



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

UNIVERSITY COUNCIL-AMERICAN
FEDERATION OF TEACHERS,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Respondent.

Case No. SF-CE-1317-H

PERB Decision No. 2852-H

February 9, 2023

Appearances: Leonard Carder by Jennifer Keating, Attorney, for University Council-American Federation of Teachers; Paul Plevin Quarles by Sandra L. McDonough, Attorney, for Regents of the University of California.

Before Banks, Chair; Shiners, Krantz, and Paulson, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) for a decision based on the evidentiary record from a hearing before an administrative law judge (ALJ). The complaint issued by PERB's Office of the General Counsel (OGC) alleged that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by no longer permitting employees at its Santa Cruz campus "to hold concurrent non-exempt

¹ HEERA is codified at Government Code section 3560 et seq. All further undesignated statutory references are to the Government Code.

staff and exempt, academic instructional positions.”² The complaint further alleged that the University violated HEERA and PERB’s unit modification regulations by unilaterally modifying the Non-Senate Faculty (NSF) Unit represented by University Council-American Federation of Teachers (UC-AFT).

We have reviewed the entire administrative record and considered the parties’ arguments in light of applicable law. As explained below, we conclude that the University made an unlawful unilateral change by implementing a new concurrent appointment policy at its Santa Cruz campus (UCSC) without providing UC-AFT notice and an opportunity to meet and confer over the decision. We also conclude that the University unlawfully modified the NSF Unit by removing one position from the unit.

FACTUAL FINDINGS

The University is an employer under HEERA section 3562, subdivision (g). UC-AFT is an exclusive representative under section 3562, subdivision (j). UC-AFT represents the University’s statewide NSF Unit. The majority of classifications in the NSF Unit are lecturers.³

NSF Unit positions typically fall under the professional exemption to the minimum wage and overtime pay requirements of the FLSA.⁴ Non-instructional staff,

² As explained *post*, “non-exempt” and “exempt” refer to whether an employee is subject to the minimum wage and overtime pay requirements of the federal Fair Labor Standards Act of 1938 (FLSA). The FLSA is codified at 29 U.S.C. § 201 et seq.

³ Accordingly, although the bargaining unit contains non-lecturer classifications, for convenience we refer to bargaining unit positions as “lecturer” positions.

⁴ The FLSA’s minimum wage and overtime pay requirements do not apply to “any employee employed in a bona fide executive, administrative, or professional capacity.”

depending on their duties, are usually subject to the FLSA's minimum wage and overtime requirements, commonly referred to as "non-exempt" status.⁵ Prior to the events giving rise to this case, non-instructional staff would occasionally receive concurrent appointments as NSF Unit lecturers to teach particular courses.

UCSC Prepares to Transition to the University-Wide Payroll System

Before January 1, 2020, UCSC had its own campus-based payroll system that allowed staff to enter an exempt lecturer appointment and a non-exempt, non-instructional appointment for the same individual. The payroll system did not alert staff when an individual held appointments with different FLSA statuses. Thus, the supervisors for each appointment would not necessarily be aware that the individual held another appointment at UCSC. At that time, there was no written policy governing such concurrent appointments.

In 2019, UCSC was preparing to transition from its campus-based payroll system to the University-wide UCPath payroll system on January 1, 2020. Unlike the campus-based system, UCPath required each employee to have a single FLSA status, and would default to exempt or non-exempt status based on which appointment constituted the majority of the employee's work time. Accordingly, UCSC decided to analyze each concurrent appointment to determine whether the default

(29 U.S.C. § 213, subd. (a)(1).) Lecturers at institutions of higher education are subject to the professional exemption. (29 C.F.R. § 541.303, subd. (a).)

⁵ An employee who does not fall under one of the exemptions in section 213 of title 29 of the United States Code is subject to the FLSA's minimum wage and overtime pay requirements. (*Klem v. County of Santa Clara, California* (9th Cir. 2000) 208 F.3d 1085, 1089.)

status assigned by UCPath was appropriate.

On September 27, 2019, UCSC Director of Employee and Labor Relations Jennifer Schiffner sent a letter to “Union Leaders and Campus Liaisons,” including UC-AFT Field Representative Jeb Purucker, about the impending transition to UCPath. The letter stated that as part of the transition, UCSC would “come into compliance with the [FLSA] by ensuring employees only maintain one FLSA status as of December 1, 2019.” After acknowledging “there are many employees on campus with multiple staff or academic appointments which cross bargaining units and FLSA statuses,” Schiffner wrote that this did not pose a problem when two or more appointments have the same FLSA status, but it did in cases where an employee concurrently held an exempt status appointment and a non-exempt status appointment. In such cases, Schiffner wrote, UCSC would assign the employee a single FLSA status to comply with federal law. According to Schiffner, this assignment “may impact the individual’s pay period by moving from bi-weekly to monthly, the need for an employee to track their time, and the ability to earn overtime if the individual moves from an exempt to nonexempt title code.” Schiffner said UCSC was drafting guidelines for determining which FLSA status to assign and would “notify impacted individuals and their union representatives about any changes to FLSA statuses that will occur on December 1, 2019.” The notice, Schiffner wrote, “will include the title codes and positions, if the employee will be considered exempt or non-exempt, information as to whether the employee is required to report time, whether the employee is eligible for overtime, [and] the anticipated pay check dates (biweekly or monthly).”

Attached to the letter were reference guides, also called matrices, developed by

the University's Berkeley campus to determine the proper FLSA status for employees with different combinations of instructional and non-instructional appointments. On the matrix for "Staff and Non-Senate Titles," the entry for a non-exempt status employee who is concurrently appointed as a lecturer states: "FLSA Status determined based upon evaluation of combined responsibilities and appointment percentage, duration, and salary. Whichever position has the greatest appointment percentage and longest duration will generally drive the FLSA status."

Based on the information provided in the September 27, 2019 letter and the attached matrices, UC-AFT determined that the proposed changes would not prevent non-instructional staff from continuing to be concurrently appointed as lecturers. UC-AFT therefore did not request to meet and confer over the proposed policy change.

UCSC Cancels Maya Gupta's Lecturer Appointment

Since February 2016, Maya Gupta has held a part-time, 20-hour per week appointment as a public service desk assistant at the UCSC library. This position is not exempt from the FLSA's overtime requirements. In addition to her library position, UCSC appointed Gupta as a lecturer to teach one or two courses in the winter and spring quarters of 2017; the winter, spring, and fall quarters of 2018; and the winter and fall quarters of 2019.

On December 9, 2019, Gupta received an e-mail from the library's human resources manager advising that, because her library appointment was 50 percent time while her lecturer appointment was 37.5 percent time, the library appointment would be considered her primary position and she would continue to be subject to the FLSA's

overtime requirements. The e-mail stated Gupta's FLSA status could vary from quarter to quarter depending on her academic appointment but any such changes would only impact her eligibility for overtime.

In September 2020, UCSC appointed Gupta to a lecturer position to teach a Philosophy course in the 2021 winter quarter. On October 19, 2020, human resources advised the Philosophy Department that Gupta could not be concurrently appointed as a lecturer and as non-instructional staff. After further discussion with human resources, Gupta was informed that "moving forward, we will be unable to offer you a lecturer position (which is an exempt position) while you are hired in a non-exempt staff position."

UCSC Announces a Change to Its Concurrent Appointment Policy

On November 25, 2020, Schiffner sent a letter to union leaders and representatives, including Purucker, announcing UCSC was "refining its procedures around holding concurrent exempt and non-exempt positions to ensure continued compliance with the FLSA." Schiffner wrote that after conducting the analysis outlined in her September 27, 2019 letter, UCSC had identified a "small subset of concurrent non-exempt staff appointments and instructional titles" that posed "significant difficulties tracking and maintaining overtime records in UCPath and our time and attendance system, CruzPay. To be concrete, it is not feasible to track time for instructional titles." Schiffner then announced: "beginning with Winter Quarter 2021, UC Santa Cruz will not allow employees to hold concurrent non-exempt staff and exempt, academic instructional positions."

On December 3, 2020, Purucker sent Heather Dawson at UCSC Labor

Relations a letter insisting that UCSC cease implementing the new concurrent appointment policy, demanding to meet and confer over the policy change, and requesting certain items of information related to NSF Unit members holding concurrent non-exempt staff positions. Schiffner responded for Dawson on December 18, 2020, asserting that the decision was outside the scope of representation and asking UC-AFT to identify effects of the decision over which it wished to bargain.

On January 21, 2021, Purucker wrote to Schiffner disputing UCSC's legal arguments and contending that UCSC had unlawfully modified the NSF Unit by excluding lecturers with concurrent non-instructional appointments. Schiffner responded by letter on February 23, 2021, reiterating UCSC's legal arguments and asking for clarification of any effects of the decision UC-AFT wished to bargain.

PROCEDURAL HISTORY

UC-AFT filed this charge on May 12, 2021, alleging that on November 25, 2020, the University made an unlawful unilateral change in violation of HEERA section 3571, subdivision (c) by deciding to no longer allow NSF Unit members at UCSC to hold concurrent appointments as FLSA-exempt instructors and FLSA-subject non-instructional staff. The charge also alleged violations of HEERA section 3571, subdivisions (a) and (b), as well as an unlawful unit modification in violation of PERB Regulation 32781.⁶

The University filed a position statement on July 9, 2021. The University argued

⁶ PERB Regulation 32781 allows an employee organization, an employer, or both to file a petition to modify the composition of an existing bargaining unit. (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

that no written agreement or past practice permitted concurrent appointments in FLSA-exempt and non-exempt positions, the decision was outside the scope of representation, and UC-AFT waived its right to bargain the decision's negotiable effects.

On January 7, 2022, OGC issued the complaint, alleging that the University violated HEERA sections 3571, subdivisions (a) and (c), and PERB Regulation 32781, by no longer allowing employees to concurrently hold FLSA-exempt lecturer and non-exempt staff appointments at its Santa Cruz campus. The University filed an answer to the complaint in which it admitted jurisdictional facts and some of the substantive allegations, while denying other allegations and asserting affirmative defenses. The University did not assert the statute of limitations as an affirmative defense.

OGC conducted an informal settlement conference on February 7, 2022, but no settlement resulted. Shortly thereafter, the case was assigned to the Division of Administrative Law for formal hearing.

An ALJ held a formal hearing by videoconference on June 21, 2022. The parties filed simultaneous post-hearing briefs on September 12, 2022.

On September 15, 2022, the Board's Appeals Office notified the parties that the case had been placed on the Board's docket for decision.⁷

⁷ PERB Regulation 32215 allows the Board itself to direct a Board agent to "submit the record of the case to the Board itself for decision." PERB Regulation 32320, subdivision (a)(1) allows the Board itself to "[i]ssue a decision based upon the

DISCUSSION

I. Unilateral Change to Concurrent Appointment Policy

HEERA section 3570 requires a higher education employer or its designee to meet and confer in good faith “with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation.” Refusal or failure to meet and confer as required by section 3570 is an unfair practice. (HEERA, § 3571, subd. (c).)

“An employer’s unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and a violation of HEERA.” (*California State Employees’ Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 934.) To prove a prima facie case of an unlawful unilateral change, a charging party must show that: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees’ terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union’s request, until the parties reached an agreement or a lawful impasse. (*Regents of the University of California* (2021) PERB Decision No. 2783-H, p. 18.)

The complaint issued by OGC alleged that the University made an unlawful unilateral change when it adopted a policy that non-exempt, non-instructional staff at UCSC could no longer hold a concurrent appointment as an exempt lecturer, without providing UC-AFT advance notice of, or an opportunity to meet and confer over, the

decision and/or its effects. For the following reasons, we find the alleged violation.

A. Change or Deviation from Status Quo

A union can prove that an employer changed or deviated from the status quo by showing: (1) deviation from a written agreement or written policy, (2) a change in established past practice, or (3) a newly created policy or application or enforcement of existing policy in a new way. (*Regents of the University of California, supra*, PERB Decision No. 2783-H, p. 19.) It is undisputed that prior to September 27, 2019, there was no written policy governing concurrent appointments in FLSA-exempt and non-exempt positions at UCSC. Instead, the parties dispute whether there was a past practice of allowing such concurrent appointments. UC-AFT contends there was a well-established past practice, while the University argues that if such a practice existed it did not meet the standard for enforceability under PERB precedent.

We need not resolve whether the University maintained a sufficiently consistent past practice prior to September 27, 2019, because UCSC's September 27, 2019 letter sets the status quo against which we measure the policy change announced in UCSC's November 25, 2020 letter, viz., the action alleged in the complaint to constitute the unlawful unilateral change. The September 27, 2019 letter acknowledged "there are many employees on campus with multiple staff or academic appointments which cross bargaining units and FLSA statuses." Specifically, there were at least six NSF Unit Members who had held concurrent appointments as non-exempt staff between 2018 and September 27, 2019. To resolve the problem that concurrent appointments in FLSA-exempt and non-exempt positions posed for FLSA compliance and UCPath recordkeeping, the letter said that in such cases UCSC would

assign the employee a single FLSA status. According to the letter, this assignment “may impact the individual’s pay period by moving from bi-weekly to monthly, the need for an employee to track their time, and the ability to earn overtime if the individual moves from an exempt to nonexempt title code.” UCSC said it was drafting guidelines for determining which FLSA status to assign and would “notify impacted individuals and their union representatives about any changes to FLSA statuses that will occur on December 1, 2019.” The notice, UCSC indicated, “will include the title codes and positions, if the employee will be considered exempt or non-exempt, information as to whether the employee is required to report time, whether the employee is eligible for overtime, [and] the anticipated pay check dates (biweekly or monthly).” The matrices attached to the letter showed that for a non-exempt status employee concurrently appointed as a lecturer, FLSA status would be “determined based upon evaluation of combined responsibilities and appointment percentage, duration, and salary.”

Notably, nowhere in its September 27, 2019 letter did UCSC indicate it was considering a prohibition against concurrently holding a non-exempt staff position and an exempt academic position. But its November 25, 2020 letter announced just such a policy: “beginning with Winter Quarter 2021, UC Santa Cruz will not allow employees to hold concurrent non-exempt staff and exempt, academic instructional positions.” The November 25, 2020 letter thus changed the status quo set forth in the September 17, 2019 letter.

In its brief, the University characterizes the November 25, 2020 letter as merely implementing the policy announced on September 17, 2019, of assigning each

employee a single FLSA status.⁸ Even if we view the November 25, 2020 letter as consistent with the policy announced on September 17, 2019, the 2020 letter sets out the new prohibition of concurrent appointments, which constitutes “application or enforcement of existing policy in a new way,” thereby changing the status quo.

(*Regents of the University of California, supra*, PERB Decision No. 2783-H, p. 19.)

Either way, the first element of the unilateral change test is satisfied.

B. Scope of Representation

The scope of representation applicable to the University includes “wages, hours of employment, and other terms and conditions of employment” but excludes “[c]onsideration of the merits, necessity, or organization of any service, activity, or program established by law or resolution of the regents or the directors, except for the terms and conditions of employment of employees who may be affected thereby.”

(HEERA, § 3562, subd. (q)(1).) The “merits, necessity, or organization” language of HEERA section 3562, subdivision (q)(1) recognizes “the right of employers to make unconstrained decisions when fundamental management or policy choices are involved.” (See *Building Material & Construction Teamsters’ Union v. Farrell* (1986) 41 Cal.3d 651, 663 [interpreting similar language in the Meyers-Milias-Brown Act,

⁸ The University adopts this characterization of the November 25, 2020 letter to argue that the unfair practice charge was untimely because the University announced the policy of assigning a single FLSA status on September 27, 2019. The University, however, waived any untimeliness argument by not asserting the statute of limitations as an affirmative defense in its answer. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 30.) Furthermore, there is no indication in the September 27, 2019 letter that UCSC would prohibit employees from holding concurrent positions, so there is no basis for finding that the policies set forth in the 2019 and 2020 letters were the same.

§ 3500 et seq.].)

Under HEERA, “[a] subject is within the scope of representation” “as a ‘term or condition of employment’” “if: (1) it involves the employment relationship, (2) it is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict, and (3) the employer’s obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer’s mission. [Citation.]” (*California Faculty Assn. v. Public Employment Relations Bd.* (2008) 160 Cal.App.4th 609, 616; *Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 21.)

As to the first element, a prohibition against concurrently holding a non-exempt staff position and an exempt academic position necessarily “involves the employment relationship” because it sets a mandatory criterion for appointment as a lecturer at UCSC, i.e., that the appointee not also hold a non-exempt position. The University contends, however, that its policy does not involve the employment relationship because it governs only pre-employment hiring decisions. While the ultimate decision as to whom to hire for a particular position is left to management’s discretion, it is well-established that criteria for personnel selection are within the scope of representation. (*Oakland Unified School District* (1982) PERB Decision No. 275, pp. 18-19.) The same is true of criteria for reemployment of temporary faculty. (*Pittsburg Unified School District* (2022) PERB Decision No. 2833, p. 9 & fn. 5; *Fremont Unified School District* (1997) PERB Decision No. 1240, adopting proposed decision at p. 19.) Because UCSC’s concurrent appointment policy establishes a general hiring criterion for every

lecturer appointment, i.e., that an individual cannot also be employed in a non-exempt position, it “involves the employment relationship” under the above authority.

Turning to the second element, the ability of a non-exempt employee to serve as a lecturer is the type of issue that raises a conflict amenable to resolution through collective bargaining. As UC-AFT acknowledges, the FLSA requires the University to designate an employee holding multiple appointments as either exempt or non-exempt. U.S. Department of Labor regulations set forth a “primary duty” test to determine whether an employee who performs both exempt and non-exempt work qualifies for an overtime exemption. (29 C.F.R. § 541.700.) As the very existence of the primary duty test demonstrates, however, the FLSA does not require an employer to prohibit an employee from concurrently holding a non-exempt position and an exempt position. (Cf. *County of Sacramento* (2020) PERB Decision No. 2745-M, pp. 17-20 [Emergency Medical Services System and Prehospital Emergency Care Personnel Act did not require county to impose a specific certification requirement on dispatchers]; *Sutter Union High School District* (1981) PERB Decision No. 175, pp. 6-7 [Education Code did not excuse district’s unilateral extension of teachers’ instructional days].) Consequently, UCSC did not have to bar non-exempt staff from concurrent appointment as lecturers to comply with the FLSA.

Although its November 25, 2020 letter referenced FLSA compliance, the actual reason UCSC gave for its decision to disallow concurrent lecturer appointments for non-exempt staff was the “significant difficulties tracking and maintaining overtime records in UCPath and our time and attendance system, CruzPay. To be concrete, it is not feasible to track time for instructional titles.” At hearing and in its brief, the University

additionally contends that applying the primary duty test to each non-exempt employee with a concurrent lecturer appointment would be administratively difficult because primary duties could vary by quarter depending upon the percentage of each appointment, UCSC does not have a mechanism for lecturers to track hours worked, and collective bargaining agreements with unions representing non-exempt University employees do not address how to pay FLSA-exempt employees.

These issues are amenable to collective bargaining. For example, the parties could explore ways to record lecturers' hours. They could discuss ways to implement quarter-by-quarter determination of primary duties. They could consider ways to excuse concurrent appointees deemed exempt from overtime requirements under existing collective bargaining agreements,⁹ or to provide a mechanism for overtime payment in the NSF Unit agreement for those deemed non-exempt. These compensation and administrative matters are the sort of subjects commonly addressed in collective bargaining. (See, e.g., *State of California (Employment Development Department)* (1999) PERB Decision No. 1318-S, p. 6 [overtime]; *State of California (Department of Transportation)* (1983) PERB Decision No. 361-S, pp. 12-13 [staffing practices].)

The final element of the scope of representation analysis requires us to determine whether negotiations would “unduly abridge [the University’s] freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer’s mission.” (*Regents of the University of*

⁹ When lecturer duties predominate, employees keep their FLSA-exempt status no matter what combination of hourly or non-hourly compensation the parties negotiate. (29 C.F.R. § 541.303, subd. (d) [salary basis test does not apply to lecturers].)

California, supra, PERB Decision No. 2300-H, p. 21.) The University claims that its new policy prohibiting certain concurrent appointments was an exercise of management rights. Yet it points to no provision in its collective bargaining agreement (Agreement) with UC-AFT granting it the right to unilaterally make this decision. Nor does the University identify any fundamental policy essential to the achievement of its mission that would be unduly abridged by requiring it to negotiate over the concurrent appointment policy. (See *Pittsburg Unified School District, supra*, PERB Decision No. 2833, p. 9 & fn. 5 [employer must bargain before changing work opportunities or qualifications, as well as before categorically excluding certain employees from performing certain work, unless required by external law].)

Instead, as discussed *ante*, the University cites only administrative difficulties as the reason for prohibiting UCSC staff from holding concurrent lecturer and non-exempt staff appointments. Administrative convenience is not a matter of fundamental policy essential to the achievement of the University's mission such that the University would be exempt from HEERA's mandate to attempt to resolve compensation issues through the collective bargaining process. (See, e.g., *Jefferson School District* (1980) PERB Decision No. 133, p. 27 [employer must bargain over timing of employee paychecks].) Further, while the University and UC-AFT bargain NSF Unit employment terms on a systemwide basis, and other campuses have allowed concurrent exempt and non-exempt appointments, here UCSC stands alone in deciding to prohibit such appointments. This fact further undercuts the University's argument that its policy addresses a fundamental management concern. Accordingly, the University's decision to adopt the policy was within the scope of representation. If

the University wishes to make this change, it must provide notice and bargain to impasse or agreement.

C. Generalized Effect or Continuing Impact

“A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members.” (*Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 9.) This element is easily satisfied here because the policy prohibiting employees from concurrently holding a non-exempt staff position and an exempt academic position is not an isolated contract breach but has an ongoing effect on work opportunities, qualifications, compensation, and re-employment. The policy also has “a generalized effect or continuing impact” on bargaining unit members because the University asserts a right to unilaterally adopt the policy, indicating it may repeat such conduct in the future. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 8.)

D. Notice and Opportunity to Bargain

Although the amount of time varies depending on the circumstances of each case, “an employer must give notice sufficiently in advance of reaching a firm decision to allow the representative an opportunity to consult its members and decide whether to request information, demand bargaining, acquiesce to the change, or take other action.” (*Regents of the University of California* (2018) PERB Decision No. 2610-H, p. 45.) When the employee organization first learns of the proposed change by virtue of “the employer’s *implementation* of that change, by definition, there has been inadequate notice.” (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 33, original italics.) “In such cases, the employer’s ‘notice’ is nothing more than its

announcement of a *fait accompli*.” (*Ibid.*)

Here, UC-AFT first learned of the University’s new concurrent appointment policy when UCSC announced the implementation of the policy in its November 25, 2020 letter. Indeed, UCSC had already implemented the policy when it rescinded Gupta’s lecturer appointment the prior month. We thus have no difficulty concluding that the University did not provide UC-AFT adequate notice or opportunity to meet and confer over UCSC’s decision to adopt the concurrent appointment policy.

UC-AFT has met its burden to prove all elements of an unlawful unilateral change by a preponderance of the evidence. We accordingly conclude that the University violated HEERA section 3571, subdivision (c), and derivatively violated section 3571, subdivision (a), by adopting the concurrent appointment policy without providing UC-AFT adequate notice or an opportunity to meet and confer over the decision.¹⁰

II. Unilateral Modification of the Non-Senate Faculty Bargaining Unit

The complaint alleged that the University’s adoption of the concurrent appointment policy violated HEERA section 3571, subdivisions (a) and (c) and PERB’s unit modification regulations and/or the recognition clause of the parties’ Agreement by

¹⁰ Because we conclude the University was obligated to bargain over the decision, we need not address its contention that UC-AFT waived its right to meet and confer over any negotiable effects of the decision. In any event, “announcing a new policy as a *fait accompli* would not trigger a duty to demand bargaining and cannot support a waiver defense.” (*Kern County Hospital Authority* (2022) PERB Decision No. 2847-M, pp. 17-18 [judicial appeal pending], citing *County of Merced* (2020) PERB Decision No. 2740-M, p. 20.)

unilaterally modifying the NSF Unit. For the following reasons, we find in favor of UC-AFT on this allegation.

Article 1 of the Agreement is entitled "Recognition." Article 1.C provides, in pertinent part: "The recognized unit may be modified by agreement of the parties to this MOU, pursuant to the rules and regulations of the Public Employment Relations Board." Article 1.F provides, in pertinent part: "If the University proposes to move an individual out of the unit during that individual's term of appointment, the University shall provide thirty (30) calendar days' notice to the AFT and upon request will meet and discuss regarding the individual's unit status. If the parties cannot agree on the individual's unit status, either party may pursue the designated PERB procedures for determining unit status. Until the dispute is resolved, the individual shall remain within the unit."

PERB Regulation 32781 allows a recognized or certified employee organization to file a petition: "(1) To add to the unit unrepresented classifications or positions; (2) To divide an existing unit into two or more appropriate units; [or] (3) To consolidate two or more established units into one appropriate unit." (*Id.*, subd. (a).) The regulation also allows a recognized or certified employee organization, an employer, or both to file a petition to delete classifications or positions from the unit for specified reasons, "make technical changes to clarify or update the unit description," or "resolve a dispute as to unit placement or designation of a new classification or position." (*Id.*, subd. (b).)

UC-AFT argues that, by no longer allowing non-exempt UCSC staff to be appointed concurrently as lecturers, the University unilaterally modified the NSF Unit by removing positions from it. UC-AFT presented no evidence that any position left vacant by application of this policy was filled by another employee outside the NSF Unit, or that

such a position would not be filled by a bargaining unit lecturer in the future. (Cf. *City of Sacramento, supra*, PERB Decision No. 2351-M, p. 16 [noting that a transfer of bargaining unit work occurs when non-unit employees begin performing work that previously was performed exclusively by unit employees].)

UC-AFT instead points to a single instance to support its claim. As a result of applying the unilaterally adopted concurrent appointment policy, UCSC eliminated Scott Makson's NSF Unit appointment as a 15 percent full-time equivalent (FTE) lecturer and modified his non-exempt appointment to include the NSF Unit work. "[T]he filing of a petition for unit modification is the proper mechanism by which PERB can exercise its authority to decide, in disputed cases, whether changed circumstances justify any proposed modification to an existing unit." (*Regents of the University of California* (1989) PERB Decision No. 722-H, p. 4.) Thus, when an employer believes an employee is performing work that belongs outside the bargaining unit, it may not unilaterally reclassify the employee to a position outside the bargaining unit. (*Id.* at pp. 4-6; see *Modesto City School District* (1991) PERB Decision No. 884, p. 11 [noting that "PERB requires the employer to observe" the unit modification process in order to "delete a position from a bargaining unit by retitling"]; *Hemet Unified School District* (1990) PERB Decision No. 820, p. 5 ["PERB is empowered to resolve any unit placement 'disputes'" and parties cannot "divest the Board of such jurisdiction"].) Here, while UCSC did not entirely reclassify Makson's position, it did eliminate the lecturer appointment he previously held and whose duties he continued to perform under the auspices of his non-exempt position. Because this conduct unilaterally modified the NSF Unit without UC-AFT's agreement or utilization of PERB's unit modification procedures, and also

unilaterally modified Article 1 of the parties' Agreement without providing UC-AFT notice and an opportunity to bargain, we conclude that the University violated HEERA section 3571, subdivisions (a) and (c).

REMEDY

HEERA grants PERB broad remedial powers, including the authority to issue cease-and-desist orders and to require such affirmative action as PERB deems necessary to effectuate the policies and purposes of the Act. (HEERA, § 3563.3.) A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) PERB's standard remedy for an employer's unlawful unilateral change is a cease-and-desist order, a notice posting, restoration of the status quo ante, and appropriate make-whole relief including back pay and benefits with interest. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, pp. 23-24.)

Those remedies are appropriate here. We thus will order the University to rescind its policy prohibiting employees at the University's Santa Cruz campus from concurrently holding a non-exempt staff position and an exempt academic position, to cease and desist from failing to meet and confer in good faith with UC-AFT over matters within the scope of representation, to cease and desist from interfering with employees' right to be represented by UC-AFT, and to post a notice of its violations.

As for make-whole relief, UC-AFT established that Maya Gupta would have been employed to teach one section of Philosophy 127 in Winter Quarter 2021 had UCSC not unlawfully adopted the concurrent appointment policy. It therefore is appropriate to

order the University to make Gupta whole for any lost wages and benefits resulting from the University's unlawful unilateral change, with interest at a rate of seven percent per year. Further, under Article 7b of the parties' Agreement, a lecturer may achieve "continuing status" upon receiving an appointment that brings the lecturer to six years of service in the bargaining unit. The make-whole relief ordered here thus shall also include appropriate credit toward the six-year requirement for continuing status under Article 7b of the parties' Agreement.

UC-AFT did not present evidence at the hearing that UCSC denied any other non-exempt employee a lecturer appointment because of the unlawfully adopted concurrent appointment policy. Any employees who were denied such an appointment because of the policy, however, should not be denied a remedy. Thus, we will order the University to make impacted employees whole for resulting losses proven by UC-AFT in compliance proceedings. (*County of Santa Clara* (2021) PERB Decision No. 2799-M, pp. 28-29; *Regents of the University of California, supra*, PERB Decision No. 2783-H, p. 32; *Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 31-32.)

To remedy the University's unlawful unilateral modification of the NSF Unit, we will order the University to restore the 15 percent FTE lecturer position formerly held by Scott Makson, make Makson whole for any wages, benefits, or credit toward the six-year requirement for continuing status he lost as a result of the elimination of the lecturer position with interest at a rate of seven percent per year, and cease and desist from modifying the NSF Unit without UC-AFT's agreement or utilizing PERB's unit modification process.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq., by failing to meet and confer in good faith with University Council-American Federation of Teachers (UC-AFT) prior to adopting a policy prohibiting employees at the University's Santa Cruz campus from concurrently holding a non-exempt staff position and an exempt academic appointment in the Non-Senate Faculty (NSF) Unit. It is further found that the University violated HEERA by unilaterally removing one lecturer position from the NSF Unit. This same conduct interfered with employees' right to be represented by UC-AFT. Pursuant to Government Code section 3563, subdivisions (h) and (m), it hereby is ORDERED that the University, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing the hiring or reappointment criteria for positions in the NSF Unit.
2. Unilaterally modifying the NSF Unit without UC-AFT's agreement or utilization of PERB's unit modification process.
3. Unilaterally modifying Article 1 of the parties' collective bargaining agreement without providing UC-AFT with notice or an opportunity to meet and confer in good faith.
4. Failing or refusing to meet and confer in good faith with UC-AFT over matters within the scope of representation.

5. Interfering with employees' right to be represented by UC-AFT.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF HEERA:

1. Rescind the policy announced on November 25, 2020, that prohibits employees at University of California, Santa Cruz, from concurrently holding a non-exempt staff position and an exempt academic position.

2. Make Maya Gupta whole for the rescission of her appointment to teach one section of Philosophy 127 in Winter Quarter 2021, as well as any later harm she suffered because of the University's new policy on concurrent employment, with interest at a rate of seven percent per year. Make any other employees who were denied appointments in the NSF Unit as a result of the University's unlawful unilateral change whole for losses proven by UC-AFT in compliance proceedings, with interest at a rate of seven percent per year. Such make-whole relief to Gupta and any other affected employees shall also include appropriate credit toward the six-year requirement for continuing status under Article 7b of the parties' collective bargaining agreement.

3. Restore to the NSF Unit the 15 percent full-time equivalent (FTE) lecturer position formerly held by Scott Makson.

4. Make Scott Makson whole for any wages, benefits, or credit toward the six-year requirement for continuing status he lost as a result of the University's elimination of the 15 percent FTE lecturer position he formerly held, with interest at a rate of seven percent per year.

5. Within 10 workdays of the date this decision is no longer subject to appeal, post at all work locations where notices to employees in the NSF Unit are

posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the University, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays.¹¹ The Notice shall also be sent to all bargaining unit employees by electronic message, intranet, internet site, or other electronic means used by the University to communicate with NSF Unit members. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

6. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The University shall provide reports, in writing, as directed by the General Counsel or designee. All reports regarding compliance with

¹¹ In light of the ongoing COVID-19 pandemic, the University shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the University so notifies OGC, or if a Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all relevant parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the University to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the University to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the University to mail the Notice to those employees with whom it does not communicate through electronic means.

this Order shall be concurrently served on UC-AFT.

Chair Banks and Members Krantz and Paulson joined in this Decision.

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



After a hearing in Unfair Practice Case No. SF-CE-1317-H, *University Council-American Federation of Teachers v. Regents of the University of California*, in which all parties had the right to participate, it has been found that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq. by: (1) unilaterally deciding to prohibit employees at its Santa Cruz campus from concurrently holding a non-exempt staff position and an exempt academic appointment in the Non-Senate Faculty (NSF) Unit; and (2) unilaterally modifying the NSF Unit and the parties' collective bargaining agreement by removing one lecturer position from the unit.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing the hiring or reappointment criteria for positions in the NSF Unit.
2. Unilaterally modifying the NSF Unit without UC-AFT's agreement or utilization of PERB's unit modification process.
3. Unilaterally modifying Article 1 of the parties' collective bargaining agreement without providing UC-AFT with notice or an opportunity to meet and confer in good faith.
4. Failing or refusing to meet and confer in good faith with UC-AFT over matters within the scope of representation.
5. Interfering with employees' right to be represented by UC-AFT.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF HEERA:

1. Rescind the policy announced on November 25, 2020, that prohibits employees at University of California, Santa Cruz, from concurrently holding a non-exempt staff position and an exempt academic position.

2. Make Maya Gupta whole for the rescission of her appointment to teach one section of Philosophy 127 in Winter Quarter 2021, as well as any subsequent harm she suffered as a result of the University's new policy on concurrent employment, with interest at a rate of seven percent per year. Make any other employees who were denied appointments in the NSF Unit as a result of the University's unlawful unilateral change whole for losses proven by UC-AFT in compliance proceedings, with interest at a rate of seven percent per year. Such make-whole relief to Gupta and any other affected employees shall also include appropriate credit toward the six-year requirement for continuing status under Article 7b of the parties' collective bargaining agreement.

3. Restore to the NSF Unit the 15 percent full-time equivalent (FTE) lecturer position formerly held by Scott Makson.

4. Make Scott Makson whole for any wages, benefits, or service credit he lost as a result of the University's elimination of the 15 percent FTE lecturer position he formerly held, with interest at a rate of seven percent per year.

Dated: _____

REGENTS OF THE UNIVERSITY OF
CALIFORNIA

By: _____
Authorized Agent

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