATION OF TEACHERS, Exclusive Representative.	REPRESENTATION CASE NO. SF-UM-730-H PROPOSED DECISION (10/06/2014)

Appearances: Regents of the University of California by Otis Crockett, Labor Relations Advocate at University of California, San Diego; Leonard Carter by Andrew Ziaja, Attorney, for University Council-AFT.

Before Yaron Partovi, Hearing Officer.

PROCEDURAL HISTORY

On or about August 2012, the University of California, San Diego (University or UCSD) established a Professor of Practice classification series that includes the following two titles[1]: Professor of Practice and Visiting Professor of Practice.

On April 23, 2013, University Council-American Federation of Teachers (UC-AFT) filed with the Public Employment Relations Board (PERB or Board) a unit modification petition (PERB Case No SF-UM-730-H)—under the Higher Education Employer-Employee Relations Act (HEERA)[2] and pursuant to PERB Regulation 32781(b)(3)[3]—seeking to add both

[1] The University often refers to classification names as "titles."

[2] HEERA is codified at Government Code, section 3560 et seq. Unless otherwise specified, all statutory references are the Government Code.

[3] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

of the Professor of Practice classifications to the Regents of the University of California's (UC) Bargaining Unit 18 (Non-Senate Instructional). On June 17, 2013, PERB received a response from the University opposing UC-AFT's petition. The interested parties were unable to resolve the instant dispute during an October 4, 2013 informal settlement conference. On March 4 and 5, 2014, after disposing of a pre-hearing motion, the undersigned Hearing Officer conducted an evidentiary hearing regarding the unit modification request.[4]

FINDINGS OF FACT

Unit 18 (Non-Senate Instructional)

UC-AFT is the "recognized organization" within the meaning of section 3562(p) of Bargaining Unit 18 (Unit 18). There are approximately 3,000 employees system-wide who comprise Unit 18. Unit 18 includes the following relevant classifications: Lecturer, Senior Lecturer, Lecturer Continuing Appointment, Demonstration Teacher, Supervisor of Teacher Education, Fieldwork Coordinator/Consultant, Field Work Supervisor, Substitute Teacher, and Teacher.[5] UC-AFT and UC are parties to a memorandum of understanding (MOU) that includes all of the terms and conditions of employment for Unit 18 employees. Unit 18 employees have heavy teaching loads and mainly provide instruction in a classroom setting.

[4] At the time of the formal hearing, the University only employed three Professors of Practice: Nathan Fletcher, Leonard Srnka, and Nancy Binkin. Neither party called any of the three Professors of Practice to the witness stand to testify during the hearing. Further, the Visiting Professor of Practice classification is vacant as no one is employed in that position.

[5] Represented faculty/academic employees at UC are split into three separate bargaining units: Non-Senate Instructional; Non-Senate Academic Research Professional; and Research Support Professionals. (*Unit Determination for Professional Non-Academic Senate Instructional and Research Employees of the University of California* (1982) PERB Decision No. 270-H.)

Academic Senate Faculty (Ladder-Rank Faculty)

The Academic Senate[6] consists of non-Unit 18 teaching faculty (hereafter, ladder-rank faculty) with increasing rank as follows: Assistant Professor, Associate Professor, and Professor.[7] Ladder-rank faculty are generally appointed to three year terms.[8] Ladder-rank faculty do not have a formal teaching load requiring them to perform teaching and peer-reviewed research work simultaneously in one quarter, but they are required to conduct such research work during their three-year appointment period. As such, it is possible that ladder-rank faculty teach two courses in one quarter, no course the following quarter, and another course in the third quarter. For the first two quarters of their appointment, Assistant Professors are not expected to do substantial research work, such as having a published peer-reviewed work, since they are focusing on teaching and establishing the foundation for a future research project, such as, applying for a research grant program or conducting archival work at a library. It is possible that an Assistant Professor's research project materializes into a published work two years after their initial appointment. Ladder-rank faculty are unrepresented and not included within any bargaining unit.

Adjunct Professor and the *Switkes* Letter

Adjunct Professors are not tenure-tracked positions and they are not members of the Academic Senate. Like ladder-rank faculty, Adjunct Professors have both teaching and

[6] The Academic Senate is a body of faculty members that share in governance and are responsible for the design of curricula and degrees and the student admissions process. Members of the Academic Senate have voting rights on these policies, which could be local or system-wide. There is also a voting process within the departments that allows eligible faculty members to vote on appointments and internal matters.

[7] A candidate that achieves an Associate Professor title or higher is deemed to have reached "tenure"—a status that confers a self-renewing contract.

[8] The University defines one year as three semester quarters.

research obligations. Adjunct Professors are excluded from Unit 18 (*Unit Determination for Professional Non-Academic Senate Instructional and Research Employees of the University of California, supra*, PERB Decision No. 270-H), and remain unrepresented by any employee organization for purposes of collective bargaining.

In an August 21, 2003 letter from UC's Assistant-Vice President of Academic Advancement Ellen Switkes to UC-AFT, Switkes affirmed UC's policy definition for Adjunct Professor appointments that was previously set forth in UC's Academic Personnel Manual (APM). The "*Switkes* letter," as it became to be known, was written in response to UC-AFT's concerns that UC had appointed Adjunct Professors with full teaching loads, but no research expectations/assignments. The *Switkes* letter states in pertinent part, as follows:

> APM – 280-4, Adjunct Professor Series, provides: Titles in this series may be assigned (1) to individuals who are predominantly engaged in research or other creative work and who participate in teaching, or (2) to individuals who contribute primarily to teaching and have limited responsibility for research or other creative work, so long as these individuals are professional practitioners of appropriate distinction. Appointees with titles in this series also engage in University and public service consistent with their assignments. . . .
>
> APM – 220-4, Professor Series, provides: the professional series is used for appointees who are members of the faculty of an academic or professional college or school of the University who have instructional as well as research, University, and public service responsibilities.
>
> Similar to the expectations placed on the Academic Senate faculty, Adjunct . . . appointees are expected to perform teaching, research and service that extend beyond class-related advising. As such, their annual teaching loads should not be the same as Lecturers in the same department. Adjunct . . . appointments should not be used for those performing Lecturer duties.

During negotiations for a successor agreement, the parties understood that generally the term "research" refers to published peer-reviewed academic research, although such

understanding was never memorialized in writing. Prior to 2003, the University had proposed that "distinguished" practitioners be appointed to perform Lecturer duties. Although the parties did not reach an explicit agreement as to what constitutes a "distinguished" practitioner, the parties entertained the idea of a current or former US Vice-President as a suitable candidate for such designation. The *Switkes* letter subsequently became a side-letter agreement to the parties' MOU.

UC's Creation of the Professor of Practice Classification Series

The University had an interest in hiring "distinguished" practitioners who were employed in industry or government, but who did not neatly fit the mold of existing Adjunct Professor titles, because they lacked "traditional academic backgrounds" or a published record of independent research. UCSD's Dean of Social Services Jeffrey Ellman testified that someone with a "traditional academic background" completes high school, then college, then a PhD program, and then follows an academic track. Some industry practitioners without such a background could not conform to an Adjunct Professor title, since they are required to have experience teaching or conducting peer-reviewed research. The University determined that placing a distinguished practitioner into a Unit 18 classification was also not a viable alternative, since the MOU does not mandate peer-reviewed research as a component for a continuing appointment. Mr. Ellman gave the example of a candidate with a PhD in Cognitive Science who had published writings in neurobiology, but who is employed in industry (not academia) as the Senior Vice-President of Engineering at Twitter. According to Mr. Ellman, this individual is a "weak" candidate for an Adjunct Professor position in either business or management programs at UC given the candidate's lack of traditional academic background in such programs. As such, the University decided to create the Professor of Practice

classification series to contribute to all three areas: research, service, and instruction, but without the requisite academic background.

In 2012, the title for the Professor of Practice series was embodied in UCSD's local policy, Policy and Procedure Manual (PPM) section 230-20 that provided in relevant part: "Professors of Practice primarily contribute to teaching *and/or* research programs . . . ." and Professors of Practice *may* also contribute to the less traditional research. . . ." (Italics added.) After publishing PPM section 230-20, the University met with UC-AFT to discuss the language contained therein. UC-AFT was concerned that in addition to service work, those employed in the Professor of Practice series could focus on *either* teaching or research and that this would violate the *Switkes* letter agreement which clarified that new adjunct appointments must not perform strictly Lecturer duties, namely teaching assignments without research functions. The University attempted to resolve this concern by issuing PPM section 230-28 in September 2013, to state that the Professor of Practice series appointments are based on numerous criteria including professional competence and activity; teaching; "contributions to the research and/or creative mission of the University;" and "service contributions" such as sitting on department committees, serving as advisors to faculty and students, helping students network, and providing internship and job opportunities.

The witnesses had varying definitions of what "research" entails. According to UCSD Academic Policy Development Director Kelly Lindlar, the "research" component for a Professor of Practice differs from research performed by someone with a traditional academic background. Mr. Ellman testified that "research" is broadly defined to mean the discovery of basic knowledge, while other witnesses understood "research" to include published peer-reviewed research materials. Regardless, UCSD intended that the Professor of Practice

classification provide "contributions" to the published peer-review research being produced by ladder-rank faculty members. Ms. Lindlar further explained:

> So getting back to Professor of Practice, we wouldn't expect necessarily, someone who's you know, CEO of a company or that type of person to be publishing independent peer-reviewed research on their own. However, the campus mission is still to continue to produce this type of work, and they will contribute to it in other ways. So, for example, they might serve as an advisor to faculty and kind of help them to shape what research is needed and what research projects might even be developed.

University's Appointment of Nathan Fletcher for the Professor of Practice Position

Nathan Fletcher was hired by UCSD in December 19, 2012 as a Professor of Practice—a privately funded position[9]—at 28% time, with an appointment date effective January 1, 2013, through June 30, 2015. Mr. Fletcher's appointment was to the UCSD's Political Science Department, a division of the college's Social Science Department. Prior to his hire date, Mr. Fletcher served in the California State Assembly and is currently in a director-level position at Qualcomm Incorporated (Qualcomm). Mr. Fletcher's appointment letter states:

> [Y]our responsibilities are teaching, contributions to the research and/or creative mission of the University, and University and public service. Reappointment is contingent upon demonstration of achievement in each of these areas and your continued professional achievement and activity.

Mr. Fletcher's position is not tenure-tracked and he was appointed to a three-year term. Mr. Fletcher's immediate supervisor is the Political Science Department Chair who reports directly to the Dean of Social Sciences at UCSD, Mr. Ellman. Mr. Ellman interviewed Mr. Fletcher for the position prior to his appointment. Mr. Ellman testified that the purpose of the interview was to determine his research interests, abilities, and skills. He further testified that

[9] Funding for Mr. Fletcher's position comes from an annual fund for Social Sciences whose aggregate contributions cannot exceed $25,000. Ladder-rank faculty and Unit 18 members are state-funded positions.

because Mr. Fletcher was a "policy wonk" in the subject of political science and was "potentially a very good researcher," he was recruited to participate in developing the Institute for California Studies (Institute), a research institute created nearly ten years ago at the campus, but never formally inaugurated by UCSD. Other non-Unit 18 instructors, including ladder-rank faculty, from UCSD's Social Science Departments were consulted in determining the specific activity agenda of Mr. Fletcher at the Institute; however, while Mr. Fletcher participated in meetings with this group through July 1, 2013, no definitive agenda materialized since the agenda was still in the "formative" stage. Mr. Ellman testified that Mr. Fletcher's appointment entailed a "service" component and "research" component. According to Mr. Ellman, the "research" aspect was, in collaboration with ladder-rank faculty, discussing the "pros and cons" of various subject matter issues and strategies for investigating such issues relevant to the Social Science Department. Mr. Ellman further testified that Mr. Fletcher was expected to teach three quarters per academic year, and that there may be a quarter where Mr. Fletcher is needed to conduct research and service without a teaching load.

At the time of his hire, Mr. Fletcher spent most of his effort on teaching. Mr. Fletcher also held office hours similar to all other UCSD instructors. During his first quarter at UCSD, Mr. Fletcher "co-taught" a Comparative American Politics course with a Professor (i.e., a ladder-rank faculty member) who also served as a mentor and advisor to Mr. Fletcher given his then-recent appointment from outside academia. During the following Spring quarter in 2013, Mr. Fletcher taught a course on elections. According to Mr. Ellman, these were new or significantly redesigned courses that are not offered as core-level courses[10] and the regular

[10] Core-courses are basic undergraduate level courses that are required for graduation. These courses have large student enrollments, are offered repeatedly throughout the year, and are taught by either ladder-rank faculty or Unit 18 Lecturers.

ladder-rank professors did not have the expertise to teach such courses. Mr. Fletcher also interacted with graduate-level students by providing advice and discussing their assigned research projects. Mr. Fletcher also devoted some time on a weekly basis for meeting with faculty members of the Institute group.

After the Spring 2013 quarter, Mr. Fletcher took a leave of absence, July 1 through December 31, 2013, to run for the City of San Diego's mayoral office. Mr. Fletcher returned to service on January 1, 2014, at which time he resumed developing the Institute's goals and objectives and taught a course about the electoral process.

University's Appointment of Leonard Srnka and Nancy Binkin

On June 14, 2013, UCSD appointed Leonard Srnka to an unpaid Professor of Practice[11] position at the campus's Scripps Institution of Oceanography Department. In his appointment letter, Mr. Srnka was advised that his responsibilities include "teaching, contributions to the research and/or creative mission of the University, and University and public service." Mr. Srnka did not have a teaching assignment during the 2013-2014 academic year. Mr. Srnka has a PhD in Physics and has studied and researched mainly geophysics. Mr. Srnka is employed by ExxonMobil Upstream Research Company (Exxon) as the Chief Research Geoscientist. Mr. Srnka also has approximately 28 published papers embodied in various science journals including "Nature," "Geophysical Journal of the Royal Astronomical Society," and "Physics of the Earth and Planetary Interiors."

On August 2, 2013, UCSD also appointed Nancy Binkin to a paid, three-year, Professor of Practice position at the Department of Family and Preventive Medicine, School of

[11] According to Ms. Lindlar, the University also appoints unpaid Adjunct Professors, who contribute the scholarly mission of the University by, for example: working in University labs; accessing the University's libraries; and collaborating with University researchers.

Medicine. She is not teaching a class during the 2013-2014 academic year. Ms. Binkin currently serves as a Lecturer at California State University, San Diego, School of Public Health. Ms. Binkin has a Master's degree in Public Health (MPH) and a Medical Doctorate (MD); has worked as the Chief of Policy and Evidence in the Health Section of UNICEF; and has numerous publications and scholarly articles, including some embodied in the "Journal of the American Medical Association" and "Italian National Epidemiologic Bulletin."

Unit 18 Lecturers' Qualifications, Duties, and Responsibilities

Unit 18 Lecturers primarily teach courses both at the undergraduate and graduate levels. However, ladder-rank faculty may also teach those same courses. PPM 230-28 specifies that Professors of Practice may teach undergraduate core courses; however, this type of teaching assignment is not mandated for a Professor of Practice appointee.

The only Lecturer who testified at the hearing was Michael Rotkin, who was first hired in 1974 at University of California, Santa Cruz (UCSC) with an "ABD" (or All But Dissertation), meaning that he obtained a bachelor's degree in English Literature and enrolled in a PhD program in History of Consciousness. In 1974, a faculty member at the UCSC Community Studies department[12] asked Mr. Rotkin to accept a Lecturer position to teach at UCSC's Community Studies Program. At the time of his appointment, Mr. Rotkin was assigned a full-time load requiring him to teach eight courses during the academic year. He did not always teach eight courses throughout the year, because he would occasionally receive "equivalencies" to allow him to conduct non-classroom work including: independent studies with assigned students, collaborating with Academic Senate faculty on projects; and serving on department committees. However, he never taught fewer than six courses and often had six

[12] The Community Studies department is part of the UCSC Social Sciences division, which is one of five divisions at the campus.

courses and two equivalencies. Mr. Rotkin was also granted an equivalency to work on the development of a new graduate program for his department relating to teaching graduate students how to create documentaries. In the mid-1980s, Mr. Rotkin was asked to teach a course on electoral politics for two quarters and a class on freeway planning.

UC-AFT presented evidence showing that there are UC Lecturers who do not have a "traditional academic background," but who nonetheless, had served in high-level government capacities. For example, at UCSC, there are a number of politicians who are Lecturers including: Mr. Rotkin, a former City of Santa Cruz Council member and Mayor of Santa Cruz; John Laird, former California Assembly member and California Secretary of the Environment; Gus Newport, Mayor of the City of Berkeley; and Ryan Coonerty, Mayor of Santa Cruz. Mr. Laird did not have a traditional academic background since his highest education level was a bachelor's degree.

Fieldwork Coordinator/Consultant's Qualifications, Duties, and Responsibilities

UCSD has several fieldwork programs on its campus with programs that involve placing students in the "field" (viz., school, non-profit organization, governmental agency, hospital, etc.) with the goal of providing tools to students for learning how to conduct "research" which, in this context, involves identifying problems and critically evaluating data. The Fieldwork Coordinators/Consultants are responsible for the logistical aspects of linking the students with these field sites.

In 1979, Mr. Rotkin was given the classification of Fieldwork Consultant and during those years he taught three classes, held equivalency work assignment, and conducted fieldwork coordination. Mr. Rotkin also testified that he did not spend his entire time teaching as he took a quarter off to develop field studies in Nicaragua, El Salvador and Mexico. During

this time, he did not have office hours; however, he continued to interact with students as the Fieldwork Consultant.

Toby Hur is the Fieldwork Consultant at University of California, Los Angeles (UCLA) Luskin School of Public Affairs which is comprised of three departments, Social Welfare Public Policy and Urban Planning. Mr. Hur received his graduate degree (Masters in Social Work) from UCLA. Although the minimum requirement for a Fieldwork Consultant is a master's degree, Mr. Hur testified that he knew of one Fieldwork Consultant colleague who had completed a doctoral program without writing a dissertation and was designated as ABD. Mr. Hur describes himself as a practice teacher and his work focuses on practical aspects of the curriculum and mainly in relation to the internships that students are required to complete for the Master's in Social Work program—a professional degree for practicing in the field.

Mr. Hur testified that Fieldwork Consultants are generally expected to teach listed courses and to train practitioners in the field of social welfare. The Fieldwork Consultants are also the instructor of record for the field practicum courses, which are internship opportunities, not classroom courses. The graduate students in the program are expected and encouraged to conduct basic research while at the assigned field location. The Fieldwork Consultants are responsible for being active in their community, such as serving on board committees or advisory board as part of their duty to maintain their practice.

During his first quarter as Fieldwork Consultant, Mr. Hur taught field courses which involved contacting agencies where the students were placed and evaluating graduate-level student performance in the field. Since his hire date in 2004, Mr. Hur has never taken a teaching quarter off to conduct a research project; his time was constantly devoted to student interaction. However, during his tenure at UCLA, he has worked on several research projects

that did not involve peer-reviewed publications. For instance, in 2008, Mr. Hur worked with outside agencies that provided services to the homeless population in Los Angeles; he worked on a media project concerning homelessness problems, in collaboration with students. Mr. Hur has also completed other media projects including a documentary on homelessness to educate graduate students and relevant practitioners.

UCLA's Dream Resource Center is a support center associated with undocumented immigrant students who reside domestically. The Social Welfare department at UCLA partners with the Dream Resource Center to research and examine the social issues associated with undocumented students. Students at the Social Welfare department were expected to research in collaboration with outside organizations and write "policy briefs" which comprised 40 percent of their final grade. Some of the students' policy briefs were published, but were not peer-reviewed. Mr. Hur testified that he published a few of his own "reports"; those were not peer-reviewed writings, but were published in a trade magazine.

Reappointment and Evaluations Process

The reappointment and evaluation standards vary depending on the employee's classification. Professors of Practice generally are evaluated every three years. Ladder-rank faculty who begin their careers as Assistant Professors are reviewed every two to three years; if they receive positive reviews for a period of seven years, they are promoted to at least an Associate Professor with "tenured" status. Adjunct Professors are also reviewed every two or three years; they are reviewed by the entire faculty of the department who conduct an extensive review of a candidate's "file" that includes evidence of teaching, service, and research; and after the review process, the department faculty make a recommendation for reappointment to the school's dean.

Adjunct Professors have other professional obligations outside of UC, but within UCSD, renewal of their appointment is dependent on teaching, research, and service both within and outside of UCSD. According to Mr. Ellman, historically, the research component is the most important factor; however, there is an effort by UCSD to recalibrate and have teaching be equally as important. Additionally, the training of graduate students is also an important review component of the Adjunct Professor's teaching purpose.

According to Ms. Lindlar, the Professor of Practice appointment period is similar to that of Adjunct Professor and requires the same period of review. After the Professor of Practice's three-year appointment period ends, he or she must undergo a review process for reappointment and advancement in accordance with PPM Section 230-28 which provides that Professors of Practice are evaluated based on their teaching quality and effectiveness, contributions to research and/or creative mission of the University, and service activities related to the appointee's professional expertise and achievements. The review process also allows the eligible candidate to write a personal statement and discuss their accomplishments and contributions which is also reviewed by the department. If the eligible candidate is deemed effective, and there is a departmental need for the position, then he or she is reappointed and is eligible for a 5% salary increase.

The three-year appointment period for Professors of Practice is longer than the typical one-year appointment period for Lecturers. It is not expected that a Professor of Practice's research work be performed in every quarter during their appointment period; for example, he or she may devote one quarter to research work and no teaching assignment followed by a quarter with only teaching assignments and no research functions. Lecturers have a shorter appointment period since they are hired to teach a specific course during a particular time

period. Further, unlike ladder-rank faculty, Lecturers can be appointed for a term as short as one quarter, unless UCSD anticipates a need for a teaching assignment longer than one quarter.

The reappointment and evaluation process for Unit 18 instructional staff, including Lecturers, is governed under the MOU. During the first six years of their appointment, Unit 18 employees receive annual performance reviews. If a Unit 18 employee reaches his sixth year of reappointment or the equivalent thereof (also known as the "eye of the needle"), to obtain a continuing appointment, it is necessary for the candidate to pass the sixth year milestone with an "excellent" or above rating on his or her evaluation. MOU Article 7b, Section E outlines the specific examples demonstrating "excellence in teaching." The MOU does not require Unit 18 employees to conduct peer-reviewed research projects to achieve this objective; however, writing and publishing professional papers are treated favorably by the University. Mr. Hur testified that after the six year mark, the Fieldwork Consultants continue to receive an annual performance evaluation by the Director of Fieldwork Consultants and every three years following, the Field Consultant receives a more comprehensive evaluation for "merit."

ISSUE

Whether it is appropriate to add the Professor of Practice and Visiting Professor of Practice classifications to Unit 18.

DISCUSSION

I. PRESUMPTION NOT APPLICABLE

In *Unit Determination for Professional Non-Academic Senate Instructional and Research Employees of the University of California, supra,* PERB Decision No. 270-H, the Board identified UC's Unit 18 bargaining unit of Non-Academic Senate and non-adjunct instructional staff as an appropriate system-wide bargaining unit under the HEERA. Thus,

there is a presumption that Unit 18 is appropriate and a petitioning party must show that the proposed modification is more appropriate than the existing unit. (See e.g., *State of California (Department of Personnel Administration)* (1990) PERB Decision No. 794-S [identifying an appropriate state civil service unit under the Ralph C. Dills Act (Dills Act)[13]].) However, this rebuttable presumption test is used only when the parties seek to move an existing classification from one bargaining unit to another or to a separate bargaining unit. (*Trustees of the California State University* (2007) PERB Decision No. 1881-H.) It is not properly used when placing a new classification into a unit because there is no presumption to rebut. (*Id.* at p. 10.) Accordingly, the presumption does not apply here. Thus, in determining the appropriate placement in a unit for a new classification, such as the Professor of Practice classifications, it is necessary to utilize the criteria set forth in, section 3579(a), *infra*, e.g., shared goals, training, working conditions, interchange with other employees, etc. (*Id.* at p. 11.)

II. UNIT DETERMINATION

HEERA's unit determination criteria are set forth in section 3579(a):

> (a) In each case where the appropriateness of a unit is an issue, in determining an appropriate unit, the board shall take into consideration all of the following criteria:
>
> (1) The internal and occupational community of interest among the employees, including, but not limited to, the extent to which they perform functionally related services or work toward established common goals, the history of employee representation with the employer, the extent to which the employees belong to the same employee organization, the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements, and the extent to which the employees have common supervision.

[13] The Dills Act is codified at section 3512 et seq.

> (2) The effect that the projected unit will have on the meet and confer relationships, emphasizing the availability and authority of employer representatives to deal effectively with employee organizations representing the unit, and taking into account factors such as work location, the numerical size of the unit, the relationship of the unit to organizational patterns of the higher education employer, and the effect on the existing classification structure or existing classification schematic of dividing a single class or single classification schematic among two or more units.
>
> (3) The effect of the proposed unit on efficient operations of the employer and the compatibility of the unit with the responsibility of the higher education employer and its employees to serve students and the public.
>
> (4) The number of employees and classifications in a proposed unit, and its effect on the operations of the employer, on the objectives of providing the employees the right to effective representation, and on the meet and confer relationship.
>
> (5) The impact on the meet and confer relationship created by fragmentation of employee groups or any proliferation of units among the employees of the employer.

In cases where employees of the same classification perform different job duties, the Board has applied an "individualized analysis" approach that must consider the actual nature of the work performed by each incumbent in the contested classification and then make a unit determination based upon each individual employee's duties. (*City of Palmdale* (2011) PERB Decision No. 2203-M; *San Ramon Valley Education Association, CTA/NEA (Abbot and Cameron)* (1990) PERB Decision No. 802.) The University has hired only three Professors of Practice: Mr. Fletcher, Mr. Srnka, and Ms. Binkin. An individualized approach is appropriate in the present matter since the record shows that the essential duties and responsibilities of the three Professors of Practice vary; Mr. Fletcher provided classroom instruction, while Mr. Srnka and Ms. Binkin did not.

A. Community of Interest

As stated above, the issue presented is whether the Professors of Practice share a sufficient "community of interest" with other positions in Unit 18, such that their inclusion in Unit 18 is appropriate.

To determine whether a community of interest exists among employees, the Board considers, inter alia, qualifications, training and skills, contact and interchange with other employees, and job functions. (*San Diego Community College District* (2001) PERB Decision No. 1445; *Rio Hondo Community College District* (1979) PERB Decision No. 87; *Office of the Santa Clara County Superintendent of Schools* (1978) PERB Decision No. 59.) "Among these various factors, the Board has considered similarities in job duties more heavily than other community of interest factors." (*City of Palmdale, supra,* PERB Decision No. 2203-M [proposed decision, pp. 23-24; internal citations omitted].)

In considering whether a community of interest exists, "PERB eschews the use of a checklist approach and instead considers the totality of circumstances." (*San Diego Community College District, supra,* PERB Decision No. 1445, citing *Monterey Peninsula Community College District* (1978) PERB Decision No. 76.) The focus of the inquiry concerns whether employees share "substantial mutual interests." (*Ibid.*)

1. Nathan Fletcher

a. *Skills, Qualifications, and Education*

As previously discussed, in evaluating unit determinations between Mr. Fletcher and Unit 18 employees, the Board must determine, among other things, whether there are similarities in education levels, skills, and qualifications of the disputed position. Mr. Fletcher was hired by the University because he was potentially a good researcher and because his skills

would contribute to the development of the Institute. Mr. Fletcher has specialized knowledge to teach his assigned political science course given his background in public office. UC does not hire Unit 18 Lecturers for their research skills; Lecturer appointments are made for the purpose of providing instruction in a classroom setting. Fieldwork Consultants are also not hired for their research skills; however, such skills appear relevant for the teaching roles required of incumbents given that research projects are required for students enrolled in fieldwork programs.[14]

Mr. Fletcher has received a bachelor's degree, but does not have any additional academic degrees.[15] Lecturers are not required to have a certain level of education to qualify for a teaching position. Mr. Fletcher's education level is on par with other Unit 18 Lecturers, including Mr. Laird, who also achieved a similar education level (i.e. a bachelor's degree). Accordingly, there is some level of similarity between Mr. Fletcher's position and the educational qualifications of Unit 18 employees. However, the record was devoid of evidence showing that ladder-rank faculty and Adjunct Professors have similar levels of education with Unit 18 employees. Given that all instructors in all three groups may have varying education

[14] As asserted by UC-AFT, the requisite level of distinction required for Mr. Fletcher's position was not consistent with the University's desire to hire a "distinguished" practitioner given that the parties previously entertained the idea in contract negotiations that such distinction applies to current or former vice-presidents of the United States. However, this point is not relevant for establishing the occupational community of interest factors in section 3579(a). Additionally, the University's decision to privately fund Mr. Fletcher's position is not relevant for addressing the merits of the instant unit modification request. This is because in unit determinations, the Board does not consider funding sources relevant for overcoming the community of interest factors. (See *Fairfield-Suisun Unified School District* (1983) PERB Decision No. 370.)

[15] As such, he seems to fit the non-traditional academic background requirement set forth in the PPM.

levels, the undersigned Board agent was unable to determine whether Mr. Fletcher's position is uniquely suitable to be placed in Unit 18, based on his current educational qualifications.

b. *Job Duties and Employee Interaction*

Although job descriptions are relevant, the Board must consider the *actual duties* performed by the disputed position(s) regardless of the job duties and responsibilities enumerated in the job description. (See *State of California, Department of Personnel Administration* (1991) PERB Decision No. 871-S, 8; see also, *Hemet Unified School District* (1990) PERB Decision No. 820 [the Board "must look at the actual nature of the work performed by the incumbents in the position, rather than the work specified in the job description." (Emphasis in original)].)

Mr. Fletcher has not completed his three year appointment at UCSD. During his first semester he co-taught a political science course with a Professor; the following quarter he taught another political science course; he then took the remainder of the school year to run for Mayor of San Diego, before returning to teaching service effective January 1, 2014. The evidence suggests that most of his efforts at UCSD were, to a large extent, spent lecturing political science courses and meeting with students during office hours. However, these duties are not particularly unique to Unit 18 or for that matter, ladder-rank faculty or Adjunct Professors.

It was established that Mr. Fletcher's position did not require him to publish peer-reviewed research writings during his appointment period. The criteria for evaluation and appointment of the Professor of Practice also do not require such publications. However, Mr. Fletcher was expected to contribute to the "research and/or creative mission of the University." In that regard, Mr. Fletcher devoted some time on a weekly basis to interact and meet with

other ladder-rank faculty who were involved in establishing the Institute, which at that time was inchoate. It was also conceivable that his participation in the Institute could assist the ladder-rank faculty with shaping and developing research projects that could culminate in a published peer-reviewed paper.

The record does not establish that research functions are a necessary component of Unit 18 employees' terms and conditions of employment; rather research duties appear to be an optional and tangential part of their employment. While there was some testimony that Fieldwork Consultants conducted research projects such as Mr. Hur's focus on the homeless population in Los Angeles, the record does not establish that the University's evaluation and reappointment procedures mandated these types of activities for the advancement or promotion of Mr. Hur's position. There is also no evidence that Mr. Hur collaborated with ladder-rank faculty on such research projects. Additionally, while some Lecturers are granted "equivalences" during their appointments to perform non-classroom work, to wit, developing internship programs, issuing independent studies to students, and serving on committees, this is not an explicit factor established by the University for evaluating Unit 18 employees for appointments beyond the six year milestone. However, it should be noted that these types of activities are looked upon favorably by the University when evaluating Unit 18 employees. By contrast, the research contributions expected of Mr. Fletcher are not optional; they are a minimum requirement of his employment as a Professor of Practice.

The demarcation line between Unit 18 employees and other faculty was underscored in *Unit Determination for Professional Non-Academic Senate Instructional and Research Employees of the University of California*, *supra*, PERB Decision No. 270-H, where the Board stated that Unit 18 employees "generally have no research responsibilities, and, as a result,

often carry a heavier teaching load than their colleagues in the academic senate . . . ." (*Id.* at p. 10.) Notably, however, the Board's decision was silent on the definition of the "research" responsibilities encompassed by both ladder-rank faculty and Adjunct Professors. Mr. Fletcher's criteria for reappointment, namely the "contributions to research" factor, are different from the research responsibilities envisioned by the Board of ladder-rank and Adjunct Professors. Nevertheless, the Board provided some insight into the establishment of a separate research bargaining unit that includes professional research classifications who are included in "Organized Research Units (ORU)" that consist of a ladder-rank faculty member to supervise the project. (*Id.* at p. 13.) Specifically, the researchers[16] at ORUs are involved in advising and instructing the public, a function that is directly dependent on the research and publishing programs for a specific area of interest. (*Id.* at p. 16.) Also included within the ORUs are programs dedicated to interdisciplinary research and publishing programs designed to increase and convey knowledge of specific areas of interests. (*Ibid.*) The Board found that this group does not interact with the Unit 18 employees. (*Id.* at p. 13.) Arguably, the research classifications at ORUs and Mr. Fletcher's involvement with the Institute appear identical. Both collaborate with ladder-rank faculty; neither interact with Lecturers directly or indirectly at their respective research facilities; and both perform research functions that lead to published writings by other non-Unit 18 faculty.

Another distinguishing characteristic between Adjunct Professors and Unit 18 employees was that although Adjunct Professors are involved in classroom instruction, their "occupational community of interest lies not with classroom lecturers but with colleagues in their primary occupation, be it research or a staff position." (*Id.* at p. 10.) Here, Mr. Fletcher

[16] The researchers are included in UC's Research Support Professional Unit and are represented by University of Professional and Technical Employees (UPTE).

has professional obligations (e.g., director level position at Qualcomm) outside of University work similar to Adjunct Professors which the Board held to be excluded from Unit 18 in *Unit Determination for Professional Non-Academic Senate Instructional and Research Employees of the University of California, supra*, PERB Decision No. 270-H. UC-AFT did not make a case that Unit 18 employees have primary professional obligations outside of University teaching service, similar to those of Mr. Fletcher.

UC-AFT points out that the Professors of Practice, including Mr. Fletcher, are not actually performing all three duties purportedly required of them: teaching, research and/or creative work, and service. As previously described, Mr. Fletcher has performed teaching duties for at least two quarters since his appointment. However, it appears disputed whether he actually performs research and/or service functions.[17] Analogous contentions were presented to the Board when making unit determinations based on the alleged confidential status of a disputed position. In at least two cases, the Board has found employees who were not currently performing confidential duties (e.g., grievance processing and labor negotiations) to have confidential status nonetheless. (*Calexico Unified School District* (1990) PERB Decision No. 800 [confidential duties not performed since grievances were not yet filed and labor negotiations had not yet occurred]; *Hemet Unified School District, supra*, PERB Decision No. 820 [disputed position had not yet performed confidential duties since there had been no grievances and because her supervisor's medical problems precluded him from participating on the employee's bargaining team during his regular rotation].) In contrast, in *Mendocino County Office of Education* (2002) PERB Decision No. 1505, the employer sought to exclude

[17] Arguably, Mr. Fletcher's research contribution *may* be established, for example, by his role in developing the Institute; and his service contribution *may* be established by Mr. Fletcher's participation in political office.

four disputed clerical positions from the classified bargaining unit on the basis that such employees *could* perform confidential duties. However, the Board declined to grant the petition since the job descriptions of the four positions did not specifically identify confidential duties as part of the employees' responsibilities. (*Id.* at p. 3.) The employer's desire to exclude the employees from the unit on the basis of "convenience" was also rejected by the Board. (*Ibid.*)

Here, Mr. Fletcher's appointment letter and reappointment criteria specify that research and service components are a term and condition of his employment. Although there is scant evidence that he actually performed "research" work expected of him, his research contributions to the Institute are reasonably comprehended within both his appointment letter and re-appointment and evaluation criterion. Therefore, the research and service work are component requirements of the position, although such assigned duties are not required to be performed at a particular time during his appointment period from January 1, 2013 to June 30, 2015.[18]

c. *Wages, Hours, and Terms and Conditions of Employment*

Like Mr. Fletcher, Unit 18 employees have offices, and provide office hours for student interaction. However, this is not unique to Unit 18 employees; ladder-rank faculty and Adjunct Professors also have offices and office hours. Mr. Fletcher's salary is not based upon the Unit 18 salary schedule; rather it is based, pro rata, on the salary scale applicable to ladder-rank faculty. Mr. Fletcher's offer of employment also does not specify that he is entitled to fringe benefits, unlike Unit 18 employees. Mr. Fletcher was required to work at 28% time. Mr. Ellman explained that during Mr. Fletcher's three-year appointment, he was expected to

[18] Similarly, Assistant Professors are not required to complete their research projects in a particular quarter, but are expected to do so during their three year appointment period.

teach at least two quarters every year, and in another year, Mr. Fletcher could teach for one quarter and allocate the rest of his time on research efforts. Generally, Unit 18 employees have heavier teaching loads and are expected to teach three quarters per year. For example, Mr. Rotkin testified to having a teaching load of eight courses during the academic year as a Lecturer, while Mr. Fletcher's appointment taught two courses during the academic year. Some Unit 18 employees are granted equivalencies in lieu of instructional time as was the case with Mr. Rotkin who used his equivalencies to develop a new graduate program for his department. Although Mr. Fletcher similarly participated in the development of the Institute for the UCSD, unlike the equivalencies required of Mr. Rotkin, Mr. Fletcher's obligations were not an optional term and condition of his employment.

Based on the totality of the above, it does not appear that Mr. Fletcher's position shares a community of interest with Unit 18 employees.

2. Leonard Srnka

Mr. Srnka spent his career in industry, working since 1979 as a research scientist at Exxon. He possesses a PhD in Geophysics and has authored numerous publications that are embodied in science journals. No testimony was provided on the factors set forth in section 3579, e.g., shared goals, training, working conditions, interchange with other employees, etc.; however, his June 2013 appointment letter noted that he was appointed for "0% time" and without compensation. Additionally and most relevant, Mr. Srnka was not assigned a teaching load during the entire academic year. In light of that fact that he does not teach any courses, and due to the lack of evidence of his actual work duties, it is unclear whether Mr. Srnka's primary obligations are to his practice in industry. There is also insufficient evidence to conclude that Mr. Srnka's position has functionally equivalent work duties as a Lecturer, or

that he shares an occupational community of interest with Unit 18 employees. As such, it cannot be concluded that his position must be included in Unit 18.

3. Nancy Binkin

Ms. Binkin is a pediatrician and epidemiologist who possesses both an MD and an MPH. In August 2013, she was appointed for a paid Professor of Practice position requiring "25% time"; however, she did not have any teaching assignment at all during the academic year. Like Mr. Srnka's position, neither party to the hearing presented sufficient testimony to describe the criteria set forth in section 3579. Given the lack of evidence, the undersigned Board agent cannot conclusively find that an occupational community of interest exists between her Professor of Practice position and Unit 18 employees.

4. Vacant Visiting Professor of Practice Positions

During the hearing, the parties provided the definition of a Visiting Professor of Practice under PPM 230-20 and the evaluation standards of such position under PPM 230-28. However, there is no dispute that the Visiting Professor of Practice classification has not been filled by any candidates. PERB has long declined to make a determination regarding the appropriate unit placement of a classification with no incumbent. (*Marin Community College District* (1978) PERB Decision No. 55.) Accordingly, since the Visiting Professor of Practice position is vacant, it is not possible for PERB to make findings regarding the *actual* nature of the work performed by the incumbents in these positions. For that reason, it cannot be conclusively found that Visiting Professors of Practice share a sufficient occupational community of interest with Unit 18 employees.

B. Other Criteria

Unit 18 employees have been represented by UC-AFT since the Board's 1982 unit determination decision in *Unit Determination for Professional Non-Academic Senate Instructional and Research Employees of the University of California, supra*, PERB Decision No. 270-H. The ladder-rank faculty and Adjunct Professors have remained unrepresented since that time. Since UCSD's creation of the Professor of Practice classification series in August 2012, it has not been included in Unit 18. Prior to that time, and in negotiations for a successor MOU, the parties had some disputes concerning whether "distinguished" practitioners belong in the Unit 18, but there were no discussions about the creation of the Professor of Practice or whether placement in Unit 18 was inappropriate. It is undisputed that UC-AFT has not represented the Professor of Practice classifications in collective bargaining. Thus, the undersigned Board agent finds that the "history of employee representation with the employer" is of little relevance in this case.

It must be determined if the addition of the Professor of Practice series to Unit 18 would have a negative effect on UC's efficient operations. Since UC would be required to meet and confer over three additional employees, this additional obligation appears minimal in light of the thousands of Unit 18 employees currently represented at UC. However, it is clear that the MOU's application of the evaluation and continuing appointment criteria would not be applicable to the Professor of Practice series given that the incumbents do not devote their full time to classroom and student interaction.

It is conceivable that incumbents serving as Professors of Practice could be subjected to the evaluation and retention policy found in the APM regardless of whether this petition was granted, since under HEERA, these potential conflict areas have been explicitly removed from

the scope of representation[19] and could not be alleviated through the meet and confer process.[20] Additionally, the Legislature considered it so important to preserve the existing procedures for appointment, promotion, retention, and tenure of academic employees, that it embodied this goal in its expression of HEERA's purpose in section 3561(b), which provides, in pertinent part, "The principle of peer review of appointment, promotion, retention, and tenure for academic employees shall be preserved." It should be noted that if PERB were to grant the unit modification, the mere fact that the University would be required to negotiate with UC-UC-AFT over negotiable effects of these procedures is not sufficient to render the proposed unit inappropriate. (*Palo Alto Unified School District* (1983) PERB Decision No. 352; see also, *Santa Ana Unified School District, supra*, PERB Order No. Ad-383.) However, the

[19] Section 3562(r) provides:

> For purposes of the California State University 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: . . .
>
> (D) Criteria and standards to be used for the appointment, promotion, evaluation, and tenure of academic employees, which shall be the joint responsibility of the academic senate and the trustees. The exclusive representative shall have the right to consult and be consulted on matters excluded from the scope of representation pursuant to this subparagraph. If the trustees withdraw any matter in this subparagraph from the responsibility of the academic senate, the matter shall be within the scope of representation.

[20] In contrast, under the Educational Employment Relations Act (codified at section 3540 et seq.), "procedures to be used for the evaluation of employees" are negotiable subjects of bargaining (section 3543.2(a)) and could be resolved at the bargaining table. The mere fact that an employer is required to negotiate over such conflicts is not sufficient to render a proposed unit inappropriate. (*Palo Alto Unified School District, supra*, PERB Decision No. 352; see also, *Santa Ana Unified School District* (2010) PERB Order No. Ad-383.)

undersigned Board agent does not find that the above considerations serve to favorably balance the deficit of community of interest factors discussed above.

III. ALLEGED UNFAIR LABOR PRACTICES

UC-AFT presents several e-mail exchanges between Mr. Ellman to University administrators as evidence to show that the University's decision to exclude Mr. Fletcher from Unit 18 was motivated entirely to discriminate against Unit 18 employees based on their protected activity as union members. UC-AFT also argues that by initially title coding[21] the Professor of Practice as non-Unit 18 Adjunct Professors, the University violated the *Switkes* letter. UC-AFT also asserts that the definition of the Professor of Practice classification series in the PPM specifies that candidates lack a "traditional academic background"; but argues UC-AFT, the University violated this criterion by appointing Mr. Smka and Ms. Binkin who have "exemplary" traditional academic backgrounds.

The Board has the authority to implement procedures for investigating unfair labor practices under the HEERA. (§ 3563.2.) Under PERB Regulation 32602, violations of HEERA must be processed as unfair practice charges. The Board also has the authority to adopt regulations to decide contested representation matters. (§ 3263(f).) Such procedures for representation matters are enunciated in PERB Regulation sections 32700 through 32786. No unfair practice charges were filed for the above allegations pursuant to PERB Regulation 32602; the instant dispute was filed pursuant to PERB Regulation 32786, which governs unit modifications. The Board has explicitly stated that the unit determination proceedings are not the "proper vehicle to remedy" allegations that the University violated HEERA. (*Unit*

[21] A "title code" refers to the number value assigned to each title that is used at UCSD's payroll system. When the Professor of Practice classification series was introduced, it used the title code of the Adjunct Professor classification.

Determination for Professional Non-Academic Senate Instructional Employees (Unit 18) of the University of California (1983) PERB Decision No. 270a-H at pp. 5-6.) Additionally, in unit modification proceedings, PERB must not consider if the employer lawfully assigned duties to a disputed position. (*State of California, Department of Personnel Administration, supra*, PERB Decision No. 871-S, 8 [Board agent is not required to consider whether employer lawfully assigned the duties specified in a job description of a Supervising Cook classification].) Thus, this Administrative Determination shall not reach UC-AFT's aforementioned contentions; such questions are more suitable in unfair labor practice proceedings.

CONCLUSION

The evidence does not show that Mr. Fletcher's primary function and goal was to solely provide instruction to students. Although Mr. Fletcher's position essentially performed teaching duties and possesses the same qualifications as Lecturers, his appointment entails conducting non-instructional functions, including research responsibilities that are not required of Lecturers or Fieldwork Consultants. Further, based on his evaluation and reappointment criteria, unlike Unit 18 Lecturers, his teaching ability is not a primary qualification for employment and retention. His appointment appears to parallel that of an Adjunct Professor, a classification which the Board has found not to have an occupational community of interest with the instructional unit (*Unit Determination for Professional Non-Academic Senate Instructional and Research Employees of the University of California, supra*, PERB Decision No. 270-H.) It is further inconclusive how Mr. Srnka's and Ms. Binkin's positions share an occupational community of interest with Unit 18 employees to justify their inclusion in the Unit, given that these Professors of Practice were not assigned a teaching load during the most

recent academic school year. Lastly, since there are no incumbents filling the Visiting Professor of Practice position(s), PERB cannot make a unit determination for such classification. Thus, based on the totality of the circumstances, it is not appropriate to place the Professor of Practice and Visiting Professor of Practice classifications in Unit 18.

PROPOSED ORDER

For the above reasons and based upon the entire record in this case, UC-AFT's unit modification petition to add Professor of Practice and Visiting Professor of Practice classifications to Unit 18 is hereby DENIED.

RIGHT TO APPEAL

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet

which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)