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IN ARBITRATION PROCEEDINGS PURSUANT TO  
AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy Between: )  
 )  
 )  
UNITED AUTOMOBILE WORKERS, LOCAL 2865 )  
 ) Arbitrator's  
 ) File No. 18-165-LA  
 )  
and, )  
 )  
 )  
UNIVERSITY OF CALIFORNIA, BERKELEY ) ARBITRATION  
 ) OPINION AND AWARD  
 ) (January 13, 2020)  
[Re: Fee Remission Grievance, )  
No. BX-01-053-17] )  
 )  
\_\_\_\_\_ )

Appearances: Margo A. Feinberg and Kirill Penteshin (Schwartz, Steinsapir, Dohrmann & Sommers), attorneys for the United Automobile Workers, Local 2865; Sandra L. McDonough (Paul, Plevin, Sullivan & Connaughton), attorney for the University of California, Berkeley.

INTRODUCTION

This dispute arises under a labor agreement between the United Automobile Workers, Local 2865, and the University of

California. The dispute concerns tuition fee remissions and other payments for graduate students and undergraduates who also serve as academic staff employees (ASEs) and instructors at the Berkeley campus. The Union contends that the University violated the labor agreement by failing to provide fee remissions for undergraduate instructors who were hired at less than a 25 percent appointment level at which payments are to be made, pointing in particular to instructors in the Electrical Engineering and Computer Sciences (EECS) program. EECS is part of the College of Engineering at Berkeley. The University maintains that it did not violate the agreement because it has leeway to make appointments at under 25 percent in the exercise of its management authority, and, as to EECS, because the instructors were hired for pedagogical reasons at less than the 25 percent level.

The undersigned was selected by the parties to conduct a hearing, and, initially, to rule on an arbitrability objection raised by the University. The arbitrability hearing was held on March 6, 2019 in Berkeley, California. A decision denying the objection was issued July 23, 2019. Thereafter, a hearing on the merits was conducted on October 1, 2019. At the hearing, the parties were afforded an opportunity to examine and cross-examine witnesses, and to introduce relevant documentary evidence. A

transcribed record of the proceeding was prepared. The dispute was deemed submitted for decision on December 2, 2019, upon receipt of posthearing briefs.

#### ISSUES

The parties were unable to agree upon a statement of the issues to be resolved, but stipulated that the arbitrator could frame the issues based on the proposed statements of the parties, and the evidence and argument presented. (Tr. 152-155.) The arbitrator has determined that the issues to resolve are as follows: Did the University violate Articles 4, 11 and/or 14 by denying fee remissions to undergraduate instructors in EECS who were appointed to 20 percent positions; if so, what is the appropriate remedy? In framing the question, and reviewing the evidence, the arbitrator uses the term "fee remission" to cover the payments spelled out in Articles 4, 11 and 14 of the labor agreement for tuition, health care, student services, and childcare.

RELEVANT CONTRACT PROVISIONS

ARTICLE 4 CHILD CARE

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B. SYSTEM-WIDE CHILD CARE REIMBURSEMENT PROGRAM

1. Academic Year

- a. Upon ratification of the contract, each eligible ASE shall receive up to \$900 per quarter or \$1350 per semester for expenses incurred during the ASE's appointment period in the regular academic year. The program will define reimbursable expenses and related procedures.
- b. An eligible ASE is a registered student with at least a 25% ASE appointment who has (a) qualified dependent(s). For the purposes of this program, qualified dependents shall include children, in the custody of the ASE, who are age 12 or under on July 1<sup>st</sup>....

ARTICLE 11 FEE REMISSION

A. ELIGIBILITY

An ASE who is a registered graduate student with (an) ASE appointment(s) or other eligible academic appointment(s) totaling 25% or more of full-time for a given term is eligible to participate in the University's Partial Fee Remission Program for Tuition and the Student Services Fee.

An ASE who is a registered undergraduate student appointed in Teaching Assistant title codes TC 2310 or TC 2311 with an appointment totaling 25% or more of full-time for a given term is eligible to participate in the University's Partial Fee Remission Program for Tuition and the Student Services Fee.

An ASE is eligible to receive only one Partial Fee Remission per term.

B. PARTIAL FEE REMISSION

For those ASEs eligible for a Partial Fee Remission, the University will provide a Partial Fee Remission of 100% of Tuition and the Student Services Fee.

ARTICLE 12 GRIEVANCE AND ARBITRATION

A. A grievance is a claim by an individual ASE, a group of ASEs, or the UAW, that the University has violated a specific provision of this agreement during the term of this agreement. A grievant may be represented at all stages of the grievance and arbitration procedures.

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ARTICLE 14 HEALTH BENEFITS

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B. An ASE who is a registered graduate student with ASE appointment(s) or other eligible academic appointments totaling 25% or more of full-time for a given term in a State-supported or Self-Supporting Program is eligible to receive remission of premium for a University-sponsored student health insurance plan. An ASE is eligible to receive only one premium remission per term. In the event premiums increase, the University will continue to provide 100% premium remissions to eligible ASEs....

ARTICLE 18 MANAGEMENT AND ACADEMIC RIGHTS

A. Management of the University is vested exclusively in the University. Except as otherwise provided in this agreement, the UAW agrees that the University has the right to establish, plan, direct and control the University's missions, programs, objectives, activities, resources, and priorities, including Affirmative Action plans and goals; to establish and administer procedures, rules, and regulations, and direct and control University

operations;.... to determine or modify the number, qualifications, scheduling, responsibilities and assignment of ASEs; to establish, maintain, modify or enforce standards of performance, conduct, order and safety;.... to recruit, hire, or transfer; to determine how and by whom instruction is delivered; to introduce new methods of instruction;.... and to exercise sole authority on all decisions involving academic matters.

- B. Decisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University.
- C. The above enumeration of management rights is not exhaustive and does not exclude other management rights not specified herein, nor shall the exercise or non-exercise of rights constitute a waiver of any such rights by the University.
- D. No action taken by the University with respect to a management or academic right shall be subject to the grievance or arbitration procedure or collateral suit, unless the exercise thereof violates an express written provision of this agreement.

## FACTUAL ANALYSIS

### 1. Grievance Proceedings

At issue in this case is a Union grievance concerning academic student employees (ASEs). The bargaining unit includes ASEs who are readers, tutors, and, as relevant here, graduate student instructors (GSI) and undergraduate instructors (UGSI).

(Tr. 14-15.)<sup>1</sup> The grievance, dated August 15, 2017, alleges that the University violated the labor agreement, stating:

Departments across the UC Berkeley campus including but not limited to the Energy and Resources Group, appoint ASEs at FTE just below 25% to avoid providing the Fee and Health Benefits Remission as well as childcare reimbursements agreed upon in Articles 4, 11 and 14.... (Jt. Exh. 2, p. 1.)

As a remedy, the Union sought relief for the affected employees:

Stop circumventing the Fee and Health Benefits Remissions and childcare reimbursements agreed to in the contract by appointing ASEs to FTE just below 25% and make whole all losses for ASEs appointed just below 25% who did not receive Fee and Health Benefits Remission and applicable childcare reimbursements starting in Fall 2016 and ongoing. (Id.)

The Union's grievance was triggered by an August 2017 position posting in the Energy and Resources Group seeking part-time academic staff at a 24.9 percent rate of a full time equivalent (FTE) position. (Jt. Exh. 2, p. 2.) Soon after the grievance was filed, a Berkeley labor relations official, Deborah Cohen, granted the remedy for the Energy and Resources Group, stating that this action resolved the grievance. (UAW Exh. 11; Tr. 126.) In explaining the outcome in an email exchange with

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<sup>1</sup>The parties use the acronym GSI to apply to both graduate and undergraduate student instructors, although at times using UGSI when specific reference is made to undergraduates. (Tr. 15, 154-155.)

Kavitha Iyengar, the Union's president, Ms. Cohen stated that "the Group has not hired a graduate student instructor (GSI) at less than 25 percent in the past, nor is it their practice to do so." (UAW Exh. 11.)

Beyond this resolution, Ms. Cohen said the Union's grievance stated insufficient facts to support a campus-wide claim. (Id.) Ms. Cohen also commented that the grievance was untimely as to actions allegedly occurring before July 15, 2017; that is, 30 days prior to the date of the grievance. (Id.; Tr. 128-129.)

Following this response, Ms. Iyengar amended the grievance, stating it was intended to cover all ASEs employed at under 25 percent FTE. (UAW Exh. 14; Tr. 127.) Attached to the Union's communication was a spreadsheet of ASEs appointed at less than 25 percent. Ms. Cohen denied the amended grievance, observing that specific facts were missing as to unpaid fee remissions and that "Appointing an ASE at less than 25 percent is not a contract violation." (UAW Exh. 14.)

The grievance proceeded to consideration at Step 2 of the contractual procedure, with a meeting on October 3, 2017. The University's reviewer at the Step 2 level, Linda Song, an assistant dean in the graduate division, provided a written



response on November 8, 2017. (Jt. Exh. 3.) By this point in time, specific allegations were advanced by the Union regarding instructors in EECS. (Id., pp. 3, 21-27.) According to Garrett Strain, the Union's lead organizer, Ms. Cohen explained at the grievance meeting that the EECS appointment decision was based on budgetary considerations and management's rights. (Tr. 219-220.)

At Step 2, Dean Song rejected the Union's claim of a broad contract violation, citing an evidentiary weakness on the issues of employee workload, schedule, and appointment percentage for some employees. Dean Song also stated that the labor agreement was not violated since it "does not require that ASEs be appointed at 25% or more." (Jt. Exh. 3, p. 2.) In the Step two response, Dean Song compared GSIs to readers and tutors, and distinguished those ASEs, observing:

....

In terms of GSI appointments, appointing students at less than 25% is not as easy to defend given the salaried nature of the job and general duties and workload, but there are potential scenarios. For example, when a GSI takes maternity leave, the department needs to hire a substitute for the duration of that leave. Additionally, some courses may not be offered for the full term, or courses may carry a lower unit value and a commensurately lighter workload, which could necessitate a lower percentage appointment. (Id.)

After sorting and assessing employees cited by the Union, Dean Song proposed a limited resolution of the grievance with a

remedy of increasing the percentage time for employees hired between 21 and 24 percent up to 25 percent of a FTE position. (Id., p. 4.) Dean Song suggested that the University's labor relations staff also examine departmental hiring for 20 percent or less of a FTE position and request a rationale, with conversion to 25 percent if a sufficient workload explanation was not given.

The Union appealed the Step 2 response to Step 3 of the grievance procedure on November 27, 2017, stating:

The union recognizes that UC has resolved some of the issues raised in this grievance. The union also recognizes that UC is investigating additional allegations made in the grievance and may resolve those issues as well. Given the deadline to file a Step 3 appeal, we are filing this appeal now. Accordingly, we are appealing to Step 3 all issues raised in the Step 2 grievance that are not yet resolved. (Jt. Exh. 4, p. 2.)

On March 7, 2018, a Step 3 response was provided by Eric Falci, associate dean in the graduate division. (Jt. Exh. 5.) Dean Falci acknowledged, "...it is understood that the spirit of the agreement is that, in typical circumstances, a GSI position for a full semester course would be a 25% appointment." (Id., p. 2.)

Nevertheless, Dean Falci rejected the Union's appeal, which, at this stage, focused solely on EECS appointments. (Id.) The reviewer observed that EECS, "made a pedagogical decision to create these specific 20 percent ASE positions in response to academic needs in the largest lecture courses which is its sole right" under the contract. (Id., p. 3.) Overall, Dean Falci found that the labor agreement was not violated because there is no requirement for ASE appointments at 25 percent or above, and because the hiring figure is a management right under the agreement, citing Article 18. (Id., pp. 2-3; Jt. Exh. 1, Art. 18.)

Responding to the Step 3 decision, the Union sought arbitration on April 20, 2018. (Jt. Exh. 6.) The Union stated:

In this grievance and subsequent meetings with the University, the union alleged that UC Berkeley violated Articles 4, 11, and 14 of the CBA, and all others that are applicable by consistently offering positions to ASEs at just under 25% appointments. The Union accepts all provisions of the University's Step III response except for those that relate to the 20% appointments in EECS. (Jt. Exh. 6.)

Arbitration followed. As noted, the University asserted grievance untimeliness as a preliminary arbitrability objection under the labor agreement. (Jt. Exh. 7.) In the July 2019 decision on this issue, the arbitrator concluded that the Union could pursue a claim on the merits as it had alleged a continuing

contract violation as of 30 days prior to filing of the grievance in August 2017. (Arbitrability Opinion, p. 13.)

## 2. Negotiating History

The fee remission provision for graduate student ASEs was adopted in bargaining for the parties' initial agreement in 1999 and 2000. (Jt. Exh. 8, Art. 10.) For the Union, securing coverage for fee remission was a high priority at the time, and in years after. (Tr. 188.) Initially, the University opposed any change in fee remission payments, with the University retaining the "sole discretion" to set the amount, while the Union proposed full coverage. (UAW Exh. 16, pp. 25, 32, 53.) Eventually, the key text adopting a 25 percent appointment level was proposed by the University and accepted by the Union after the University assured the Union that appointments at less than 25 percent would be rare, offering as examples sick leave, travel, substitute instruction and other limited exceptions. (Tr. 192-194.) A distinction also was drawn by the University with course readers and tutors to be used at lower percentages than GSIs.

Provisions extending receipt of fee remissions to undergraduate instructors were adopted in negotiations in 2007.

(Jt. Exh. 11, Art. 11; UAW Exh. 17; Tr. 199-200.) This followed a Union observation that undergraduate instructors were being used in greater number, and a Union goal of limiting erosion of the bargaining unit. (Tr. 202-203.) As a result of 2007 bargaining, undergraduate instructors were covered by the remission provisions for appointments made at 25 percent or more. Again, the Union in negotiations sought full coverage, but accepted retention of the 25 percent level after University negotiators acknowledged the need for undergraduates to be treated in an equitable manner as they were working "side by side" with graduate students and "doing the same work." (UAW Exh. 17, pp. 1, 11; Tr. 200-204.) Although the final text includes differences in how the 25 percent determination is made for graduates and undergraduates, these differences are immaterial to resolving the present dispute.

After the 2007 bargaining, a March 2008 notice was sent by George Breslauer, the executive vice chancellor and provost at Berkeley, to campus departments. (UCB Exh. 6.) The notice stated that undergraduate student instructors would be entitled to fee remissions drawn from department budgets. Reference is made in the memo to appointments totaling 25 percent or more for undergraduates. No exceptions are mentioned.

Other than minor changes in language, successor agreements have not modified the 25 percent appointment standard adopted in 2000 for graduate students and in 2007 for undergraduates. (Jt. Exhs. 9 (Art. 10), 10 (Art. 10), 12 (Art. 11), 13 (Art. 11); Tr. 265-266.)

### 3. University Policies Regarding Undergraduate Instructors

Typically, an ASE instructor's workload is set by a faculty supervisor. (Tr. 259.) Workload factors may include how course content is assigned over a semester, the need for lab sessions and office hours, and the nature and timing of exams and grading. To an extent, graduate and undergraduate instructors have different needs, with the former entitled to greater financial support, fellowships, and research obligations, while also subject to lower course-credit requirements. (Tr. 262, 270-271, 280-281.)

The goal of using 25 percent as the norm for GSIs is evident in a 2002 memo from Berkeley's labor relations manager providing a method to ensure that late appointments could reach the 25 percent level by increasing weekly workloads. (UAW Exh. 18.) As noted, this objective to secure 25 percent appointments was confirmed by University reviewers during the grievance process as

the usual practice and as the basis for partial relief, even as the grievance was denied.

Procedurally, as detailed in a 2017 graduate division handbook, the use of undergraduate instructors at the Berkeley campus is an exception to the use of graduate students, and the University customarily provides appointments at a 25 percent level or above, accompanied by fee remission payments. (See UAW Exh. 27, pp. 13-14, 20-22.) The handbook does not identify exceptions to 25 percent appointments, or fee remissions. Nor is mention made of 20 percent appointments in a 2014 College of Engineering memo describing eligibility and qualification requirements for UGSIs. (UAW Exh. 4.) The graduate division at Berkeley also has adopted an administrative appointment policy, posted on the University's website, stating that fee remissions are available, but without mention of under-25 percent appointments. (UCB Exh. 4, Sec. H1.5.)

Reinforcing a finding that appointments at 25 percent or above are the norm are administrative forms requiring approval above the department level to authorize under-25 percent exceptions in a narrow class of cases. (UAW Exh. 28.) Typical exceptions are "fees paid by another source," "title code...to combine with...title code \_\_\_ to generate fee remission,"

"temporary appointment to substitute...for leave," and "student fellowship doesn't allow for work of 25% or more but department has critical need." (Id., p. 5.) It wasn't until 2017 that an exception was mentioned for "academic needs" in EECS. (Id., p. 3.) This exception, however, was not included in the form for 2019. (Id., pp. 1-2).

#### 4. Use of Undergraduate Instructors at Berkeley and in EECS

As reflected in a data analysis prepared by the Union, there has been a long history of very limited use of undergraduate instructors at the Berkeley campus, dating back to 2003 or so. (UAW Exhs. 20, 21; Tr. 238-250.) For nearly 15 years, the number of appointments at under 25 percent was stable in the range of one to two percent. In 2003, for example, there were 1,605 GSIs, with only 19 appointed at less than 25 percent. (Tr. 244.)

There was a significant increase in the use of appointments under 25 percent as of the 2015-16 school year, and an even larger increase in 2016-17 academic year. The increase has continued, with over 300 appointments as of April 2019 at less than 25 percent. (UAW Exh. 21.) Of these, over 200 are in EECS. (Id.) For introductory computer courses in EECS, dozens of undergraduate student instructors have been hired for semester-



long appointments at a 15 percent level in 2015-2016, and at a 20 percent appointment level in 2016-17, and after. (UAW Exhs. 21, 22; UCB Exh. 19.)

In a memo issued in July 2016 authorizing the use of undergraduate instructors in EECS, the Department explained that increased use was "due to rapid growth." (UAW Exh. 19.) However, no mention was made of the 20 percent appointment as a standard or of any other reason for departing from the more widely-used 25 percent level.

The testimony of Fiona Doyle, a former dean of the graduate division who oversaw the engineering department, was offered by the University to support the increased use of undergraduate students at or below a 20 percent appointment level in EECS, or eight hours per week. Dean Doyle stated that eight hours per week was adopted, in part, to remedy a shortage of available graduate students as instructors, and, in part, to protect undergraduates from suffering academically by carrying an excessive workload of ten or more hours per week. (Tr. 274-278.) The instructor shortage was noted as early as a 2014 memo proposing to increase use of undergraduates. (UAW Exh. 4.)

According to Dean Doyle, the shift to a lower appointment percent was adopted for undergraduates to guard against a decline in academic performance. Dean Doyle testified this approach was based on a handful of examples she learned about of undergraduates being placed on academic probation. (Tr. 277, 288.) No complainants were identified, nor was there any written substantiation of what the complaints stated when made. However, an administrative memo from November 2017 issued by Dean Doyle notes, at least in part, the use of undergraduates for appointments under 25 percent was for their "academic needs" as "extenuating circumstances" permitting an exception to the "best practice" of hiring at 25 percent or above. (UAW Exh. 1; also see Tr. 298-300.)

Another University witness was John DeNero, an associate professor in EECS and the principal faculty member in charge of the major EECS course at issue in this case; that is, CS 61A. Professor DeNero testified that the department authorized him to redesign the course in 2015-16. (Tr. 290, 310-314, 349-351.) The course offers basic instruction on computer programming, and is taken by students in a variety of fields. Both lab work and paper exercises are used. For years, all instructors were hired at 50 percent; both graduates and undergraduates. (Tr. 308-310.)

By 2019, the course had about 1,800 students, about twice the size of the student attendance in 2014. (Tr. 340-341.) As part of the course redesign, partly because the number of graduate students willing to teach was insufficient, Professor DeNero, by 2015-2016, used four graduate students to serve as the lead instructors, at 50 percent time, to oversee course administration and content development. Professor DeNero reduced undergraduate instructors who had been working at 50 percent, teaching two lab and two discussion sections with three office hours a week, to 15 percent. Instead, the undergraduates at the 15 percent level taught two labs or two discussion sessions per week, or held three office hours during the week. (UCB Exh. 1; Tr. 302-305, 308-310, 313-314.)

In making this change, Professor DeNero used a survey to gauge student preferences. However, the survey only offered respondents a choice of an appointment at 20 hours per week, which would be 50 percent time, or a lower level appointment of six hours per week, or 15 percent, without clearly mentioning that an option below 50 percent, or 20 hours per week, would not be eligible for any fee remission, something the survey noted would be available to instructors working 50 percent. (UCB Exh. 1; Tr. 43, 305-306, 332-335.)

After a year with instructors at the 15 percent level, in response to instructor requests for more expansive assignments, undergraduate appointments in 2016-17 were made at 20 percent to permit the instructors to carry out multiple functions. (UCB Exh. 19; Tr. 313-316.) In doing so, duties were increased, including additional lab and office hours, to provide greater variety in the instructional experience. As a result of the changes from 50 percent to lower levels, whether 15 or 20 percent, student-teacher ratios and academic workloads were reduced for undergraduate instructors. (Tr. 39-41.)

In adopting a change to appointments less than 25 percent, Mr. DeNero was aware that there was a monetary savings in the form of reduced fee remissions. (Tr. 315-316, 339-340, 349-352.) However, Professor DeNero's testimony emphasized the goal of more effective instruction, including creation of materials, and not budgetary concerns, as the key reason to make structural changes for EECS courses.

At the arbitration session on the merits in October 2019, Professor DeNero provided a pedagogical reason tied to teaching effectiveness for the undergraduate instructor appointment change to 15 percent in 2015-16 and then to 20 percent in 2016-17. (Tr. 303-304, 311-314.) In contrast, on the first day of the hearing

in March 2019 concerning arbitrability, Professor DeNero referred to budget constraints and the need to hire a sufficient number of instructors as the main reason for the appointment level changes as a way to avoid having "to shrink our courses." (Tr. 50, 52-53, 58-60.)

On the second day of hearing, Professor DeNero acknowledged that the instructional funding now received by EECS is about the same as it was five years go, even with the large enrollment increase. (Tr. 348-349.) Still, Professor DeNero explained that, after examining additional documents between the two days of hearing, he believes that the budget was not the main reason for the course redesign, but that the principal factor was a need for teaching effectiveness in the absence of sufficient graduate students to teach the course. (Tr. 345-347.) The written guidelines issued in 2017 to undergraduate instructors in EECS refer to workload expectations for 20 percent appointments, but do not refer to fee remissions. (UCB Exh. 2.)

Challenging a pedagogical explanation for the EECS action, the Union presented evidence from the beginning of the 2016-17 school year, when the number of undergraduate student instructors increased markedly. This evidence, and related testimony, supports a finding that EECS was pursuing the greater use of

undergraduate instructors with a financial reason as the driving factor. (UAW Exhs. 23, 24, 37.) Fiscal and graduate student shortages, which began a year before, had accelerated. (Tr. 41-42, 51-53, 274-275, 303-304.) Notably, a one-time supplemental funding grant to EECS in 2015-16 was no longer provided for 2016-17.

This funding shortfall was a key subject at a "town hall" meeting with EECS students in September 2016. At the meeting, the Department's chair described problems for EECS courses tied to increased student enrollment, but observed that there was insufficient financial support for instructors, especially due to the loss of the one-time funding supplement given for 2015-16. (UAW Exh. 24 (p. 2), 25 (p. 1); Tr. 223-228.) By 2015-16, as shown by charts displayed at the meeting, the benefit cost for remissions was increasing, but at a much slower rate than available instructional funding. (UAW Exh. 24, pp. 3-4.) As illustrated by one speaker at the "town hall" meeting, due to the fee remission differential, one GSI at eight hours, or 20 percent, would cost about \$4,000, and one GSI at 10 hours, or 25 percent, would cost about \$11,000, while a GSI at 20 hours, or 50 percent, would cost about \$16,000. (UAW Exh. 37, at 39:38, et seq.)

There is no indication that, with few exceptions for the lead GSIs and a smattering of others, EECS considered hiring GSIs at more than 20 percent. (Tr. 334-335.) By the 2019-20 academic year, the cost per instructor for the fee remission benefit was \$6,000 to \$7,000 or more per semester. (Tr. 56-57, 227, 266-267; UAW Exh. 26, pp. 28-29 (2019-20).) Hiring two UGSIs at 25 percent would have significantly increased the cost of one instructor working at 50 percent since remissions would be payable at both levels. Mr. DeNero estimated that replacing three 20 percent instructors with one at 50 percent, would add 16 percent to the teaching budget for the course. (Tr. 352.)

#### DISCUSSION

The Union contends that the University deprived undergraduate instructors working in EECS with fee remissions authorized by the labor agreement, contrary to assurances provided by University negotiators in bargaining over successive contracts. As stated by the Union, "...a party to a contract may not make a promise, then prevent that promise from being realized." (UAW Br., p. 27.) For support, the Union points to a budgetary rationale as the main reason for the changes in EECS, urging that the University has not demonstrated either pedagogy

or student academic needs as the motivating factors. The Union also observes that EECS failed to adhere to the established practice authorizing only limited exceptions for fee remissions for instructors.

The University counters that its decision to use undergraduate instructors in EECS at 15 and 20 percent levels was based on a pedagogical rationale tied to the academic needs of students, and to reducing workload and academic problems for undergraduate instructors. In the University's view, the labor agreement's reference to a 25 percent benchmark necessarily allows for appointments below that level, as do management rights to control program resources and to determine instructors needed and their responsibilities. For the University, its actions are consistent with negotiating history rejecting Union proposals for full remission coverage, and with past appointments at less than 25 percent that were made for years without challenge by the Union.

Central to the resolution of a contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, an arbitrator will first examine the language used by the parties. To resolve uncertainty or ambiguity in the text, an arbitrator will review



previous practice by the parties related to the subject. In addition, an arbitrator will assess negotiating proposals and comments made when the bargain was reached, assuming there is evidence on the subject. For the reasons that follow, the Union's grievance is sustained.

First, it is concluded that budgetary concerns were the principal motivating factor leading to the structural changes for EECS instructors. In particular, the September 2016 "town hall" gathering provides telling evidence of the importance of the budgetary rationale, as shown in statements by the Department's chair about insufficient fiscal resources to staff the larger courses. A rapid change increasing the number of undergraduate student instructors at 15 and 20 percent levels also is consistent with Professor DeNero's testimony from the first day of hearing, and with the compilation of instructor use prepared by the Union based on its study of hiring records over a 15 year period.

From this record, the weight of the evidence supports a conclusion that, but for the Department's budgetary demands, Professor DeNero would not have restructured the course to the 15 and 20 percent levels, and reduced the number of 50 percent instructors. An initial shortfall for 2015-16 was alleviated for

one year by a supplemental allocation, but that extra assistance was not provided for 2016-17. Even if undergraduate instructors were available to teach at 15 percent or 20 percent levels, there is no evidence that, with sufficient funding and the 25 percent option of being offered to potential instructors, the University would have been unable to organize the course using the 25 percent standard, an approach that apparently was not considered in the student preference survey, or otherwise. Indeed, the substantial and disproportionate increase in instructional duties from a 15 percent to a 20 percent appointment level supports a conclusion that the Department was seeking to gain more work for less pay.

On a related point, the University maintains that if an individual GSI believed excessive work was assigned, an objection could have been lodged under Article 31, a "workload" provision in the labor agreement. Such a filing would have permitted an expedited internal review of an individual's concern. However, even if such relief might be available to an individual under the contract, there is no preemptive bar under the agreement to the Union seeking to enforce a broader contractual remedy for instructors as a group.

Second, maintaining a 25 percent standard, with limited exceptions, is consistent with the negotiating history that exceptions would be few to avoid erosion of the bargaining unit. This understanding was restated in negotiations for the agreement in 2007 when UGSIs were added to the remission provisions to secure a rough parity for graduate and undergraduate students and to forestall erosion of the bargaining unit. If upheld, the University's position that it has virtually unchecked authority under the broad management rights provision to set teaching needs and budgetary resources would be contrary to bargaining history and would undermine the specific contractual fee remission promise previously made by the University.

Third, the failure of EECS to secure exceptions to utilize 15 percent or 20 percent appointments for undergraduate instructors, despite a policy requiring such approval and years of near-exclusive use of 25 percent appointments, or greater, supports an inference adverse to the University; that is, by deviating from its longstanding practice, the University was seeking to bypass the fee remission requirement established in the labor agreement. Other adverse inferences arise based on admissions in administrative memos and grievance communications that support a finding that 25 percent or above was the expected appointment level, subject to few exceptions. Why else did

reviewers at Step 2 and Step 3 write as they did and offer partial relief to the Union?

#### REMEDY

Having found a violation of the labor agreement, the issue of the appropriate remedy must be resolved. On this question, the parties diverge sharply.

The Union proposes sweeping relief, beyond EECS, so that "...any award issued...should remedy the University's contract violation across all UC Berkeley academic departments...and such award should have precedential force at the other UC campuses where UAW 2865 represents academic student employees." (UAW Br., pp. 54-55.) The Union also seeks an order, to be applied on a prospective basis, permitting only a narrow set of exceptions to the 25 percent appointment level, consistent with those the Union asserts were agreed upon in bargaining.

The University argues strongly against any affirmative relief, even if there was a continuing violation commencing 30 days prior to filing of the grievance. The University urges that, "Contacting and tracking down all potentially impacted

students would require considerable University resources and potentially jeopardize already awarded financial aid." (UCB Br., p. 22.) The University also maintains that, "the principles of acquiescence and estoppel support allowing the EECS department to continue offering 20 percent appointments." (Id., p, 23.) For the University, compelling restoration of the status quo ante of appointments at the 50 percent level will result in instructor cutbacks and course reductions adversely affecting students.

Both parties reach too far in their position statements for and against relief. Instead, the traditional remedies for a contractual pay violation are appropriate in this instance; namely, a cease-and-desist directive and a make whole award. Accordingly, the University is directed to cease-and-desist from 20 percent appointments in EECS, establish instructor appointments at 25 percent, and provide retroactive make whole relief to those who lost fee remission benefits under Articles 4, 11 and 14 during the period commencing 30 days prior to filing of the grievance.

The Union's proposals seeking broader compensatory relief at Berkeley and declaratory relief throughout the University system are not well founded on this record. The grievance was advanced to arbitration focusing on the alleged violation in EECS.

References to other academic departments were dropped as the grievance was advanced. The violation in EECS has been proved, not more.

For the University, its approach to the remedy would shift the burden of loss to student instructors despite the absence of any contract language stating that fee remission payments are dependent on financial resources being sufficient. By limiting the remedy to commence 30 days before the grievance was filed, the Union's delay in pressing its case, relatively brief though it was, reduces the extent of loss the University must correct.

Nor must future appointments be made at the 50 percent level, as the University suggests. On the facts offered, the University approached its fiscal limits with a binary choice for appointments; that is, either at 50 percent or using a lower figure without any fee remission. Granted, the financial impact of using instructors at 25 percent may be more costly for EECS, and might even raise the prospect of layoffs or student course reductions. But, in the end, bargaining unit members are protected by contract provisions that block the University from funding its academic offering by taking benefits away from its instructors.

Regarding the University's contention that implementing make whole relief will be complicated and expensive, the short answer is that denying make whole relief would permit the University to be unjustly enriched if its proposal was adopted. A difficulty in identifying individuals owed funds, and how much, are not reasons to deny such relief. If the University caused the problem, despite years ago being placed on notice of a dispute by the Union and by its own graduate managers who granted partial relief, the University cannot now be heard to speculate that the problem is too difficult to fix.

Beyond this consideration, the University's concerns about locating and paying members of the instructor class are overstated. In this respect, the Union's group grievance resembles a traditional wage-and-hour class action that advances pay claims on behalf of hundreds of instructors. The parties would be wise to negotiate the use of a third-party administrator to implement a payment structure that is designed by the parties to find instructors and pay them.

AWARD

Based on the testimony and documentary evidence, and the findings and conclusions set forth above, the undersigned renders the following Award:

1. The grievance is sustained based on the University's violation of Articles 4, 11 and 14 by failing to hire undergraduate instructors in EECS at a 25 percent appointment level.

2. The University shall cease-and-desist from continued fee remission violations in EECS.

3. Undergraduate student instructors in EECS at the Berkeley campus affected by the University's violation of the fee remission provisions of the labor agreement are to be made whole for any loss of wages and benefits commencing 30 days before filing of the grievance on August 15, 2017.

4. Pursuant to the stipulation of the parties, the undersigned will retain jurisdiction for a period of 120 days from the date of this Award to resolve any dispute over its implementation. Upon timely notice of a dispute, the arbitrator's retained jurisdiction can be extended.

*Barry Winograd*

Dated: January 13, 2020

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BARRY WINOGRAD  
Arbitrator