

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



REGENTS OF THE UNIVERSITY OF CALIFORNIA,)
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)
Employer,) Case No. SF-RR-805-H
) (UC San Diego)
)
and)
) PERB Decision No. 1261-H
)
ASSOCIATION OF STUDENT EMPLOYEES,)
)
U.A.W., UNITED AUTOMOBILE,) April 23, 1998
)
AEROSPACE AND AGRICULTURAL)
)
IMPLEMENT WORKERS OF AMERICA,)
)
AFL-CIO,)
)
)
Petitioner.)
)
_____)

Appearances: Corbett & Kane by Sharon J. Grodin, Attorney, and Cochran-Bond & Connon by Walter Cochran-Bond and Nicholas P. Connon for Regents of the University of California; Schwartz, Steinsapir, Dohrmann & Sommers by Margo A. Feinberg, Attorney, for Association of Student Employees, U.A.W., United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (University) to a proposed decision issued by a PERB administrative law judge (ALJ). In the attached proposed decision, the ALJ determined that the student employees in the reader, tutor and associate positions at the University of California, San Diego campus (UCSD), as identified in the request for recognition petition filed by the Association of Student Employees, U.A.W., United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Petitioner), are employees under the Higher

Education Employer-Employee Relations Act (HEERA or Act).¹ The ALJ held that a unit composed of employees in the reader, tutor and associate titles at UCSD was an appropriate bargaining unit and he ordered that a representation election be conducted.

The Board has reviewed the entire record in this case, including the transcript and exhibits, the ALJ's proposed decision, the University's statement of exceptions and the Petitioner's response thereto. Finding them free of prejudicial error, the Board hereby adopts the ALJ's findings of fact as the findings of the Board itself. The Board also adopts the ALJ's conclusions of law, as modified below, and finds that student employees in the reader, tutor and associate positions at UCSD are employees under the HEERA.

PROCEDURAL HISTORY

On May 28, 1993, the Petitioner filed a request for recognition petition with PERB seeking to represent a proposed unit of readers, tutors, acting instructors, community teaching fellows and nursery school assistants employed at UCSD.

On October 15, 1993, the PERB San Francisco regional director determined that the proof of support submitted by the Petitioner with its request for recognition petition was sufficient to meet the requirements of HEERA. (PERB

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Reg. 51030(b).)²

On November 8, 1993, the University filed its response to the petition, asserting that the unit sought by the Petitioner was inappropriate because it included student employees who are not employees as defined in HEERA. The University also indicated that to the extent the petitioned for titles included non-student employees, those employees should be placed in a separate systemwide unit or accreted to the existing systemwide Non-Senate Academic Unit (Unit 18).

Following the University's response, the Petitioner, on December 9, 1993, filed a request for a Board investigation to determine the appropriateness of the proposed unit. (PERB Reg. 51090.) Settlement conferences/investigatory meetings were held on February 7, May 19 and June 17, 1994; however, the matter was not resolved.

On June 27, 1994, the Petitioner amended its request for recognition petition by adding the title Associate In _____ (Teaching a Course) and deleting nursery school assistants, community teaching fellows and acting instructors, titles which were not in use at UCSD. On June 29, 1994, the PERB regional director determined that the amended request for recognition had sufficient proof of support. Accordingly, the titles at issue before PERB are Readers (title codes 2850, 2851 and 2500), Tutors (title codes 2860, 2861 and 2510) and Associates (title

²PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

code 1506). The approximate membership of the proposed unit is 450.

The University filed a response to the amended request for recognition on July 27, 1994, disputing the appropriateness of the unit for the same reasons it opposed the original petition.

On September 19, 1994, the Petitioner filed a motion with the ALJ to consolidate the hearing in this case with hearings for related, but not identical, request for recognition petitions concerning the University's campuses at Davis (UCD), Los Angeles (UCLA), and Santa Barbara (UCSB).³ The ALJ granted the motion in part on October 28, 1994. The ALJ ordered the consolidation of the records in the four separate requests for recognition cases, thus assuring that much of the University's case-in-chief offered in the UCSD hearing would not need to be duplicated in

³The Petitioner was seeking only to consolidate the separate hearings, not the petitions themselves for the purpose of forming a single multi-campus bargaining unit. The request for recognition petition concerning UCD (Case No. SF-RR-806-H), filed on June 30, 1993, seeks a unit comprised of Readers, Tutors, Acting Instructors, Community Teaching Fellows, Nursery School Assistants, Teaching Assistants, Associates in _____ and Research Assistants.

On March 31, 1994, a petition was filed concerning UCLA (Case No. SF-RR-813-H) which, as amended, proposes a unit of Readers, Special Readers, Tutors, Remedial Tutors/Part-Time Learning Skills Counselors, Teaching Assistants, Associates in _____, Teaching Fellows and Research Assistants.

On June 27, 1994, a petition was filed concerning UCSB (Case No. SF-RR-815-H) seeking a unit of Readers, Tutors, Remedial Tutors, Acting Instructors, Nursery School Assistants, Teaching Assistants, Associates in _____, Teaching Fellows, and Research Assistants.

the other cases. The Petitioner's request for a single formal hearing for all four cases was denied.

Thirty-two days of formal hearing were held between February 6 and June 9, 1995. Briefs were filed and the case was submitted to the ALJ on August 19, 1995. The ALJ's proposed decision was issued on October 20, 1995.

Following extensions of time granted to the parties to file the University's exceptions and the Petitioner's response, the filings were completed April 8, 1996.

INTRODUCTION

Under HEERA, an employee organization may request that the University recognize it as the exclusive representative of the employees of a proposed bargaining unit for the purpose of meeting and conferring with the University over terms and conditions of employment. (HEERA sec. 3573.) The University will grant the employee organization's request to become the exclusive representative of the proposed unit, unless, among other reasons, the University reasonably doubts the appropriateness of the proposed unit. (HEERA sec. 3574.)

In response to the Petitioner's request for recognition petition, the University denied recognition to the Petitioner as the exclusive representative, asserting that the unit proposed by the Petitioner was inappropriate because it included student employees who are not covered by HEERA. HEERA section 3562(f) defines an employee of the University:

'Employee' or 'higher education employee'
means any employee of the Regents of the

University of California, . . . However, managerial, and confidential employees shall be excluded from coverage under this chapter. The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter. [Emphasis added.]

Accordingly, the Board must determine whether students employed by the University at UCSD as readers, tutors and associates are employees under HEERA and, therefore, are entitled to negotiate with the University over the terms and conditions of their employment.

The Statutory Test

HEERA section 3562(f) (hereafter subsection (f)) sets out a three-part test to determine whether collective bargaining rights should be extended to student employees.

Under the first part of the test, the Board must determine whether employment of student employees is contingent on their status as students. If so, the Board must proceed to apply the subsection (f) test. If not, the student employees are employees under HEERA and the remainder of the subsection (f) test need not be applied.

Under the second part of the test, the Board must determine whether the services provided by student employees are related to their educational objectives. If so, the Board must proceed to apply the third part of the subsection (f) test. If the services provided by the student employees are unrelated to their

educational objectives, they are employees under HEERA and the third part of the subsection (f) test need not be applied.

The third part of the test has two-prongs. Under the first prong, the Board must determine whether the educational objectives of student employees are subordinate to the services they perform. Under the second prong, the Board must determine whether coverage of the student employees under HEERA would further the purposes of the Act. In order for the Board to conclude that student employees are employees under HEERA, affirmative determinations must be made under both prongs.

BACKGROUND

The issue of student employee bargaining rights under HEERA has come before PERB and subsequently the courts in two prior cases, both of which have involved the application of subsection (f).

In Regents of the University of California v. Public Employment Relations Bd. (1986) 41 Cal.3d 601 [224 Cal.Rptr. 631] (Regents), the Supreme Court upheld the Board's decision that housestaff (medical interns, residents and clinical fellows in residency programs at University hospitals) were employees under HEERA. In this case, the court considered the legislative history behind the enactment of HEERA. Initially the court noted that prior to final passage of the Act, the Legislature amended it to remove a specific hourly standard under which a student employee would be determined to be an employee for purposes of HEERA. Thus, the Legislature left the determination of student

employee status to PERB. The court concluded that subsection (f) requires PERB to make a "case-by-case assessment of the degree to which a student's employment is related to his or her educational objectives." (Regents at p. 607.)

The court then considered whether the Legislature intended the language of subsection (f) to incorporate the precedent of the National Labor Relations Board (NLRB), which held that housestaff in the private sector were not employees under the National Labor Relations Act. In two NLRB decisions involving housestaff, a majority of the NLRB adopted a "primary purpose" test which focused primarily on the students' motivation for participating in housestaff programs. The majority concluded that the students' interests in their own educational development by participating in residency programs, outweighed their interests in providing services. The dissent in these cases concluded that the housestaff's motivation was irrelevant, believing that the focus should be confined to the services actually performed by the student employees.

Based upon its review of these NLRB decisions, a majority of the court in Regents concluded that the Legislature intended to create a new standard in the HEERA, rather than follow NLRB precedent. The court found that subsection (f) represents a compromise between the NLRB's majority and dissenting opinions, requiring that both factors, a student's purpose for participating in the position and the services provided, be considered. With this position, the majority in the Regents case

rejected the dissent's view that it would be impossible for PERB to balance a student's "subjective" educational objectives against the "objective" services performed. The court stated:

The Legislature has instructed PERB to look not only at the students' goals, but also at the services they actually perform, to see if the students' educational objectives, however personally important, are nonetheless subordinate to the services they are required to perform. Thus, even if PERB finds that the students' motivation for accepting employment was primarily educational, the inquiry does not end here. PERB must look further -- to the services actually performed -- to determine whether the students' educational objectives take a back seat to their service obligations. [Regents at p. 614, fn. omitted.]

The court instructs, therefore, that even if all the student employees agreed that their purpose in seeking student academic employment was to further their educational objectives, the Board could determine that those educational objectives were subordinate to the value of the services they provided to the University.

Applying this standard, the court in Regents found that there was substantial evidence to support the Board's finding under prong one of the third part of the statutory test, that the educational objectives of housestaff were subordinate to the services they provided. There was evidence that housestaff sought to participate in residency programs in order to obtain extensive medical training. However, these educational objectives were found to be subordinate to the valuable patient care services they provided.

The court also found support for the Board's determination under prong two, that the purposes of HEERA would be furthered by extending collective bargaining rights to housestaff. The Board found that there were substantial employment concerns which affect housestaff and that certain issues, such as salaries, vacation time, fringe benefits and hours, were "manifestly amenable to collective negotiations." (Regents at p. 622.) The Board also concluded that by providing housestaff with a mechanism for resolving disputes, harmonious and cooperative labor relations between the University and housestaff would be furthered. Accordingly, the court affirmed the Board's determination that housestaff were employees for purposes of HEERA.

PERB addressed the student employee issue a second time in Regents of the University of California (AGSE) (1989) PERB Decision No. 730-H (UC (AGSE)). In this case, the Board considered whether graduate students at UC Berkeley appointed to graduate student instructor (GSI) and graduate student researcher (GSR) positions were employees covered by HEERA. After reviewing the Regents decision, the Board concluded that there were significant factual differences between the housestaff in Regents and the graduate student employees in this case. The Board noted the difficulty in balancing a seemingly subjective element (educational objectives) against an objective one (services performed). Based upon these considerations, the Board in

UC (AGSE) found it necessary to "recalibrate" the scale in the first prong of the statutory test set forth in Regents. Under this new approach, the Board focused on the apparent conflicts between the student employees' academic and employment interests. The Board concluded that the educational objectives of GSIs and GSRs were not subordinate to the services they provided because where conflict existed between academic and economic considerations, academic considerations prevailed.

Applying the second prong of the test, PERB also found that the purposes of HEERA would not be furthered by extending collective bargaining rights to GSIs and GSRs for several reasons, including: (1) impact on the student/faculty mentor relationship; (2) the economic nature of collective bargaining would override academic goals; (3) impact on the academic nature of the selection process; (4) instability resulting from the continuous movement of graduate students in and out of the unit; and (5) the impossibility of separating academic and economic matters. Accordingly, the Board concluded that graduate students appointed to GSI and GSR positions at UC Berkeley were not employees for purposes of HEERA.

On appeal, the court in Association of Graduate Student Employees, District 65, UAW v. Public Employment Relations Bd. (1992) 6 Cal.App.4th 1133 [8 Cal.Rptr.2d 275] rev. den. August 13, 1992 (AGSE), found that the Board erred by establishing a new test which conflicted with the standard set forth in Regents. The court held that the Board's "recalibration

of the scales" had so distorted the first prong of the test that the Board's conclusion was suspect unless saved by its ruling under the second prong. The court stated the proper test under the first prong:

'Case-by-case analysis' would call upon PERB to consider all the ways in which GSI and GSR employment meet educational objectives of the students and all the ways in which the employment provides services and to compare the value and effectiveness of the employment in meeting the students' educational objectives with the value and effectiveness of the employment in providing services. PERB, with its expertise, would then make a judgment about whether the employment was more valuable and effective in meeting educational objectives or in providing service to the University: whether the 'educational objectives are subordinate to the services' the students perform. [AGSE at p. 1143, emphasis in original.]

Although the court rejected the Board's first prong test, it upheld the Board's conclusion that GSIs and GSRs were not employees under HEERA, finding that the Board properly applied the second prong of the statutory test. The court concluded that there was substantial evidence to support the Board's determination that the purposes of HEERA would not be furthered by extending collective bargaining rights to GSIs and GSRs.

These cases provide guidance to the Board in the application of subsection (f) to the student employees at issue in the present case.

APPLICATION OF THE STATUTORY TEST

Part One: Is Employment Contingent on Student Status?

The ALJ held that employment as a reader or a tutor is not contingent on status as a student. Under the subsection (f) test, this holding is sufficient to conclude that readers and tutors are employees under HEERA. The ALJ reached this conclusion by noting that while students are given preference for these positions, non-students are also hired in order to meet the needs of the University. Under the ALJ's reasoning, if a single non-student is hired as a reader or tutor, then employment in these positions is not contingent on status as a student.

The University argues that this finding is overly rigid, and contends that it is irrelevant that non-students are placed in positions occupied primarily by student employees. The question presented by this case, the University asserts, is whether the employment of students as readers, tutors and associates is contingent on their status as students. The University contends that current registration as a student is not an appropriate measure of employment contingency. The University points out that the non-student employees in question generally have had a very recent student relationship with the University as either temporarily non-registered students or recent graduates who have yet to begin graduate school. The University also notes that in Regents the residents and interns at issue had graduated from their degree programs and were not currently registered students. Nonetheless, the court proceeded to apply the statutory test to

these housestaff to determine if they were employees under HEERA.

Initially, the Board notes that part one of the subsection (f) test requires PERB in this case to determine whether the employment of students as readers, tutors and associates⁴ is contingent on their status as students. The fact that the University may employ non-students to perform some of the same functions as these student employees is irrelevant to the Board's determination.

The record clearly establishes that reader and tutor positions are essentially student employment positions. As explained by Vice Chancellor of Student Affairs Joseph Watson, students are given preference for employment in these positions, and non-students are considered for employment as readers and tutors only after the pool of available, qualified students has been exhausted. Of the 1,078 reader positions filled at UCSD during the five academic quarters from the fall of 1993 through the fall of 1994, 1,057 were filled by registered students. Of the 1,255 tutor positions filled during the same period, 1,082 were filled by registered students. These 2,139 registered students were given preference for employment as readers and tutors because they were students. Thus, their status as students was a key consideration in the employment being made available to them by the University.

⁴It is undisputed that the employment of students as associates is contingent on their status as students, and the remainder of this discussion focuses on readers and tutors.

The University correctly points out that actual, current registration as a student was not a factor in the court's application of the statutory test in Regents. In fact, the court observed that housestaff lacked "most indicia of student status." (Regents at p. 620.) The court noted that housestaff paid no tuition or student fees, completed no registration process, took no examinations, and received no grades. However, employment as housestaff required graduation from medical school and a fundamental purpose of the employment was to further the medical education of housestaff. The court did not apply a requirement of current registration as a student in order to proceed to apply the subsection (f) test to housestaff.

The record contains ample evidence supporting the application here of the perspective employed by the court in considering the housestaff in Regents. The vast majority of readers and tutors are registered as students during their employment. The evidence demonstrates that those who are not registered also have a recent academic relationship with UCSD, such as students taking a temporary break from their studies, or recent graduates waiting to begin or resume their graduate work. For example, Scott Penrose-Kafka was not a registered student when he was employed as a tutor because he was waiting to take a final course needed for graduation. Gary Gillespie took time off from his graduate studies, but continued working as a tutor. Director Victor Cifarelli of the Office of Academic Support and Instrumental Services (OASIS) explained that non-student OASIS

tutors are typically individuals who were registered students when appointed to a tutor position, but who did not register for classes the following quarter. From the viewpoint of the Regents court's consideration of housestaff, there can be little doubt that the employment of students as readers and tutors is contingent on their status as students, and PERB must proceed to apply the subsection (f) test to determine if these student employees are employees under HEERA.

This finding is consistent with the significant public policy considerations which are the underpinnings of the subsection (f) statutory test. As the court instructs in Regents, the subsection (f) test gives PERB the responsibility to balance the educational objectives and service obligations of student employees to determine whether they should be given HEERA bargaining rights. The finding that the employment of students as readers, tutors and associates is contingent on their status as students permits PERB to fulfill this responsibility. Consequently, the Board concludes that the employment of students as readers, tutors and associates is contingent on their status as students.⁵ Thus, we reverse the ALJ's contrary finding with

⁵Member Dyer agrees with the ALJ's determination that readers' and tutors' employment is not contingent on their status as students and that readers and tutors are, consequently, employees under HEERA. Accordingly, Member Dyer does not join in the Board's analysis of Part One of the statutory test. However, Member Dyer agrees that the application of the remainder of the statutory test also leads to the conclusion that readers, tutors, and associates are employees under the HEERA. Therefore, Member Dyer specifically joins in the Board's analysis of Parts Two and Three of the statutory test.

regard to readers and tutors.

Part Two: Are the Services Provided by the Student Employees Related to Their Educational Objectives?

In previous cases, the Board and the courts have accepted as a given fact that the services provided by the student employees in question were related to their educational objectives. In this case, however, the ALJ rejected that assumption with regard to readers, finding that the services they provide are unrelated to their educational objectives. The ALJ defined the educational objectives of readers as securing their degrees and obtaining better credentials for their careers or graduate school. He concluded that the primary duties of readers, grading examinations and term papers, were not effective ways for readers to achieve their educational objectives. Based on this conclusion alone, the application of the subsection (f) statutory test would cease, and readers would be found to be employees under HEERA.

The Board disagrees with this conclusion for several reasons. First, this part of the statutory test does not call upon the Board to evaluate the effectiveness with which employment as a reader, tutor or associate furthers the educational objectives of students. It requires the Board to determine whether there is any relationship between the services provided and those educational objectives. If there is, the application of the statutory test must continue to balance those objectives in relation to the services performed by the student employees. Under this part of the statutory test, non-academic

student employees would likely be found to be employees under HEERA. For example, if the University made cafeteria worker positions available to students as a means of assisting them in meeting their financial needs, it is likely that the services provided by those student employees would be unrelated to their educational objectives. In the current case, the Board must assess whether there is any relationship between the educational objectives and services performed by certain student academic employees.

Second, the University correctly points out that the educational objectives of students are broader than those described by the ALJ. The most fundamental educational objective of a student is to become educated - to learn and master a subject matter or field of study. Readers, tutors and associates testified that their student academic employment assisted in their educational development by increasing their learning with regard to the subject material and assisting in development of skills needed for their own course work.

Third, it is difficult to imagine how the academic employment of students in areas associated with their fields of study could be found to be wholly unrelated to their educational objectives. The record clearly establishes a relationship between the fields of study of students employed as readers, tutors and associates and the areas in which they are employed. A reader is assigned to a course related to the reader's field of study, and is expected to have either completed the course or

demonstrated familiarity with its subject matter. Similarly, a tutor provides assistance to other students, or serves as a teaching assistant in subject areas with which the tutor is familiar and proficient. Associates teach courses in areas closely related to their own fields of graduate study.

Our review of the record leads the Board to conclude that the services provided by readers, tutors and associates are related to their educational objectives. Therefore, we reverse the ALJ's contrary finding with regard to readers.

Part Three - Prong One: Are the Educational Objectives of the Student Employees Subordinate to the Services They Provide?

Appropriately, the determination of whether student readers, tutors and associates are employees under HEERA turns on the application of the third part of the statutory test. The first prong of this test directs the Board to determine whether the educational objectives of student readers, tutors and associates are subordinate to the services they perform. As the Regents court stated:

The Legislature has instructed PERB to look not only at the students' goals, but also at the services they actually perform, to see if the students' educational objectives, however personally important, are nonetheless subordinate to the services they are required to perform. [Regents at p. 614.]

The court of appeal in AGSE held that the proper application of this prong of the test requires PERB to conduct a case-by-case analysis of "all the ways" in which the employment meets the educational objectives of the students and "all the ways" in which the employment provides services. PERB is to "make a

judgment about whether the employment was more valuable and effective in meeting educational objectives or in providing service to the University." That judgment determines whether the "educational objectives are subordinate to the services." The AGSE court instructs that "the statute and Regents decision call for a value judgment about which is subordinate, not a scientific weighing process." In making this value judgment, the Board must consider how vital employment as a reader, tutor or associate is to the achievement of students' educational objectives, and how vital the services provided by readers, tutors and associates are to the accomplishment of the educational mission of the University. In Regents, the court applied this part of the subsection (f) test by considering whether "services must be performed without regard to whether they will provide any educational benefit" to the students performing them.

As noted above, the ALJ described student educational objectives as, primarily, to obtain a degree and to prepare for employment or graduate studies. The University contends that this description is too narrow and fails to consider "all the ways" in which students' employment meets their educational objectives. The University identifies four categories of student educational objectives which are furthered by employment as a reader, tutor or associate: mastery of subject matter, obtaining experience which helps to define career and educational goals, developing relationships with faculty, and obtaining valuable academic and career qualifications.

The University cites the testimony of its witnesses that using students in these positions is neither the most efficient nor most effective way of filling these positions. Instead, the University requires that these appointments be given to students, where possible, to provide them with financial support and teaching experience, particularly graduate students, and to assist them in maintaining an academic focus. The University acknowledges that it receives a benefit from the services provided by students serving as readers, tutors and associates, but asserts that it could continue to operate effectively without the use of these student academic employees.

In sum, the University argues that the weight of the evidence demonstrates that the educational objectives of students employed as readers, tutors and associates are not subordinate to the services they perform.

The Board disagrees.

The record reveals that the value and effectiveness of employment as a reader does not appear to be substantial in meeting students' educational objectives. While employment as a reader contributes to a student's mastery of a particular subject matter, readers typically have little interaction with faculty or other students as part of their duties. Exposure to the teaching process is limited to the grading of examinations and papers, and employment as a reader meets or fulfills no academic requirement or qualification. Employment as a reader is not a particularly

effective means of achieving the educational objectives described by the University.

In contrast, the value and effectiveness of the services provided by readers are essential to the University's educational mission. Several witnesses testified that the absence of readers would require fundamental changes to the current academic processes of the University, resulting in detrimental effects on the educational enterprise. Further, the University's assertion that it could provide these services by hiring a sufficient number of professional, non-student readers possessing the required academic expertise is problematic given the extremely large numbers of positions involved and the relatively modest wages currently paid to readers. More importantly, the University's assertion appears to be tacit acknowledgment that reader services are essential to the University and must be provided, regardless of whether they are performed by students. It is clear that the services provided by readers are vital to the academic mission of the University.

As correctly determined by the ALJ, application of this part of the subsection (f) statutory test leads to the conclusion that the educational objectives of readers are subordinate to the services they perform.

The majority of tutors at UCSD provide services through the OASIS program to help students overcome academic deficiencies and assist students seeking to excel in a particular academic subject. Other tutors serve as undergraduate teaching

assistants, leading course discussion sections, conducting review sessions, holding office hours and grading papers and examinations. Some graduate student tutors assist departments by coordinating academic enrichment projects designed to assist other graduate students.

Tutors testified that while obtaining an income was a motivating factor in seeking a tutor position, serving as a tutor helped them achieve certain educational objectives. As a result of their experience as tutors, they achieved a deeper understanding of academic subject matter, developed useful relationships with faculty, and were able to experience and practice teaching skills. Thus, employment as a tutor is helpful in achieving educational objectives.

The record also demonstrates that tutors are absolutely vital to the University's ability to fulfill its teaching mission. For example, the OASIS tutoring program is an essential component of UCSD's effort to encourage student retention and academic success. The use of tutors as undergraduate teaching assistants to assist faculty in large classes is vital to the academic achievement of many students.

The "value judgment" the court directs PERB to make asks the Board to consider if tutor services must be provided, regardless of whether student tutors receive any educational benefit from the employment. It is virtually undisputed that tutor services must be offered at UCSD. The University does not argue that these services can be eliminated, instead asserting that they can

be redistributed to faculty and/or assigned to non-student tutors. As with readers, this assertion is problematic given the numbers of positions involved. But more importantly, it is a clear statement by the University that the services provided by tutors must continue to be provided in order to achieve the academic mission of the University. Since tutor services must be provided irrespective of who provides them, the value and effectiveness of employment as a tutor in meeting students' educational objectives is subordinate to the value and effectiveness of the services tutors provide.

The ALJ correctly concluded that the educational objectives of student tutors are subordinate to the services they perform.

Students appointed to associate positions have full authority over a particular course, including selecting the textbooks, preparing the course syllabus, delivering the lectures, designing the course assignments and examinations, holding office hours, and determining student grades. The work of associates is virtually indistinguishable from that of other faculty with complete responsibility for teaching a course. According to Dean Richard Attiyeh, associates are qualified to accept a regular faculty appointment. In fact, two associates testified that they were asked to step in and teach courses when the regular faculty members were granted leave.

Employment as an associate meets several educational objectives, such as providing students with teaching skills and experience. Employment as an associate provides valuable

experience to doctoral degree candidates who will eventually seek permanent faculty positions. However, the small number of associate positions indicates that employment as an associate is not the method by which graduate students typically achieve these educational objectives. While some graduate students may be required to obtain teaching experience as part of an advanced degree curriculum, there are numerous ways, including employment as an associate, in which to fulfill that requirement.

The employment of associates is necessary to meet the service needs of the University. Associates, performing duties identical to those of regular faculty members, are a critical component of the University's academic program. The courses taught by associates are part of the University's core curriculum and must be offered to meet the educational needs of the students enrolled in those classes. The University must provide instructors for those courses, and associates or other qualified individuals must be employed to serve in that capacity. When conflicts occur between an associate's teaching and personal academic obligations, the teaching duties take precedence because they are more immediate and affect large numbers of other UCSD students. For example, two associates testified that work on their own dissertations was slowed by the demands of the associate position.

The University uses associates to teach essential courses which are indistinguishable from courses taught by other faculty. These services must be provided, regardless of whether associates

fulfill an educational objective while performing them. Therefore, the educational objectives of associates are subordinate to the services they provide to the University as held by the ALJ.

Under the first prong of part three of the subsection (f) statutory test, the Board concludes that the educational objectives of students employed as readers, tutors and associates are subordinate to the services they perform.

Part Three - Prong Two: Would Coverage of the Student Employees Under HEERA Further the Purposes of the Act?

Under this final portion of the statutory test, the Board must determine whether coverage under HEERA of students employed as readers, tutors and associates would further the purposes of the Act.

As a preliminary matter, in light of this Board's 1989 decision in UC (AGSE), the University argues that the fundamental matter at issue here already has been decided, i.e., that extending HEERA coverage to these student employees would disrupt the pursuit of excellence at the University which the Act seeks to encourage. However, questions of representation are inherently dynamic since job duties may fluctuate substantially over time. As a result, the Board has long held that representation matters are subject to periodic re-examination, especially where no representative is in place, to determine whether circumstances have changed. Prior unit determinations are binding only "to the extent that circumstances are the same

and Board precedent remains the same." (Regents of the University of California (1986) PERB Decision No. 586-H; see also, State of California (Department of Personnel Administration) (1990) PERB Decision No. 794-S.)

The Board's decision in UC (AGSE) was based on conditions and job duties existing on the UC Berkeley campus in 1984. We do not find those conditions and duties, or the Board decision based on them, determinative of the status of student employees at UCSD more than a decade later.

We begin our application of this prong of the subsection (f) statutory test by identifying the purposes of HEERA. HEERA begins at section 3560(a) by stating the Legislature's finding and declaration that:

The people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees.

Section 3560(b) states that it would be "advantageous and desirable" to expand PERB's jurisdiction to cover the employees of the University of California. HEERA proceeds to establish a system of collective bargaining, to be administered by PERB, as the means of achieving harmonious and cooperative labor relations between the University and its employees.

HEERA section 3560(e) states:

It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by

statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them. It is the intent of this chapter to accomplish this purpose by providing a uniform basis for recognizing the right of the employees of these systems to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select one of these organizations as their exclusive representative for the purpose of meeting and conferring.

Thus, HEERA's expressed purpose is to permit the full participation by employees in the determination of the conditions of their employment by providing for a system of collective bargaining. It is axiomatic, therefore, that the extension of collective bargaining rights to University employees is consistent with, and in furtherance of, the expressed purpose of HEERA. To the extent that the University's position is based on the assertion that extending collective bargaining rights to student academic employees would fundamentally conflict with the University's educational mission, that position ignores and is inconsistent with HEERA's expressed purpose.

HEERA section 3561(a) states:

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

Thus, it is also HEERA's purpose to establish a process designed to promote the orderly resolution of disputes, and to describe conduct by both higher education employers and employee

organizations which is inimical to the purposes of the Act. Obviously, this purpose can only be furthered if the University and its employees are subject to the HEERA process.

HEERA section 3561(b) states:

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.

Thus, while providing for collective bargaining and a dispute resolution process, the Legislature has also specifically provided for the preservation under HEERA of joint decisionmaking between higher education employers and faculty members, and of peer review and tenure systems for academic employees. Further, HEERA recognizes that these systems are essential to the performance of the University's educational mission.

Finally, HEERA section 3561(c) states:

It is the policy of the State of California to encourage the pursuit of excellence in

teaching, research, and learning through the free exchange of ideas among the faculty, students, and staff of the University of California, Hastings College of the Law, and the California State University. All parties subject to this chapter shall respect and endeavor to preserve academic freedom in the University of California, Hastings College of the Law, and the California State University.

Thus, while encouraging the free exchange of ideas between faculty, students and staff, HEERA expressly seeks to preserve academic freedom at California's public institutions of higher learning. Thereby, HEERA encourages the "pursuit of excellence" at the University. Harmonious and cooperative labor relations result from a system of collective bargaining between the University and its employees which respects the concept of academic freedom. Under HEERA, these concepts - collective bargaining and academic freedom - coexist and complement one another. They are not mutually exclusive, as much of the University's argument seems to suggest.

The University excepts to the ALJ's finding that HEERA coverage for students employed as readers, tutors and associates would further the Act's purposes. The University argues that the evidence establishes that granting collective bargaining rights to these student employees would interfere with academic policy and result in difficult and protracted efforts to define the scope of representation in relation to academic matters.

The Regents court characterized similar arguments by the University in that case as a "doomsday cry" which was "somewhat exaggerated" and "premature." The Board rejects the University's

argument here as well. HEERA expressly provides for the preservation of academic freedom at the University, as well as its systems of joint decisionmaking, peer review and tenure for academic employees. Coverage by the Act can not and will not be allowed to undercut these systems and processes, which are singled out for protection and preservation by HEERA's own terms.

Further, HEERA expressly enumerates subjects which are excluded from the scope of representation for purposes of collective bargaining with the University. HEERA section 3562(q)(1) states that the scope of representation at the University shall not include:

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

Therefore, the University retains the unfettered prerogative to determine what and how services, academic and non-academic, are to be offered and delivered. Those services include those performed by student readers, tutors and associates.

Of particular note is HEERA section 3562(q)(3) which excludes from the scope of representation:

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

Therefore, any concern by the University that degree requirements and aspects of course work or research may become the subject of

collective bargaining with student readers, tutors and associates is misplaced, as these subjects are outside of the HEERA scope of representation.

Additionally, HEERA section 3652(q)(4) excludes from the scope of representation:

Procedures and policies to be used for the appointment, promotion, and tenure of members of the academic senate, the procedures to be used for the evaluation of the members of the academic senate, and the procedures for processing grievances of members of the academic senate. The exclusive representative of members of the academic senate shall have the right to consult and be consulted on matters excluded from the scope of representation pursuant to this paragraph. If the academic senate determines that any matter in this paragraph should be within the scope of representation, or if any matter in this paragraph is withdrawn from the responsibility of the academic senate, the matter shall be within the scope of representation.

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

Again HEERA seeks to preserve various processes and policies in use at the University by an academic senate. Further, subjects not within the scope of representation, such as degree requirements, course content and curricula "may not be subject to meeting and conferring."

To the extent, despite this guidance, that disputes arise over whether a subject is within the scope of representation,

HEERA section 3563(b) provides that PERB shall have the right, power, duty and responsibility:

To determine in disputed cases whether a particular item is within or without the scope of representation.

With these specific exclusions, safeguards and processes in place, the Board concludes that HEERA coverage of students employed as readers, tutors and associates poses no threat to the pursuit of excellence at the University, or its academic processes, or its ability to effectively manage its operations.

The University asserts that HEERA coverage for students employed as readers, tutors and associates will have a detrimental impact on the faculty/student mentor relationship. This relationship, which is particularly essential between graduate students and faculty members of dissertation committees, is, at its core, an academic one. As noted, HEERA specifically excludes from the scope of representation at the University "conditions for the award of certificates and degrees to students," as well as "the content and supervision of courses, curricula, and research papers." Therefore, HEERA contains protections against the interjection of collective bargaining into the academic aspects of the mentor relationship between graduate students and dissertation committee members. With regard to the more general relationship between student employees and faculty, it appears that this protection and the existence of a HEERA process designed to resolve disputes involving terms and conditions of employment which are within the scope of

representation, would free student employees and faculty to concentrate on the academic aspects of their relationships.

The University also argues that the ALJ's analysis under this prong of the subsection (f) test is incorrectly based on a presumption of the positive effects of collective bargaining coverage for employees.

HEERA is a collective bargaining law. It is based on a legislative determination that relations between higher education employers and their employees will be more harmonious and cooperative if employees have the right to be collectively represented in those relations with regard to terms and conditions of employment. Therefore, the Act is based on the presumption of the positive aspects of collective bargaining. Consideration of the ways in which those positive aspects will apply with regard to student readers, tutors and associates is the appropriate approach to application of the subsection (f) statutory test.

As noted by the ALJ, the free exchange of information would be furthered by the presence of a collective bargaining relationship between the University and student readers, tutors and associates. Collective bargaining provides a proven mechanism for communicating ideas and concerns about negotiable working conditions and a process for resolving problems and grievances. Under HEERA, that process includes mediation and factfinding, procedures which are designed to reduce the

possibility of job actions which could interrupt or disrupt the delivery of the vital services provided by the University.

(San Diego Teachers Association v. Superior Court (1979)

24 Cal.3d 1 [154 Cal.Rptr. 893].) Clearly, the HEERA process is more likely to result in dispute resolution prior to work stoppages or interruptions than a labor relations environment which does not provide for mediation and factfinding.

Based on the foregoing, and on the ALJ's discussion in the attached proposed decision, the Board concludes that coverage under HEERA of students employed as readers, tutors and associates would further the purposes of the Act.

APPROPRIATENESS OF THE UNIT

The University objects to the finding by the ALJ that the University waived its right to challenge the appropriateness of a campus unit of student employees at UCSD. The University claims that the issue of establishment of a campus unit versus a statewide unit remains alive. The question has not been ripe for consideration, the University asserts, while the issue of whether student readers, tutors and associates are employees under HEERA remains in dispute. Only when the employee status of the various classifications has been determined, the University argues, is it possible to evaluate the composition of the bargaining unit. Until that time, the University argues, it should have the opportunity to continue making its record on appropriateness through a consolidated hearing.

The University offered this argument in its post hearing reply brief to the ALJ. There, in a footnote, the University observed that once the issue of employee status is determined there might be issues remaining concerning the appropriateness of the unit. The ALJ summarily rejected this assertion, noting that the University had not previously contested the appropriateness of a campus unit. Although the University previously had stated that non-student employees should be accreted into bargaining Unit No. 18, it offered no evidence on this issue at the hearing nor did it argue the question in its brief. Moreover, the University never specifically contested the appropriateness of a campus unit at UCSD should students employed as readers, tutors and associates be determined to be employees under HEERA.

We agree with the ALJ that the University had a full opportunity to raise issues of unit appropriateness in the hearing. It failed to do so. We hold, therefore, that the University has waived any arguments that the unit sought by the Petitioner is inappropriate for reasons other than employee status under subsection (f).

SUMMARY

The Board has applied the HEERA section 3562(f) statutory test, and reached the following conclusions:

- the employment of students as readers, tutors and associates is contingent on their status as students;
- the services provided by students employed as readers, tutors and associates are related to their educational objectives;

- the educational objectives of students employed as readers, tutors and associates are subordinate to the services they perform; and
- coverage under HEERA of students employed as readers, tutors and associates would further the purposes of the Act.

Based on these conclusions, the Board finds that the individuals in dispute in this case are employees under the HEERA, and that the unit requested by the Petitioner is appropriate for negotiating with the Regents of the University of California at the San Diego Campus, provided an employee organization becomes the exclusive representative of that unit.

ORDER

The following unit is found to be appropriate for meeting and negotiating at the University of California San Diego campus.

The unit shall Include All:

Readers
Tutors⁶
Associates In _____ (Teaching a Class)

The unit shall Exclude All:

Managerial, Supervisorial and Confidential employees,
and All Other Employees.

An election will be conducted by the PERB San Francisco Regional Director in accordance with PERB Regulation 51300

⁶At the hearing, the University indicated that it may be revising the tutor title and title codes. This order includes all of the tutors that were the subject of this hearing, performing both tutoring duties and undergraduate teaching assistant duties by whatever title and in whatever title code that may result from such revision.

et seq. unless the University grants voluntary recognition pursuant to PERB Regulation 51330.

The Board hereby ORDERS that this case be REMANDED to the San Francisco Regional Director consistent with the attached Notice of Decision and Notice of Intent to Conduct Election.

Member Dyer joined in this Decision.

Member Johnson's dissent begins on page 39.

JOHNSON, Member, dissenting: I dissent from the conclusion that students at the University of California, San Diego campus (UCSD) serving as readers, tutors and associates are employees for purposes of collective bargaining under the Higher Education Employer-Employee Relations Act (HEERA or Act).

As the majority notes, HEERA is a collective bargaining statute which governs the rights and obligations of employees, employee organizations and the University of California (University) to jointly determine terms and conditions of employment. The Legislature determined in adopting HEERA, however, that the right to collectively negotiate terms of employment is not appropriate for all classes of University employees. For example, the Legislature expressly excluded managerial and confidential employees from coverage under HEERA. (HEERA sec. 3562(f).) The Legislature also placed limits on scope of representation matters which faculty units can address through collective bargaining. (HEERA sec. 3562(q)(4).)

The Legislature also recognized that student academic employees have a unique dual relationship with the University which is different from any other employment relationship covered by HEERA. Student academic employment, while educational in nature, also provides a service to the University and, thus, encompasses some of the characteristics of an employment relationship. Concerned that a traditional collective bargaining relationship may not be appropriate between the University and student academic employees, the Legislature directed the Public

Employment Relations Board (PERB or Board) to make a case-by-case assessment, weighing academic and employment considerations, and determine whether collective bargaining rights should be extended to student academic employees at issue. (Regents of the University of California v. Public Employment Relations Bd. (1986) 41 Cal.3d 601, 607 [224 Cal.Rptr. 631] (Regents); Association of Graduate Student Employees v. Public Employment Relations Bd. (1992) 6 Cal.App.4th 1133, 1143 [8 Cal.Rptr.2d 275] rev. den. August 13, 1992 (AGSE)).

In HEERA section 3562(f) (hereafter subsection (f)), the Legislature set out the standard under which PERB is to determine whether student academic employees are employees for purposes of HEERA. Subsection (f) defines an employee of the University:

"Employee" or "higher education employee" means any employee of the Regents of the University of California, . . . However, managerial, and confidential employees shall be excluded from coverage under this chapter. The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter. [Emphasis added.]

The majority opinion properly concludes under the first part of the statutory test that the employment of readers, tutors and associates at UCSD is contingent upon their status as students. The record supports the finding that these student academic employees must meet certain academic criteria, such as having previously taken the course to which they are appointed and

having attained a certain level of proficiency in the subject matter they are selected to teach or read for, in order to be appointed to these positions. Therefore, their employment is contingent on their student status. The fact that non-students, most of whom are temporarily non-registered students, perform the same functions as students, is irrelevant to the Board's responsibility to determine the employment status of students under subsection (f).

The majority also correctly finds that the services provided by readers, tutors and associates are related to their educational objectives under the second part of the statutory test. The student employees in these titles are engaged in academic work in subjects related to their fields of study. Student employees in each of these titles have testified that through these positions they have advanced their educational objectives by developing a deeper understanding of the course material, building important relationships with faculty and developing skills which have helped them in their own course work or will assist them in their future careers. Clearly, the services provided by readers, tutors and associates are related to the students' educational objectives.

I part company with the majority, however, under the third, two-prong test. Contrary to the findings of the majority, the evidence clearly supports a determination under the third part of the statutory test that extending collective bargaining to readers, tutors and associates would not further the purposes of

HEERA and, therefore, the petition should be dismissed.

Two-Prong Test

As discussed by the courts in Regents and AGSE, subsection (f) requires the application of a two-prong test to determine whether student academic appointees are employees for purposes of HEERA. The first prong of the test requires PERB to consider whether the student employees' educational objectives are subordinate to the services they perform. The Board must then, under the second prong of the test, evaluate whether the purposes of the Act would be furthered by extending collective bargaining rights to student academic employees in the disputed titles. The Board must find both that the students' educational objectives are subordinate to the services they provide and that the purposes of HEERA would be furthered, to conclude that the student academic employees in the disputed titles are employees under HEERA.

Prong One: Are the Student Employees' Educational Objectives Subordinate to Services they Provide?

To determine whether the student employees' educational objectives are subordinate to the services they provide, the court in AGSE instructed PERB to,

. . . consider all the ways in which GSI and GSR employment meet educational objectives of the students and all the ways in which the employment provides services and to compare the value and effectiveness of the employment in meeting the students' educational objectives with the value and effectiveness of the employment in providing services.
[AGSE at p. 1143, emphasis in original.]

The Board must then decide whether the work of readers, tutors

and associates is more valuable and effective in meeting the students' educational objectives or in providing services to the University.

The majority incorrectly characterizes its obligation here by weighing educational objectives against services and deciding which are least able to be eliminated. In other words, the majority concludes that the students' educational objectives are subordinate to the services provided because the University cannot function without these services.

The proper application of the test, however, requires the Board to weigh the value and effectiveness in the students achieving their educational objectives through these positions against the value and effectiveness in the students' provision of services to the University, and then determine which has greater value. If the University can continue to adequately provide these services without the assistance of readers, tutors or associates, then the value to the student academic employees in achieving their educational objectives through these positions is greater than the services the students provide, and the students' educational objectives are not subordinate to the services they provide.

Applying this standard to the disputed titles, as discussed below, I find that the educational objectives of readers are subordinate to the services they provide to the University. However, the evidence demonstrates that the educational objectives of tutors and associates are not subordinate to the

services they provide.¹

Readers

Readerships provide a wide range of effectiveness in meeting readers' educational objectives. Some readers viewed their readership simply as a job for which they were paid. Other than obtaining an income, these readers believed they derived no benefit from their work as a reader. In fact, some felt that the time spent on reader duties took time away from their own studies.

An equal number of readers found that in addition to receiving an income, they achieved important educational objectives through their readership. For example, by serving as a reader, Lea Hubbard interacted with faculty and was able to build relationships and get to know a particular faculty member before deciding whether to invite him to participate on her dissertation committee. Abraham Shragge purposefully sought to work with different professors to observe and learn different teaching methods. As a reader for a math class, Trang Vu

¹As a preliminary matter, I find that the administrative law judge's (ALJ) determination of the students' educational objectives is too narrow and ignores the learning objectives expressly identified by the students. Student academic employees have a range of educational objectives which they seek to attain as they progress toward the successful completion of their academic careers and the beginning of their professional careers. Based upon the evidence presented, including the students' stated motives for seeking these positions, I conclude that the educational objectives of readers, tutors and associates are, to obtain: (1) a deeper understanding of the subject matter; (2) experience which helps them define education and career goals; (3) beneficial relationships with faculty; and (4) valuable academic and career qualifications.

achieved a deeper understanding of the material and strengthened her own problem solving skills.

Clearly what a student gains from a readership depends on the student's motivation and expectations in seeking the readership. If a reader takes advantage of the opportunities to interact with faculty, observe and practice teaching methods, and master the subject matter by reviewing the assignments and attending the class lectures, a readership can be valuable and effective in meeting educational objectives.

In meeting the needs of the University, Dr. Ellen Switkes (Switkes), Assistant Vice President for Academic Advancement, testified that "readers and tutors are an important component of the University's academic enterprise." Without the services provided by readers and tutors the faculty would likely assign fewer papers which, according to Dr. Switkes, "would be bad for the educational enterprise." Michael Davidson, professor of literature, also felt that he would have to alter his manner of instruction if the services readers provide were not available. He stated,

Well, if I didn't have a reader in an upper division course that had a large enrollment, . . . I would probably rely more on tests and multiple choice kinds of situations than papers, but I think that's pedagogically irresponsible because . . . what you can ask on a multiple choice test is pretty minimal, whereas on a paper you can really get to see what they're thinking . . . [Par.] but I imagine you could hire outside the University, a person to do some grading for you.

Several witnesses proposed that the services provided by

readers could be performed by other University employees. For example, Dr. Switkes suggested that faculty and teaching assistants (TAs) could read more papers, hold more office hours and conduct more tutorial sessions. Dr. Barbara Sawrey (Sawrey), Vice Chair of the Chemistry and Biochemistry Department, stated that readers are used in the Chemistry Department to facilitate the rapid return of exams, but that in the absence of readers, TAs could meet grading needs. Joseph Watson, Vice Chancellor for Student Affairs, believes that it would be more efficient to hire professional readers, rather than use students who are distracted by their studies. However, because a readership can foster beneficial mentoring and academic objectives, he explained that the University promotes student readerships as a valuable part of a student's educational experience.

The evidence suggests that the elimination of reader services from the University altogether would change the University's "educational enterprise," by causing faculty to assign fewer papers or rely on multiple choice tests to measure academic achievement. While suggesting that the University could function without the services provided by readers, none of the University witnesses indicated that it would be beneficial to the academic enterprise. To maintain the current academic structure, the University would have to assign these functions to other University employees or develop a pool of professional readers. Clearly it appears that it would be difficult for the University to maintain its teaching mission if the services provided by

readers were eliminated or assigned to the faculty.

Nor has the University made a compelling case for the position that it could replace the services provided by student readers by hiring a pool of professional readers to attend lectures and grade assignments. The large number of readers that would be required and the sporadic nature of the services provided by student readers appears to make this alternative infeasible. A more plausible solution would be to assign reader duties to TAs since grading and attending lectures are already functions of the TA position.

Clearly, the services provided by readers are an important component of the University's teaching mission and readerships are a valuable and effective means of achieving this mission. In contrast, the value and effectiveness of a readership in meeting student educational objectives is not uniformly applicable to all student readers. For these reasons, I conclude that the educational objectives of readers are subordinate to the services they provide.

Tutors

In contrast to readerships, employment as a tutor is consistently effective in meeting the tutors' educational objectives. Tutors gain a deeper understanding of the course material by having to review and explain it to other students and they are better prepared for their own advanced courses and exams. Appointment to a tutor position leads to regular interaction with faculty from which students develop beneficial

student/faculty relationships and obtain insight into department programs and academic opportunities. Working closely with faculty members also assists the faculty in writing better letters of recommendation for tutors for graduate school admission and employment opportunities. Tutors are able to experience teaching, confirm career goals and learn teaching, communication and leadership skills which are important in professional endeavors. Work as a tutor also provides valuable experience for students entering the job market.

The varied functions of a tutor, reviewing material, instructing other students, grading assignments and interacting with faculty, provide a valuable and effective method to achieve the students' educational objectives.

The services provided by tutors are also important to the University's teaching mission. Tutors assigned to the Office of Academic Support and Instrumental Services (OASIS) provide individual and small group tutoring to encourage student retention and help students succeed academically. Tutors serving as TAs lead discussion sections for large classes, reviewing the material and answering questions for the students who are unable to meet individually with the professor.

However, the evidence indicates that others could more efficiently provide these services. As Acting Provost Daniel Wulbert (Wulbert) noted, the use of student tutors requires the University to constantly recruit and train new tutors. Tutors receive training for a full quarter and, yet, their tenure as a

paid tutor may end after only a single quarter.

There is evidence that the services required by the OASIS program could effectively be provided by career employees. For example, the tutorial program at the University's Los Angeles campus (UCLA) was successfully operated for years by career employees. UCLA subsequently decided, however, to utilize undergraduate students to provide tutoring services when it realized that the students themselves would benefit educationally from experience as a tutor. By appointing career employees to the OASIS program, tutorial services would continue to be available and it would significantly lessen the continuing efforts to recruit and train tutors, limiting turnover and providing stability to the program.

Similarly, the services currently provided by undergraduate TAs, were previously provided by graduate student TAs and post doctoral fellows. Jean Fort, Assistant Dean of Graduate Studies and Research, explained that during a sudden expansion in the undergraduate population, UCSD considered hiring recent University graduates to provide TA services. However, when the University discovered that serving as a TA was a valuable learning experience for the students, it decided to use undergraduates in these positions. As a secondary benefit, serving as a TA provides the students with financial support so they can better focus on their own studies.

Finally, the services provided by graduate student tutors to coordinate seminars and conferences, while of some educational

value to the University, do not appear to be essential services that only a graduate student could perform.

While the services provided by tutors are important to the University, it is not essential that these services be performed by tutors. On the other hand, the evidence demonstrates that experience as a tutor is a valuable and effective means to achieve the students' educational objectives. For these reasons, I find that appointment as a tutor is more valuable and effective in meeting the students' educational objectives than in providing services to the University and, therefore, I conclude that the tutors' educational objectives are not subordinate to the services they perform.

Associates

Employment as an associate is also effective in meeting the students' educational objectives. Once selected, associates are given full autonomy over teaching their assigned course, from selecting textbooks to lecturing to assigning grades. Richard Attiyeh, Vice Chancellor for Research and Dean of Graduate Studies, explained, an associate is a student who is "virtually qualified to accept a regular faculty appointment . . . someone who is quite far along in their professional training."

Experience as an associate assists graduate students in achieving professional training goals. Associates are able to practice teaching and develop teaching skills. In doing so, they increase their understanding of the material and their ability to communicate information to other students. It is also a highly

desired experience for their curriculum vitae which gives associates an advantage when seeking employment as college instructors. Experience as an associate also meets educational objectives by fulfilling academic requirements to perform teaching duties.

Employment as an associate also meets the needs of the University by filling an instructor position. However, the use of associates to meet this need is not essential to the University. As Provost Wulbert explained, it is more effective to use lecturers than associates. Lecturers comprise a large pool of trained instructors who serve the needs of the University. Lecturers repeatedly teach the same subjects, thus, limiting the need to prepare new course material each quarter. Nor are they distracted by their own studies as associates are. Finally, they require no supervision and are significantly less costly than associates.

By appointing graduate students who are near completion of their Ph.D. degree to associate positions, the University is providing them with an opportunity to gain experience in their future professions, more so than fulfilling the University's service needs. Because the University can obtain the services provided by an associate more efficiently and less costly by utilizing lecturers, employment as an associate is more valuable and effective in meeting the students' educational objectives than in providing teaching services for the University. Thus, I conclude that the educational objectives of associates are not

subordinate to the services they provide.

Applying the second prong of the test to readers, tutors and associates, I find that the purposes of HEERA would not be furthered by extending collective bargaining rights to students in the disputed titles.

Prong Two: Would Coverage Under the Act Further the Purposes of HEERA?

In reviewing the purposes of HEERA, the majority opinion cites policies which encourage employee participation "in the determination of conditions of employment which affect them." (HEERA sec. 3560(e).) However, reliance on the policies which describe the rights of University employees disregards PERB's obligation to first determine whether student academic employees are employees under HEERA entitled to negotiate terms of their employment.

In adopting HEERA, the Legislature declared that, "the people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations" between the University and its employees. (HEERA sec. 3560(a).) However, in appreciation of the academic mission of the University, the Legislature, when adopting HEERA, recognized that collective bargaining must exist in an atmosphere which encourages the long-accepted practice of "joint decisionmaking and consultation" between the University and its academic employees, and preserves the role of the faculty in setting policy on academic and professional matters through the Academic Senate and other "shared governance mechanisms and practices."

(HEERA sec. 3561(b).) These policies demonstrate that the Legislature was conscious of the unique role academic employees have in setting policy on academic and professional matters on University campuses and envisioned a cautious application of collective bargaining which did not displace the existing role of academic employees in the academic mission of the University.

In addition, the Legislature was attentive to the goal of preserving academic freedom in the University, and also declared that, "It is the policy of the State of California to encourage the pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the faculty, students, and staff of the University" (HEERA sec. 3561(c).)

The purposes of HEERA set forth by the Legislature are intended to promote harmonious and cooperative labor relations between the University and its employees through a collective bargaining relationship and, at the same time, respect the importance of the academic mission of the University to the people of the State of California. To determine whether this delicate balance would be furthered by extending collective bargaining rights to student academic employees serving as readers, tutors and associates, the effects of collective bargaining must be considered.

Separation of Academic and Employment Issues

An important consideration in deciding whether students appointed to reader, tutor and associate positions should be permitted to engage in collective bargaining to determine terms

and conditions of employment, is whether academic matters can be separated from the employment aspects of student academic employment.

Student academic employees experience a dual relationship with the University. As students, they expect the University to assist them in increasing their knowledge and developing skills necessary for professional careers, including the ability to evaluate information, communicate verbally and in writing, and conduct research. They also expect the University to provide them with opportunities to practice these skills in a nonthreatening setting before they enter a competitive job market. As employees, they are expected to provide services for the University by performing certain duties in areas related to their fields of study.

In Regents of the University of California (AGSE) (1989) PERB Decision No. 730-H (UC (AGSE)), the Board held that students at UC Berkeley in graduate student instructor (GSI) and graduate student researcher (GSR) positions were not employees under HEERA. The Board found,

. . . in some instances, it is virtually impossible to separate academics from economics. For example, the overlapping concerns in the selection and retention of GSIs and GSRs, hours of work, salary, and job security would involve the parties bargaining over the current academic practices. [p. 54]

In AGSE the court reviewed this decision, concluding that the record supported the Board's findings. The court stated, "If all these issues were removed from the bargaining process, too few

significant or meaningful issues would remain to make the process worthwhile." (AGSE at p. 1147.)

The Petitioner in this case, the Association of Student Employees, U.A.W., United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, contends that the separation of academic and employment issues can be accomplished through the collective bargaining process by negotiating the parameters of the bargaining relationship. Union witnesses point to contract language successfully negotiated at other universities which limits bargaining to employment matters and restricts an arbitrator's authority to rule on academic matters.

However, University witnesses, including those from other universities where contracts include the cited language, contend that contractual language written to avoid academic issues is not adequate to prevent encroachment into matters of academic policy. For example, job security provisions in other university contracts which require automatic reappointments or prevent the university from limiting the number of times a student can be appointed, hamper the university's ability to encourage students to move forward with their studies and attract new students through the availability of financial support. Susan Light testified that she selected UCSD for her graduate studies because there were jobs available and she could not fund her graduate education without some type of employment.

At the University of Manitoba, the university must reappoint students each quarter unless they are removed for disciplinary

reasons. In AGSE, the court cited an example involving Dutch graduate students where collective bargaining led to a "stagnant system because it has saturated the university system with permanent employees and prevented talented people from pursuing academic careers." (AGSE at p. 1147.)

The selection of student academic employees also involves academic matters. Faculty could lose the flexibility to guide students to assignments which would be beneficial to the student. Dr. Paul Saltman, professor of biology, testified that he has sought exceptions to student employee appointment criteria when he felt the student would benefit from the experience. He stated he has observed "transcending experiences . . . where the opportunity [to teach] has literally changed a kid's life." Joseph Duggan (Duggan), Professor and Associate Dean of the Graduate Division at UC Berkeley, testified that he has made exceptions to student appointment requirements involving the level of experience, grade point average, academic standing and support time limits. He also expressed a concern that with union representation any exceptions to appointment criteria or financial support limits for student employees would set a precedent that the union would use to alter appointment criteria.

At the University of Wisconsin, the university must obtain the union's permission before it can permit a student to work less than a minimum number hours. Dr. Judith Craig (Craig), Associate Dean at the University of Wisconsin, testified that the university finally stopped seeking union approval because the

requests were never granted, even when it was the student who wanted and needed the reduced workload in order to balance their studies.

At the University of Oregon, the faculty finds it difficult to prepare student academic employee performance evaluations because they are barred from considering a student's mastery of the subject matter they teach. A similar provision at UCSD, would alter graduate student evaluations currently prepared to measure how successfully graduate students are progressing in their academic careers.

In the proposed decision, the ALJ suggested that to prevent an infringement on the University's academic discretion, the University should simply maintain a strong position against such proposals or refuse to bargain altogether. The ALJ concluded that when disputes arise over scope of representation issues, PERB can distinguish academic from employment matters.

In addressing similar concerns over the difficulty in separating academic and employment issues, the court in AGSE stated:

The evidence before PERB warned of intractable problems in defining and limiting the scope of representation to prevent interference with academic policy. PERB was not required to conduct a laboratory experiment by granting bargaining rights and then overseeing difficult and potentially protracted efforts to define the scope of that representation. [AGSE at pp. 1147-1148.]

Accordingly, the court concluded that merely because PERB is authorized to resolve scope of representation matters, the Board

is not required to ignore the difficulty in separating academic and employment issues and extend collective bargaining rights to student academic employees.

The use of the grievance procedure is another avenue to academic matters. Although contract language purports to limit the authority of arbitrators to judge academic decisions, grievances claiming procedural matters can lead to academic issues.

For example, at several universities the unions have used the grievance procedure to challenge teaching requirements which are prerequisites for a degree. The unions have charged that teaching requirements unlawfully transfer work out of the bargaining unit. At the University of Wisconsin, the union asserted that the faculty have no role in establishing department teaching requirements, instead they claimed this decision rests with the university and the union at the bargaining table.

Other grievances have challenged the requirement that to receive an appointment students must be in good academic standing. At the University of Wisconsin, the union filed a grievance alleging that the university failed to post the job criteria for TA positions. In fact, the criteria had been posted, but the union used the opportunity to challenge the academic criteria.

In the University of California system, the faculty members of the Academic Senate are responsible for all academic policies and standards. The intrusion of an arbitrator into academic

matters would undermine the faculty's academic policy making role contrary to the stated purposes of HEERA. In addition, the establishment or modification of academic policies through collective bargaining would not further the pursuit of excellence in teaching, research and learning, nor would it preserve the faculty's role in setting policy on academic matters.

Student/Faculty Relationships

The Board and the court in AGSE also considered the "complex and fragile" nature of student/faculty mentor relationships. The court cited evidence in support of the Board's conclusion that collective bargaining would interfere with these "unique relationships."

In the proposed decision, the ALJ found that a mentor relationship "is limited primarily to the relationship between a graduate student and a dissertation committee chair, or sometimes a committee member," a relationship that offers "intense, lifelong guidance." It is true that a strong mentoring relationship between Ph.D. candidates and their dissertation directors is an important factor in the successful completion of a Ph.D. degree. However, this view of student/faculty relationships is much too narrow and disregards the support and guidance undergraduates and other graduate students receive. If in fact mentor relationships are limited only to Ph.D. candidates and their dissertation committee members, why does the University sponsor numerous programs designed to encourage the development of mentor relationships between faculty and undergraduate

students?

Several witnesses described a mentoring relationship as one where a professor will assist a student in their academic or professional development. Students turn to faculty for advice and help in clarifying their academic and career goals, and receive guidance to assist them in achieving their goals. Student witnesses described interactions with their supervising faculty members as mentor relationships. For example, Britt Loftesnes, a reader for a Teacher Education Program course, characterized her supervising faculty member as a mentor who advised her on teaching credential options and assisted her with career planning issues. Lea Hubbard testified that her readership led to a mentor relationship with her supervising professor. Her mentor encouraged her to write a paper which was accepted for presentation at a national conference. Dr. Sawrey described the camaraderie which exists between readers, TAs and faculty because they are working as a team on an educational venture. The student employees are socialized into the department where they interact with and learn from both faculty and advanced students.

Disputes which arise between students and faculty have the potential to damage student/faculty relationships. The University contends that an informal, collaborative approach to the resolution of disputes creates the least impact to student/faculty relationships. Union witnesses, however, assert that a formal grievance process depersonalizes disputes between

students and faculty. David Hecker (Hecker), Executive Assistant to the President of the Metropolitan Detroit AFL-CIO, argued that with collective bargaining, disputes are resolved by the union and the employer. He stated that a formal process removes the perception that an individual student employee is challenging an individual faculty member.

The University rejects the contention that collective bargaining depersonalizes disputes. Several witnesses testified that faculty view the formal grievance process as an accusatory approach. Dr. Craig stated there is a sense of discomfort among the faculty at having been publicly charged. Dean Duggan described the impact of a formal process:

[I]n the appeals process people -- people get very defensive, they get offended by what's said. They're called on the carpet, they have to answer charges, they become embarrassed. If the person who's bringing the appeal brings a lawyer, then everything is ratcheted up to a legal level.

Even union witness Ross Frank, currently a professor at UCSD and formerly a student member of the Association of Graduate Student Employees (AGSE) executive board at UC Berkeley, testified that he has seen cases where professors reacted to a grievance like they were personally attacked. He stated that resolving grievances can be emotional and contentious, they are crises for both the student and the affected faculty member.

The prospect of being publicly charged also affects the faculty's academic decision making role. Dean Duggan testified that faculty are constantly worried about what actions to take

because of their concern about how the union will respond. At UC Berkeley when a professor withdrew his signature from a graduate student's dissertation after the student failed to make certain changes in the final draft, the union claimed the professor was retaliating against the student because he participated in a recognition strike. The fact that scholarly criticism could be interpreted as retaliatory may have a chilling effect on academic integrity.

The union's position that with collective bargaining disputes are resolved between the union and the employer, supports the view expressed by Dean Duggan that union representation tends to make students think of faculty as a monolithic institution, rather than as individuals. Consequently, students may not realize the effect of publicly charging their faculty member when they file a grievance. For example, a graduate student at the University of Michigan used the formal grievance procedure to resolve a workload problem. The student believed that she was filing her grievance "against this huge impersonal university, but . . . she found that in effect the grievance was filed against this faculty member, which happened to be her major Professor." The professor was "an emotional basket case" after being charged in the grievance. The relationship between the student and professor was irreparably damaged and the student who was only a few months from completing her master's degree left the university to finish her degree program elsewhere. The dean was unable to attempt to heal the

relationship between the student and the professor because the union insisted that there be no direct contact with the student.

Similarly, at UC Berkeley a workload grievance was filed on behalf of several readers. During the hearing one reader expressed dismay that the supervising faculty members were called to testify about the students' assigned duties, believing that the University was pitting the faculty against the students.

At the University of Wisconsin which has the longest history of collective bargaining with graduate students, the students recognize the potential damage to student/faculty relationships when they publicly charge their faculty members. The students have sought to regain the ability to file anonymous grievances. They realize they must continue to work and study with the faculty and need faculty recommendations for jobs, and they do not want to risk jeopardizing their relationships with their faculty members by identifying themselves in their grievances.

Another factor in the relations between students and faculty involves the union's need to constantly demonstrate its effectiveness as new students enter the university. As a means of building support among students, witnesses described union efforts to increase grievance filing, publicize disputes and portray the university in an adversarial role. Stedman Upham, Dean of the Graduate School, testified that at the University of Oregon grievances are often filed directly at the third step, especially prior to the commencement of negotiations for a successor agreement. He explained that by filing grievances at

step three, the opportunity to investigate and resolve problems informally is lost and the level of acrimony and confrontation is increased.

Strikes by student academic employees also place a tremendous strain on student/faculty relationships. A five week recognition strike by UC Berkeley graduate students resulted in resentment and strained relationships by both faculty and students. Faculty were angry at having to take sides in the strike and take on additional courses taught by striking graduate student instructors. The students also felt a lot of bitterness towards faculty when they did not receive the support they expected from the faculty.

Dean Duggan recounted his own experience as a dissertation advisor to a graduate student who served as a union spokesperson during the UC Berkeley strike. He described the tension which carried over into their mentor relationship:

When you're giving advice on a dissertation, there has to be a cooperative relationship between the faculty member and the student. I mean, you can't teach somebody who is hostile to you. So, we had a lot of reasons for hostility that were outside the dissertation, itself, but that kind of thing carries over into the academic relationship.

Graduate students at the University of Michigan engaged in a one day strike in 1991 and strikes are typically authorized each year that successor agreement negotiations occur. Paul Lehman, Associate Dean at the University of Michigan, testified that the strike and threat of strikes generate stress between faculty and students. He explained that the university and the faculty must

prepare contingency plans for strike possibilities which, even in the absence of a strike, results in a significant source of tension throughout the university community.

Strikes are intended to disrupt the educational process for the purpose of imposing pressure on the university. A serious consequence of strikes is the disruption of educational services provided to other students and the burden placed on faculty to continue the delivery of these educational services. While lessening the frequency of strikes is a positive feature of collective bargaining, it does not obviate the impact on the student/faculty relationship when students engage or threaten to engage in concerted activities in an effort to compel the University to meet their demands.

The interaction between student employees and faculty in an "educational venture" enhances the students' academic and professional careers, and promotes the academic mission of the University. The possibility that the "complex and fragile" nature of these unique relationships could be damaged by collective bargaining does not further the policies of excellence in the University.

Part-time/Intermittent Employees

In UC (AGSE), the Board found that the continuous movement of graduate students in and out of academic employment positions would result in instability which does not make collective bargaining a feasible alternative. The Board also noted that graduate students would be split into competing groups, those

working for pay and those working for academic credit. The court in AGSE recognized that collective bargaining could create arbitrary distinctions between these two groups.

Union witnesses testified that there is no difference in the representation of part-time and full-time employees. Mr. Hecker testified, for example, that part-time employees working as grocery or retail clerks are represented in the same manner as full-time clerks.

The vast majority of students in the proposed unit at UCSD are undergraduates. Unlike graduate students who rely more frequently on student academic appointments to fund their graduate education, the tenure of undergraduate readers and tutors is brief. With rare exception, student readers and tutors do not continuously hold positions as readers and tutors. In contrast, part-time grocery clerks have a continuing expectation of employment on a less than full-time basis.

The evidence demonstrates a high rate of turnover in student academic employee bargaining units and correspondingly in union leadership roles. Union witness Mary Ann Massenburg, UAW staff representative, testified about the need for constant leadership development by the union among student academic employees. The high turnover rate and lack of continuity has an impact on labor relations at the bargaining table as well. Dr. Craig described the frustration which occurs at the bargaining table when new student bargaining team members have no understanding of the history that went into crafting the previous agreement. The

parties end up debating the same issues that were previously resolved.

Frequent turnover in the bargaining unit also leads to instability through contracts of shorter duration. At the University of Michigan, the union prefers to negotiate agreements of shorter duration because of the continual turnover in the bargaining unit, allowing them to more frequently demonstrate their value to new unit members. Shorter agreements result in constant preparation for the next round of bargaining and the use of disruptive pressure tactics which are designed to provide leverage at the bargaining table. Several witnesses testified about the increased level of grievance filing which occurs prior to negotiations for successor agreements.

The Board also found in UC (AGSE) that splitting graduate students into two groups would not promote harmonious and cooperative labor relations. Students performing identical duties as tutors would be in or out of the bargaining unit depending on whether they were paid or receiving academic credit. The provisions of a collective bargaining agreement would apply only to paid tutors, thus creating an arbitrary distinction between the two classes of tutors.

The University of Michigan's attempts to avoid arbitrary distinctions between TAs covered by collective bargaining and research assistants (RAs) who are not in the bargaining unit, adversely affected its ability to obtain government research contracts. The university was concerned about creating two

groups of graduate students supported at different levels when there was no meaningful distinction between TAs and RAs. Consequently, when TAs were successful in obtaining an increase in their stipends, the university increased RA stipends by the same percentage. The effort to eliminate the arbitrary distinction led to relatively high RA stipends, which had the effect of pricing the university out of the market for government research contracts and limited the students' opportunity to participate in government research projects.

As the Board has previously determined in UC (AGSE), the instability which derives from the students' continuous movement in and out of the bargaining unit and the lack of continuity at the bargaining table would not further the purposes of HEERA by promoting harmonious and cooperative labor relations.

Free Exchange of Ideas

The purposes of HEERA encourage the free exchange of ideas among faculty, students and staff. The Legislature also encouraged the preservation of the long-accepted manner of higher education institutions to consult with academic employees through the Academic Senate and other faculty councils.

As the ALJ noted, collective bargaining does provide for the exchange of ideas through the bargaining process. However, it may run counter to the express purposes of HEERA by discouraging the long-accepted manner of "joint decisionmaking and consultation" with academic employees through "shared governance mechanisms or practices."

For example, at UC Berkeley students participate on numerous faculty committees, including the Graduate Council. The Graduate Council sets policy for graduate studies and discusses matters which may concern student academic employees. At one bargaining session between AGSE and the University, the union objected to a proposal which would ensure the continued practice of faculty-student committees discussing matters which may concern student academic employees. The University feared that it would have to remove represented student employees from faculty-student committees in order to avoid a charge of direct dealing, thus losing the benefit of student employee input. The union claimed that it had the exclusive right to meet and discuss student employment matters and insisted rather than removing student unit members from these committees, that the committees be barred from discussing matters which were within the purview of the exclusive representative.

The ALJ dismissed any concern over the impact of removing student employees from faculty-student committees, concluding that the nature of collective bargaining requires that only the exclusive representative is permitted to meet and discuss negotiable matters concerning student academic employees. However, this view ignores the express purposes of HEERA which encourages the preservation of existing decision making and consultation mechanisms with academic employees.

A formal grievance process could also limit the free exchange of ideas. An informal, collaborative approach to

problem solving encourages the joint resolution of problems. A formal grievance procedure has an informal step and many grievances are resolved at this level. However, grievances filed directly at higher levels preclude informal communication and resolution. Dr. Upham testified that the process is cumbersome and bureaucratic and without the constraints of a formalized, multi-step resolution process there would be more direct interaction between faculty and students in the resolution of their problems. For example, union representation precluded the dean at the University of Michigan from contacting the student who filed a grievance against her major professor, in an attempt to heal the relationship and allow the student to complete her studies.

As the evidence demonstrates, the pursuit of excellence through the free exchange of ideas would be adversely affected by limiting joint decision making and consultation between the University and its academic employees.

Based upon the above discussion, it is evident that under the second prong of the statutory test, the purposes of HEERA would not be furthered by extending collective bargaining rights to readers, tutors and associates. Student academic employees experience a unique dual relationship with the University where their pursuit of learning as students is inextricably interwoven with their provision of academic services in subjects related to their fields of study. While collective bargaining would most likely result in a "set of rules" designed to guide employment

matters, it is apparent that the line distinguishing academic from employment matters is not a clear one. If not immediate, certainly a gradual encroachment into academic matters would result from a bargaining process which requires compromise. The likelihood that academic policies would be established or modified through collective bargaining is inevitable and would compromise the pursuit of excellence in teaching, research and learning at one of the leading educational institutions in the country and it would also undermine the faculty's academic policy making role. The court in AGSE recognized this concern when it concluded:

This well-tuned system could easily be disrupted by introduction of collective bargaining on the behalf of thousands of graduate students whose self-interest might outweigh concern for the institution.
(AGSE at p. 1148.)

The promotion of collective bargaining would also alter student/faculty mentor relationships by changing the focus to one of employee/supervisor where disputes over employment issues could harm mentor relationships and impact academic integrity. Furthermore, the continuous movement of students in and out of the bargaining unit would create instability and the lack of continuity at the bargaining table would not encourage harmonious and cooperative labor relations. Finally, the pursuit of excellence through the free exchange of ideas and the preservation of joint decision making and consultation between the University and its academic employees through shared governance mechanisms, would be adversely affected by limiting

the means of discourse solely to the union and creating formal, bureaucratic processes.

In conclusion, under the two-prong test, I find that the educational objectives of tutors and associates are not subordinate to the services they provide to the University. While the readers' educational objectives are subordinate to their services, under the second prong of the statutory test, I find that the purposes of HEERA would not be furthered by extending collective bargaining rights to readers, tutors and associates. Accordingly, I conclude that students appointed to reader, tutor and associate positions at the University of California, San Diego campus are not employees for purposes of HEERA and, therefore, the petition should be dismissed.



PUBLIC EMPLOYMENT RELATIONS BOARD
NOTICE OF DECISION AND
NOTICE OF INTENT TO CONDUCT ELECTION

April 23, 1998

CASE: PERB Decision No. 1261-H
(Case No. SF-RR-805-H)

EMPLOYER: Regents of the University of California

DESCRIPTION OF UNIT:

The unit shall Include All:

Readers
Tutors¹
Associates In _____ (Teaching a Class)

The unit shall Exclude All:

Managerial, Supervisorial and Confidential
employees, and All Other Employees.

ELECTION: A representation election will be conducted in the unit described above provided one or more employee organizations qualifies to appear on the ballot. However, pursuant to PERB Regulation 51330, if only one organization qualifies to appear on the ballot and the organization has demonstrated proof of majority support in the unit found appropriate, the Regents of the University of California may grant voluntary recognition and notify the Board to cancel the election.

INTERVENTION TO APPEAR ON BALLOT:

Pursuant to PERB Regulation 51310, any employee organization wishing to appear on the ballot in the representation election conducted in the unit listed on this Notice must file an intervention to appear on the ballot with the PERB San Francisco Regional Office within 15 workdays from the date

¹At the hearing, the University indicated that it may be revising the tutor title and title codes. This order includes all of the tutors that were the subject of this hearing, performing both tutoring duties and undergraduate teaching assistant duties by whatever title and in whatever title code that may result from such revision.

of this Notice. The intervention must be on a form provided by PERB and must be accompanied by proof of support of at least 10 percent of the employees in the unit. Proof of support is defined in PERB Regulation 32700.

The last day to file an intervention to appear on the ballot in the unit described above is:
May 14, 1998.

This Notice of Decision is provided pursuant to PERB Regulation 51235.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA,)	
)	Representation
Employer,)	Case No. SF-R-805-H
)	(UC San Diego)
and)	
)	PROPOSED DECISION
)	(10/20/95)
ASSOCIATION OF STUDENT EMPLOYEES,)	
U.A.W., UNITED AUTOMOBILE,)	
AEROSPACE AND AGRICULTURAL)	
IMPLEMENT WORKERS OF AMERICA,)	
AFL-CIO,)	
)	
Petitioner.)	
<hr/>		

Appearances: Corbett & Kane by Sharon J. Grodin, Douglas N. Freifield and Aron Cramer, and the Office of the General Counsel by James N. Odell and Edward M. Opton, Jr., Attorneys, for the Regents of the University of California; Schwartz, Steinsapir, Dohrmann & Sommers by Margo A. Feinberg and Brenda Sutton, Attorneys, for the Association of Student Employees, U.A.W., United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

Before James W. Tamm, Administrative Law Judge.

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INTRODUCTION

This decision concerns a dispute regarding coverage of student employees in the reader, tutor and associate positions at the University of California, San Diego campus (UCSD), under the Higher Education Employer-Employee Relations Act (HEERA or Act).¹

I first make factual findings about reader, tutor and associate duties, and the impact of collective bargaining. I then apply three tests of section 3562(f) (subsection f) which are applicable to this dispute.² Under the first test I conclude that readers and tutors are employees because their employment is not contingent upon their status as students. Under the second test I also find that readers are employees under the Act because the services they perform are unrelated to their educational objectives. Finally, under the two prongs of the third test, I conclude that the educational objectives of readers, tutors and associates are subordinate to the services they perform (Prong One), and extending coverage of the Act to readers, tutors and associates would further the purposes of the Act (Prong Two).

PROCEDURAL HISTORY

On May 28, 1993, the Association of Student Employees, U.A.W., United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Petitioner) filed this request for recognition seeking a unit of readers, tutors, acting

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise noted, all statutory references are to the Government Code.

²In previous decisions PERB and the courts have only concerned themselves with the two prongs of the third test.

instructors, community teaching fellows and nursery school attendants employed at UCSD.

On October 15, 1993, the Regional Director of the Public Employment Relations Board (PERB or Board) determined that the Petitioner had submitted proof of support sufficient to meet the requirements of HEERA.

On November 8, 1993, the Regents of the University of California (UC or University) filed its response to the Petitioner's request for recognition, asserting it was inappropriate because it included student employees who are not employees as defined in HEERA. The University also responded that to the extent the petition included non-student employees, those employees should be placed in a separate systemwide unit or accreted to the existing systemwide Non-Senate Academic Unit³ (Unit 18).

On December 9, 1993, Petitioner filed a request for a Board investigation pursuant to PERB Regulation 51090.⁴ Settlement conferences/investigatory meetings were held on February 7,

³The University offered no evidence or argument at the hearing regarding the appropriateness of non-student employees being accreted into Unit 18. Nor did the University address the issue in its post-hearing brief. In its post hearing reply brief, the University did state in footnote 46 that once the issue of employee status is determined there may be issues remaining concerning the appropriateness of the unit. However, the University had a full opportunity to raise unit appropriateness issues in the hearing and failed to do so. The University has therefore waived any arguments that the unit sought by Petitioner is inappropriate for reasons other than employee status under subsection (f).

⁴PERB regulations are codified at California Code of Regulations, Title 8, section 31001, et seq.

May 19 and June 17, 1994, however, the matter was not resolved. On March 9, 1994, the case was assigned to me for formal hearing. The Regional Director retained responsibility over several pre-hearing issues. A hearing was scheduled for October through November of 1994.

On June 27, 1994, the Petitioner amended the request for recognition, adding the title Associate In _____ (Teaching a Class) (associate) and deleting nursery school attendants, community teaching fellows, and acting instructors, titles which were not in use at UCSD. On June 29, 1994, the PERB Regional Director determined that the amended request for recognition had sufficient proof of support. Therefore, the positions at issue in this decision are readers (title codes 2850, 2851 and 2500), tutors (title codes 2860, 2861 and 2510) and associates (title code 1506). The approximate size of the proposed unit is 450.

At a prehearing conference on July 9, 1994, Petitioner's motion that the hearing be continued until February and March of 1995 was granted.

On July 27, 1994, the University filed its response to the amended request for recognition and again denied it for the same reasons it denied the original petition.

On September 19, 1994, the Petitioner filed a motion to consolidate the hearing in this case with hearings for related, but not identical, requests for recognition at the University's campuses at Los Angeles (UCLA), Davis (UCD), and Santa Barbara

(UCSB).⁵ At a prehearing conference on October 4, 1994, the parties made oral arguments regarding the Petitioner's motion to consolidate. The parties briefed the issue and on October 28, 1994, I granted the motion in part. The order consolidated the records of the four requests for recognition, thus assuring that much of the University's case-in-chief offered at UCSD need not be duplicated in the other cases. Petitioner's request for a single formal hearing for all four cases was denied.

Thirty-two days of formal hearing were held between February 6 and June 9, 1995. Briefs were filed and the case was submitted for decision on August 19, 1995.

JURISDICTION

The University is an employer within the meaning of section 3562(h) of the Act. The Petitioner is an employee organization within the meaning of section 3562(g) of the Act.

ISSUES

HEERA subsection (f) provides:

"Employee" or "higher education employee" means any employee of the Regents of the University of California, . . . However, managerial, and confidential employees shall be excluded from coverage under this chapter. The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their

⁵The motion did not seek consolidation of the petitions themselves. At the time the motion was filed, the only petition set for formal hearing was UCSD (Case No. SF-R-805-H.) The UCLA petition (Case No. SF-R-813-H) is currently scheduled for a hearing beginning October 18, 1995. The UCD petition (SF-R-806-H) is tentatively set for hearing beginning in April, 1996. The UCSB hearing (SF-R-815-H) is not yet scheduled.

educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter.

Thus, the issues to be decided in this dispute are:

(1) Under the first test, is employment in the disputed titles contingent upon student status?

(2) Under the second test, are the services provided by the student employees in question unrelated to the educational objectives of the student employees?

(3) Under the third, two prong test, are those educational objectives subordinate to the services provided (Prong One), and does coverage of the student employees under HEERA further the purposes of the Act (Prong Two)?

FINDINGS OF FACT

Background Regarding UCSD

The University is a public, state supported, higher education institution offering undergraduate and graduate instruction and professional education. The University is required to provide undergraduate education to the top one-eighth of California's high school graduates. It has exclusive jurisdiction in California public higher education over instruction in the professions of law, medicine, dentistry and veterinary medicine. The University also has sole authority to award doctoral degrees in all fields, either alone or jointly with the California State University system.

The University has nine campuses. This decision concerns the University's San Diego campus. UCSD was established as a campus in 1960 with the intention of being primarily for graduate instruction. In the early 1970's however, a huge influx of undergraduate students required UCSD to operate differently. UCSD established a college system for undergraduate students. There are currently five undergraduate colleges: Earl Warren College, Thurgood Marshall College, Revelle College, Muir College and Eleanor Roosevelt College.

Each of the colleges has its own general education requirements. Each undergraduate also has an academic major, typically within a department, but sometimes within an interdepartmental program. Departments are housed within the various colleges. It is possible to major in any department from any college. Students must meet both college and departmental or program requirements in order to graduate. This combination of college and departmental or program requirements defines the curriculum for each undergraduate student.

Each faculty member is a member of one undergraduate college and one department. Graduate students are members of a department or a program, but not of an undergraduate college.

The facts regarding the disputed positions vary depending upon the skill and experience of the student employees, the program or department in which the student employee works and the approach of the supervising faculty member. Nonetheless, clear factual patterns have emerged which are summarized below.

Job Functions, Educational Objectives and Motives for Seeking Employment

Readers

Readers assist in the University's teaching mission by reading and grading homework assignments, quizzes, mid-term and final exams and papers. Readers may have some regular on-going responsibilities throughout the quarter, but more commonly their duties involve sporadic activities, usually concentrated in intense periods around mid-term and final exams.⁶

A hiring preference exists that gives graduate students the first opportunity for open reader positions. If there are not enough graduate students available or interested in the openings, or if graduate student applicants do not possess the necessary expertise or knowledge of course materials (such as foreign language skills), then undergraduates are given the next preference. If the University is not able to fill the open positions with either graduate or undergraduate students, then non-students may be hired to fill the vacancies.

Vice Chancellor Joseph Watson testified regarding both readers and tutors:

⁶In a small number of departments, the use of readers is somewhat different than the norm. For example, Computer Science and Engineering (CSE) hires about 20 readers per quarter to staff computer labs. They are referred to as proctors, and their duties and training more closely resemble those of undergraduate teaching assistants than typical readers. Readers with the Teacher Education Program (TEP) are also used more like undergraduate teaching assistants than typical readers. They are often interested in becoming teachers and are typically enrolled in credentialing programs. Both proctors and TEP readers tend to have more contact with faculty and students than the typical reader.

. . . in these positions priority has always been given to enrolled students, but one has to leave open the possibility that students will not be available with the capabilities, or will not be available at the needed time.

Vice Chancellor for Research and Dean of Graduate Studies Richard Attiyeh testified:

We use non-students when there are teaching opportunities in these titles . . . that can not be met by hiring students.

Several other University witnesses testified about their experience hiring non-students in order to maintain the quality of the program.

The University's Administrative Policy Manual (APM) section 420.10 provides that readers will usually be graduate or undergraduate students. However, it also provides that non-students may be employed to meet the needs of the University.

The reader positions at UCSD are filled primarily by undergraduates. However, a substantial number of graduate students accept reader positions to supplement their income when a teaching assistant or research position is not available to them. There is also a small number of non-student readers. University statistics show that from the fall of 1993 through the fall of 1994 there were approximately 681 undergraduate readers, 376 graduate readers and 21 non-student readers.

Readers are recruited and hired by a number of methods. Often a faculty member will announce to a class at the end of the quarter that s/he has openings for reader positions and invites those doing well in the course to apply. Sometimes faculty

members will recruit specific students. Departments sometimes send out recruiting letters to all students with a 3.0 grade point average (GPA) or better, or post job announcements and invite applications. Much of the hiring process seems to revolve around the personal style of the faculty member. Some faculty take a strong role in selecting from among the applicants. Many, however, simply leave it up to an administrator in the departmental office to assign readers to them.

Readers and their supervising faculty members typically meet prior to the start of the quarter and discuss expectations and assignments. Readers and faculty members will also typically meet during the quarter to discuss major writing and grading assignments such as mid-term and final exams. At those meetings they sometimes engage in cursory discussions of the pedagogy of grading. Readers testified about receiving feedback on their grading practices such as "you're too tough," "try to end on a positive note," "make more balanced comments," "make specific suggestions for improvement rather than simply criticizing the work." While this perfunctory grading feedback was more the norm, there were other extremes. Many readers testified that they received no pedagogical feedback at all and only saw the faculty member to get their time sheets signed. A couple of readers testified that they never even met the faculty member and merely picked up and dropped off assignments via mailboxes. At the other extreme were a few readers who actually helped faculty members prepare exams and engaged in more complete discussions

about the faculty member's grading and examination philosophy. Faculty members tended to testify that readers were given much more direction and supervision regarding grading than did the readers who testified.

Readers must have taken the course for which they are reading or its equivalent, and received a "B" grade at a minimum. Some faculty members require readers to have received an "A" in the course. Potential readers must also have a GPA of 3.0 or better. Readers are sometimes requested to attend lectures, but it is not considered part of the job duties and they cannot be required to attend.

Readers receive no course credit for the duties they perform as readers. It is possible, however, for readers to receive credit for engaging in independent study under the direction of the same faculty member. In those situations, the faculty member will typically assign additional reading related to the course for which the reader is hired. The reader will often be required to write a paper or make a presentation to the faculty member as part of the independent study course. It is the additional directed reading and related assignments for which the reader receives course credit, not the work as a reader.

Undergraduate readers receive approximately \$9.00 per hour and graduate students approximately \$9.50 per hour. Graduate students are paid more than undergraduates in recognition of their additional expertise. Non-students receive the graduate

rate if they hold a bachelor's degree and the undergraduate rate of pay if they do not.

The time for which readers are paid is spent almost entirely performing grading duties as opposed to meeting with faculty discussing pedagogical issues.

The financial need of reader applicants is typically not taken into consideration in either the application or selection process, nor are the salary levels keyed in any way to the financial needs of individual readers. Commitments for reader positions are not included in letters of acceptance sent by UCSD to students, which also details financial aid packages.

If graduate students hold any combination of academic appointment (reader, tutor, graduate teaching assistant, graduate research assistant or associate) in excess of 25 percent of full-time equivalent position (FTE), they are eligible for two benefits. First, they receive graduate student health insurance (GSHIP). Second, they are eligible for registration and educational fee remissions. Undergraduate and non-student readers are responsible for their own health insurance and registration and educational fees. Non-student readers are placed in a different title code than student employees for Internal Revenue Service (IRS) administrative reasons.

The reader staffing ratio is usually determined by departments based upon a formula. Typically, courses with a large number of writing assignments get more readers than those with assignments easier to grade. The most important factor in

reader staffing, however, is the number of students enrolled in a course. As such, reader staffing is enrollment driven. For example, in sociology the ratio is 60 to 1. Thus, a class with 120 students would be assigned two readers.

When grievances arise out of employment disputes, the applicable grievance process is outlined in APM 140 and its campus equivalent, Policy and Procedures Manual (PPM) 230-5. This process will be described in greater detail later in this decision; however, it can generally be described as a multi-step process culminating in a hearing and decision, which can be accepted or rejected by the chancellor.

Disputes arising out of academic issues are dealt with through informal departmental processes involving faculty advisers, provosts, deans, etc.

In some courses the total number of hours allotted to a reader is based upon the enrollment of the course. However, none work more than 50 percent of an FTE.

Readers have initial control over the extent of their employment. They are urged not to over commit by taking on more hours than they will have time to complete, given their academic schedule. By carefully considering the extent of a reader's commitment, it is hoped that conflicts between job duties and the reader's own academic obligations will be avoided. However, since job duties often intensify around the time of mid-term and final exams, conflicts do occasionally arise. When that happens, a reader's own studies may suffer because of the natural and

necessary priorities given to completing grades on time.

Educational objectives of undergraduate students, as a group, and more specifically educational objectives of undergraduate readers, are difficult to assess because their goals in general are more in flux and less defined at this stage of their academic life, than when they begin their formal career or graduate school. Numerous witnesses testified about the educational objectives of students. Many students, however, framed their testimony in terms of their motivation for seeking employment as a reader, rather than their ultimate educational objectives. Several faculty members also testified about both the motivations and the general educational objectives of individuals seeking reader positions. To the extent that faculty members were offering their own subjective views about the educational objectives and motivation of readers, that testimony is speculative and not generally pervasive.⁷ Where faculty

⁷In determining the educational objectives of the student employees, the Supreme Court in Regents of the University of California v. Public Employment Relations Board (1986) 41 Cal.3d 601 [224 Cal.Rptr. 631] (Regents) made it clear that PERB was to focus on the personally held subjective perceptions of the students themselves.

. . . Moreover, nothing in the language of subdivision (f) even hints that the University's subjective perceptions of the functions of housestaff duties should be taken into consideration. [Id. at p. 614, emphasis in original.]

testimony is based upon objective factors such as conversations with individual readers, that testimony is relevant.⁸

The testimony of Dr. Barbara Sawrey, Vice Chair of the Chemistry and Biochemistry Department, was reflective of faculty beliefs regarding undergraduate educational goals.

Some students plan on going on to get a job.
Some want to go on to graduate school. Some
don't have a clue. Some want to go on to
medical school; very, very, different things.

Most reader witnesses reflected a desire to first successfully complete their undergraduate degree program. Many also indicated a desire attend graduate school at some time in the future.

A survey of the 1988 incoming freshman class at UCSD indicated that the top five reasons they were going to college were: "To learn of more interesting things; be able to get a better job; gain appreciation of education and ideas; prepare for graduate school;" and "be able to make more money." The top five "objectives" (not limited to educational objectives) of the entering freshman class were: "Becoming an authority in my field; being very well off financially; raising a family; helping others in difficulty; and obtaining colleague's recognition." Almost half of the class said there was a very good chance they would: "Get their bachelor's degree, find a job in their field; be satisfied with college; make at least a "B" average;" and "get

⁸To the extent that faculty and staff have testified about discussions they have had with student employees, however, it is hearsay testimony and entitled to less weight than the direct testimony of readers themselves, which is subject to the scrutiny of cross-examination.

a job to pay their expenses." The top probable career choices were: engineer; doctor/dentist; undecided; business; and scientific researcher. A career as an educator was a probable choice for only 4.2 percent of the incoming class (two ranks below being a judge or lawyer, and one rank higher than joining the foreign service.)

Based on the subjective testimony of readers, objective testimony of faculty and other evidence such as the freshman survey, I find there are two primary educational objectives of undergraduate readers. The first is to successfully complete their undergraduate degree program. The second is to better position themselves for their next step regarding either a career or graduate education program.

The educational objectives of graduate student readers in dispute are a bit easier to ascertain. Many, although not all, are hoping for careers as educators, usually in higher education. They too, have as primary educational objectives finishing their degree program and being well positioned for their next step. Since they are already in graduate school, they are usually more focused about that next step, which typically is employment oriented rather than continuing their education. For them, being well positioned means having demonstratable skills and teaching experience on their curriculum vitae.

While graduates and undergraduates, are motivated to seek reader positions for a variety of reasons, the most common thread woven through all the testimony was that readers were performing

a job for which they expected to be paid. Almost without exception, readers testified that being paid for this work was a motivating factor to some extent. The following examples are illustrative and not meant to be an exhaustive or complete recitation of the testimony of all witnesses.

Many readers indicated pay was their primary motivation. For example, Claudia Ehrig was employed as a reader and a tutor. She testified that if she had other means of support, she would not have sought the employment. When she realized she could make more money driving the UCSD shuttle bus, she sought that job instead of a reader position. Paul Briedenbach was a reader twice during the summer. He previously had two quarters of a paid fellowship which had ended, and he simply needed income to support himself. Rachelle Van Bushkirk testified that she might have had to drop out of her program, had she not been able to make money to support herself. When Karen Van Ness was asked why she worked as a reader, she testified, "for the money." Ann Shea testified she chose to be a reader "for economic reasons to support myself." Lorna Lueken was admitted to the UCSD on a Regents fellowship, but when that turned out not to provide enough money to pay her bills, she took a job as a reader.

Many others were motivated by a combination of income plus the flexibility a readership position provides. When Monica Szurmuk worked as a reader, her son had just been born and she could do the work at home. Had she had other means of financial support during that time, she would not have chosen to work as a

reader. John Putman chose to work as a reader because he has a family to support and needed additional income. He was usually on campus already, so the logistics of a readership were convenient because he would not have to leave campus to go to work.

Susan Light testified that she took a job as a reader because she had no other sources of income and she needed the money. Had she received a fellowship or scholarship, she would have taken that in preference to any readership. She has previously worked as a clerical employee in a temporary employment agency and was able to make more money. She would have preferred temporary clerical work because the income was better, however, her academic schedule made it difficult to accept temporary work even though she would make more money.

A few others testified that along with being paid, the work was interesting. Matthew Talpis realized that when other students asked him questions, he enjoyed helping them out. When he saw a flyer for a proctor position in CSE, he thought that would be a fun job because he would be able to help others. Brit Loftesnes was motivated because the work seemed interesting. She also sought it for financial reasons, but that was not the main reason. Likewise, Brian Ruff was a proctor in CSE, primarily because he liked it, and it gave him an opportunity to learn course material in another way. Financial reasons were only secondary for him. Michael Pinkerton became a proctor in CSE because it paid well compared to other positions available to

undergraduates. However, he continued in the position because he liked the work.

Pinkerton was not the only witness who gained insight about teaching. Trang Vu is now a professional staff member within UCSD's Office of Academic Support and Instructional Service (OASIS). She coordinates the OASIS Before Calculus program. While Vu was a student at UCSD, she was a reader in the Math Department. She was exploring the possibility of becoming a teacher and sought a readership to gain insight about what grade level she wanted to teach and to build contacts within the Math Department.

Lea Hubbard sought out certain reader positions in order to learn from particular faculty members who were experts in fields that interested her. Becoming a reader was a way for her to build rapport with the faculty and to make some money in the process.

Abe Shragge testified that he was motivated to become a reader to do some reading in areas that interested him and to learn how to become a college instructor. He also wanted to build his inventory of lecture notes for his own teaching that he was doing at local community colleges.

University witness Dr. Stephen Cox is a Professor of Literature and Director of the UCSD Humanities Program. He testified that: ". . . the students certainly want to be readers because they want some financial support. . ." Students have told him: "This is important for me to get some money." Cox

also testified that readers look forward to opportunities to work directly with certain faculty.

Dr. Ruth Williams, a professor of mathematics at UCSD, testified that readers are motivated by the opportunity to brush up on material they learned some time ago or learn material more thoroughly because they are interested in a particular area. Occasionally, Dr. Williams also has readers who are preparing for actuarial examinations and use their position to review material prior to taking their exams.

According to Dr. Sawrey, readers take their positions because: "They thoroughly enjoy the comradery that comes with being a grader, because they're working as part of a team with TA's and the faculty on an educational venture. . . ." Sawrey testified that readers are also motivated by the opportunity to get to know faculty, other teacher assistants (TAs), or graduate students who are at the next step educationally. It also helps them review material or prepare for other examinations and, as a bonus, they also get paid.

Professor Rand Steiger, Chair of the Music Department, indicated that student employees in music often seek positions outside the Music Department because the pay is better.

The clear pattern which develops about the motivation of readers in accepting the position is that first and foremost, readers are looking for an opportunity to generate income. While there are some exceptions to this generalization, it would be a rare case indeed where readers would seek the experience were

they not compensated. While many readers testified that income was their only motivation, many also indicated that multiple factors influenced them to seek such employment. I therefore also find that to a significantly lesser extent, individuals seek employment as readers because they think the job offers them an opportunity to help other students, review materials or courses that might interest them, interact with faculty, have a flexible work schedule, to explore teaching as a career, prepare for other examinations, and because the job would be enjoyable.

The extent to which readers are successful in realizing the factors which motivated them to take the job varies a great deal. The most easily measured, of course, is the generation of income. Except for some differences in testimony about whether readers work more or less hours than they are paid, there is no dispute that readers get paid for the job they perform. There is also no dispute that the job provides a degree of flexibility necessary for a student's academic schedule.

Whether the job provides an enjoyable environment where readers can assist fellow students seems to depend a great deal on the setting for the job. Proctors in a computer lab like Talpis and Pinkerton interact with students on a regular basis. They review work personally with students, answer their questions, and give advice. Proctors enjoy the interaction and the job meets their interests. The vast majority of readers, however, do not experience that type of interaction. For most readers, it is quite the opposite. Most have no contact with the

students they are grading, they do not hold office hours, and do not attend lectures. Most readers rarely receive feedback from students.

Interaction with faculty is also very limited for most readers. The comradery of working on a team in an educational venture as described by Dr. Sawrey was noticeably absent from the testimony of most readers. The norm is for faculty members and readers to meet at the beginning of the quarter to discuss grading strategy. They might also occasionally meet throughout the quarter when papers or exams are due.

Dr. Michael Davidson, Professor of Literature at UCSD and Vice Chair of the department, observed that if the objective was to have more contact with a professor, it would be more effective to enroll in the professor's course than to be a reader. For the most part, employment as a reader appears to be a rather solitary endeavor involving little contact with either faculty or students.

If students were considering a career as an educator, grading papers would certainly give them a flavor for part of the teaching profession. However, some students sought the job only because other positions such as teaching assistantships, which would provide more teaching experience, were not available.

There was evidence that some readers have been successful in building relationships with faculty. Abe Shragge, for example, has worked with many faculty in order to gain exposure to different readings and methods of teaching. While working on his

dissertation, Shragge also teaches history at two local community colleges. He has used his employment as a reader to gather over 1000 pages of lecture notes, which he uses in his own teaching.

Lea Hubbard is another example of a reader successfully building relationships with faculty. She sought out reader jobs with certain faculty in order to learn that faculty member's specialty. She was also considering a faculty member for her dissertation committee and wanted the opportunity to get to know him. When Hubbard was asked to be a reader for another faculty member, she agreed because that faculty member had been supportive of Hubbard's admission into graduate school.

Matthew Talpis was also successful at building contact with particular faculty members. He described one professor as "very practical, a very cool guy," so he wanted to sit in on his course. He thought he would not have the time to do all the projects, so by grading them he could learn about the processes being taught without the same investment of time.

The experiences of Talpis, Hubbard and Shragge demonstrate that some readers do select jobs to increase their knowledge of a subject matter or build relationships with faculty. This subject matter knowledge could also be helpful if the reader were studying for some type of related exam.

In these cases, however, much of the interpersonal contact that is developed seems to stem from the readers attendance at lectures, which is not part of the typical readership, and the reader's personal desire to build a relationship with a

particular faculty member. While employment as a reader may make such contact easier, it is not an inherent aspect of the job itself. These experiences stand in contrast to most readers who seem to look at the reader's experience as a job.

There was ample evidence in the record that readers are vital to the accomplishment of UCSD's teaching mission. Several witnesses testified that when students were not available, they would hire non-students because it was necessary to maintain the integrity and quality of the teaching mission. Acting Provost Daniel Wulbert testified that the use of both readers and tutors was essential. Professor Davidson summarized how he would have to operate without readers as follows:

Well, if I didn't have a reader in an upper division course that had a large enrollment . . . I would probably rely more on tests and multiple choice kinds of situations than papers, but I think that's pedagogically irresponsible because . . . what you can ask on a multiple choice test is pretty minimal, whereas on a paper you can really get to see what they're thinking.

Dr. Ellen Switkes, Assistant Vice President for Academic Advancement, Office of the President, testified that the University could manage without readers and tutors, but acknowledged that, "it would be bad for the educational enterprise." Dr. Switkes' solution would be for faculty to read more papers and assign fewer papers. Faculty, who have already been required to increase their duties due to previous budget cuts, would also have to hold more office hours and either conduct tutorials in larger classes or eliminate them altogether.

Dr. Switkes also indicated that graduate TAs could perform more of these tasks. In other words, either eliminate work which has been highly valued, or pass it on to other University employees, including other student employees.

Tutors

Tutors are used in two primary ways. The majority of those in the tutor title are hired to do one-on-one or group tutoring through the OASIS program. A significant number, however, are also used within various departments as undergraduate teaching assistants (TAs).⁹

The OASIS program plays a vital role in the success of the UCSD student body. The program is designed specifically to provide a variety of services to maximize student performance and retention at UCSD. Programs range from services helping students overcome past academic deficiencies to programs designed to help them excel in a subject matter or academic skill. Between 37 and 39 percent of the UCSD student population uses the OASIS program. Past statistics indicate that over 60 percent of all freshmen use OASIS services.

An example of an OASIS program which uses tutors is the Underground Tutorial Program. This is a drop-in tutoring center where students receive one-on-one tutoring on subject specific

⁹Graduate Teaching Assistants are in a different job title not at issue in this hearing. For the remainder of this decision unless specified otherwise, the term TA refers to undergraduate students in the tutor title code performing teaching assistant duties. When I refer generically to individuals in either the tutor or undergraduate TA role, I will use the term tutor/TA.

problems, such as biology, chemistry, math, economics, or computer science. Courses are offered in subject matters as a result of student demand, but OASIS also periodically analyzes which courses cause difficulty for the greatest number of students to insure that students are offered what they need most.

Another OASIS program is the Writing Center, where students can schedule appointments with writing tutors to improve their writing skills and strategies. Assistance is available for a range of different writing situations, from essays to lab reports, and across disciplines, from science to literature. Both one-on-one and small group tutoring is available.

The Study Management Center offers skill-building, reading and study skills strategies. It offers practice and strategies for taking tests, and mini courses and seminars on subjects such as time management, concentration and memory techniques.

The Before Calculus program supports students in their efforts to build a foundation for the calculus sequence. The Language Program offers assistance to students in reading, writing and speaking English if that is not their primary language. It also offers tutoring to students needing to study other languages. For example, students taking a course in Russian literature, can get tutoring in both reading and writing in Russian languages.

OASIS also offers several programs specifically aimed at assisting under-represented and low income students, first

generation college students, first year students and others at higher risk of academic difficulty or attrition.

The actual duties of OASIS tutors will vary depending upon the particular program in which they work. Typically, however, they will have set hours when they will go to an assigned location and do one-on-one individual tutoring.

The second way tutors are used is as undergraduate TAs within various departments. During the early 1970s when the UCSD undergraduate population increased dramatically, the existing faculty was incapable of fulfilling the demand for more undergraduate courses. UCSD needed a cost effective way of dealing with the increased teaching load.

According to the credible testimony of Professor Paul Saltman, the use of undergraduate TAs began in 1971 when he was Provost of Revelle College. Saltman maintained a heavy teaching load in lower division biology along with his provost duties. When another faculty member suddenly took a sabbatical, there was an urgent need to fill in for the missing faculty member. There was a commitment within Revelle College that significant lower division courses would be taught by senior faculty. Saltman did not want to break that commitment by hiring a part time employee to teach the course, so he took it on himself. With the addition of the extra course, Saltman was teaching lower division biology to over 600 students. He had a desperate need for teaching assistants who, in the past, had always been graduate students. The department, however, had already assigned all the available

graduate students that it had. Saltman personally recruited several post doctoral fellows to assist him as TAs, but he still needed additional help. Saltman then asked for and received special permission from the academic senate to use a group of undergraduate senior majors in biology who had done well in his course as TAs along with the graduate students and post doctoral fellows.

According to Saltman, the course was an inadvertent but perfect experiment because the students were assigned randomly to various TAs. At the end of the course, Saltman noticed an interesting pattern. The students taught by the graduate student TAs had average grades lower than those taught by post doctoral fellows. The best average grades came from classes taught by the undergraduate TAs who had the least amount of formal taught knowledge.

Saltman investigated this finding by talking to both TAs and students, and found that students taught by fellow undergraduates felt those TAs were giving more time, effort and commitment to the learning process of their peers. Students felt the graduate students were much more concerned about getting their own research done for their thesis.

The next year Saltman became Vice Chancellor of Academic Affairs and helped push the extensive use of the best undergraduates as TAs to compensate for the enormous number of students they had to teach and the small number of graduate students available. Saltman has become an impressive advocate

for peer teaching and collaborative learning efforts, believing them to be to the advantage of both the students and the TAs. It intensifies the learning process for students while at the same time creating for the TA a love of teaching and a gratification that comes from seeing fellow students learn. The experience also builds the substantive knowledge of course material, develops communication skills, builds confidence and provides opportunities for leadership.

Typically, TAs will meet with the faculty at the start of the quarter to discuss strategies and expectations. TAs usually attend all lectures and have regular weekly meetings. These meetings vary from just touching bases for a few minutes after the lecture session to lengthier, regularly scheduled meetings where problems and teaching strategies are discussed. TAs must usually be available to students during regularly scheduled office hours (two to three hours per week). TAs lead discussion sections of the course and might also lead review sessions for mid-term or final exams. They also help with grading of exams.

Prior to becoming a paid tutor/TA, however, almost all individuals must perform the duties for one quarter while they receive course credit and undergo training in pedagogy. It should be noted that during the training program in their initial quarter, the tutor/TAs are receiving course credit, not pay, and they are specifically excluded from the petition in this

case. The requested unit includes only those tutor/TAs who have been hired into paid positions.¹⁰

The training is offered through three primary sources: A course within the OASIS program known as TEP 116¹¹; courses sponsored by the University's Center for Teacher Development (CTD); or through training programs offered by individual departments. It is only possible to take the training course once for credit because repeating it would provide diminishing returns.

All new OASIS tutors must take TEP 116. It is an upper division four unit course taught within the OASIS program. The course meets weekly and balances lectures and readings with the opportunity to gain practical experience as a tutor. The course content focuses upon both the teaching and learning process. Class discussions include topics such as collaborative learning, social issues in education, cultural issues, learning theory, etc.

The course also includes a practicum assignment within the OASIS program. As part of the practicum, participants engage in supervised tutoring. They begin gradually accepting increasing tutor duties toward the end of the course. The speed at which

¹⁰There was some evidence that a very small number of departments do not require TAs to have completed a training course for credit prior to being hired as a paid TA. They apparently require training during the first quarter of employment as a paid TA, but do not offer credit for the training, nor do they consider it a prerequisite to being hired.

¹¹The course was previously called TEP 196 and is referred to as such by most of the witnesses.

they begin tutoring duties depends upon their skills and the structure of the program to which they are assigned. For example, in the OASIS Underground Tutoring Center, tutors might start after a couple of weeks of observation, role playing and feedback. In the writing program, however, tutors may wait until the seventh or eighth week before they do any actual tutoring. Participants in TEP 116 may also be videotaped and given feedback about the video sessions by OASIS staff.

Training for TAs is available through workshops offered by the CTD. Services provided by CTD include individual consultations, workshops about teaching methods and feedback through the use of videotaping, student questionnaires, classroom observations and other methods. Workshops commonly include topics such as cognitive strategies and student learning styles, classroom management, cultural diversity, sexual harassment, preparing instructional materials, fairness and objectivity in grading, and dealing with problem students, among other issues. At least three fourths of the departments at UCSD that utilize undergraduate TAs have their staff trained by the CTD.

The third source of training are individual departments with their own training programs. A good example is the program required by the biology and chemistry departments. That training is a series of pedagogy workshops run by Professor Gabriele Weinhausen, in conjunction with other faculty. Those enrolled in the training are given four units of credit and are expected to

perform the full range of TA duties during the quarter in which they are trained.

The training includes topics such as the duties and responsibilities of TAs, conducting the first class, teaching a lab course versus a lecture course with sections, questioning skills, tension points in teaching, academic regulations, grading strategies, cheating policies, sexual harassment, using blackboards more effectively, etc.

The course includes regular weekly class meetings. Course instructors will also observe at least one section discussion led by each TA in order to give feedback to the TA. At the end of the quarter, TAs are supposed to receive evaluations from students in the section and the faculty member for whom they work. Faculty evaluations, however, are not consistently given.

While it is expected that the training will enhance the educational experience of the tutor/TAs themselves, the primary reason for the training is to ensure a certain level of quality in the instructional program offered to UCSD students. The University wants the tutor/TAs to have a certain level of polish, good communication and interpersonal skills, and substantive knowledge. The University wants assurance that the tutor/TAs are interacting with students in an appropriate manner. The training is designed to help them become better tutors, not better students.

According to Cecilia Ubilla, Coordinator of the Language Program at OASIS, it is not part of her program's mission to

train the paid tutors. She expects them to be qualified when they are hired. She testified:

Well, the goals are to serve the population with highly trained personnel. . . . Now if the student tutors later decide . . . that they are stronger workers because they've worked with us, we have no control over that and it's not the goal of the University to prepare them for any particular career. . . . We don't intend to prepare them to become teachers or for any other profession. Our main concern is how well they're working and delivering services we are paying them for.

There are, in fact, several other programs at UCSD designed specifically to prepare and credential those students seeking to become teachers.

There is sharp disagreement among witnesses about the value of the training. Numerous faculty witnesses such as Professors Weinhausen, Saltman, and Cifarelli, among others, testified that the training was essential preparation, not only for long-term success as a tutor/TA, but also for short term survival. Without the information and resources provided in the training, tutor/TAs would be destined to make, and constantly repeat, common mistakes. They would not only fail to effectively serve the undergraduate student population they are supposed to be helping, but their own learning experience would be significantly reduced.

Other witnesses, mostly tutor/TAs, testified that while they may have found the issues relevant and/or interesting, they did not gain a great deal from the training. Still other tutor/TAs testified that the training was of no value whatsoever. Scott

Penrose-Kafka, for example, testified that the class merely included discussions about current events and that "it was useless and a waste of time." He was adamant that it offered nothing relevant to his work as a tutor.

I believe there are three explanations for this discrepancy in testimony about the value of the training. First, most faculty members testifying about the value of the training have both a greater breadth and depth of experience about how pedagogical instruction might benefit tutor/TAs than do the tutor/TAs themselves. Second, some of the tutor/TAs might not have derived as much benefit from the training as others because they already had experience either teaching or tutoring prior to attending UCSD. Finally, some individuals appear to be closed minded and unwilling to accept any new concepts and methods.

I find that the training provided through TEP 116, the CTD program or the individual departmental TA training, such as that offered in biology and chemistry, to be of immediate and long term value to most tutor/TAs. To the extent that witnesses testified that it was valueless, their testimony is found not to be credible and is disregarded.

The training courses are not limited to those individuals seeking paid positions. Some students take the course simply to explore teaching as a career. Others take them because they heard it was an easy upper division course, to refresh their knowledge of certain subjects, to gain confidence, or to add

credentials to their resumes. Most, however, take the course in order to be eligible for a paid position.

Some tutor/TAs who were originally motivated by the possibility of a paid position do not necessarily continue on into a paid position. Sometimes participants feel they have obtained whatever learning they had been seeking from the training course and do not feel a need or desire to continue doing the work for pay. Others may not seek a paid position because they do not like to teach. Some may not get a paid position because they were not that competent and the University is unwilling to hire them. Others might not seek a paid position because their schedule does not permit that great of a time commitment, or because they have a better job or other means of support.

OASIS tutors are typically recruited through letters to all upper division students with a 3.0 GPA or above, or word of mouth. Each program within OASIS does its own interviewing and selecting of students for both the training course and for paid positions. TAs are typically recruited by faculty through announcements to classes at the end of each quarter, job postings and word of mouth.

Staffing within OASIS depends on the funding it receives and the usage of each program by the general student population. Staffing levels of TAs, are enrollment driven, just like readers.

In order to be hired into a paid tutor/TA position, students typically must have completed a training course for

credit, have an overall GPA of 3.0 or better, and have taken and received an A in the course or subject for which they will be hired. These same criteria do not apply to non-students who appear to be hired based upon availability and skill level.

Tutors/TAs expressed a broad range of career goals, educational objectives for their time at UCSD, and motives for seeking a tutor/TA position. Because they are primarily undergraduates, their goals and objectives are, as a group, somewhat unsettled. Many express the desire to go on to graduate school or into the professions of medicine and law. Some want to become researchers in industry. A few were interested in academia. Typically, their specific educational objectives while at UCSD are to successfully complete their program and obtain a degree, and in doing so, be well credentialed for their next step, be that graduate school or the work force. In this regard, they are similar to readers.

Their specific motivations for seeking employment as tutor/TAs were much broader than those of readers. While generating income was a common theme, it was not as universal a primary motive as it was for readers. Several tutors/TAs expressed the desire to explore teaching as a profession or to gain teaching skills to use in other professions. For example, Roger Long, who hopes to become a medical doctor, was seeking to gain teaching skills in order to improve his effectiveness in educating future patients. Thomas Diller's long term goals were to conduct research in the field of chemistry, but he had enjoyed

some teaching in the Navy. He was hoping his experience as a TA might help him narrow his career goals. Others have been motivated by a specific desire to work with certain professors, either to gain specific knowledge from them or to increase their chances of obtaining a good letter of recommendation for graduate schools.

Experience as a tutor/TA is a mark of distinction well thought of by those reviewing graduate school admissions. Working as a tutor is a successful way of meeting faculty, building credentials for a resume and detaining better letters of recommendation. Faculty typically spend more time with TAs than they do with readers. They get to know them personally and faculty are better able to assess their skills for letters of recommendation. TAs have the opportunity not only to stand out academically, but they are also given the opportunity to demonstrate leadership ability and teaching skills. This additional information provides faculty members with a method of distinguishing the TA from the mass of other students in contact with the faculty member.

With an undergraduate student body so interested in going on to professional or graduate schools, distinguishing letters of recommendation are valuable currency. Professor Saltman writes approximately 200 per year and states that he can write better letters for his TAs than regular students in his classes. Cecilia Ubilla also commonly writes many letters of recommendation for the tutors she supervises at OASIS. She makes

it clear, however, that the tutors come to her for letters when they need a letter of recommendation from their employer and not just from a faculty member.

Another significant reason for seeking a tutor/TA position was to gain mastery of the particular subject matter, either to prepare for exams, or to gain breadth and depth of knowledge. It seems to be almost universally accepted that one of the best ways to learn material is to have to teach it to others. The proverb, "to teach is to learn," was often quoted by witnesses. As Professor Saltman put it, the fear of being humiliated and looking stupid in front of a class of students is remarkable motivation to learn the material well.

I therefore find that individuals seeking to be tutors/TAs are motivated by several factors: paid employment to support themselves, an opportunity to teach, an opportunity to work with particular faculty, mastering particular subject areas and improving credentials for graduate school.

As with readers, there are different pay rates for graduate and undergraduate tutor/TAs.¹² Both graduate and undergraduate rates are separated into group sessions and individual sessions. Graduate students are paid \$11.37 per hour for tutoring sessions with individual students and \$13.66 per hour for group tutoring sessions. Undergraduates receive \$8.75 per hour for individual

¹²There is also an additional rate offered to post doctoral tutors employed by the UCSD medical school for tutoring medical students. Individuals employed in that position are not included in the requested unit and are not relevant to this hearing.

sessions and \$10.49 for group sessions. The group session rate is used when the tutor works with three or more students in a session. The difference in pay reflects the additional expertise of graduate students and the additional effort required by group sessions. Pay is not based upon the financial need of the tutor/TA.

In the OASIS program, tutors are paid for hours worked. In some departments, tutors/TAs are paid a set amount based upon the hourly rate as a percentage of a full-time position.

Graduate students serving as tutors are eligible for two additional benefits if they are appointed 25 percent or more of a full-time position. The first is GSHIP health insurance. The second is registration and educational fee remissions. Undergraduates and non-student tutor/TAs do not receive benefits. They are responsible for their own health insurance and registration and educational fees.

As with readers, tutors/TAs are urged not to over-commit their time. Thus, most conflicts between job duties and the students' own academic program are avoided. Tutors in the OASIS program have more flexibility with their hours and therefore are better able to avoid conflicts with their own studies than TAs. Once TAs accept their position, however, they have committed to a rigorous schedule of section meetings, office hours and preparation time. When conflicts do occur between their employment commitments and their own academic program, I find

that TAs will maintain their TA obligations at the expense of their own coursework.

When either employment or academic disputes arise, they are handled in the same manner as with readers. The vast majority are handled informally between tutor/TAs and their supervisor or faculty member. Assistance in resolving such disputes is available from a number of sources. Provosts, deans, advisers, and departmental staff all appear to be very willing to assist conflicted individuals in resolving their disputes. At these initial informal stages, disputes of both employment and academic issues are treated identically.

If disputes are not resolved informally at these initial levels, then more formal avenues are available. If the dispute is employment related, the tutor/TAs may utilize the grievance procedure outlined in APM 140 and PPM 230-5. If the dispute is academic in nature, the process varies depending upon the department or college where the dispute arises.

Non-students are employed when students are not available to fill open positions. The hiring preferences for tutor/TAs are the same as readers, i.e., graduate students are given first preference, then undergraduate students, then non-students. A significantly greater number of non-student tutor/TAs are hired compared to non-student readers. For example, from fall 1993 through fall 1995 almost as many non-students were hired (173) as graduate students (203). During that same period, there were 879 undergraduates in the tutor/TA position. Student employee

tutor/TAs and non-students are placed in different title codes due to IRS administrative regulations.

As with readers, there is ample evidence that UCSD could not fulfill its teaching mission without the use of undergraduate tutor/TAs. Numerous University witnesses testified that undergraduate TAs were essential. Professor Weinhausen testified that UCSD had to rely on undergraduate TAs because of a 40 percent growth in the number of biology majors over the last 4 years. Provost Bond echoed the testimony that there just were not enough graduate students to fill the TA needs and undergraduates must be used. Professor Saltman was clear that he would not have been able to teach his courses without the assistance of undergraduate TAs. Provost Wulbert not only testified that they were essential, but also that there was a great financial advantage to the University in hiring them.

Oh, the undergraduate TAs are cheaper. We hire them - - they cost less. There have been enormous budget cutbacks . . . That's an issue. We're looking at costs more now than we ever did before.

Even as far back as the 1970s, University officials realized the essential nature of using tutor/TAs. In a memo from Assistant Dean of Graduate Studies Jean Fort to Vice Chancellor Javet, Fort acknowledged that the inability to use undergraduate TAs "would, of course, have a severe impact on lower division teaching at UCSD."

A few University witnesses testified that it might be possible to do just as effective a job using all non-student

tutor/TA positions, but that was contradicted by several other University witnesses.¹³ For example, Cecilia Ubilla, Coordinator of the Language Program at OASIS, testified that while she could hire many French speaking individuals from the La Jolla community, they are not trained in the dynamics of academic programs, and would therefore never acquire the caliber she requires. Several other witnesses, Saltman, Fort, and Bond, among others, also testified about the unique benefits of undergraduates being taught by peers. TAs have recently taken the same course and received an A in the course. Undergraduate TAs also share many other common University experiences which can assist communications. Most witnesses testifying on this subject indicated a belief that a collaborative learning environment involving peers as teachers was much more effective than other available alternatives.

Most graduate tutors are funded through the Graduate Enrichment Program (GEP). The GEP is a small program administered within the Office of Graduate Studies and Research (OSGR). The primary purpose of the program is to fund "academic enrichment" projects for graduate students throughout UCSD. Departments submit project proposals to OSGR, which in turn determines the funding level of the grant it will provide. A typical grant would be approximately \$800. Although most of the

¹³While some witnesses suggested it might be possible to utilize all non-students to perform tutor/TA functions, not a single witness suggested the University could eliminate the duties they perform without doing irreparable damage to the instructional program.

funds expended have gone to graduate student salaries, program guidelines specify that the primary purpose of the program is to provide academic enrichment to students, not financial support.

A few examples of proposals that were funded were a visiting scholars program where graduate students were polled as to whom they would like to invite for a seminar series. Another was a symposium where graduate students were provided the opportunity to present their research to both faculty and peers. Another was a series of faculty student seminars where faculty would discuss their current research efforts. Another supported a film series followed by faculty student discussion groups. One supported an all-day conference on Cuba held in the Latin American Studies Complex. Some supported social events involving faculty and students. In the literature department, funds supported informal discussion groups between faculty and students where faculty presented their works in progress. Some grants funded tutoring projects aimed at helping specific students prepare for departmental exams or increase language proficiency in order to speed up progress on the research for their dissertations.

It appears that a significant portion of the funding went to graduate students' salaries in the tutor title for their time spent coordinating these various programs.

Associates

Associates are graduate students hired to teach a course. They are utilized in two primary ways. The largest number of associates are employed in the Music Department where they give

individual or group lessons as a course entitled Music 32. Other associates are employed by various departments, and have complete autonomy for teaching a course. Associates typically have advanced to candidacy and have full responsibility over the course they teach. When teaching a course, their responsibilities include, but are not limited to, selection of textbooks and reading lists, preparation and delivery of lectures, holding office hours, design of all course assignments, mid-term and final exams and determination of grades. These duties are identical to those of regular faculty when teaching a course.

According to Dean Attiyeh, associates are:

. . . [V]ery near completion of their degree and are virtually qualified to accept a regular faculty appointment anywhere, so they are someone who is quite far along in their professional training. They are also someone who has had teaching experience before. . . . and we have pretty much restricted it to people who have clearly demonstrated that they are highly qualified to carry out this institutional responsibility.

Provost Wulbert echoed Attiyeh's views stating that associates are "the people we think absolutely can do the best teaching job that we have available there."

Associates receive little, if any, supervision of their work. If they ask for assistance and feedback from more senior faculty, they are, however, able to get help. The amount of guidance received seems to be directly related to whether or not it is requested. Thus, while there is no requirement for any supervision and most associates receive very little, the

opportunity does exist. Similar opportunities for help are available for new faculty. Provost Wulbert has on six to ten times sat in on lectures of new faculty and given them feedback on their teaching skills. Wulbert testified, however, that he gives more attention to associates than he would a new instructor coming on staff. Last year, he sat in on the class of an associate several times and reviewed all the associate's exams and homework assignments.

The actual work performed by associates is indistinguishable from that of lecturers or other faculty. During the development of the position in the 1960s, both non-student lecturers and student employees doing the work currently performed by associates were placed in the title of acting instructor. When the lecturers unit was created (Unit 18) that title was abandoned throughout the UC system. All non-students were placed in the lecturer position, and at least at UCSD, student employees teaching a course were placed in the associate position.¹⁴

Gary Gillespie has been in the unique position of being both an associate and a lecturer at UCSD. Gillespie testified:

There was no difference to me in being an Associate or a Lecturer. . . I had complete freedom to do what I wanted to do. . . I designed the whole course myself. . . My job was to keep the students happy and I needed to prepare them for the following courses, so

¹⁴One associate testified that he was told he could not be hired as an associate as long as he was a registered student. According to that witness, he therefore did not register that quarter. I believe this testimony was either mistaken or the situation was an aberration. All other testimony clearly supports a finding that associates must be registered students.

they needed to basically meet the prerequisite and they had to be happy. They didn't want students complaining about this or that, so under those guidelines, I was able to, you know, create the whole course myself.

Question: As a lecturer?

Answer: As a lecturer, as an associate in the summer and then as a lecturer in the Fall.

When asked whether there were any differences between associates and lecturers, Professor Williams responded:

Yes. The lecturer position requires a Ph.D, I believe, and so associates are graduate students who do not yet have Ph.Ds.

Associates appear in the course catalogs in a matter indistinguishable from other faculty. Students receive the same credit for courses taught by associates and faculty.

The largest employer of associates is the Music Department where associates teach Music 32. From fall 1993 through fall 1994, the Music Department employed 34 associates. During that same period, only six other departments employed more than one associate (political science and theater employed two, literature three, math four, philosophy six and sociology seven.)

All associates in the Music Department have expertise on the instruments they are teaching and most, if not all, appear to have extensive teaching experience. For example, Patty Cudd had her own private students for the past 12 years. According to Cudd, the teaching was very similar. David Savage had more than 20 years of teaching experience with private clients prior to teaching Music 32. He has continued his private teaching

practice while also teaching Music 32. He does not distinguish between Music 32 or private students. He uses the same teaching techniques for both. Even on his job applications, he lists teaching, but does not distinguish between private students and UCSD students.

Although there are many associates in the Music Department who seek careers as performing musicians, most associates have as a career goal to become teachers, preferably in higher education. To that end, their educational objectives are to obtain a degree and be well credentialed for the job market, with both marketable skills and an impressive curriculum vitae. Employment as an associate can provide individuals with both experience and credentials. While some individuals have other higher education teaching experience, such as in local community colleges or at San Diego State University, for some associates it is the most significant teaching responsibility they have had to date. Selection as an associate is a recognition of a certain skill level that may be important to future employers. Employment as an associate also provides income for the associate.

I therefore find that associates are motivated to take the associate job for three main reasons; to build their teaching skills and gain teaching experience, to add teaching experience to their curriculum vitae, and to generate income.

The number of potential associate positions is determined by undergraduate enrollment and availability of faculty. Lea Hubbard was selected as an associate when the professor scheduled

to teach the course left for a post doctoral position. Hubbard was a logical choice because the course material was related to her dissertation subject, and she knew the material. When Gary Gillespie first interviewed, it was for a lecturer position upon the retirement of a lecturer. Because he was a graduate student at UCSD, the department told him he would have to be hired as an associate, rather than a lecturer. Laura Miller took her job as an associate because the chair asked her to teach the course. John Putman was asked to be an associate when the professor teaching the course had dropped out at the beginning of the quarter. The chair asked him to take over the class due to his expertise with the material.

In the Music Department, assignments are made in order to fulfill the need to teach undergraduates certain instruments. Selection is also somewhat influenced by a faculty ranking of graduate students based upon factors such as grade point average, activity within the department, completion of certain classes, etc.

Associates receive the same course evaluation by the students as do all other faculty. They do not receive any other formal evaluations by any supervisor.

Of the many associates who testified, only one mentioned she was assisted as an associate by a mentor relationship. Lea Hubbard testified that she considered several members of her dissertation committee to be mentors. When she was offered a job as an associate, she went to several of them and asked for help.

They responded with incredible support according to Hubbard. Hubbard indicated that the same individuals were also very helpful to her in her teaching at a local community college.

The only other associate testifying about a mentor relationship was David Savage. Savage had three teachers he would consider mentors and none of them were associated with UCSD. Two of them were in Los Angeles and one of them was in Mexico. He sought them out as teachers, traveled to them, studied with them and developed his pedagogy based upon their teaching.

Most associates indicated that the teaching experience was very valuable for them. Patty Cudd testified that teaching percussion helped her in her own performance because she had to think about things about why she moved her hands in the way she does. Hubbard testified that she learned a great deal about how to teach, improved her credentials on her resume, learned the material better, and made some money. Hubbard did not distinguish her teaching at the community college from her teaching at UCSD. She prepared the same for both classes. John Putman said that any experience in front of students is helpful, but he would not distinguish between his experience as an associate from his experience as a faculty member at San Diego State University or local community colleges. David Savage testified in a similar manner. He felt he learned from teaching all of his students, but made no distinction between his UCSD music students and his private students.

A couple of associates also testified about a downside of accepting an associate position. Both Miller and Putman testified that working as an associate slowed progress on their own dissertation research and writing. According to Putman, he was too busy writing lectures, administering exams and grading papers to do any significant writing of his own. According to Miller, her first experience as an associate took up most of her time. Although less time consuming the second time it still took the majority of her time. Her time spent as an associate will cause her to take longer to complete her dissertation.

In the Music Department, associates are paid 3 percent of an FTE for each student they are assigned. Therefore, an associate with three students would receive a 9 percent appointment. One assigned six students would receive an 18 percent appointment. This is the identical rate paid to non-student lecturers also teaching Music 32.

In departments other than music, an associate teaching a course is considered a 50 percent appointment. The associate would also receive GSHIP and fee remissions. If a lecturer were hired to teach the same course, the lecturer would be hired at a 33 percent appointment and would not receive any benefits. Therefore, although a lecturer's pay is at a higher rate than that of an associate, the cost to the University for hiring an associate is greater than hiring a lecturer to teach an individual course.

According to Provost Wulbert, if all the University cared about was getting classes taught, it would probably be more effective to use lecturers rather than associates. A large pool of community college instructors known as "freeway flyers" would offer undergraduate students consistency in teaching. According to Wulbert, each new group of associates have to be trained and a certain amount of mistakes occur each time. Those might be avoided by using lecturers instead of associates.

Indicia of Student and Employee Status

Student employees in all the positions in dispute are required to perform all the functions, fill out all the paperwork and complete all the course requirements as all other students. They also fill out employment forms, tax forms, timesheets, etc., like other employees.

Mentor Issues

Mentoring is a well recognized aspect of graduate education programs in the United States. It generally reflects a relationship that is significantly more important than simply giving advice, answering questions or writing letters of recommendation. In the context of this record, it denotes a relationship where a faculty member will take a graduate student or a junior colleague under his or her wing and offer intense collegial advice about issues including, but not limited to, the student's educational goals, research goals and methods, career objectives and opportunities, and the student's mastery of subject matters. Mentors will often go well beyond writing

letters of recommendation and will more actively help graduates in their search for employment. Mentors often remain available to the student for guidance long beyond the time period the two individuals may be in a mentor student relationship.

Dean Attiyeh testified that UCSD has tried to create numerous opportunities for developing undergraduate mentoring relationships. For example, UCSD created freshman seminars where a faculty member would give an informal seminar on some subject of interest to the faculty member. An example might be a professor of chemical engineering teaching a class on how a refrigerator works, or a class regarding the faculty member's particular area of research. The objective is to create the opportunity for closer student faculty ties of a more personal nature than might ordinarily be available.

Vice Chancellor Watson testified about a special undergraduate research program where faculty can identify students whose research papers or course papers are particularly good. Faculty can nominate the student to make presentations at undergraduate research conferences, thus providing opportunities for additional personal contact between faculty and student.

Audrey Littlefield, Assistant Dean for Graduate Studies and Research, testified that some research fellowships actually require that a mentor be appointed and provided to the student to give guidance regarding research. Professor Saltman described a sense of collegiality that develops between himself and the TAs working for him.

Numerous University witnesses testified about the importance of the mentor relationship for both graduate and undergraduate students and their fear that the process would be undermined by collective bargaining. Dean Duggan testified that mentor relationships are primarily between Ph.D. candidates and their dissertation committee members, although some mentoring can take place within numerous other student faculty relationships. He believes that a good mentoring relationship is the most important factor to successful completion of a Ph.D. program. Duggan believes that although not always the case, union representation of student employees could endanger the mentor relationship. An example he gave was when graduate students went out on strike in support of the Association of Graduate Student Employees (AGSE) seeking recognition at the Berkeley campus in 1992. According to Duggan, many faculty were very unhappy at having to take sides in the dispute. Some supported recognition of the union and others were against it. Some faculty were also quite upset at having to teach sections that had usually been taught by student employees. Duggan also believed it was equally true that many student employees felt resentment towards faculty for not supporting the strike. The bad feelings on both sides caused disillusionment and strain on the faculty student relationship.

During the strike, Duggan, who was the University spokesperson at the time, was on a dissertation committee of Andy Kahl, an AGSE spokesperson. The strike created a strain in their relationship. However, their relationship continued after the

strike and Duggan continued reading Kahl's dissertation chapters. Duggan felt it was up to the two of them to work through the strain created by the strike and that they were successful in doing so.

Dr. Ellen Switkes testified that it is very likely that a student's thesis adviser could also be that student's supervisor. However, this is not supported by the record. Quite the opposite is true. The record reflects that it is very rare that individuals will be in both an employee-supervisor relationship and a student-faculty mentor relationship at the same time. According to Switkes, the mentor relationship could be disrupted if faculty were limited in any way in their hiring preferences of student academic employees. Switkes worries that collective bargaining "could disrupt the fluidity of the student faculty mentor relationship by hardening the ways in which students and faculty work together."

Part-Time and Intermittent Employee Issues

University experts testified that in their opinion representation of part-time or intermittent employees is difficult due to turnover and lack of continuity. Union witnesses, however, offered examples where part-time or intermittent employees such as grocery clerks, have been successfully represented by unions.

Grievance Issues

The vast majority of disputes involving student employees, both employment related and academic related, are settled within departments through informal discussions. Student employees and faculty supervisors are encouraged to resolve matters at the lowest possible level through collaborative and informal efforts. Student employees may also enlist the advice and assistance of their faculty advisers, department chairs, provosts, and deans, if matters are not resolved between the student employee and the faculty member or supervisor.

If employment related disputes are not resolved informally, a grievance may be filed. The grievance process for employment related grievances is set forth in the UCSD Policy and Procedure Manual (PPM 230-5) and is consistent with the University's non-senate academic appointee grievance policy set forth in APM 140.

Student academic appointees are eligible to grieve a matter related to their assignments in the Teaching Assistant, Research Assistant, Reader and Tutor titles only. Student complaints pertaining to matters of academic standing or to non-academic matters (e.g., discrimination) are handled through applicable student grievance procedures.

The grievance procedure provides a multi-step process starting with informal review and proceeding through a formal hearing process. There are specific timelines applicable at each step of the process.

If the grievance is not resolved informally at Step I within 30 days, it can be appealed to Step II, where the grievance is reviewed by the appropriate department head or dean, and a

written response is issued by the University. If the grievance is not resolved at Step II, it may be appealed to either Step III (administrative consideration) or Step IV (hearing consideration) but not both. The Vice Chancellor, Academic Affairs determines whether Step III or Step IV is the appropriate route for appeal.

At Step III (administrative appeal), the grievance is reviewed by the chancellor's designee and a written decision is issued.

If the subject of the grievance¹⁵ is appropriate for Step IV, the grievant may elect to have the grievance heard by either a University hearing officer (appointed by the chancellor's designee), a three-member University hearing committee (each side selects one member and they, in turn, select a third), or a non-University hearing officer (selected by the parties off lists provided by the American Arbitration Association).

Both the grievant and the University may be represented throughout the process. A record of the hearing is either transcribed or recorded. Both sides have the opportunity to call and cross-examine witnesses and present documentary evidence. A statement of findings and recommendations is issued by the hearing officer or hearing committee and is forwarded to the chancellor or chancellor's designee. The procedure limits the

¹⁵The following subjects are appropriate for a Step IV hearing: Nondiscrimination, Layoff and Involuntary Reduction in Time, Personnel Records/Privacy, Holidays, Vacation, Sick Leave Corrective Action (Censure, Suspension, Demotion), Dismissal, Reprisal, and Procedural Irregularity in the Personnel Review Process.

authority of the hearing officer or committee from exercising academic judgment. The chancellor may adopt, modify or reject the findings and recommendations. However, if modified or rejected, reasons must be given.

The process also specifically states that:

The use of this policy shall not be discouraged by the University by any means, either direct or indirect.

That admonition is not heeded in some cases, however, as University witnesses testified that they actively steer students away from using the grievance process and into the student's academics appeals process. For example, Dr. Ellen Switkes testified:

. . . students are not excluded from using that process. In other words the process, unlike some other policies in the APM, does not say students may not use this policy. However, my office has for many years and continues to advise that we can't think of any appeals or grievances that should be allowed under that policy from student employees. We advise that all student grievances and appeals get handled through the student appeals mechanism and not through the employment appeals mechanism.

Switkes urges that such a grievance procedure not be used by student employees because she fears that any process having the potential to formally find a wrongdoing by a faculty member, or one which could lead to an order against a faculty member, could lead to retribution by that faculty member against the student employee grievant. Thus, according to Switkes, even though the faculty member may have been completely in the wrong and a terrible grievance might be redressed, it could ultimately be

damaging to the student employee grievant because faculty advisers and students are tied together for their professional life, and professors can exercise great power over students.

Dr. Judith Craig, Associate Dean at the University of Wisconsin-Madison, supported Switkes' testimony that any grievance process for student employees is problematic because of the potential of academic retaliation by faculty. Craig opposes representation for student employees because she feels union involvement creates a more adversarial relationship. Craig testified as follows:

I think that it is much better, it's more productive and it tends to resolve issues better and faster if the union is not involved. When the union is involved, I think an adversarial tone comes into the situation that is counter-productive.

Craig also fears that a grievance process is problematic because arbitrators might involve themselves in academic issues and faculty members might avoid taking action, which was appropriate for them to take, simply out of fear that a grievance might be filed.

Dean Littlefield also testified that allowing students to be represented makes the process more formal and hampers the parties' ability to settle a dispute in a collaborative manner. Littlefield referred to two instances where students had been accused of academic dishonesty. They both chose to be represented and Littlefield felt, as a result, the process did not work as well.

The student brought in an attorney, and as soon as that happened, the faculty and department sort of backed away and decided that they weren't that interested in collaborating because the student was legally represented in this endeavor.

These two cases were, however, the only two such cases Littlefield had experienced since she came to UCSD in 1979. Although she has referred students to PPM 230-5 when they have disputes regarding strictly employment matters, she has only actually been involved in processing one or two grievances under 230-5 during her tenure at UCSD. Littlefield has never been involved in a grievance filed pursuant to a collective bargaining agreement, and she acknowledges that the right to file a grievance does not limit the parties' ability to settle the dispute informally.

Littlefield's experience is that most often disputes involving student employees are tied to academic issues. According to Littlefield, while disputes rarely involve only employment issues, there are cases, such as denial of sick leave or assignment of too many hours, that do seem strictly employment related.

The evidence regarding grievances at other universities has been mixed. Union witnesses generally testified that grievance procedures provide an effective mechanism for employees to address concerns. Many said that such procedures tend to depersonalize the issues raised, attacking problems and not people. Practically every University witness who has been involved in grievance processing convincingly disputed the idea

that a grievance process depersonalizes complaints raised by student employees.

A number of witnesses testified about grievance experiences at UC Berkeley. Dean Duggan does not believe that formal procedures, regardless of the nature of the substantive issues, tend to depersonalize conflicts. He believes that any time that individuals are challenged, called on the carpet, or embarrassed, they tend to get defensive. Duggan's experience at UC Berkeley leads him to believe that union representation tends to make students think of faculty as a monolithic institutional body rather than as individuals. Duggan believes that conciliation is more difficult because faculty see themselves being perceived by students as members of a class, rather than individuals. This, in turn, leads to faculty defensiveness. The same can be said of other processes available to students however. In the graduate student appeal process at UC Berkeley, where academic conflicts may be raised, students have the right to a hearing and may be represented. If the student is represented by a lawyer, then so is the University, and the adversarial nature of the dispute is often ratcheted up to another level.

Duggan also testified about two cases at UC Berkeley where grievances were filed by student employees against their mentors. In one case there was no erosion of the mentor relationship and in the second case, the personal relationship deteriorated.

Duggan clearly prefers to resolve the disputes before they get to a formal appeals process, whether it is academic or

employment related. Approximately 80 percent of the disputes coming to Duggan are resolved informally. According to Duggan, however, most cases that get to the actual formal appeals process are cases that are just too difficult from the start to resolve any other way.

Debra Harrington, Manager of Labor Relations at UC Berkeley, testified that other processes, such as bringing disputes before the graduate council in a manner similar to academic disputes would be less confrontational because it is not a standard evidentiary process and does not necessarily involve having a faculty member come in and testify. Harrington believed such a process would be more effective because it is difficult to separate employment and academic issues and the graduate council would have the ability to look at the total relationship.

Mary Ann Massenburg, International Representative with the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), testified that the University's concerns about arbitrators intruding into academic judgments via the grievance process can be dealt with in a manner similar to other universities and other industries, where related issues have arisen. Massenburg cited examples of the UAW representing attorneys, where the parties have successfully dealt with employer concerns about arbitrators making judgments regarding legal expertise, or with writers where employers want to maintain sole discretion over editorial content and competence matters, or artists where the concern is over creative differences.

Massenburg also testified that employment disputes over payroll processing, workload, emergency loans, pay, classification, termination, and layoff have been resolved through the use of both informal and formal processes of APM 140 without any adverse impact on student employees. In many instances, the outcomes of the grievance process have been the resolution of conflicted situations which have been acceptable to both sides.

Dr. Steadman Upham, Dean of the Graduate School and Vice Provost of the University of Oregon, testified that under current leadership, they are experiencing relative labor peace. Their labor management relationship, however, like any bargaining relationship, evolves depending upon the leadership of both parties; sometimes good, sometimes not so good. Dean Upham expressed his concern that grievances are accelerated prior to negotiations as a pressure tactic and that grievances have not been settled at the lowest possible levels. He believes that the union uses individual grievances as a possible way to build solidarity for bargaining issues.

It is of great concern to Upham that an arbitrator might assert binding authority over academic decisions. It appears however, that the authority of arbitrators has not been that great of a problem to date. No grievances have gone to arbitration since Upham has been Dean. In the history of the bargaining unit, only two grievances have ever gone to arbitration; one on dues deductions which was decided in favor of

the union and one on severance pay which was decided in favor the University. Upham cited solutions reached through the grievance process which were compromises designed to meet the key interests of both parties. Upham also cited several grievances where the University prevailed by simply maintaining its position that the grievance involved rights reserved to the University.

Diane Rau, a union representative from the University of Oregon, testified that grievances were often settled informally at the lowest possible levels. She gave numerous specific examples of employment related grievances being settled. Issues such as personnel files, evaluation processes, assignment of pay levels, payroll issues, work environment, office equipment and supplies, use of telephones, and safety issues were settled using both informal and formal grievance processes within the collective bargaining agreement. According to Rau, neither the processes used, nor the outcomes, had any negative effect on unit members' ability to operate freely within their academic environment. She testified that most disputes are resolved informally and typically very quickly. She may not even hear about them when they are resolved. They are often legitimate concerns which are addressed promptly, with no further action or discussion.

Occasionally, however, grievances can damage the student faculty relationship. Dr. Paul Lehman, an Associate Dean at the University of Michigan, gave an example where a student employee felt that her grievance was against the University, a huge

impersonal institution. When it came time to try to resolve the grievance, however, it became clear that the grievance was aimed at one particular faculty member, who happened to be a professor within the grievant's major.

According to Lehman, the informal conversations at Step I of the grievance procedure were perceived as a casual inquiry by the professor rather than a grievance. When the professor received the written grievance, the professor became "an emotional basket case." Lehman assured the professor that the grievance was a routine procedure that the student employee had a right to file under the terms of the contract, and that the professor should not take it personally. Nevertheless, the professor was in Lehman's office several times in tears over the grievance.

Lehman had no knowledge about the state of the relationship between the grievant and the professor prior to the grievance, but after the grievance, it deteriorated rapidly to the point where the student employee left the University of Michigan to finish a degree program elsewhere.

Dr. Judith Craig, from the University of Wisconsin, believed that contracts providing for grievance mechanisms escalated issues to the highest levels very rapidly. Craig believed there was very little effort made to resolve issues informally. She also believed that the union would increase the number of grievances in order to build support for negotiations when contracts were coming up for renewal.

Dr. Alice Audie-Figueroa, Assistant Director of the Research Department of the UAW, was formerly a job steward for the Teaching Assistants Association at the University of Wisconsin, Madison. While there, she processed a number of grievances and found having a process for resolving disputes was helpful. In contrast to the testimony of Dr. Craig, she also felt it was helpful to grievants to be represented. Most of the grievances she processed were resolved at the lowest levels within the department. In a few cases regarding workload, the information the parties had available was insufficient to make informed decisions. The union and the University agreed that for the next semester, TAs would keep careful logs of their assignments and hours. The parties discovered there were clear inconsistencies among faculty about expectations and responsibilities which led to inconsistent assignments. These collaborative efforts helped to resolve the dispute.

Nancy DeProse was a UAW representative at the University of Massachusetts at Amhurst. Both the university and the union emphasize informal grievance resolution. During her tenure, approximately 30 to 40 grievances covering a wide range of issues have been resolved, almost all of them at the first informal step. Only one or two have gone to Step II and only one has gone to arbitration. Sometimes the parties will get the grievant and the faculty member together to resolve the issue and sometimes the parties will involve the department head. She testified that the grievance process has not created any detrimental effect to

the relationships between student employees and faculty members. In only one instance were the parties unable to resolve a student employee faculty conflict. In that case they were able to have the student employee's job moved to another location with a different faculty supervisor. The conflict between the student employee and the original faculty member preceded the grievance and the grievance process was able to deal with the conflict, not exacerbate it.

Dr. Daniel Julius, Associate Vice President for Academic Affairs and Director, National Center for Employment Studies at the University of San Francisco, testified that grievances in a collective bargaining setting can be particularly troublesome because arbitrators may interfere with academic issues. Julius believes it is likely that arbitrators may assert authority over issues such as tenure decisions or the awarding of grades.

The following very briefly reflects some of the grievance processes included in other collective bargaining agreements involving student employees, which were offered into evidence at the hearing. They all are multi-step processes beginning with some form of informal resolution discussion and culminating in final and binding arbitration. Both parties have the right to be represented at all stages of the process. A record is usually made of the proceedings and parties are entitled to both call and cross-examine witnesses as well as offer documentary evidence.

The collective bargaining agreement between the University of Michigan and the Graduate Employees Organization, AFL-CIO

Local 3550 includes informal discussions at Step I and ends in final and binding arbitration at Step IV.

At the University of Wisconsin, Milwaukee, the collective bargaining agreement between the State of Wisconsin and the Milwaukee Graduate Assistants Association provides a grievance process beginning with informal discussions at Step I and ending in final and binding arbitration at Step IV. Allegations of retaliation based on the use of the grievance process are specifically deferred to the Wisconsin Employment Relations Commission. The termination of probationary employees is also not subject to the grievance process. The parties have agreed to meet whenever necessary outside the grievance and collective bargaining procedures in order to share information and concerns, and to resolve matters concerning the administration of the contract.

At the University of Wisconsin, Madison, the collective bargaining agreement between the State of Wisconsin and the Teaching Assistants Association, is very similar to the University of Wisconsin, Milwaukee collective bargaining agreement, except that a grievance may be filed by either the union or the employer. When the grievance is denied entirely, the fees and expenses of the arbitrator are borne entirely by the party initiating the grievance. When a partial decision is issued, the arbitrator allocates expenses. At Madison, the union management meetings are regularly scheduled each month in an

effort to share information and concerns, and discuss administration of the agreement.

The collective bargaining agreement between the State University system of Florida and the Graduate Assistants United (United Faculty of Florida) provides for informal discussions prior to a grievance being filed and leads to final and binding arbitration at Step IV. Arbitrators are specifically precluded from reviewing supervisory exercises of discretion.

The collective bargaining agreement between the University of Massachusetts at Amhurst and the Graduate Employee Organization Local 2322, UAW, includes a grievance procedure starting with pre-grievance informal discussions and ending in final and binding arbitration at Step III. It includes the following limitations to the authority of the arbitrator:

Furthermore, the arbitrator shall be without authority to consider or render decisions concerning any academic matters or any aspect of a GEO member's status as a student.

The Memorandum of Understanding between the State of New York and the Graduate Student Employee Union, Communication Workers of America, Local 1188, provides for binding arbitration for five types of grievances. It specifically is not applicable to actions taken by the employer regarding academic matters. Fees and expenses are paid by the losing party.

At the University of Oregon, the collective bargaining agreement with the Graduate Teaching Fellows Federation (AFT Local 3544, AFL-CIO) provides that grievances may be filed by individual employees, the union, or the university. The parties

also negotiated limitations on the arbitrator's authority regarding academic judgements, including the following:

The arbitrator shall have no authority to hear or decide any issue or grievance relating to any academic decision or judgment concerning the member as a student

The arbitrator shall have no authority to make a decision which is contrary to the academic policies and academic regulations of the University.

The parties also agreed that the union and the designee of the president of the university shall meet at the request of either party to discuss matters pertinent to the implementation or administration of the contract. Those meetings are not for negotiations, but rather for the purpose of discussing collective bargaining issues or any other issues that are of concern to the parties.

Information Flow

Several witnesses called by the Petitioner testified about how unions gather information from members in their role as the exclusive representative. Typically, members are surveyed to determine issues and concerns. Bargaining notes are kept to be available to successor bargaining teams in an effort to build continuity. Bargaining teams are selected in an effort to balance the interests of bargaining unit members. Job stewards are also selected in an effort to make representation available to unit members.

Several collective bargaining agreements, such as those mentioned above from the University of Wisconsin at Madison and

Milwaukee and the University of Oregon, also provide for special processes outside the grievance and collective bargaining procedures for mutually sharing information and concerns among the parties. There was testimony that these information sharing meetings were successful at heading off potential problems.

Other University Academic Units

Several other academic units exist within the University system. There is a faculty unit at UC Santa Cruz represented by the Santa Cruz Faculty Association, a systemwide unit of professional librarians (Unit 17) represented by the University Federation of Librarians, University Council-American Federation of Teachers and a systemwide unit of lecturers in the non-academic senate instructional unit (Unit 18) represented by University Council-American Federation of Teachers, AFL-CIO.

In each of these units, the parties have negotiated collective bargaining agreements. The collective bargaining agreements contain some unique provisions to accommodate the particular interests of the parties. For example, at UC Santa Cruz, the parties agreed to defer to a wide range of existing University policy as part of their contract. The librarian contract has similar provisions which defer issues to other longstanding University policies, thus excluding them from the grievance processes of the contract.

During the pendency of the appeal in the AGSE¹⁶ case, the University and AGSE engaged in a non-HEERA representation process. In August 1989, in an effort to limit the University's potential remedial liability if the AGSE decision was reversed on appeal, and to avoid additional strikes at the start of the school year, the University and AGSE entered into an agreement which became known as the Interim Agreement.

The Interim Agreement provided that the University would meet with AGSE in good faith, on a regular basis at reasonable times, to discuss issues related to terms and conditions of employment of AGSE's membership. As part of the agreement, the University agreed to provide AGSE with payroll dues deductions and provide an option for dependent health care coverage at the Berkeley campus. AGSE agreed to a no-strike clause for the duration of the agreement. The terms of the agreement also required ratification by the AGSE membership. The parties stated in the document that the agreement did not confer rights or obligations under the HEERA and that the agreement expired upon final determination in the AGSE decision.

There is conflicting testimony about the negotiating process and rights provided in the Interim Agreement. It is, however, clear that the parties did meet in an effort to resolve problems of a collective bargaining nature which were of concern to the

¹⁶Association of Graduate Student Employees, District 65, UAW v. Public Employment Relations Board; The Regents of the University of California (1992) 6 Cal.App.4th 1133 [8 Cal.Rptr.2d 275] (AGSE).

parties. Both sides had negotiating teams and they exchanged proposals on various issues and reached agreements. When they reached agreements, they were reduced to writing and became enforceable policy. These final agreements, however, were issued by the University as University policy and were not mutually signed as contract provisions.

AGSE is currently the exclusive representative of a unit of readers, tutors, acting instructors, nursery school attendants, and community teaching fellows at UC Berkeley. During the AGSE hearing in 1985, the University stipulated that readers, tutors, and acting instructors were employees as defined by the Act, and therefore, entitled to rights guaranteed by HEERA.

The parties have been engaged in bargaining for an initial contract since late 1993. The parties have negotiated over a full range of bargaining subjects and have reached agreement on a number of issues. Progress toward a first contract, however, has been very slow. Negotiations have been stalled, to some extent, over disputes in unit makeup.¹⁷

The tone of negotiations has been described by both parties as mixed. Debra Harrington described negotiations as sometimes quite antagonistic, and sometimes fairly cordial. She says there have been times when both parties have taken strong positions in

¹⁷After the representation hearing, but prior to the representation election, the University stopped using the title, acting instructor, and placed all such employees into the title of graduate student instructor (GSI) which had been excluded from coverage under the Act. There is also a dispute about whether learning skills counselors are "tutors" within the unit description.

negotiations. Mary Ann Massenburg testified that the negotiations have basically the same atmosphere and tone as many other negotiations in which she has participated. She describes them as generally civil, sometimes humorous, and sometimes argumentative. Massenburg noted that the large University bureaucracy sometimes makes the decision making process more cumbersome for the employer, but otherwise negotiations are similar to other public sector bargaining experiences.

On some issues, the University has taken a strong stand to avoid any infringement upon the University's academic judgement and discretion. For example, the parties have spent a great deal of time discussing issues regarding an arbitrator's authority to make academic judgments. The parties have reached partial agreement on the arbitrability of some issues. While the parties differ on the progress of negotiations, management feeling less progress is being made and the union believing more progress has been made, they have reached some agreements, solved some problems, and hit other stumbling blocks that they are still working to resolve.

Over the years, the University has been subjected to a number of strikes from student employee groups. At UC Berkeley there have been strikes in May of 1989, and November and December of 1992. At UC Santa Cruz there have been two student employee strikes. There have also been strikes at UCLA and UCSD. All of these strikes have been recognition strikes. None occurred during a formal bargaining relationship.

Credibility Findings

In making these findings of fact, I have weighed the contradictory testimony of many witnesses. Several experts were called to offer opinion testimony about the second prong of subsection (f). I generally find that those experts called by the Petitioner were more credible, for purposes of this hearing, than those called by the University. The experience of Petitioner's experts seem to have either both more breadth and depth, or was more directly related to the issues in dispute in this case.

Petitioner's expert, Dr. David Hecker, Assistant President of the Metro Detroit AFL-CIO, had direct negotiating experience involving student employees, combined with extensive training and academic expertise in the field. His testimony did not appear to be overstated. He was able to support his opinions with specific facts and examples. His direct testimony and cross-examination were also internally consistent.

Dr. Alice Audi-Figueroa's expertise is strong in the area of contract analysis. She is Assistant Director of Research for the United Auto Workers and is a resource for local bargaining units on a wide range of collective bargaining issues. In her testimony she was able to clearly articulate the basis for her opinions and support them with numerous examples and helpful analysis. Her direct and cross-examinations were also internally consistent.

University witness, Dr. Daniel Julius, has tremendous credentials as an expert in collective bargaining in higher education. He has negotiated at least 25 collective bargaining agreements in higher education and has authored 5 books and numerous articles on many collective bargaining subjects. However, his wealth of experience does not include any negotiations involving units of student employees. Most of his information regarding student employee negotiations was obtained second hand. As well as being primarily hearsay, his testimony suffers from excessive generalities and is undermined by inaccuracies in specific examples cited. For example, Dr. Julius' testimony about the University of Oregon had inconsistencies with that of Dean Upham from the University of Oregon. Additionally, Dr. Julius stated as a fact that at the University of Oregon, the parties reached agreement to limit the amount of time one could be a graduate student to seven years. This was offered as an example of a conflict between maintaining bargaining unit status and maintaining good academic standing. On cross-examination, however, he was unable to find that provision in the Oregon collective bargaining agreement and admitted it was only a management proposal. Julius was incorrect about the number of collective bargaining agreements negotiated at State University of New York (SUNY) and admitted on cross-examination that he has not read any of the SUNY proposals or given SUNY any input. His discussions have been limited to

strategic issues. Such examples undermine the credibility of this witness' opinion testimony.

Another University expert witness who did not suffer from lack of specific knowledge of student employee negotiations was Dr. Craig, an Associate Dean at the University of Wisconsin in Madison. She has had extensive experience with student employee bargaining at the University of Wisconsin, Madison since 1976. Her Ph.D. dissertation studied the causes and conditions which led to initial recognition of a graduate student employee union at the University of Wisconsin.

Craig's credibility, however, suffers from a very shallow analysis and apparent lack of understanding of the bargaining process. For example, when asked about difficulties which arose during the University of Wisconsin's early stages of the bargaining relationship from 1971 to 1976, she responded as follows:

Q. What activities were difficult that you are referring to?

A. Well, there were - - there were stewards and groups of teaching assistants who would request meetings, would challenge decisions, that kind of activity.

Q. And what was difficult about that?

A. Well, it interferes with - - it interferes with the graduate program. It makes it difficult for people who used to get along well together, and used to work towards a common end to keep on working towards that end.

Craig also tended to make gross generalizations which she could not back up with specifics. When asked to give an example of harassment or a nuisance grievance, Craig testified:

. . . the [union] filed complaints, if not grievances, on behalf of teaching assistants in departments over class size issues where the teaching assistants had no interest in grievances being processed. I would characterize this as nuisance and harassment, and so did the departments.

Q. And did the university feel that was - - that the [union] was being deliberately provocative?

A. Yes, I did.

When cross-examined on these harassment/nuisance grievances, it became clear that Craig based her conclusions on the comments of two department chairs who had no knowledge of whether the TAs had asked the union to look into the matter. Furthermore, in some of those grievances, adjustments were made because the University was, in fact, violating its own class size policy.

Craig also gave several other examples of how collective bargaining does not work in a university setting, which appear to be based entirely upon internal management disputes between the University and its chief negotiator. She also testified about the negative impact the union's maintenance of membership agreement might have on the University's recruitment of future graduate students. In doing so, it became clear she could not distinguish between maintenance of membership agreements, agency fee agreements or a union shop. While these concepts can often confuse people, a witness presented as an expert in collective

bargaining testifying about provisions of a contract she helped negotiate should know the difference.

The testimony of Julius and Craig is also less persuasive because their opinions about student employee coverage under HEERA are based upon beliefs that collective bargaining is detrimental to all higher education academic units. They painted their opinions with a very broad brush, thus contradicting the California Legislature, which specifically determined that it was "advantageous and desirable" to provide coverage for faculty. When one's opinions are based upon a fundamental belief so at odds with the stated purposes of the Act, those opinions about coverage under the Act tend to be less compelling. Of course it is not appropriate to reject opinions of a witness simply because they believe collective bargaining is destructive in academic settings. However, when combined with other credibility issues as well, their opinions were not helpful in making the necessary distinctions between student employee coverage, which is at issue in this case, from other academic bargaining, which is clearly sanctioned by the Legislature under HEERA.

Dr. Ellen Switkes' testimony was limited to mentoring issues and University processes.¹⁸ To the extent that Switkes offered expert opinion testimony in other areas, that testimony is not credited. Her opinion testimony within her area of expertise is of limited value because it often seemed to be based on

¹⁸Limitations regarding her area of expertise and opinion testimony did not limit her testimony in other areas as a percipient witness.

uninformed speculation. For example, she testified about how detrimental the use of APM 140 was to the student's welfare when compared to "the student complaint policy." But, when she was asked to give a brief summary of the difference between APM 140 and the student complaint policy, she was unable to do so, stating: "I can't because I don't know anything about the student complaint policy except to refer people to it."

I have already noted that I discount the testimony of those student employee witnesses who testified that the tutor/TA training offered them no learnings whatsoever. Except for those instances, the testimony of student employee witnesses is accepted at face value, particularly with regard to their individual motives for seeking work. It should be noted, however, that some of the student witnesses (Victor Vendovato, for example) were never employed in any of the title codes at issue in this hearing. As such, their testimony does not carry great weight regarding some issues.

There were also a number of percipient witnesses whose testimony was particularly credible on certain aspects of issues in this dispute. They were Professors Paul Saltman, Ross Frank, Gabriele Weinhausen; Deans Duggan and Upham; Provost Wulbert; and UAW Representatives Massenburg and DeProsse.

DISCUSSION

Indicia of Student Versus Employee Status

Before discussing the application of subsection (f) to the facts in this case, I want to dispose of two issues upon which

the parties offered considerable argument. The first is whether the facts are more of an indicia of status as a student or as an employee. The University argued that the facts support a finding of "studentness" among the individuals in question. It is clear, however, that the individuals at issue, are both. They possess all the attributes of students and they possess all the attributes of employees. The test I must apply is not whether they are more like students or employees, but rather I must balance the value to educational objectives against the value of the services. My analysis, therefore, does not focus upon, nor do I try to decide, whether student employees are more like students or more like employees.

UC Berkeley Precedent

The second issue is whether I should draw any significant conclusions from events at UC Berkeley. Both parties offered evidence and made substantial arguments about the significance of bargaining events and issues at UC Berkeley. Each side seeks to draw conflicting conclusions from this evidence. Although the record reflects numerous similarities in the duties and terms and conditions of employment between the UC Berkeley unit and the one sought at UCSD, I place little reliance upon the evidence presented regarding UC Berkeley. First, the University's stipulation that readers, tutors, and acting instructors at UC Berkeley are employees under the Act is not binding on the University at UCSD. I have previously ruled that absent a new stipulation to the contrary, each petition should be judged by

the record established at that location. The UC Berkeley stipulation was a tactical decision based upon the UC Berkeley record. It was not an admission, nor is it binding on other petitions.

Similarly, I do not find the UC Berkeley Interim Agreement an admission that collective bargaining is appropriate at UCSD or any other location. That agreement did not amount to collective bargaining under HEERA. It also was a tactical effort to limit liability in an unfair practice case and an effort to avoid another recognition strike.

Finally, I also do not place great weight on the bargaining occurring in the UC Berkeley readers, tutors and acting instructors unit. The bargaining there appears to be like many other new bargaining relationships. The parties are struggling with their first contract and dealing with new issues. There are unit description issues that are not yet resolved, which make bargaining particularly difficult. It is simply too early to draw any conclusions from bargaining at UC Berkeley, other than the fact that the parties are engaged in a difficult first negotiations.

Analysis of Subsection (f)

Subsection (f) calls for the application of three tests to determine coverage under HEERA of student employees. The first test is whether employment is contingent upon the candidate's status as students. If employment in a disputed position is not contingent upon status as students, then the additional

requirements of subsection (f) do not apply and student employees are guaranteed rights under HEERA.

The second test provides that even if employment in a disputed position is contingent upon status as a student, coverage under HEERA will be extended if services provided to the University by the student employees are unrelated to the educational objectives of those student employees.

The third test has two prongs. Under this test, student employees whose employment is contingent upon their status as students and whose educational objectives are related to the services they perform for the University, may be extended coverage under HEERA if their educational objectives are subordinate to the services provided (Prong One) and coverage under HEERA would further the purposes of the Act (Prong Two.)

First Test-Employment of Readers and Tutors is not Contingent Upon Student Status

Subsection (f)'s first test for coverage under HEERA is whether employment is contingent upon status as a student. The best evidence reflecting whether employment in a disputed position is contingent upon status as a student is whether non-students are hired into the disputed position. The record in this case very clearly reflects that employment as a reader or a tutor is not contingent upon being a student.

University policy, as well as the testimony of numerous witnesses, support a finding that students are given a preference in filling the open positions, but that student status is not a requirement. Both Vice Chancellor Watson and Dean Attiyeh

confirmed that while students are given a priority for open positions, non-students are also hired to fulfill the needs of the instructional program. Other University witnesses also testified that they hired non-students to maintain the quality of their program. This testimony is also consistent with University policy APM 420.10, which allows non-students to be hired to meet the needs of the University.

Thus, regarding readers and tutors, there is a clear hiring preference that starts with graduate students, then goes to undergraduate students, then to non-students. This is borne out by the employment figures from fall 1993 through fall 1994. While non-students make up a small number of readers, (21), they make up a significant percentage of tutors, almost as many as graduate students. There were 203 graduate student tutors and 173 non-student tutors.

Witnesses testified about being hired into a position while they were a student, then dropping out of school or graduating, and being rehired the very next quarter as a non-student. If employment was truly contingent upon student status, these non-students could not be hired once they left school. The same could be said for the numerous members of the San Diego community who have never been UCSD students, but have been hired into one of the disputed positions.

The fact that the University places student employees and non-student employees into different title codes is not significant. Different title codes are used for administrative

convenience due to IRS regulations. It is the position of reader and tutor that is determinative. Student employees and non-student employees perform exactly the same work and are treated the same in the reader and tutor positions. It is the status of the hired individual that determines which title code is used, not vice versa. Reader and tutor positions are not reserved exclusively for either student employees or non-student employees. There are no individual staffing levels assigned to student employee versus non-student employee positions.

The lack of student status as a requirement for employment is even more evident in comparison to the other position in dispute in this hearing, associates. To be an associate, an individual must be a student. That is an absolute requirement for employment as an associate. No non-students are given the job of associate.

The University argues that neither PERB nor the courts have endorsed the above argument. However, neither the Supreme Court in Regents, nor the Court of Appeal in AGSE, nor PERB in either case, have ever been presented with this issue. In Regents, it was clear that all of the proposed unit members were, in fact, students. In the AGSE case, the University voluntarily stipulated that students as well as non-students employed as readers and tutors and acting instructors, were, in fact, employees under the Act.

The University argues that non-student readers and tutors generally have had a recent student relationship with the

University. That argument is rejected for two reasons. First, the record does not support such a claim. There is little comprehensive evidence about the nature of non-students. Mostly, the record reflects anecdotal accounts of non-students being both former students and community members who are not recent students. The second, and most important reason however, is that HEERA subsection (f) does not refer to employment being contingent upon "status as a very recent student," "a former student," "a future student," or "the spouse of a student." It simply refers to "status as students."

For the above reasons, I find that the hiring preference given to students in the reader and tutor positions does not amount to a contingent requirement of student status. Therefore, the additional restrictions of subsection (f) do not apply, and all individuals, students and non-students, employed as readers or tutors, are employees under the Act.

Second Test-Services Provided by Readers are Unrelated to their Educational Objectives

Assuming for the sake of argument on appeal, that status as a student is found to be a requirement for employment as a reader, then there are still other reasons for finding readers to be employees under the Act.

Under subsection (f), student employees may also be employees under the Act if their employment is unrelated to their educational objectives. In previous decisions on student employment, the Board and courts have started their analyses after accepting the fact that the employment was related to

educational objectives of the student employee. References to the relationship between the employment and the educational objectives of student employees have been dicta and have not been consistent. For example, in Regents, the Supreme Court articulated the test in several ways. At various points the Court referred to whether the student's employment was related to "their course of study" (p. 612); whether the job was "related to their educational program" (p. 612); whether student employees were "motivated by educational objectives" (p. 613); whether "the services were unrelated to their educational objectives" (p. 613); and whether "the student's motivation for accepting employment was primarily educational" (p. 614).

In AGSE, the Court of Appeal referred to whether the "student's motivation for accepting employment was primarily educational . . ." (p. 1140).

Thus, there are two areas of analysis in determining whether the services that students provide are related to their educational objectives. The first is whether the services (grading exams and correcting papers) are related to the student's educational objectives (getting a degree and being better credentialed for career opportunities or graduate school). The second area of analysis is whether readers are motivated to perform reader duties primarily in order to fulfill their educational objectives or primarily for economic objectives. Under either analysis, I find that the services provided by readers are unrelated to their educational objectives.

The reader position fulfills no obligations which are part of any degree program. In most cases the position offers little direct contact with faculty. It does not appear to be a particularly effective way of either building credentials for graduate school or adding to a resume when seeking employment upon graduation. Except for those whose career objectives are specifically to become a teacher (such as TEP readers), the learning provided through the reader job is marginal. Even for those who plan on becoming teachers, the instruction they may receive regarding grading is typically cursory and sporadic. The readers must have already demonstrated their expertise in the subject matter or they would not have been hired for the job. While reviewing course material will always be helpful to a student, other methods such as directed reading courses or teaching the material as a TA, are much more effective at building mastery of the subject.

In reviewing the motivation of readers to seek employment, it is clear that economics plays a much more significant role than academics. It was the norm that readers sought employment to generate income in order to support themselves. While some readers were also motivated by an opportunity to meet faculty, master subject matters, gain lecture notes for their own teaching, or simply assist other students, any success they might have achieved in attaining their goals seems to relate more to their individual circumstances than to the inherent nature of the reader position. The non-economic goals of some individuals were

realized because of the atypical structure of their particular reader position (e.g., proctors who are given duties more closely akin to an undergraduate TA position than the typical reader position). For others, non-economic goals were realized because of the particular manner in which they performed their duties (e.g., Abe Shragge, a reader who also teaches courses at two community colleges, attends lectures even though it is not a part of reader duties in order to build his inventory of lecture notes for his own teaching.)

These unique experiences, however, stand in contrast to most readers who look at the readers' experience as a job. Typically, a reader position is considered a better job than many students could get elsewhere. The pay is competitive with other part-time hourly positions on campus. Most readers appreciate that it is a job with flexibility not offered by many other jobs. They also appreciate that it is a job that usually relates more closely to their academic program than driving a taxi or working in a grocery store. Most were pleased that it could help fund their education. Almost all witnesses felt it was a sought after job and many felt it was a very rewarding job. However, fundamentally, almost all readers acted like it was a job and not an educational endeavor.

The UC argument that money earned as a reader is financial aid is unpersuasive. The wages earned as a reader are not financial aid. The positions are not need based and are typically not guaranteed as part of any financial aid package,

nor referred to in letters of acceptance. When requests for financial aid are considered, income from employment as a reader is treated the same as outside income. Wages are not transformed into financial aid simply because they enable a student employee to stay in college. They are still wages just like those earned by a student working his or her way through college at a bookstore or a gas station, or like those wages spent on a vacation to Mexico over spring break.

For the above reasons, I find that the service provided by readers are unrelated to their educational objectives. The further restrictions of subsection (f) do not apply and student employees in reader positions are entitled to coverage under the Act.

Third Test-Educational Objectives are Subordinate to Services and Coverage Under the Act Would Further the Purposes of the Act

In Regents, the Supreme Court reviewed HEERA legislative history, noting that the Legislature had created a new standard for determining this issue rather than following National Labor Relations Board (NLRB) precedent. The court believed that subsection (f) was the Legislature's attempt to craft a more comprehensive alternative to either a "primary purpose" test or a test focused instead on the value of the services performed.

The court believed that in crafting HEERA, the Legislature did not focus solely on the primary purpose for the employment or on the value of services performed. Instead, subsection (f) requires that in cases where employment is contingent upon student status and the student employee's educational objectives

are related to the services performed, then PERB must balance those educational objectives against the value of the services performed.

In determining the educational objectives of the student employees, the court made it clear that PERB was to focus on the personally held subjective perceptions of the students themselves. Once the subjective educational goals of the student employees are determined, they are then weighed against the objective value of the services performed:

. . . to see if the students' educational objectives, however personally important, are nonetheless subordinate to the services they are required to perform. Thus, even if PERB finds that the students' motivation for accepting employment was primarily educational, the inquiry does not end here. PERB must look further-to the services actually performed-to determine whether the students' educational objectives take a back seat to their service obligations. [Regents at p. 614, fn. omitted.]

Thus, even if all the student employees concurred that their purpose in taking the job was to further their educational objectives, the Board could determine that those educational objectives were subordinate to the value of the services provided. For example, in Regents, there was evidence that the interns and residents chose those positions in order to best fulfill their personal educational objectives.¹⁹ Yet, the Board

¹⁹The administrative law judge (ALJ) in that case noted:

[A]ll housestaff witnesses testified that their educational objectives in choosing [and participating in a] residency program was to receive [the] best medical training and to

still found that the educational objectives were subordinate to the valuable patient care services provided by housestaff.

Once the Board determined that the educational objectives were subordinate to the services performed, the Board had to determine if it would further the purposes of the Act to extend coverage to housestaff. The Board reviewed the purposes of the Act and concluded that the extension of collective bargaining rights to housestaff would give them a viable mechanism for resolving their differences, and coverage would therefore foster harmonious and cooperative labor relations between the University and housestaff.

In upholding the Board decision, the court specifically rejected the University's claim that the University's mission would be undermined by bargaining on subjects tied to the educational aspects of the residency programs.

. . . This "doomsday cry" seems somewhat exaggerated in light of the fact that the University engaged in meet-and-confer sessions with employee organizations representing housestaff prior to the effective date of HEERA.

Moreover, the University's argument is premature. The argument basically concerns the appropriate scope of representation under the Act. (See section 3562, subd. (g).) Such issues will undoubtedly arise in specific factual contexts in which one side wishes to bargain over a certain subject and the other side does not. These scope-of-representation issues may be resolved by the Board when they arise, since it alone has the responsibility "[t]o determine in disputed

qualify for specialty or subspecialty certification.

cases whether a particular item is within or without the scope of representation." (Section 3563, subd. (b).) [Regents at p. 623, emphasis in original, fn. omitted.]

It also rejected the University's claim that extending coverage could lead to strikes and was inappropriate due to the brief tenure of housestaff.

The University also argues that permitting collective bargaining for housestaff may lead to strikes. However, it is widely recognized that collective bargaining is an alternative dispute resolution mechanism which diminishes the probability that vital services will be interrupted. (See San Diego Teachers Assn. v. Superior Court, supra, 24 Cal.3d at pp. 8-9, 13.)

Finally, the University argues that the brief tenure of housestaff's relationship with the University undermines the conclusion that coverage would further the purposes of the Act. The University acknowledges that many other individuals whose relationship with the University is of short duration have been accorded employee status with full bargaining rights. Housestaff should not be treated differently. . . . [Regents at pp. 623-624.]

In the AGSE case, originally filed in 1983, the petitioner sought to represent graduate student instructors (GSIs) and graduate student researchers (GSRs), among others. The Board had a difficult time applying the facts of the AGSE case to the test set forth in Regents. First, the Board redefined the definition of educational objectives. The Board minimized the subjective view of the student employees, added the additional opinions and objectives of professors, and analyzed them within the framework of the University's graduate program. Instead of weighing the personal educational objectives of the student employees against

the value of the services rendered, the Board stated the issue as follows:

The issue in this case is how the academic considerations of student, faculty and administration are to be weighed against the kind of services the student is performing within the context of the University's entire graduate student program. [Regents of the University of California (1989) PERB Decision No. 730-H, p. 39.]

The Board also noted that the test it was supposed to apply required the Board to balance a seemingly subjective element (personal educational objectives) against an objective one (the value of the services rendered). The Board therefore felt it was necessary to "recalibrate the scale."

Instead of looking at each side of the scale and weighing each interest (academic and employment) independently, a more helpful approach is to examine how the two interests interrelate and determine which side ultimately prevails when the two interests conflict . . . by examining the balancing test from this perspective, we avoid having to weigh subjective against objective factors in reaching our conclusion.

.

Weighing the facts of this case on our newly calibrated scale, we find that in cases of conflict between academic and employment considerations, academic considerations ultimately prevail. We therefore conclude, based upon the record as a whole, that the students' educational objectives are not subordinate to the services they actually perform as GSIs and GSRs. . . . [Id. at pp. 47-48.]

The Board then reviewed the second prong of the test, i.e., whether finding GSIs and GSRs to be employees under the Act would further the purposes of the Act. It concluded:

Thus, the academic nature of the GSI and GSR appointments, which promotes the free exchange of ideas necessary for the graduate students to become scholars and achieve their educational objectives, would be sacrificed for the economic nature of collective bargaining. This result is contrary to the purpose of HEERA to encourage the "pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the faculty, students, and staff. . . ." [Regents of the University of California, supra, PERB Decision No. 730-H, p. 54.]

The Board noted that while the ALJ focused upon the development of harmonious and cooperative labor relations between the University and its student employees, he did not address the academic nature of the professor student relationship. Citing the NLRB's discussion of labor policy in St. Clare Hospital and Health Center, supra, 229 NLRB 1000, the Board held that the importance of the mentor relationship between professors and their students in the pursuit of educational excellence cannot be understated. The Board found:

The record is replete with testimony from both professors and graduate students which describe the professor-student assistant relationship as including many more hours than the required minimum, one-on-one interaction, mutual collaboration on lectures and research papers, participation in seminars and constructive comments on each other's written work. [Regents of the University of California, supra, PERB Decision No. 730-H, p. 50.]

The Board feared that:

Collective bargaining would emphasize economics, which would become the primary goal at the expense of the academic goals of the GSI and GSR programs. [Id. at p. 51.]

Focusing specifically on the GSIs, the Board stated:

Although it could be argued that including GSIs under the coverage of HEERA could promote harmonious and cooperative labor relations among the GSIs, there is no evidence that collective bargaining would encourage the pursuit of excellence in teaching. [Regents of the University of California, supra, PERB Decision No. 730-H, p. 52.]

The selection process at Berkeley involves a mutual process of accommodating the choices of professors and GSIs. The Board found that GSIs based their choices on their desire:

. . . to learn a particular subject, refresh their background in fundamentals, or learn a different approach or perspective to a topic through a particular professor or course. This selection process emphasizes the academic nature of the GSI program. [Id. at p. 53.]

Collective bargaining was found not to promote harmonious and cooperative labor relations among GSIs and GSRs because of the continuous movement among graduate students in and out of GSI and GSR positions. The Board felt graduate students would be split into two groups: Those in bargaining unit positions and those not. Membership would change frequently, depending upon the availability of appointments and thus causing instability.

The final basis for the Board's decision was its belief that it is virtually impossible to separate academics from economics, thus, involving the parties in bargaining over current academic practices.

On appeal in the AGSE case, the court held that the Board's "recalibration of the scales" had so distorted the first prong of subsection (f) that the Board's finding was invalid.

PERB's test contradicts Regents' test because it does not examine in aggregate the educational objectives of the students and compare them with the aggregate of the services rendered. Instead it extracts those services which conflict with educational objectives and examines how conflicts are resolved. PERB lacks the authority to change the Regents test. [Citation.]

.....

PERB should have been looking for a better way to evaluate student's educational objectives and to compare them with the services they performed, not for an excuse to "avoid having to weigh subjective against objective factors."

.....

PERB's distortion of the first prong renders suspect its conclusion that GSI and GSR educational objectives are not subordinate to services. . . . [AGSE at pp. 1142-1144.]

Instead, the court laid out the proper test as follows:

"Case-by-case analysis" would call upon PERB to consider all the ways in which GSI and GSR employment meet educational objectives of the students and all the ways in which the employment provides services and to compare the value and effectiveness of the employment in meeting the students' educational objectives with the value and effectiveness of the employment in providing services. PERB, with its expertise, would then make a judgment about whether the employment was more valuable and effective in meeting educational objectives or in providing service to the University: whether the "educational objectives are subordinate to the services" the students perform. (Id. at p. 1143, emphasis in original.)

The court did uphold the Board's decision, however, because it found that the Board appropriately applied the second prong of the test, and that the Board's decision was supported by substantial evidence.

The court found substantial evidence based on the testimony of Dr. Robert Bickel, that collective bargaining would interfere with complex and fragile mentor-student relationships, could do serious damage to the stature of the institution and, effect its ability to attract and retain the most able and productive faculty and graduate students. The Board's finding was also supported by testimony about collective bargaining by Dutch graduate students.

Both the Supreme Court in Regents and the Court of Appeal in AGSE reiterated that the application of subsection (f) requires a case-by-case analysis of the unique facts presented from each petition. The unique facts of this case demonstrate that the educational objectives of readers, tutors, and associates are subordinate to the services they provide, and it would further the purposes of the Act to extend coverage to these employees. Prong One-Educational Objectives are Subordinate to Services

In this next section I will discuss the first prong of subsection (f), i.e., how the educational objectives of readers, tutors and associates are subordinate to the services they provide.

Readers - Prong One

Assuming, for the sake of argument on appeal, that it is found that employment as a reader is contingent upon student status, and that the services performed are related to the reader's educational objectives, readers should still be covered by the Act because their educational objectives are subordinate to the services provided and coverage would further the purposes of the Act. Even if the educational objectives of students are described in the broadest terms as argued by the University (finishing the degree programs, mastering various academic subjects, building relationships with faculty, serving the needs of students, experiencing the teaching process and building credentials for graduate school and post graduate employment), I find the value and effectiveness of meeting those objectives through employment as a reader to be minimal. If educational objectives are described as narrowly as the Petitioner argues (simply obtaining a degree), the value of being a reader in meeting that objective is practically non-existent.

As covered in the previous section, the greatest value of employment as a reader appears to be economic rather than academic. It does not fulfill requirements of any academic program and is not particularly effective in building relationships with faculty. A typical reader position is not at all effective for building relationships with or directly assisting fellow students.

Clearly, employment as a reader is of some value to many students in gaining mastery of academic subjects, experiencing the teaching process and building credentials for graduate school and future employment. However, as discussed earlier, employment as a reader is not a particularly effective way of obtaining that value.

An additional fact considered is that when, on rare occasions, conflicts do occur between the student's educational objectives and the service obligations to the University, they are normally resolved by the reader in favor of the service obligation to the University. This is a natural result of the necessity to get grades submitted in a timely manner. While the University places great emphasis on avoiding such conflicts by encouraging students not to over commit and by requiring approval of larger than normal workloads for readers, once the readers accept employment they are expected to fulfill those obligations even at the expense of their own studies.

The value and effectiveness of employment of readers upon service to the University is substantial. The University, as it is currently structured, would not be able to fulfill its mission if it did not employ students to perform the service of readers. Several witnesses testified that when students were not available they would hire non-students because it was necessary to maintain the integrity and quality of the teaching mission. Provost Wulbert testified that the use of readers and tutors was

essential. Professor Davidson summarized how he would have to operate without readers as follows:

Well, if I didn't have a reader in an upper division course that had a large enrollment, let's say it had an enrollment of 60 or 70 people, I would probably rely more on tests and multiple choice kinds of situations than papers, but I think that's pedagogically irresponsible because I think in those kinds of courses, they're usually large courses in the novel, for example, what you can ask on a multiple choice test is pretty minimal, whereas on a paper you can really get to see what they're thinking about these novels.

Even Dr. Switkes, who testified that the University could manage without readers and tutors acknowledged that, "it would be bad for the educational enterprise." Switkes' solution would be for faculty to read more papers and assign fewer papers. Faculty would also have to hold more office hours and either hold larger tutorial classes or eliminate them altogether. Switkes also indicated that graduate TAs could also perform more of these tasks. In other words, either eliminate work which has been highly valued or pass it on to other University employees, including other student employees. However, given the magnitude and volume of work performed by readers, simply requiring other current University employees to perform those duties seems little more than an unreasonable fantasy. This is especially true in light of the testimony that faculty have already been asked to increase their duties due to budget cuts.

The University suggests in its brief that professional readers without other academic commitments and with the potential of a long-term regular working relationship would most likely

present a more cost effective way of handling the services which need to be provided by readers. That would, however, require a drastic change in the manner in which the University operates. The University has never tried that approach and estimates about the ease with which it could be accomplished is speculation at best. It would require a candidate pool extensive enough to fill over 1000 reader positions per year and require a staggering array of academic expertise. These candidates with superior academic credentials would have to be willing to work at a wage rate of approximately \$9.50 per hour (if they were college graduates) and forego most employment benefits. They would also have to have schedules flexible enough to be available to work in concentrated bursts of time around mid-term and final exams.

Simply put, I am not convinced that the University would be successful in replacing student employee readers with a cadre of permanent professional staff in a cost efficient and academically effective program.

On the other hand, to the extent that the University could be successful in replacing student employee readers with a non-student professional staff, that supports a finding that the position is in fact a job and not an academic exercise. Furthermore, it is also clear that those replacement workers would be entitled to representation and collective bargaining rights provided by coverage under HEERA.

For the above reasons, I find that the educational objectives are subordinate to the services performed by student employees in the reader title.

Tutors-Prong One

Assuming, for the sake of argument on appeal, that it is found that employment of tutors is contingent upon student status, tutors should still be covered by the Act because their educational objectives are subordinate to the services provided and coverage would further the purposes of the Act. Unlike readers, there is a direct relationship between the services performed by those in the tutor classification and their educational objectives. The relationship is more direct for those in TA positions than those working in the OASIS program, but even at OASIS there is a relationship. A significant number of tutor/TAs found that their experience helped them meet important educational objectives of being prepared for graduate school and increasing subject matter knowledge. It also increased their relationships with faculty, resulting in better letters of recommendation, and added significant experience to their curriculum vitae. For those who were exploring teaching as a career, it offered one of the most directly applicable experiences available.

Thus, in performing those services, there is value to the educational objectives of tutor/TAs. There is, however, even greater value to the University in having those services performed. There is no credible evidence that the University

could eliminate the use of tutor/TAs without doing obvious irreparable damage to the teaching mission of UCSD. Speculation that this huge body of work could be redistributed to faculty is illogical and contrary to the evidence in the record. There is simply no one else within the University to adequately perform this work. The reason the positions were created in the first place was that it was literally impossible for the faculty to keep up with the teaching load faced with a huge influx of students. It would be just as impossible now as it was then for the faculty to teach the larger number of students without the assistance of TAs.

Tutor/TAs provide vital services not only in the classroom. They also support the mission of UCSD through the OASIS program. Over half of the freshman class have relied upon the OASIS program for assistance during their first year at UCSD. The OASIS program also plays a vital role in the success of the diversity and retention rates of the UCSD student body.

While the University does utilize a significant number of non-student tutor/TAs, it is unlikely that non-students could be relied upon entirely to fill this need. As with readers, replacement of student employees would require a huge candidate pool with an enormous range of academic expertise. These highly educated and intelligent non-student candidates would have to be willing to work at a rate of between \$8.73 and \$16.66 per hour and would receive almost no benefits. If they worked full-time their pay would be as low as \$13,600 and would top out at \$21,400

per year, depending upon their degree. If they worked part-time, they would be working a sporadic academic schedule with a limited number of hours spread over several days. Such a schedule would make other full-time employment difficult. If it were possible to hire enough non-student tutor/TAs to replace student employees, the benefits of peer teaching would also be lost.

Given the small percentage of the student body that ever gets to experience employment as a tutor/TA, it cannot be said that the experience is vital to the success of students. It obviously is helpful and enriching, but not vital. It can, however, be said that the services provided to the University by the tutor/TAs are clearly vital to the success of the University's teaching mission. I therefore conclude that the value to the educational objectives of tutors are subordinate to the value of the services to the University.²⁰

²⁰Two possible exceptions to this conclusion are the GEP and TEP. In GEP, many graduate tutors are paid for coordination activities of GEP seminars and conferences. The services provided by those individuals are probably unrelated to their educational objectives. The result (coverage under the Act), however, is the same, so there is no point in trying to distinguish which tutors within GEP fall within this category. A second possible exception are math students who are considering a teaching career, hired by TEP to provide math tutoring in local school districts. These services might be subordinate to the TEP tutors educational objectives and thus, not appropriate for coverage under the Act. There was testimony, however, that there were no employees in that title at this time. In Mendocino Community College District (1980) PERB Decision No. 144, the Board held it was inappropriate to decide inclusion when there are no incumbents in the position. Such a determination is best deferred to the time when there are student employees in the position and the question can be raised by an appropriate unit modification petition.

Associates-Prong One

Employment in the associate position meets many of the stated educational objectives of associates. It gives them an opportunity to increase their teaching skills, add significant teaching employment to their curriculum vitae, and generate income. It does not fulfill teaching requirements of the degree programs because associates have normally already fulfilled any such requirements well before being hired as an associate. This valuable work experience may, for some associates, also be gained at the expense of progress toward their degree.

Employment of associates also meets many of the service needs of the University. Associates, by all accounts, have complete autonomy and full responsibility for teaching a course. They perform all the same functions as other faculty, from selecting textbooks to designing final exams. They also utilize readers and TAs the same as other faculty. They are presented to students in the same way as other faculty from how they are listed in the catalog as faculty to the course credit received by students. From the point of view of the student in a classroom, the predominant reason for the associates' employment is the delivery of services and not the educational objectives of the associates. The students receiving the services have little, if any, concern or knowledge about the educational objectives of the professor at the front of their class.

Individuals employed as associates are, according to Dean Attiyeh, "virtually qualified to accept a regular faculty

appointment anywhere. . ." The only completely accurate distinction that can be made between associates and lecturers is that associates must be registered students. Based upon this record, it may not even be an accurate generalization to say lecturers have greater teaching experience. A steady stream of associates testified about their extensive teaching experience, whether it was with private music clients or at local community colleges.

When conflicts occur between their teaching obligations and their academic obligations, the teaching duties clearly take precedent because they are more immediate and involve large numbers of other UCSD students. Associates have committed to the assignment and they are being compensated for their work. Witnesses described how their own studies were reduced or actually halted during their time as an associate.

Associates have no formal supervision. The assistance they receive is informal and typically only if requested. With each new class, associates increase their teaching proficiency, as is typical of any new teacher. Many professors testified that they develop their teaching skills each time they teach a course.

Associates and the University seem to have a very successful symbiotic relationship, meeting many needs of both parties. However, because of the nature of the services provided, the total autonomy and responsibility given to associates, the interchangeability with other faculty such as lecturers, the extent of training and supervision received by associates, and

the extremely limited number of students who have the opportunity to gain that experience, I conclude that the educational objectives of associates are subordinate to the services they perform for the University.

Prong Two-Coverage Will Further the Purposes of the Act

The arguments applicable to the second prong are similar for all the positions in dispute in this hearing. I therefore do not distinguish between readers, tutors and associates in this portion of the decision.

In creating HEERA the Legislature believed that it would be "advantageous and desirable" to extend PERB's jurisdiction to the University. The Legislature noted that the people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the University and its employees. A harmonious labor management relationship is necessary to preserve and promote the responsibilities granted to the University by the people of the State of California. HEERA assured that those responsibilities would be carried out an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them.

It was a purpose of the Act to create a system of collective bargaining which includes an impasse mechanism and unfair practice processes. It was also a purpose of the Act to preserve and encourage joint decision making in consultation between the administration and faculty or academic employees. The

Legislature also reiterated the State's policy of encouraging the pursuit of excellence in teaching, research and learning through the free exchange of ideas among faculty, students and staff. It also provided that parties subject to HEERA shall endeavor to preserve academic freedom.

Extending coverage to student employees at issue in this hearing will create the opportunity for them to participate in collective bargaining. There are substantial employment concerns affecting student employees. These concerns, such as wages, hours, benefits, disciplinary procedures, and grievance processes, are all amenable to collective negotiations and will have a direct and primary impact on the employment relationship between student employees and the University.

The Legislature has already determined that collective bargaining is the best mechanism for allowing employees full participation in determination of employment conditions which affect them. Providing employees the opportunity for such full participation is also one of the most effective ways of building a harmonious and cooperative labor management relationship. Coverage under the Act will also extend the prohibition of certain unfair labor practices which the Legislature has determined to be contrary to the public interest. Finally, coverage will institute a system for resolution of bargaining impasses which will help avoid the type of labor unrest that the University has experienced through the many recognition strikes of student employees.

I therefore conclude that extending coverage will further the Act's purposes of establishing a system of collective bargaining which will foster a harmonious labor management relationship, and encourage joint decision making and consultation between administration and academic employees.

The University argues that both PERB and the Court in AGSE had recognized the State's policy of encouraging excellence in teaching, research, and learning through the free exchange of ideas among faculty, students and staff, as an additional purpose of the Act. According to the University, PERB may not change this interpretation merely because different facts now present themselves. The University argues that PERB is not free to reinterpret the purposes of the Act, nor "constrained in this decision by the need to find the 'correct' analysis of legislative language, since that has already been established. . . ."

I agree with only part of the University's argument. I agree that it is beyond my authority to reinterpret the purposes of the Act as found by PERB and the Court in AGSE. In order to extend coverage to the disputed positions, coverage must encourage excellence within the University. However, I do not feel constrained from looking at the facts in this record and reaching a conclusion that coverage will encourage such excellence.

In determining that excellence within the University will be encouraged by extending coverage, I will review several factors

such as its impact on the free flow of information, the student faculty mentor relationship, the disruption of work stoppages, problems separating employment from academic issues, potential damage to the stature of the University, issues of intermittent employees, and the potential strain on the University's limited resources.

Freeflow of Information

Collective bargaining, as envisioned under the law, will produce a greater flow of information and free exchange of ideas than a situation where employees are unrepresented. Union witnesses testified about the democratic participation of unit members in the development of issues and proposals. Representative bargaining teams are selected. Surveys are taken among their membership to ensure that concerns of student employees are voiced to management. Mutual bargaining obligations will ensure that the employment concerns of both parties have a forum for expression.

This increase in the free flow of information through the bargaining process does not typically diminish communications between individual students and individual faculty members. The University has cited one instance where communication may be reduced among some student committees at UC Berkeley.²¹ In that one instance, the University proposed to AGSE at the bargaining

²¹Both Dean Duggan and UAW International Representative Mary Ann Massenburg testified regarding this instance. Where their testimony conflicts, I credit Massenburg. This is not because Duggan's testimony is unreliable, but rather because Massenburg provided a more complete explanation.

table that the University would continue to meet and discuss negotiable terms and conditions of employment with other committees which included bargaining unit members. AGSE rejected that proposal.

It is a reasonable and legitimate concern on the part of any union that the employer bargain with the exclusive representative. If bypassing the union on negotiable issues were evidence of a restriction in the free flow of information under the Act, the Legislature would not have adopted the concept of exclusive representation, and bargaining throughout the University would be eliminated. I therefore reject this as an example of a negative impact of collective bargaining and find that the collective bargaining process will increase the free flow of information.

Mentor Issues

A factor weighing heavily in the AGSE decision was the potential impact of collective bargaining on the mentor relationship. The record in this case does not support a conclusion that collective bargaining will damage mentor relationships.

The mentor relationship, which is crucial to education at the University, and about which numerous University witnesses testified, is limited primarily to the relationship between a graduate student and a dissertation committee chair, or sometimes a committee member. Any impact upon that relationship by

establishment of the requested bargaining unit is virtually non-existent.

It was extremely rare for the same individuals to have been in both an employee-supervisor relationship and a student-faculty mentor relationship. While there were many examples of student employees seeking out certain faculty members for advice, guidance, specific knowledge or letters of recommendation, these relationships did not amount to the intensity of a true mentor relationship. A good example of this was the relationship between Victor Vendovato²² and Professor Paul Saltman. Saltman is highly respected as a professor and appears truly dedicated to enhancing the learning opportunities for TAs. He meets with them regularly, emphasizing teaching skills as well as substantive knowledge. His approach is collegial rather than authoritative. Vendovato volunteered to be a TA with Saltman without pay after he had already graduated, just for the additional learning experience. This is one of the clearest examples of a potential mentor relationship between a faculty member and an undergraduate TA. While Vendovato learned a great deal from Saltman, the relationship did not approach a true mentor relationship. When Vendovato first applied for graduate school, for example, he did not even seek a letter of recommendation from Saltman. Instead,

²²Vendovato was a TA twice for Saltman; once for credit during the initial training quarter and once as a non-student, non-paid volunteer. As such, he was never in a position included within the petition. His experience is, nevertheless, a good reflection of student faculty mentor issues, even if he is not included in the petition and is not reflective of employment issues.

he used two other professors for whom he had worked as a researcher and his tennis coach.

Other readers and TAs do ask Saltman for letters of recommendation. He writes about 200 per year, a fact which also indicates that the relationships are not of the depth described by University witnesses as crucial mentor relationships. It would be impossible to be that type of a mentor, offering intense, lifelong guidance to 200 new students per year.

Even if there were evidence that a large number of mentor relationships overlapped with employment relationships, extending coverage would not damage those relationships. Conversely denying coverage would not enhance the relationships. Potential conflict is a natural part of any relationship, be it employer-employee, or a faculty-student relationship. As stated by Dr. Hecker:

The problems that a contract addresses are not going to go away. If graduate assistants are overworked, if graduate assistants don't have health insurance, if jobs are given arbitrarily, if graduate assistants are dismissed without just cause, you're going to have an angry bunch of graduate assistants . . . graduate assistants who are less angry and less concerned because their issues [are] covered by a contract are probably more likely to be better teachers, more likely to be able to focus better on the research they do, whatever their responsibilities are. Problems aren't going to go away just because there may not happen to be a collective bargaining agreement someplace. Those problems have to be resolved and this is the best way to resolve them.

Having greater clarity about the parameters of the employment relationship, brought about by a collective bargaining agreement, will tend to avoid potential conflict between students and faculty rather than create it. Numerous witnesses called by both the University and the Petitioner, testified that greater clarity of the rules of employment are extremely helpful in avoidance of conflict. While such guidelines might be accomplished through a good faculty handbook or good personnel policy manual, providing employees with greater input into the issues and decisions tends to make any such document more effective than one unilaterally developed. The dialogue of collective bargaining can help develop a better roadmap for problem avoidance between faculty mentors and student employees.

Most disputes of any sort between faculty and student, either academic or employment, are settled informally at early stages where it is to the advantage of both parties to avoid escalation. This is true regarding all of the other bargaining relationships examined at the hearing. Only a minute number of disputes ever made it to the final stages of whichever conflict resolution process was being utilized. This hardly supports the University's argument that one of the most fundamental aspects of graduate education, the student faculty mentor relationship, will be damaged because student employees will have the opportunity to negotiate with faculty members and administrators at the bargaining table, and possibly confront them through a negotiated grievance procedure.

Student employees are no doubt aware of the potential precarious nature of their relationship with faculty, and the tremendous advantage of maintaining a positive relationship with someone on whom they may rely for entrance into graduate school or in establishing their careers. Regardless of the nature of any collective bargaining grievance process ultimately agreed upon, it is unlikely that coverage under HEERA will unleash a frenzy of grievances by student employees against their mentors.

The fear that collective bargaining could restrict, in any way, the hiring process and therefore impact the mentor relationship, does not justify denying coverage. There currently exists many restrictions in the hiring process that do not do damage to those relationships. For example, students must have a 3.0 GPA. They must have taken the course and received an A. Graduate students have priority over undergraduate students. They cannot work more than 50 percent, etc. Fears that collective bargaining would lead to student faculty mentor relationships based upon seniority are unjustified. That has not been the result at any other University where bargaining has occurred, nor would HEERA ever compel the University to agree to such a proposal.

Even in situations where grievances are increased and the rhetoric is ratcheted up in efforts to build solidarity for upcoming bargaining, those disputes typically are not the sort of activities which will directly impact individual faculty student mentor relationships.

The University offered the testimony of Dean Duggan at Berkeley to show how collective bargaining strained the relationship between Duggan, a University spokesperson during one of the previous student employee strikes, and Andy Kahl, a spokesperson for AGSE when they were out on strike. This obviously created strain in their relationship. However, this example does not support the University's position for two reasons. First, Duggan and Kahl were able to re-establish their relationship after the strike. Duggan continued as a member of Kahl's committee and continued reading his dissertation, eventually leading to Kahl's Ph.D. Even more fundamentally however, is that the conflict in that situation (the student employee strike) was not a result of collective bargaining. Exactly the opposite was true. The strike occurred because the University was refusing to recognize AGSE and engage in collective bargaining. The strike and the resulting strain on the Duggan/Kahl relationship was a direct result of the lack of collective bargaining, not the existence of collective bargaining.

Finally, several University witnesses expressed fears that collective bargaining in general, and a formal grievance process in particular, would ultimately damage the student faculty relationship because faculty members might retaliate against students if they filed grievances. Witnesses suggested that students would ultimately be better served if disputes were resolved informally within the academic family. If a formal

determination was made or a decision issued by an arbitrator that concluded that a faculty member had acted inappropriately, illegally, or contrary to provisions of a contract, that faculty member might retaliate academically against the student. Since faculty members play such a vital role to the success of students, the student would ultimately be the loser, according to these witnesses.

The argument that rights should be denied to individuals because those in power, when confronted with their alleged misdeeds, might retaliate against those not in power, has rarely been persuasive. At best, this argument is paternalistic and is based upon a fear of confrontation, rather than a realistic assessment of the impact of collective bargaining. It may be more comfortable for faculty members to avoid being confronted with alleged misdeeds or to avoid final determinations made against them. However, some discomfort and education may be necessary to fairly resolve contested issues. There is no justification for denying individuals rights in order to avoid an improper or illegal overreaction by other individuals opposed to those rights. Such actions are typically counterproductive and are an ineffective method of resolving disputes regardless of their nature.

To the extent that the fears expressed are realistic, however, and faculty might actually retaliate against student employees, that dramatically underscores the rather superficial nature of the relationship to begin with. It also vividly

demonstrates the potential need for representation and greater protection.

Work Stoppages

The occurrence of strikes and the potential for strikes was raised by several witnesses. While strikes among student employees in a recognized bargaining unit have occurred as negotiation pressure tactics (at the University of Michigan for example) they are rare. Most of the strikes referred to by witnesses in this hearing occurred as a demand for recognition. Recognition strikes have occurred at UC Berkeley at least twice, at UC Santa Cruz twice, and at UCLA and UCSD.

Work stoppages are, by the accounts of most witnesses, one of the most disruptive and adversarial aspect of the labor management relationship. They not only have the potential to strain relationships between an employee and a supervisor, but in a University setting, they have crucial additional negative impacts. Student employee strikes can pit faculty against faculty and can drive a wedge between some faculty and the administration. It can also be very disruptive to the educational process of members of the bargaining unit, whether or not they honor the strike. Strikes can also draw harsh reaction from the public at large. At a time when the University is continually under siege regarding budget issues and under intense public scrutiny for a myriad of other reasons, strikes send a decidedly wrong message to the community.

Finally and most important, strikes are enormously disruptive to the educational process of other university students. Most students, and particularly undergraduate students because of the tremendous cost of their education, are faced with a very limited window of opportunity for completing their coursework. One quarter is a very short period of time for students to absorb a huge volume of information. Even a strike of short duration, causing the loss of only a few section meetings, can amount to a major setback for students and have ramifications beyond that particular quarter. While perhaps not as important to many students, delays in submission of grades can also be crucial.

Strikes are a breakdown in the labor management relationship and can result in a fundamental disruption of the educational process. Probably more than any other aspect of the labor management relationship, they disrupt the "pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the faculty, students, and staff"

While the record is not completely clear, it appears that there have been more student employee strikes at the University than the combined total of all the other universities from which witnesses testified at the hearing. Given the fact that student employee unions do not typically have the opportunity to negotiate over academic issues, providing a mechanism for the avoidance of strikes is an effective way to encourage excellence within the University's mission.

The Legislature recognized how damaging strikes can be to the excellence of the University and its mission. It included a multi-step dispute resolution process, which involves the assistance of mediation, a factfinding process, and post factfinding mediation. The Supreme Court recognized the value of that process in San Diego Teachers Association²³ and Regents, where it stated:

The University also argues that permitting collective bargaining for housestaff may lead to strikes. However, it is widely recognized that collective bargaining is an alternative dispute resolution mechanism which diminishes the probability that vital services will be interrupted. [Citation.] (Regents at p. 623.)

The University urges in its brief that extending coverage to student employees will not guarantee the absence of strikes. That is absolutely true. As recognized by the Supreme Court, it will, however, reduce the likelihood of strikes. Furthermore, the University's denial of bargaining rights to student employees has over the past decade almost guaranteed the presence of strikes. As a policy to avoid the disruption of work stoppages, denying collective bargaining rights to student employees has failed.

I therefore conclude that extending coverage to the employees in question diminishes the likelihood of strikes. Obligating the parties to participate in the mediatory influence of the HEERA impasse procedures will not only help develop a

²³San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893].

harmonious and cooperative labor management relationship, but will encourage the pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the faculty, students, and staff.

Academic Versus Economic Issues

The belief that it is impossible to successfully separate academic from economic issues is no longer accurate based on the record in this case. Witnesses for the Petitioner testified that parties have been able to separate academic from employment disputes and offered examples of where they were able to do that. University witnesses testified that it is difficult to separate academic from employment issues.

The conclusion I draw from this record is that although it may be hard work, it is possible to distinguish between the two, and therefore fears of overlap between academic and employment issues are not a legitimate reason for denying coverage under HEERA.

Many of the collective bargaining agreements entered into evidence in this hearing, along with the negotiating proposals for the AGSE unit at UC Berkeley, contain either explicit limitations on the authority of arbitrators regarding academic issues or express reservation of University authority regarding academic matters. Even the University's own conflict resolution process (APM 140) and University proposals at the UC Berkeley bargaining table draw a distinction between academic and employment issues.

Other university employers passionately defend their exercise of academic discretion. For them it appears to be the line drawn in the sand. The University of Oregon is a good example. There, Dean Upham clearly takes a collaborative approach to collective bargaining. Of the approximately 35 formal grievances filed during his tenure as dean, not a single one has gone to arbitration. His philosophy is that confrontations are not in anyone's best interest. His exception to this philosophy, however, is when the issues at hand are fundamental to the University's exercise of academic discretion. When such issues arise, the University becomes intractable, refusing to relinquish these rights. Dr. Julius testified that universities would probably be even more resistant to giving in to student employee unions than they would with faculty units. Even Dr. Craig, clearly the most anti-union, anti-collective bargaining witness in the hearing, acknowledged that there were no provisions in their collective bargaining agreement that she felt infringed upon or negatively impacted the academic program at the University of Wisconsin.

The University of Michigan refused to bargain over an issue that it felt infringed upon its academic discretion. It spent several years litigating the issue and ultimately prevailed. That not only demonstrates how universities have been able to identify academic issues, but shows they have not rolled over and played dead when their academic discretion is threatened. It also demonstrates that if and when the parties are unable to

resolve their differences regarding which issues are bargainable, there are other appropriate forums for resolving such disputes.

As noted in Regents:

These scope-of-representation issues may be resolved by the Board when they arise, since it alone has the responsibility "[t]o determine in disputed cases whether a particular item is within or without the scope of representation."

Disputes over the scope of representation are manageable issues. PERB and the courts have resolved literally hundreds of scope of representation disputes since collective bargaining obligations were extended to California's more than 1100 public school employers almost twenty years ago. The potential for scope of representation disputes is not a reason to deny coverage, given the dispute resolution mechanisms available to the parties.²⁴

Potential Damage to Stature of the University

Another issue relied upon in the AGSE decision was the fear that collective bargaining would damage the stature of the institution and affect its ability to attract and retain the most able and productive faculty and graduate students. There is no credible evidence whatsoever in this record that would support such a finding. The only such evidence offered was from Dr. Craig who repeated second hand speculation that \$9.00 per month union dues might dissuade graduate students from choosing the University of Wisconsin. Her fears are undermined by her other

²⁴The same holds true for other concerns raised by the University such as disputes over unit work, hours, etc.

testimony that the University of Wisconsin was the first University in the country to negotiate a collective bargaining agreement with graduate student employees and that it remains to this day a world class university with an outstanding reputation.

A mature bargaining relationship providing a collective bargaining agreement with clarity over terms and conditions of employment would probably be more of an enhancement to potential student employees, rather than a deterrent. It is also difficult to believe that granting coverage to student employees in this case would affect the University's ability to attract and retain the most able and productive faculty, since faculty themselves are covered under HEERA.

The most likely scenario, since this petition involves overwhelmingly undergraduate students, is that this will be a non-issue having no impact whatsoever in either direction.

Part-time/Intermittent Employee Issues

There was some testimony by University witnesses that representation of part-time or intermittent employees will be ineffectual and create discontinuity. This was rebutted by union witnesses who gave examples in other industries where such representation can be very effective. Furthermore, there are ample examples within the field of education where part-time or intermittent employees have been represented in a successful manner.

In Unit Determination for Employees of the California State University and Colleges (1981) PERB Decision No. 173-H, PERB

found a comprehensive unit of faculty, including all full-time and part-time instructors, tenured and non-tenured, as well as coaches and librarians, to be appropriate for meeting and conferring under HEERA. PERB has also established separate units of part-time faculty in Mendocino Community College District, supra, PERB Decision No. 144 and Long Beach Community College District (1989) PERB Decision No. 765.²⁵ Additionally, in at least three districts, the Board found a separate bargaining unit of per diem substitute teachers appropriate under EERA. (Oakland Unified School District (1979) PERB Decision No. 102 and Palo Alto Unified School District/Jefferson Union High School District (1979) PERB Decision No. 84.) Finally, substitute, temporary, hourly, adult education and summer school employees have been consistently included by PERB within bargaining units.²⁶

It should also be noted that if student employees feel that collective bargaining may be ineffective, nothing compels them to exercise their right to select an exclusive representative. This

²⁵Part-time faculty were included by PERB in units with full-time faculty in Hartnell Community College District (1979) PERB Decision No. 81 and Marin Community College District (1978) PERB Decision No. 64; adult education teachers were included in the faculty unit in Glendale Community College District (1979) PERB Decision No. 88; and summer school faculty were included in the faculty unit in Mt. San Antonio Community College District (1983) PERB Decision No. 297.

²⁶See, e.g., Redwood City Elementary School District (1979) PERB Decision No. 107; El Monte Union High School District (1980) PERB Decision No. 142; Dixie Elementary School District (1981) PERB Decision No. 171; Palo Alto Unified School District (1983) PERB Decision No. 352; Fairfield-Suisun Unified School District (1983) PERB Decision No. 370.

decision deals with the question of whether student employees have the right to choose to be represented, not the wisdom of whatever choice they may make.

One other issue regarding intermittent employment was the concern that establishment of a bargaining unit might create two classes of employees, one covered and one not covered. Yet the University has already created two classes in the disputed positions. For example, some student employees have GSHIP, others do not. Some have fee remissions, others do not. These differences do not seem to have created insurmountable problems for the University or its student employees.

Limited Resources of the University

Another reason urged by the University for denying coverage was that bargaining would put increased strain on the limited resources of the University. This strain would be caused by the increased staff time necessary to engage in collective bargaining and contract administration. It would, according to University witnesses, also result from the demands of the Petitioner for better wages and benefits. Any increases granted to unit members would have to be taken from other academic programs, according to the University.

If this were a legitimate reason for denying collective bargaining rights to employees, there would not be a single unit in existence, in either the public or private sectors. Arguments that union demands will create a financial burden upon the

University are entirely appropriate at the bargaining table, but are not reasons to deny coverage under HEERA.

Erosion of the Status Quo

Another University argument is that public pressure and a strong desire to resolve conflict with its students will lead the University to give in on crucial issues which may erode the academic and administrative status quo which currently supports excellence at the University. This argument is a bit like asking PERB to deny coverage to employees in order to protect the University from its own lack of will, bargaining strength or persuasive ability at the bargaining table. This is a weak argument for several reasons. There is ample evidence in the record that other universities have been able to maintain their interests while bargaining with student employees. There is also ample evidence in the record that the University has adamantly and successfully maintained its interests to date during collective bargaining with student employees at UC Berkeley. Finally, there is nothing in the record suggesting that a change in the status quo will undermine excellence at the University. Any status quo at the University is clearly a dynamic status quo subject to change at any given time.

An examination of these second prong issues leads me to conclude that extending coverage to the disputed positions will not only help develop a more harmonious and cooperative labor management relationship, but it will affirmatively encourage excellence within the University. Mutual bargaining obligations

will result in a greater flow rather than a lessening of information and ideas. Clarity over employment issues provided through a collective bargaining agreement will help avoid disputes which may endanger student faculty relationships. If disputes do arise, a mutually negotiated dispute resolution process can assist the parties with their employment dispute by ensuring some protections for the complainant and a sense of fairness for both parties. Impasse procedures built into the act will also minimize the possibility of one of the most disruptive aspect of collective bargaining, the work stoppage. These affirmative encouragements of excellence will be gained without other significant negative impacts.

For these reasons, I find that the educational objectives of readers, tutors and associates are subordinate to the services they provide and that it would further the purposes of the Act to extend coverage to the employees in question.

CONCLUSION-APPROPRIATENESS OF REQUESTED UNIT

Based upon the above findings of fact, discussion, and the entire record in this case, I find that the individuals in dispute in this hearing are employees under the Act, and that the unit requested by the Petitioner is appropriate for negotiating with the Regents of the University of California at the San Diego Campus, provided an employee organization becomes the exclusive representative of that unit. Pursuant to the following ORDER, an election will be conducted by the PERB Regional Director unless the University grants voluntary recognition to the Petitioner.

PROPOSED ORDER

The following unit is found to be appropriate for meeting and negotiating at the University of California San Diego campus.

Shall Include All:

Readers
Tutors²⁷
Associates In _____ (Teaching a Class)

Shall Exclude All:

Managerial, Supervisorial and Confidential employees,
and All Other Employees

APPEAL PROCESS

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

²⁷At the hearing, the University indicated that it may be revising the tutor title and title codes. In an attempt to avoid the type of confusion that occurred with the acting instructor title at UC Berkeley, my intention is to include all of the tutors that were the subject of this hearing, performing both tutoring duties and undergraduate TA duties by whatever title and in whatever title code that may result from such revision.

than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc., sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

James W. Tamm
Administrative Law Judge