STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and STUDENT ASSOCIATION OF GRADUATE EMPLOYEES, U.A.W., UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case No. SF-RR-813-H (UC Los Angeles) PERB Decision No. 1301-H December 11, 1998

Appearances: Proskauer, Rose, Goetz and Mendelsohn by Walter Cochran-Bond, Attorney, for The Regents of the University of California; Schwartz, Steinsapir, Dohrmann & Sommers by Margo A. Feinberg, Attorney, for Student Association of Graduate 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 (attached) by a PERB administrative law judge (ALJ). In the proposed decision, the ALJ determined that student employees in graduate student instructor (GSI), reader, special reader, tutor, remedial tutor and part-time learning skills counselor positions at the University of California, Los Angeles campus (UCLA), as identified in the request for recognition petition filed by the Student Association of Graduate 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 bargaining unit composed of employees in these titles at UCLA is an appropriate bargaining unit, and he ordered that a representation election be conducted. The ALJ also found that student employees in graduate student researcher (GSR) and tutor supervisor positions are not employees under HEERA, and should be excluded from the bargaining unit.

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 Petitioner's response thereto. Finding them to be 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 GSI, reader, special reader, tutor, remedial tutor and part-time learning skills counselor positions at UCLA are employees under the HEERA.

INTRODUCTION

Procedural History

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

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

meeting and conferring with the University over terms and conditions of employment. (HEERA sec. 3573.)

On March 31, 1994, the Petitioner filed a request for recognition petition with PERB seeking to represent a proposed unit of readers, tutors, acting instructors, community teaching fellows, nursery school assistants, teaching assistants, associates, teaching fellows, and research assistants employed at UCLA.

On May 6, 1994, the PERB San Francisco regional director determined that the proof of support submitted by the Petitioner with the request for recognition petition was sufficient to meet the requirements of HEERA. (PERB Reg. 51030(b).)[2]

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.)

On May 23, 1994, 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

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

systemwide unit or accreted to the existing systemwide Non-Academic Senate Unit (Unit 18).

On June 27, 1994, the Petitioner filed a request for a PERB investigation to determine the appropriateness of the unit. (PERB Reg. 51090.) The settlement conference on August 9, 1994, did not resolve the matter.

On September 12, 1994, the Petitioner amended its request for recognition petition by adding the special reader and remedial tutor positions. On September 19, 1994, the PERB regional director determined that the amended request for recognition had sufficient proof of support.

Also, on September 19, 1994, the University filed a response to the amended request for recognition disputing the appropriateness of the unit for the same reasons it opposed the original petition. Additionally, 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), San Diego (UCSD), 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 request for recognition cases. The Petitioner's request for a single formal hearing covering all four cases was denied.

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[3]The motion did not seek consolidation of the petitions themselves. At the time the motion was filed, the only petition set for formal hearing involved positions at UCSD (Case No. SF-RR-805-H).

On December 22, 1994, the ALJ issued an order to show cause on Petitioner as to why GSIs and GSRs should not be dismissed from the petition based upon Association of Graduate Student Employees v. Public Employment Relations Bd. (1992) 6 Cal.App.4th 1133 [8 Cal.Rptr.2d 275] rev. den. August 13, 1992 (AGSE).[4] On March 13, 1995, the ALJ determined that GSIs and GSRs would not be dismissed from the petition, and that the parties would be given the opportunity to fully litigate those positions during the hearing. The University appealed the ALJ's ruling to the Board itself and on July 17, 1995, the Board affirmed the ALJ's ruling on the order to show cause. (Regents of the University of California (1995) PERB Order No. Ad-269-H.)

On October 16, 1995, Petitioner amended the request for recognition petition deleting certain tutor title codes, acting instructors, community teaching fellows, nursery school assistants and some GSR title codes. The amendment also added tutors in other title codes and part-time learning skills counselors. Another title code amendment was filed on October 30, 1995. As a result of these amendments, the titles at issue in this case are: GSR, GSI, readers, special readers, tutors, remedial tutors, part-time learning skills counselors and tutor supervisors at UCLA.

The ALJ conducted thirty-nine days of formal hearing between October 18, 1995 and January 10, 1996. Briefs were filed and the

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[4]The Board's decision in the AGSE case is Regents of the University of California (1989) PERB Decision No. 730-H (Regents (AGSE)).

case was submitted for decision on July 16, 1996. The ALJ's proposed decision was issued on September 13, 1996. Following extensions of time granted to the parties to file the University's exceptions and the Petitioner's response, the filings were completed January 10, 1997.

The Statutory Test

The University asserts that the unit proposed by the Petitioner is inappropriate because it includes student employees who are not covered by HEERA. HEERA section 3562(f) (hereafter subsection (f)) defines an employee under HEERA:

> '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 Board must apply this definition to determine in this case whether students employed by the University at UCLA in the positions included in the request for recognition petition are employees under HEERA and, therefore, are entitled to negotiate with the University over the terms and conditions of their employment.

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.

Prior Cases Involving the Application of the Statutory Test

The issue of the application of the subsection (f) test to student academic employees at the University has come before PERB in three prior cases. 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 that 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 work hour 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 NLRB 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 student employees' 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. 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 (AGSE). In this case, the Board considered whether graduate students appointed to GSI and GSR positions at the University's Berkeley campus 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 Regents (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 the Berkeley campus were not employees for purposes of HEERA.

On appeal, the court in 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 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.

The Board recently applied the guidance contained in these two prior cases in determining whether HEERA coverage should be extended to certain student academic employees at UCSD. In Regents of the University of California (1998) PERB Decision

No. 1261-H (UC San Diego), the Board determined that students employed as readers, tutors and associates at UCSD are employees under HEERA.

In UC San Diego, the Board rejected the University's assertion under prong one of the third part of the subsection (f) test, that the educational objectives of the student academic employees at issue were not subordinate to the services they performed. Referring to the prior court decisions, the Board stated:

> 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. (UC San Diego at p. 20.)

The Board then concluded that, because the services provided by readers, tutors and associates were vital to the academic mission of the University, and were not vital to the accomplishment of educational objectives, the educational objectives of student employees in those positions were subordinate to the services they performed.

The Board in UC San Diego also determined that coverage under HEERA of the student academic employees at issue would

further the purposes of the Act. In response to the University's arguments to the contrary, the Board noted the expressed purpose of HEERA, at section 3560(e), to provide for relations between the higher education employer and its employees which permit the fullest participation of employees in determining the conditions of their employment. The Board stated:

> 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. [UC San Diego at p. 28.]

The Board noted HEERA provisions which preserve and encourage academic freedom, shared governance and joint decisionmaking between the University and its faculty, and peer review and tenure systems for academic employees. The Board also cited HEERA provisions which exclude from the scope of representation subjects which could intrude in these academic areas. The Board stated:

> 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. (UC San Diego at p. 30.)

As noted above, the record in UC San Diego and the case at bar have been consolidated. In UC San Diego, the Board applied the guidance included in the prior cases involving the application of the subsection (f) test to student academic employees at the University, and concluded that the student employees at issue were employees under HEERA. The Board is guided by its reasoning in UC San Diego in the application of the subsection (f) test here.

DISCUSSION

Petitioner offers no exceptions to the ALJ's finding that GSRs are not employees under subsection (f) and, therefore, are not covered under HEERA. Petitioner also offers no exceptions to the ALJ's finding that tutor supervisors are supervisory employees as defined in HEERA section 3580.3 and, therefore, are not covered under HEERA. The Board adopts these findings by the ALJ as the findings of the Board itself. As a result, the following discussion pertains to the positions of GSIs, reader, special reader, tutor, remedial tutor and part-time learning skills counselor.

The Constitutional Issue

In its exceptions to the ALJ's proposed decision, the University for the first time raises a constitutional issue. The University argues that the application of HEERA to student academic employees, such as those at issue here, would violate Article IX, Section 9 of the California Constitution, which states, in pertinent part:

> The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.

The University asserts that HEERA coverage of student academic employees would interfere with certain central functions of the University, and thereby violate the constitutional restriction that the "full powers of organization and government" reserved to the Regents of the University may be subject only to limited legislative control. The University does not argue that HEERA coverage of any of its employees interferes with its central functions in violation of this constitutional restriction. Instead, the University asserts that the implications of this constitutional issue with regard to HEERA coverage of its employees are narrow - limited to student academic employees only. The University explains:

> The Legislature, at the time it was considering the enactment of a collective bargaining statute that would be applicable to the University, was aware of the limitations imposed by article IX, section 9. It invited the University to participate in negotiating the terms of the statute, and the resulting statutory language reflected the extent to which the University was willing to become voluntarily subject to the collective bargaining scheme created by the Act. As a result of this collaborative process, the constitutional issue of whether the

> Legislature had the power to enact HEERA over the University's objection did not arise, because the University agreed to participate in the framework created by the statute.
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> The extent of the University's agreement is reflected in the language of the statute. The text makes it clear that the Act intends that all of the University's non-academic employees and some of its academic employees will participate in its procedures. For example, the statute clearly indicates an intention to cover tenured faculty. (Gov. Code, § 3579, subd. (e).) And the University has consistently abided by these provisions.
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> The same is not true with respect to student academic employees. Rather, the statute includes section 3562, subdivision (f) which expressly limits HEERA coverage to only certain student employees.

The University points out that it has consistently argued in the prior cases cited above that the language of subsection (f) is sufficient to exclude student academic employees from HEERA coverage.

> Throughout this litigation, it was the University's position that the two-pronged test was intended to exclude student academic employees such as housestaff. Since the University was confident that the two-pronged test sufficiently addressed its concerns, it was not necessary to raise the article IX, section 9 issue, and constitutional issues are to be avoided when a case can be resolved on other grounds.

However, while the University's view prevailed in AGSE, the court in Regents and the PERB ALJ in the case at bar determined that certain student academic employees are entitled to HEERA coverage. Thus, the University concludes:

> The ALJ's departure from Board precedent, and the decision of the Supreme Court in the housestaff case, in which the constitutional

> issue was not addressed, make it necessary now to appraise the Board of the constitutional issues we have sought to avoid, and to urge an interpretation of the statute which is consistent with the powers and duties assigned by the Constitution to the Legislature and the University respectively.

The Board declines to adopt the interpretation of HEERA with regard to this constitutional issue which the University advances.

PERB is an administrative agency, established in Government Code section 3541, and expressly charged with the authority to administer the HEERA (HEERA sec. 3563). Article III, section 3.5 of the California Constitution states:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
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> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
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> (b) To declare a statute unconstitutional;
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> (c) To declare a statute unenforceable, or to refuse to enforce a statue on the basis that federal law or federal regulations prohibit the enforcement of such a statue unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations. [New sec. adopted June 6, 1978.]

While the University does not seek from PERB a ruling that the HEERA is unconstitutional, it asks the Board to conclude that student academic employees do not meet the subsection (f) test

because of the constitutional constraints imposed by Article IX, section 9. A Board decision adopting the University's argument would represent a finding that the subsection (f) test is constitutionally unenforceable with regard to student academic employees. The issue of HEERA coverage of student academic employees has been before the appellate courts in two prior cases, but neither the University nor the court has raised this constitutional issue in the application of the subsection (f) test in those cases. As a result, there has been no appellate court determination on the issue. Prior to such a determination, PERB has no power, pursuant to Article III, section 3.5, to make the finding which the University urges it to make.

At such time as this issue is presented to an appellate court, the court no doubt will consider HEERA's specific references to the University's constitutional status and responsibilities. Section 3560(c) states, in pertinent part:

> The people of the State of California have established a system of higher education under the Constitution of the State of California with the intention of providing an academic community with full freedom of inquiry and insulation from political influence in the administration thereof.

Section 3560(d) states:

> The people and the aforementioned higher education employers each have a fundamental interest in the preservation and promotion of the responsibilities granted by the people of the State of California. Harmonious relations between each higher education employer and its employees are necessary to that endeavor.

And Section 3560(e) states, in pertinent part:

> 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 appears from these references that the Legislature was well aware of the University's constitutional status, and intended that the system of collective bargaining which it established in enacting the HEERA would not interfere with the University's constitutional authority over its central functions.

The University asserts that HEERA coverage of student academic employees interferes with several of those central functions, including the academic aspects of the administration of the University, the establishment of curriculum, and the establishment of patterns of internal governance. However, consistent with the Legislature's acknowledgment of the University's constitutional responsibilities, HEERA specifically excludes from the scope of representation "any service, activity or program established by law or resolution of the regents or the directors," as well as "the content and supervision of courses, curricula and research programs." (HEERA sec. 3562(q).) Further, HEERA seeks to preserve and encourage the relationship between the University and its academic employees which is "the long-accepted manner of governing institutions of higher learning." (HEERA sec. 3561(b).)

The University argues that HEERA interferes with its central functions in violation of the constitutional restrictions only with regard to student academic employees. When HEERA was being drafted, the University asserts, it voluntarily agreed to a system of collective bargaining without raising the constitutional issue, provided that subsection (f) was included in the statute to make clear that HEERA coverage does not extend to student academic employees.[5]

The Regents court looked to the legislative history of the HEERA to determine whether the Act precluded the housestaff at issue in that case from being considered employees under subsection (f). The court noted that housestaff are clearly not eliminated from HEERA coverage by the language of subsection (f), and stated:

> Although the statute is silent on the subject of housestaff, it clearly leaves open the possibility that such persons may come within it. As the words of the statute make clear, the Legislature intended that PERB determine whether a particular student qualifies as an employee under the Act. [Regents at p. 607.]

Clearly, the language of subsection (f) does not mandate that student academic employees be excluded from HEERA coverage. Rather, it establishes the test for determining whether coverage should be extended to them.

PERB's primary right, power, duty and responsibility, as described in HEERA section 3563(a), is "To determine in disputed

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[5]Interestingly, the University has voluntarily extended HEERA collective bargaining rights to certain student academic employees at the Berkeley campus, including readers and tutors.

cases, or otherwise approve, appropriate units." It is PERB's duty and responsibility to apply the subsection (f) test to determine whether the proposed unit in this case, consisting of student academic employees, is an appropriate unit. The Board rejects the University's argument that PERB should find the application of the test to student academic employees to be in violation of the constitutional restrictions of Article IX, section 9.

Application of the Statutory Test

In order to determine if the student academic employees at issue in this case are entitled to HEERA coverage, the Board applies the three-part subsection (f) test described above.

Part One: Is Employment Contingent on Student Status?

With regard to GSIs, readers, special readers and tutors, the ALJ finds that employment in these positions is contingent on student status. The parties offer no exceptions to this finding, which the Board adopts as its own conclusion.

The ALJ finds that since non-students serve in remedial tutor and part-time learning skills counselor positions, employment in these positions is not contingent on student status. Based on this finding alone, employees in these positions are covered under HEERA pursuant to the subsection (f) test.

The Board addressed similar findings by the ALJ in the UC San Diego case. The Board states:

> . . . part one of the subsection (f) test requires PERB in this case to determine

> whether the employment of students as readers, tutors and associates 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.
> (UC San Diego at p. 14; emphasis in original; fn. omitted.)

The Board also noted that the court in Regents observed that the employees at issue in that case lacked "most indicia of student status." (Regents at p. 620.) However, the court did not apply a requirement of current registration as a student in order to proceed to apply the subsection (f) test.

It is clear from the record that students employed in remedial tutor and part-time learning skills counselor positions were given preference for employment because of their student status. While some non-students may be placed in these positions, under the approach adopted by the Board in UC San Diego, the employment of students in these positions is clearly contingent on their status as students.

The Board concludes that the employment of students in all of the positions at issue, is contingent on their status as students. Thus, we reverse the ALJ's contrary finding with regard to remedial tutors and part-time learning skills counselors.[6]

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[6]Member Dyer agrees with the ALJ's determination that the employment of remedial tutors and part-time learning skills counselors is not contingent on their status as students and that, consequently, they are employees under HEERA. Accordingly, Member Dyer does not join in the Board's analysis of Part One of the statutory test with respect to those positions. However, Member Dyer agrees that the application of the remainder of the statutory test also leads to the conclusion that student academic employees in all the disputed positions in this case are

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

The ALJ finds that the services provided by student employees in all the disputed positions are related to their educational objectives. The parties offer no exceptions to this finding, which the Board adopts as its own conclusion.

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

The ALJ finds that the educational objectives of students employed as GSIs, readers, special readers, tutors, remedial tutors and part-time learning skills counselors are subordinate to the services they perform.

The University excepts to this finding, arguing that employment in these positions is of greater value and effectiveness in meeting the educational objectives of students than in providing services to the University. Employment in the positions at issue assists student employees in meeting their educational objectives. Those objectives include mastering a particular subject matter, and preparing the student to achieve educational and career goals. The University asserts that the services provided by student academic employees could be provided as well, if not better, by non-students at an equivalent or reduced overall cost to the University. Therefore, argues the University, under the AGSE court guidance, the value and effectiveness of the employment in meeting educational objectives

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employees under the HEERA. Therefore, Member Dyer specifically joins in the Board's analysis of Parts Two and Three of the statutory test.

is greater than its value and effectiveness in providing services. Thus, the educational objectives of these student academic employees are not subordinate to the services they perform, and they fail to meet the first prong of this part of the subsection (f) test.

The Board disagrees.

Under this prong of the subsection (f) test, the Board, on a case-by-case basis, must consider all the ways employment in the disputed positions meets the educational objectives of students, and all the ways it provides services to the University. PERB must then "make a value judgment about whether the employment was more valuable and effective in meeting educational objectives or in providing service to the University." (AGSE at p. 1143.) The Board is not expected to engage in a scientific weighing process, but to exercise its judgment about which factor - service or educational objectives - is subordinate. 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. The Board in UC San Diego exercised its judgment and determined that the employment was not vital to students' ability to achieve their educational objectives, but that the services performed were vital to the University's ability to accomplish its mission.

Here, the record establishes that while employment in the disputed positions contributes to the accomplishment of

educational objectives, it is not vital to achieving them. It can not be concluded from the evidence that students deprived of the opportunity for employment in these positions would fail to achieve their educational objectives. Instead, it is reasonable to conclude that affected students would find other means to accomplish those objectives, as do the many students who currently do not serve in the positions in dispute in this case. Conversely, the services performed by the student academic employees in dispute are vital to the University and must be performed without regard to whether they provide any educational benefit to student employees. The University asserts that these services can be provided more efficiently and effectively by non-students, but does not suggest that they can be eliminated. The University implicitly acknowledges the need to maintain these services in order to achieve its mission, regardless of whether the services are performed by students.[7]

The Board concludes that employment in the disputed positions is more valuable and effective in providing service to the University than in meeting the educational objectives of students. Therefore, the Board adopts the findings of the ALJ that the educational objectives of the student academic employees

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[7]Non-students performing the services provided by student employees in the disputed positions would be employees entitled to HEERA coverage. The University's response to the request for recognition petition includes the assertion that any non-students in these positions should be placed in the existing systemwide non-academic senate instructor bargaining unit, or a separate systemwide unit, for purposes of collective bargaining under HEERA.

at issue in this case 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?

The University excepts to the ALJ's finding that HEERA coverage of the student academic employees at issue would further the purposes of the Act.

As in UC San Diego, the University asserts that since the Board in Regents (AGSE) found that HEERA coverage of GSIs at the University's Berkeley campus would not further the purposes of the Act, the Petitioner in this case has "the burden to come forward with evidence of circumstances that did not exist in 1985 . . . and to show that these changed circumstances require a rejection of the Board's prior determinations." The University argues that the ALJ did not require the Petitioner to meet this burden and, therefore, applied the wrong legal standard under this part of the subsection (f) test.

The University seeks to create a burden for the Petitioner beyond that which was intended by the Board. As noted in the procedural history above, the Board in Regents of the University of California (1995) PERB Order No. Ad-269-H affirmed the ALJ's Ruling on Order to Show Cause why GSIs and GSRs should not be dismissed from the petition in this case in light of the court's AGSE decision. In concluding that the positions should not be dismissed from the petition, the ALJ determined that the unique circumstances of each campus, as well as changes and developments occurring in the ten years since the AGSE record was developed,

should be considered. It was not the Board's intent in affirming the ALJ's ruling to establish a burden under which the Petitioner would be required to present a detailed comparison to the AGSE Berkeley record in order to demonstrate specific changed circumstances at UCLA. Instead, the Board intended that the circumstances relating to the disputed UCLA positions should be examined in detail in reference to the prior cases, including AGSE. However, the application of the subsection (f) test to student academic employees must occur on a case-by-case basis, based primarily on the unique circumstances of a particular campus at the time the test is applied.

Questions of representation are inherently dynamic. As a result, the Board has long held that representation matters are subject to periodic re-examination, especially where no representative is in place. 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 at pp. 6-7; see also, State of California (Department of Personnel Administration) (1990) PERB Decision No. 794-S.)

In Regents (AGSE), the Board considered conditions and job duties existing at the University's Berkeley campus in 1984. In UC San Diego, conditions and job duties existing at the San Diego campus more than ten years later were considered. As noted above, these cases provide the Board with guidance, but the Board's responsibility remains to apply the subsection (f) test

to determine the status under HEERA of student academic employees in the disputed positions at UCLA based on the record in this case.

The University offers extensive argument in support of its position that HEERA coverage of student academic employees will not further the purposes of the Act. The University points to HEERA section 3561(c), which 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.

The University asserts that this section demonstrates that the extension of collective bargaining rights to student academic employees would not further the purposes of HEERA. According to the University, section 3561(c):

> . . . is a legislative acknowledgement that California's system of higher education has special and vital features that could be seriously damaged by the imposition of collective bargaining rights for student academic employees.

The University misconstrues the meaning of section 3561(c) and misinterprets the purposes of HEERA. Those purposes are stated in HEERA sections 3560 and 3561.

HEERA section 3560 states, in pertinent part:

> (a) 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.
>
> (d) The people and the aforementioned higher education employers each have a fundamental interest in the preservation and promotion of the responsibilities granted by the people of the State of California. Harmonious relations between each higher education employer and its employees are necessary to that endeavor.
>
> (e) 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.

HEERA section 3561 states, in pertinent part:

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

Thus, HEERA's expressed purpose is to foster harmonious and cooperative labor relations by providing for a system of collective bargaining between the University and its employees.

It is axiomatic that this purpose is furthered by the extension of collective bargaining rights to those employees determined by PERB to meet the subsection (f) test.

The policy expressed within HEERA section 3561(c) "to encourage the pursuit of excellence in teaching, research and learning" is achieved "through the free exchange of ideas among the faculty, students, and staff of the University of California" and through a system which seeks "to preserve academic freedom in the University of California." This is the very system established by HEERA. Contrary to the University's contention, HEERA presents a framework under which the pursuit of academic excellence, the free exchange of ideas, the preservation of academic freedom, and collective bargaining all co-exist and complement one another. These purposes and policies do not inherently conflict with one another, and are not mutually exclusive, as much of the University's argument asserts.

The University makes a number of specific assertions concerning the detrimental effects of extending HEERA coverage to student academic employees. Among them are:

> Collective bargaining would interfere with academic policy because most subjects of bargaining have the potential to encroach on the academic domain.
>
> Collective bargaining could interfere with selection procedures for academic apprentice appointments, replacing academic considerations with economic considerations.
>
> Collective bargaining would interfere with the academic senate's role in making academic policy.

In considering similar arguments by the University, the court in Regents characterized the arguments as a "doomsday cry" which was "somewhat exaggerated" and "premature." Moreover, the court held that "The argument basically concerns the appropriate scope of representation." (Regents at p. 623.)

HEERA contains extensive guidance and specific restrictions on the scope of representation to ensure that providing collective bargaining coverage for employees will not interfere with the pursuit of academic excellence and the academic policies and procedures which both the University and HEERA seek to preserve. For example, 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 academic employees. Also, HEERA section 3562(q)(3) 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 academic employees is misplaced, as these subjects are outside of the HEERA scope of representation. Given these HEERA provisions, the University's assertions that collective bargaining for student academic employees would "encroach on the academic domain" or "interfere with selection procedures for academic apprentice appointments" are simply incorrect.

Additionally, HEERA section 3652(q)(4) specifically 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.

And 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 . . . with respect to policies on academic and professional matters . . . [t]he principle of peer review of appointment, promotion, retention, and tenure for academic employees shall be preserved.

Thus, HEERA specifically provides for the preservation of the academic senate's role with respect to academic policy, and the University's assertion that collective bargaining for student academic employees would interfere with that role directly contradicts the statute.

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.

Given these specific exclusions and safeguards, the University's assertions that HEERA coverage for student academic employees will not further the pursuit of academic excellence at the University because it will interfere with academic policies, selection processes for academic apprentice positions, and the role of the academic senate, are simply incorrect. As the Board stated in UC San Diego at p. 31:

> 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.

Based on this discussion, and the findings of the ALJ, the Board concludes that HEERA coverage of the student academic employees at issue in this case would further the purposes of the Act.

SUMMARY

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

- The employment of students as graduate student instructors, readers, special readers, tutors, remedial tutors and part-time learning skills counselors is contingent on their status as students;

- the services provided by students employed in these positions are related to their educational objectives;

- the educational objectives of students employed in these positions are subordinate to the services they perform;

- coverage under HEERA of students employed in these positions would further the purposes of the Act.

Based on these conclusions, the Board finds that students employed at UCLA as graduate student instructors, readers, special readers, tutors, remedial tutors and part-time learning skills counselors are employees under HEERA, and that a unit consisting of these positions is appropriate for negotiating with the Regents of the University of California at the Los Angeles 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 Los Angeles campus.

The unit shall Include All:

Graduate Student Instructors
Readers
Special Readers
Tutors
Remedial Tutors
Part-Time Learning Skill Counselors

The unit shall Exclude All:

Graduate Student Researchers
Tutor Supervisors
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 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 37.

JOHNSON, Member, dissenting: I dissent from the majority's conclusion that students at the University of California, Los Angeles campus serving as graduate student instructors, readers, special readers, tutors, remedial tutors and part-time learning skills counselors are employees for purposes of collective bargaining under the Higher Education Employer-Employee Relations Act (HEERA).

I agree with the majority's treatment of the constitutional issue. I also agree that the record establishes that the employment of students in the disputed positions is contingent on their status as students, and that the services provided by these student employees are related to their educational objectives.

I part company with the majority under the third, two-prong test in HEERA section 3562(f). In my view, the evidence clearly supports a determination under the third part of the statutory test that extending collective bargaining to student employees in the disputed positions would not further the purposes of HEERA and, therefore, the petition should be dismissed. My rationale for reaching this conclusion is the same as I explained in detail in Regents of the University of California (1998) PERB Decision No. 1261-H. Therefore, in the interest of brevity I refer the parties to my dissent in that case.

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

CASE: PERB Decision No. 1301-H
(Case No. SF-RR-813-H)

EMPLOYER: Regents of the University of California

DESCRIPTION OF UNIT:

The unit shall Include All:

Graduate Student Instructors
Readers
Special Readers
Tutors
Remedial Tutors
Part-Time Learning Skill Counselors

The unit shall Exclude All:

Graduate Student Researchers
Tutor Supervisors
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

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: January 5, 1999.

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and STUDENT ASSOCIATION OF GRADUATE EMPLOYEES, U.A.W., UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, Petitioner.	Representation Case No. SF-R-813-H PROPOSED DECISION (9/13/96)

Appearances: Proskauer, Rose, Goetz and Mendelsohn, by Walter Cochran-Bond, Christopher M. Brock, Elizabeth J. Kruger and Maria E. Greckie, and Corbett and Kane by Sharon J. Grodin and Peter M. Chester, and Office of the General Counsel by James N. Odell, Attorneys, for the Regents of the University of California; Schwartz, Steinsapir, Norman and Summers by Margo A. Feinberg, Brenda Sutton and Stuart Libicki, Attorneys, for Student Association of Graduate Employees, U.A.W., United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

Before JAMES W. TAMM, Administrative Law Judge.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
PROCEDURAL HISTORY	1
JURISDICTION	5
ISSUES	5
FINDINGS OF FACT	6
Background Regarding UCLA	6
Common Factors	6
Graduate Student Researchers	7
Graduate Student Instructors	11
Special Readers	19
Remedial Tutors/Part-Time Learning Skills Counselor	20
Readers	22
Tutors	26
Educational Objectives of Student Employees	27
Mentor Issues	31
Part-Time and Intermittent Employee Issues	34
Grievance Issues	35
Information Flow	49
The Rhetoric of Conflict	50
Other University Academic Units	52
Credibility Findings	56

Page

DISCUSSION 63

Indicia of Student vs. Employee Status 63

UC Berkeley Precedent 63

Analysis of Subsection (f) 65

First Test: Is Employment Contingent Upon Student Status? 66

Second Test: Are Services Related to Educational Objectives? 68

Third Test: Are Educational Objectives Subordinate to Services (Prong One) and Would Coverage Under the Act Further the Purposes of the Act (Prong Two)? 68

Prong One: Are Educational Objectives Subordinate to Services? 76

GSRs 76

GSIs, Special Readers, Readers, RT/LSCs and Tutors 79

Prong Two: Will Coverage Further the Purposes of the Act? 92

GSRs 93

GSIs, Special Readers, Readers, RT/LSCs, and Tutors 94

Freeflow of Information 96

Mentor Issues 98

Work Stoppages 106

Academic vs. Economic Issues 109

Potential Damage to the Stature of the University 113

Page

Conflicts Between Services and Educational Objectives 113

Part-Time/Intermittent Employee Issues 116

Limited Resources of the University 118

Union Rhetoric 119

Erosion of Status Quo 120

Coverage Will Further the Purposes of the Act 121

TUTOR SUPERVISORS 122

Finding of Facts 122

Discussion and Conclusion 124

CONCLUSION 127

PROPOSED ORDER 128

APPEAL PROCESS 128

INTRODUCTION

This decision is the second issued in a series of representation cases which have been consolidated to avoid a duplication of records. The first decision (Regents of the University of California (10/20/95) SF-R-805-H (UCSD), involved coverage under the Higher Education Employer-Employee Relations Act[1] (HEERA or Act) for certain student employees at the University of California, San Diego campus (UCSD). This decision determines HEERA coverage for student employees in the classifications of graduate student instructor (GSI), graduate student researcher (GSR), reader, special reader, tutor and remedial tutor/part time learning skills counselor (RT/LSC) at the University of California, Los Angeles campus (UCLA). It also determines the supervisory status of tutor supervisors.

In this decision, I first make factual findings about the positions and then apply HEERA section 3562(f). I conclude that GSRs are not employees as defined by HEERA, and that all other classifications in dispute are employees as defined by HEERA. I also find that tutor supervisors are supervisors as defined by the Act and therefore, should be excluded from the proposed bargaining unit.

PROCEDURAL HISTORY

On March 31, 1994, the Student Association of Graduate Employees, U.A.W., United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Petitioner or SAGE) filed

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[1]HEERA is codified at Government Code section 3560, et seq. PERB regulations are codified at California Code of Regulations, Title 8, section 31001, et seq.

this request for recognition seeking a unit of readers, tutors, acting instructors, community teaching fellows, nursery school assistants, teaching assistants, associates in_____ graduate student, teaching fellows, and research assistants employed at UCLA.

On May 6, 1994, the San Francisco 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 May 23, 1994, 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 by 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 Unit (Unit 18).[2] On June 27, 1994, the Petitioner filed a request for a Board investigation pursuant to PERB Regulation 51090.[3]

A settlement conference was held August 9, 1994, but the matter was not resolved.

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[2]The University offered no evidence or argument regarding the appropriateness of non-student employees being accreted into Unit 18.

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

On September 12, 1994, Petitioner filed an amended request for recognition, which added the positions of special readers and remedial tutors. On September 19, 1994, the regional director determined that the proof of support submitted with the original petition remained sufficient to cover the amendment. The University filed a new response to the amended request for recognition and denied it for the same reasons it denied the original petition.

On September 19, 1994, Petitioner filed a motion to consolidate the hearing in this case with hearings for related, but not identical, requests for recognition at UCSD and the University's campuses at Davis and Santa Barbara.[4] 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, consolidating the records of the four requests for recognition. This assured that much of the parties' cases offered at UCSD need not be duplicated in the other hearings. Petitioner's request for a single formal hearing for all four cases was denied.

On December 22, 1994, I issued an order to show cause upon Petitioner as to why GSIs and GSRs should not be dismissed from the petition based upon AGSE District 65 UAW, AFL-CIO v. PERB/Regents of the University of California (1992) 6 Cal.App.4th

[4]The 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).

1133 [8 Cal.Rptr.2d 275] rev. den. August 13, 1992 (AGSE).[5] The parties briefed the issue and on March 13, 1995, I ruled that GSIs and GSRs would not be dismissed from the petition and that the parties would be given the opportunity to fully litigate the positions during the representation hearing.[6] The University filed an interlocutory appeal, however, on July 17, 1995, PERB affirmed the ruling on the order to show cause (Regents of the University of California (1995) PERB Order No. AD-269-H.)

On October 16, 1995, after receiving additional information from the University about title code usage, Petitioner amended the request deleting certain unused tutor title codes, acting instructors, community teaching fellows, nursery school assistants and some unused GSR title codes. The amendment also added tutors in other various title codes and part-time learning skills counselors. Another title code amendment was filed on October 30, 1995.

Several prehearing conferences were conducted and 39 days of formal hearing were held between October 18, 1995 and January 10, 1996. Briefs were filed and the case was submitted for decision on July 16, 1996.

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[5]The Board's decision in the AGSE case is Regents of the University of California (1989) PERB Decision No. 730-H (AGSE Bd Dec.).

[6]The ruling was based upon two factors. The first was that the previous case only dealt with the UC Berkeley campus. The second was that circumstances may have changed since the UC Berkeley record had been developed.

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 section 3562(f) (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 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 regarding employee status 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 their educational objectives?

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

An issue independent of employee status is whether tutor supervisors are supervisors pursuant to HEERA section 3580.3.

FINDINGS OF FACT

Background Regarding UCLA

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 student employees on the UCLA campus.

Common Factors

While I make separate findings for each of the disputed titles, there are some common facts among them. In addition to a salary, student employees in the disputed titles receive two significant benefits. First, they receive graduate student health insurance (GSHIP). Second, they are eligible for registration and educational fee remissions.

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

Graduate Student Researchers

GSRs generally are hired to perform research under the direction of a faculty member. GSRs are employed in two types of positions. One is on an hourly basis, typically working a limited number of hours for an individual faculty member who requires research for a book or other special project which the professor is working on. The GSRs in these positions are usually students in the field or discipline within which they are employed. The work they perform, however, is not tied to the student's own dissertation or course work. Faculty will often utilize GSRs to do hourly research such as computer work, library research, or data analysis. Some professors with substantial grants may simply hire GSRs as a means of funneling financial support to a student, asking for very little service in return. Some hourly GSRs, even though not working directly within their dissertation field, have been able to publish articles based upon hourly GSR work, and have learned valuable skills which may be helpful to them later in their own research.

Hourly GSRs constitute a very small percentage of the total GSR funding. Funds for such employment usually come from faculty senate grants given to faculty members for the purpose of funding their own research projects.

The vast majority of GSR funds are spent on the second type of GSR position, half-time positions attached to certain research grants. Most of these GSRs are in the sciences and engineering

fields. There are four levels of compensation for GSRs depending upon their experience and completion of academic milestones.

The duties performed by GSRs in half-time positions vary greatly, depending upon the field of study and the experience of the GSR. A newly admitted graduate student might first be assigned to perform research of a very basic nature. This has two primary purposes. One purpose is to assist faculty members, post doctoral researchers (post docs) or other more advanced students with research grunt work. A second and more important reason, however, is to provide the student with an opportunity to learn basic laboratory research skills. Acquiring these skills is essential for later success as a graduate student, and is done for the education of the GSR more than for the smooth operation of the lab. According to one professor, new GSRs "break more things than they fix."

Once GSRs have picked up some basic skills and have a better idea of their field of interest, a mutual courting process occurs by which faculty and students select each other. Students seek a dissertation chair and committee members, while faculty members seek bright, energetic graduate students whose research interests are a match for the research conducted in their laboratories.

When the process works well, the faculty member becomes not only a dissertation chair, but a mentor to the student, assuming a certain responsibility for the success of that student. Along with the acceptance of a student into the faculty member's lab

comes a perceived, if not official, obligation to make efforts to secure financial support for the student.

While some students bring their own funding source with them (e.g., National Science Foundation grants), most GSRs are funded through grants obtained by the faculty. Many grants are obtained by faculty for the sole purpose of providing training funds for GSRs. Several faculty members testified that obtaining grants to provide for GSR funding was one of the most time consuming obligations inherent in accepting graduate students into their labs.

Many agencies provide grants with sufficient flexibility to divert funds into the projects of graduate students which are only loosely related to the original line of inquiry. Most grants include some portion of funding for the principal investigator as well as for the graduate student. Approximately 40 percent of all research grants go directly to the University as overhead expenses. Typically all equipment purchased with grant funds also is retained as University property at the conclusion of any project.

As part of their role as mentors, faculty will often co-author scholarly research papers, assist and/or encourage GSRs attendance and presentation at conferences and meet regularly with students to supervise their research and dissertation efforts. The relationship between GSRs and their faculty mentors typically constitute a stronger bond and are more time consuming

than relationships between other student academic employees such as GSIs and their supervising faculty members.

Most GSRs have either jointly published research papers with their faculty supervisor or expressed a desire to do so at some point during their educational program. These papers are usually based upon research paid for at least in part by the GSR funding. These papers not only help build the GSR's curriculum vitae, but sometimes may be reworked into their dissertation.

To be appointed as a GSR, an individual must be an admitted and enrolled UCLA graduate student. While there is a great deal of overlap of job functions among GSRs and other university positions, such as post docs or a variety of staff research assistants, these other individuals are placed in distinctly different job classes, typically with different pay and responsibilities.

While GSRs typically serve in 50 percent appointments, this time limitation has little practical meaning in most cases. Unlike all other disputed titles, in most cases it is virtually impossible to distinguish between the time a student is performing paid work as a GSR from the time spent on non-paid status performing the student's own dissertation research. This is so simply because most GSRs are essentially paid by the University to perform their own research upon which they will base their dissertation.

Graduate Student Instructors

In this decision, the term GSI refers to teaching assistants, teaching associates and teaching fellows. Placement into these three titles depends upon the individual's teaching experience and completion of various educational milestones in the student's degree program. Salaries also increase with experience through several levels. The salary schedule has been determined by the University in an effort to remain competitive with other major universities. An uncompetitive salary scale would result in the most promising graduate students seeking their degrees at other universities.

Most GSI positions are 50 percent appointments, although some are at 25 percent. With 50 percent appointments, students may still be considered full-time students for funding purposes from the state. A 50 percent appointment provides that GSIs should be able to perform their duties within 20 hours per week, averaged over the course of the appointment. Because workloads vary a great deal from week to week depending upon factors such as exam schedules or major assignments, the workload may often greatly exceed 20 hours one week and be substantially below the next. Although several witnesses testified that it was impossible to do their job in a conscientious manner within the 20 hour average per week, a greater number testified that it was usually sufficient. Newer, less experienced GSIs, or those teaching in unfamiliar subject areas would naturally need to put in more time than an experienced GSI teaching the same course for

the second, third or fourth time.[7] Some individuals apparently were simply given more work than could be accomplished within the 20-hour average, however, this seems to be more the exception than the rule.

The duties of GSIs fall into two major categories: teaching courses and leading discussion or lab sections. A great number of the GSIs teaching courses are within language departments or English composition. For example, almost all Spanish I through V courses are taught by GSIs. Thus, it is not only possible, but extremely likely that an undergraduate student could be taught five days a week, one hour per day through this entire Spanish series and not have a single class meeting with a regular faculty member. Sixty percent of English III (writing, composition, rhetoric and language) courses are taught by GSIs. Ninety percent of English IV (critical reading and writing) are taught by GSIs.

In classes taught by a GSI, there is no distinction from the undergraduate student's point of view between the GSI and a regular faculty member. The course catalog does not distinguish them. Course credit and tuition are also the same.

GSIs teaching a course are responsible for each day's lessons, designing and grading homework and quizzes and holding office hours. If mid-term and final exams are part of the

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[7]In a 1993 survey conducted by the University, 41 percent of those responding stated that they had, at least once, served as a GSI for a course that required an average work week of more than 20 hours. That number dropped to 23 percent when asked about courses taught after they had become a more experienced GSI.

course, they are sometimes jointly drafted with other GSIs and/or the departmental supervisor in an effort to maintain consistency among the various sections of the course.

In theory, GSIs teaching a course are supervised and observed by a faculty member who sets the curriculum, writes the syllabus and has final responsibility for grading. In practice, however, GSIs teaching a course do not appear to receive much supervision or observation. A syllabus is often provided to GSIs by the department to assist in some of the course planning. However, all of the actual teaching and grading of undergraduate students is done by the GSI.

A very limited number of GSIs also have the opportunity to teach a course through the Collegium program. To be eligible, a GSI must have formally advanced to doctoral candidacy and had at least two years of GSI experience, or approved teaching experience at a comparable institution. Collegium courses are designed by the GSI and are typically related to the GSI's own dissertation research. Collegium GSIs are selected through a highly competitive process and it is considered an honor to be given the opportunity to teach within the program.

The Collegium provides for a weekly seminar prior to the actual teaching quarter, within which the GSI designs the course, develops a syllabus, selects instructional materials and determines pedagogical approaches. GSIs receive course credit for this seminar and do not receive pay. Once they begin

teaching their courses, however, they receive pay and are responsible for literally every aspect of the course.

The second general category of GSI employees are those serving as instructors for discussion or lab sections attached to large undergraduate lecture courses. A lecture course might, for example, have 250 students and 10 sections scheduled with approximately 25 students per section. Section or lab meetings are typically scheduled once or twice per week with GSIs explaining and/or augmenting materials introduced during larger lecture classes conducted by faculty. GSIs are required to hold regular office hours and will typically also hold review sessions prior to midterm and final exams. GSIs assign and grade homework assignments and projects which are usually based upon general guidelines determined by the faculty member teaching the course.

Supervision of section GSIs varies a great deal depending upon the experience of the GSI and the inclination of the faculty member. Some faculty provide GSIs with an opportunity to present a lecture to the large class of undergraduate students and other faculty may choose to observe GSIs leading a lab or discussion section. GSIs can learn helpful teaching skills through discussions with their faculty supervisors. Issues such as teaching styles, presentation of course material and grading philosophy are sometimes discussed during faculty-GSI meetings.

Although some faculty take a great interest in and meet regularly with GSIs, offering pedagogical advice and support, this is not, however, the norm. Typically, GSIs meet with the

faculty member at the start of the quarter to discuss strategies and expectations. They may also meet prior to major assignments or exams. Even in situations where regular meetings are held, they appear to be primarily for the purpose of ensuring the quality of the education being delivered to undergraduate students rather than a method of teaching pedagogy.

The level of supervision provided by faculty to GSIs does not, in most cases, rise to the level of a mentor/student relationship. This is primarily because the most significant graduate student-faculty relationship is between students and chairs of dissertation committees. Faculty witnesses regularly refer to students for whom they were the dissertation chair as "my student." While faculty sometimes serve in both the roles of supervisor of the GSI as well as that GSIs dissertation chair, it is more often not the case.

The relationship between GSIs and their faculty supervisors is underscored by the contrast between GSIs and GSRs. GSRs are supervised primarily, if not exclusively, by the same person overseeing their dissertation research. In most cases it is hard to tell when GSRs are being supervised in their role as GSR, as opposed to their role as students working on their dissertations. It is typically very easy to make a distinction between the teaching work of a GSI and that individual's own educational program leading to their degree. It is also typically easy to determine whether GSIs are being supervised in their role as GSIs or in their own research.

Prior to the fall quarter each year, the Office of Instructional Development holds a one-day campus-wide orientation session for new GSIs. GSIs may attend a variety of presentations on issues such as office hours, motivating students, math anxiety, sexual harassment, meeting the first class, diversity within the classroom, etc.

Most GSIs are also required to take a quarter-long "495 course" prior to being employed as a GSI. The course varies depending upon the type of teaching the GSI will be doing. For example, a language department's 495 course might cover issues such as second language acquisition, whereas a lab section 495 course might cover issues such as lab safety. GSIs receive credit but no pay for the 495 course. In addition, some individual departments sponsor voluntary workshops dealing with the particular intricacies of their department. These workshops are also open to recently hired lecturers.

GSI's also receive credit for taking a "375 course" teaching practicum while they are employed. No instruction is provided as part of receiving this credit. The 375 course counts only toward status as a full-time student and does not satisfy degree requirements. It is very rare for departments to require service as a GSI as part of their educational program.

The staffing ratio of all GSI positions, except those teaching in the Collegium, is determined primarily by the needs of the department to staff undergraduate courses and the amount

of available funds.[8] As such, GSI staffing is enrollment driven, based upon the number of undergraduates to be educated, rather than the number of graduate students seeking teaching experience or pay.

Funding for GSI positions comes from state revenues that are allocated to the campus by the Office of the President and then to departments by the chancellor and the academic deans. These funds come from the same source and are interchangeable with funds used for other instructional employees such as lecturers.

Selection methods vary among departments. Some departments with more graduate students than open positions use a highly competitive complex algorithm to select GSIs based upon many factors including academic achievement. Other departments which have greater undergraduate needs and fewer graduate students advertise throughout related fields just to secure enough GSIs to fill their open positions.

All selection processes are merit based, however, as opposed to need based. Therefore, the financial need of the GSI is not a selection factor. The University does have a variety of financial aid services available to graduate students, some of which may include employment, but not in the titles disputed in this hearing.

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[8]Those participating in the Collegium are selected on a competitive basis. This last year there were only eleven graduate students participating in the Collegium of University Teaching Fellows (CUTF). Given the limited number of participants in the Collegium, their experience is only marginally helpful in deciding the GSI issue.

Employment as a GSI is limited to 12 quarters unless an exception is made based upon the educational advantage to the GSI. The University specifically prohibits granting exceptions to the 12-quarter rule based simply upon the need to staff courses.

When teaching either a course or section meeting, the GSIs play a vital role in the accomplishment of the University's teaching mission. The evidence is quite clear that without the services currently provided by GSIs, the University would not be able to accommodate undergraduate programs. Professors would not be able to teach large lecture courses. Undergraduates would receive very little personal attention. Writing assignments would have to be curtailed and tests would need to be restructured utilizing easily graded questions such as multiple choice rather than essay exams. In short, the University's teaching mission would suffer irreparable harm without the services currently provided by GSIs.

The University offered evidence that it could provide those same services in an economically feasible manner utilizing non-students, without doing damage to the educational program. The University would simply hire non-students such as post docs or local part-time community college instructors, high school teachers or unemployed aerospace engineers to fill the huge void if students were not utilized as GSIs.

To be appointed as a GSI, an individual must be admitted and enrolled as a UCLA graduate student. While there is a great deal

of overlap of job functions between some GSIs and post docs, lecturers, or other regular UCLA faculty, these other non-students are placed in distinctly different job classes typically with different pay and different responsibilities.

The percentage of graduate students employed as GSIs varies greatly among departments, depending upon several factors, such as the amount of alternative fellowship and GSR funding available, and the number of undergraduate students served by that department. For example, in language, biochemistry and chemistry, departments with large numbers of undergraduate students to educate, 100 percent of graduate students receiving their degree this past year were employed as GSIs at least once during their graduate programs. At the other extreme are departments without large undergraduate programs and with a significant amount of GSR funding. For example, geophysics and space physics had only 13 percent of graduate students serving as GSIs and nuclear engineering had only 20 percent.

Special Readers

The special reader class is used only on the UCLA campus. It was approved in the early 1980s in response to a need for assistance which was more advanced than readers or GSIs. The expectation was that providing a classification with a more advanced qualification and pay scale would stop the use of GSIs and readers in advanced courses.

Special readers usually function much the same as GSIs except they work in upper division or graduate courses. They

teach sections, hold office hours, and assign and grade homework, exams and projects.

Some special readers serve in unique appointments. For example, one special reader in the advanced directing program within the film and television department supervised film projects. In that role, she assigned crew members and organized the scheduling of film shoots throughout the year. She not only scheduled use of equipment, but also organized how insurance would be obtained for the students.

Appointments as special readers are made by the faculty member after the department has allocated a position to a course. Appointments are made on an hourly basis and pay is equal to or greater than the pay received by typical GSIs. Non-students have never been appointed as special readers.

Remedial Tutors/Part-Time Learning Skills Counselors

Prior to the summer of 1995, individuals staffing these jobs were hired into the remedial tutor class. This created a problem because the program wanted to hire non-students into these positions and the remedial tutor class was reserved for students. In response, the UCLA personnel office suggested they use the learning skills counselor title code. From then on all new hires, both students and non-students, were hired as learning skills counselors. A few individuals who had already been hired remained in the remedial tutor title. Since individuals in both titles are currently performing the same duties, I will refer to

them as remedial tutors/part-time learning skills counselors (RT/LSC).

RT/LSCs work for the Office of Student Support Services whose purpose is twofold. One is to provide academic and psychological personal support for medical students. The second is for outreach and recruitment of under-represented minority students into medical school.

RT/LSCs are used in two major areas. The first is during the academic year where they are used to conduct review sessions, do one-on-one tutoring and work in small groups with first year medical students. The RT/LSCs used in this manner have in the past been advanced UCLA medical students. The RT/LSC's subject matter knowledge, ability to do the job and availability are the primary criteria for selection, according to Patricia Pratt, Director of Student Support Services for the School of Medicine. One witness who had been involved in recruitment of RT/LSCs stated that an interest in teaching was something they looked for in candidates. Students who sought the job as a method of refreshing their knowledge for board exams tended to be rejected.

The second area of employment for RT/LSCs is during the summer session, which has different programs. One is a three-week pre-entry program where RT/LSCs run small group study sessions teaching pre-med students how to study the medical curriculum. Another is an eight-week program called UCLA Prep. It is a pre-medical school enrichment program to teach undergraduate students subjects which are prerequisites to

medical school. The program is funded by the U.S. Department of Health and Human Services and federal grants targeting both outreach and retention efforts. The summer program is not limited to UCLA pre-med undergraduate students, but rather is open to students throughout the United States.

RT/LSCs are hired in both instructor and GSI roles, teaching learning skills, communication skills, personal development and career development. With the assistance of the learning skills director, they set the curriculum, develop a syllabus, develop, administer and grade assignments and examinations and evaluate the student's performance.

Recruitment for the RT/LSC class is also broader than UCLA. Job announcements are distributed throughout the Los Angeles area, although UCLA medical students are given a preference. Non-students hired typically have a master's degree or doctorates in the subject area and often have teaching experience at either the community college or university level.

RT/LSCs who are medical students benefit from occupying this position by increasing their subject matter knowledge, and developing their teaching skills, as well as benefitting them economically.

Readers

The reader position at UCLA is virtually identical to the reader position at UCSD. Readers assist the University's teaching mission by reading and grading homework assignments, quizzes, midterm and final exams, and papers. Readers have some

regular ongoing responsibilities throughout the quarter, but more commonly, their duties involve sporadic activities usually concentrated in intense periods around midterm and final exams.

The University's academic personnel manual (APM) 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. While extremely rare at UCLA, non-students have been employed in the reader position. This appears only to have happened when an individual dropped out of school during a quarter and was allowed to remain employed for the remainder of the quarter.

Readers at UCLA are typically selected by professors and are appointed by the department chair after the position is funded. Readers and their supervising faculty members typically meet prior to the start of the quarter to discuss expectations and assignments. Readers and faculty members also will typically meet during the quarter to discuss major writing and grading assignments, such as midterm and final exams. The time for which readers are paid is spent almost entirely performing grading duties as opposed to meeting with faculty discussing pedagogical issues. The amount of pedagogy discussed varies among faculty, though it does not appear to be substantial in most cases.

Readers are sometimes requested to attend lectures, but it is not typically considered part of their job duties. Since readers have already typically taken the course or its equivalent, they usually are already familiar with the material.

Readers receive no course credit for the duties they perform.

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 financial needs of individual readers. Graduate students are paid more than undergraduates in recognition of their additional expertise. Commitments for reader positions are not included in letters of acceptance sent out by the University to students, which also details financial aid packages.

The reader staffing ratio is usually determined by departments based on 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 the course. As such, reader staffing is enrollment driven and not a reflection of the employment needs of readers.

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 a reader's own academic obligations will be avoided. However, since job duties often intensify around the time of midterm and final exams, conflicts occasionally arise. When that happens, a reader's own studies may suffer because of the necessary priority of completing grades on time.

There is ample evidence in the record that readers are vital to the accomplishment of UCLA's teaching mission. Faculty hire readers because they are unable to grade all the papers and assignments themselves. Without the services provided by readers the educational program at UCLA (just like at UCSD) would have to be dramatically restructured with extremely negative pedagogical results.

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's 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 GSIs could perform more of these tasks. In other words, the University could eliminate work which has been highly valued or pass it on to other University employees, including other student employees.

There is evidence in the record that a large candidate pool exists outside the UCLA system which the University could tap into if it decided to replace student employees with non-student replacement workers at competitive salaries.

Tutors

The role of tutors at UCLA is also identical to that at UCSD, although the program organization varies somewhat. At UCLA there are two major tutoring programs. One is the College Tutorial Service (CTS) and the other is the Academic Advancement Program (AAP). Each of the programs offers individual and group tutoring to UCLA students.

The goal of the CTS is to assist students in becoming effective, independent learners. The CTS program has four distinct sub programs: English Composition, English as a Second Language, Math and Science and Athletic Tutorial. The first three provide basic tutoring and skill building in general subject areas rather than specific courses. They are open to all UCLA undergraduate students (approximately 20,000). The Athletic Tutorial provides tutoring to UCLA athletes, tailored to specific courses they are taking. A vastly disproportionate larger number of CTS tutors are assigned to the Athletic Tutorial program where they tutor UCLA's 400 athletes.

The mission of the AAP is the retention and graduation of students who come from historically under-represented communities. It has been an integral part of UCLA's affirmative action program. AAP also offers an intensive summer program designed to assist new and transferring students with their transition into University life.

The minimum qualifications to be hired as a tutor is an overall GPA of 3.0 and a GPA of 3.4 in their major. Tutors will

have typically received an A in the subject course they are tutoring. In the AAP, a selection criterion also includes the ability to work with AAP students. Many AAP tutors have themselves been former recipients of AAP tutoring.

Tutors are hired on an hourly basis with a 50 percent maximum workload. Tutors are typically given latitude in scheduling their tutoring sessions so that they do not interfere with their own coursework.

Tutors receive training through a series of workshops during their first quarter of tutoring. It includes roleplaying, video presentations, pedagogical discussions as well as various other issues ranging from tutoring ethics to logistics. When new tutors first start they are also assigned to a more experienced tutor to discuss issues which may arise. Once past the initial quarter, they tend to receive only a minimal amount of supervision and evaluation.

An individual must be a student to be initially hired as a tutor. However, once hired, they may continue their employment for an additional three quarters after they no longer have student status, either by graduating or dropping out. Most tutors are undergraduates, although some continue on in the role as graduate students.

Educational Objectives of Student Employees

Individual educational objectives vary a great deal depending upon the student's history, current circumstances, progress in their degree program and vision of their future.

Testimony was wide ranging and sometimes diametrically opposed. Some students define their educational objectives as narrowly as getting their degree and nothing else. Others seem to encompass every learning opportunity impacting both university related goals as well as future career and interpersonal goals. Educational objectives of undergraduate students are often more difficult to assess because their goals in general are more in flux and less defined at this stage of their academic life. Some witnesses also framed their testimony in terms of the student's motivation for seeking employment rather than their educational objectives.

Several faculty members also testified about both the motivations and the general educational objectives of individuals seeking student employment. To the extent that faculty members were offering their own subjective views about the educational objectives and motivation about student employees, their testimony is speculative and not generally persuasive.[9] Where faculty testimony is based upon objective factors such as

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[9]In determining the educational objectives of the student employees, the Supreme Court 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.
> (Emphasis in original; Regents of the University of California v. PERB (1986) 41 Cal.App.3d 601, 614 [224 Cal.Rptr.631] (Regents).)

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

While there exists great contradictions in some of the testimony offered about educational objectives, the educational objectives of almost all the student employees at issue in this hearing can be summarized into two major objectives. The first is to complete their educational program and be awarded their degree. For undergraduate students this will encompass completion of course work. For graduate students, however, it encompasses much more. They must not only complete course work, but typically they must also learn research skills, select topics for their thesis or dissertation, form a dissertation committee, perform a substantial amount of original research, write a dissertation and defend it.

The second major educational objective is to better position themselves for their next step after they receive their degree, whether that is a career or an additional educational program. This educational objective typically encompasses gaining demonstrable skills, building a strong curriculum vitae and building helpful relationships. The demonstrable skills typically sought include research, writing and teaching skills. Building a strong curriculum vitae typically includes publishing

papers, presenting research at conferences, being the recipient of prestigious awards and grants and gaining direct work experience such as research and teaching. Building relationships typically encompasses mentor relationships within the university as well as professional relationships established at conferences or through joint publication of research papers.

There was also a wide variation about motivation for seeking employment within the classifications at issue. These can also be summarized into major categories. A motivation common to almost all student employees was that employment generated income and reduced their fees.[10] Although there were students who had other means of support or who would have sought the experience even if they had not been paid, they were quite rare and do not reflect an accurate cross-section of student employees.

Another rather universal motivation for seeking student employment was the desire to have a convenient job. These jobs are on campus and can typically be scheduled around the student's own academic program. Another common motivation for seeking this work is that it enhances one's resume or, in the case of undergraduate students, an application for graduate school.

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[10]Almost all student employees seek and accept student employment due to the money they receive. As the University correctly points out, however, the primary purpose test was rejected by the Legislature. The test is not to decide whether the student's primary purpose in taking the job was for educational or economic reasons. However, the student's motivation for taking the job may shed some light on whether the value to the incumbent is educational or economic. If the student seeks the job for economic reasons, that may reflect less value to the student employee's educational objectives.

Employment in the contested positions is in many ways seen as a reflection of academic excellence and a way to distinguish one's self from the mass of other students.

Other motivating factors for seeking employment which arose commonly, although not universally, were a desire to gain teaching experience, to help other students, to interact with faculty and to gain subject matter knowledge. The desire to help other students seemed particularly strong in programs like AAP, where student employees have a strong personal identification with the goals of the program itself. The interest in interacting with faculty seemed more significant for those student employees attempting to organize their dissertation committee. Gaining subject matter expertise may be stronger motivation for student employees preparing for qualifying exams or entrance exams.[11]

There was scattered evidence of other more individual motivations for seeking this employment. However, none seem as common as those listed above.

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

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[11]There is evidence, however, that the Office of Student Support Services actually screens out potential applicants who are interested in tutoring as a method of reviewing for their own board exams.

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 matter. 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 are in a mentor-student relationship.

Numerous University witnesses testified about the importance of the mentor relationship for both graduate and undergraduate students and their fear that these relationships would be undermined by collective bargaining. UCLA's Interim Assistant Vice-Chancellor of Graduate Programs, Jim Turner, testified that graduate students without strong University mentors are greatly handicapped, tending to have greater difficulty getting strong letters of recommendations, fellowships and eventually jobs.

Dean Duggan testified that mentor relationships exist primarily between Ph.D. candidates and their dissertation committee members, although some mentoring can take place within numerous other student faculty relationships. He stated that a good mentoring relationship is the most important factor for 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 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, Dugan, who was the University spokesperson at the time, was on the dissertation committee of Andy Kahl, an AGSE spokesperson. The strike created a strain in their relationship. However, their relationship resumed 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.

According to Dr. 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."

Dr. Switkes testified further that it is very likely that a student's thesis adviser could also be that student's supervisor. This is very true for GSRs, but typically not for other disputed titles. A number of students have been supervised as GSIs by faculty who have also been on their dissertation committee, and a few have even developed a strong mentor relationship primarily through the GSI-faculty supervisor setting. However, the depth of most student-mentor relationships seem to have developed more from the supervision of the students' dissertation research than from supervision of the GSI work. There are, of course, exceptions where GSIs have developed mentor relationships only with their GSI supervisor and students who have not developed any mentor relationships within their dissertation committee. However, these are not the norm.

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 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.

The University offered evidence that conflicts at UCLA have been successfully resolved using informal methods. Dean Kathleen Komar testified that she has been able to resolve complaints on behalf of students without having to reveal the identity of the student making the complaint. According to Komar, it is less disruptive of student faculty relationships if complaints can be raised informally and confidentially within the department. Komar has found department chairs very cooperative when approached by peers, however, she fears a different reaction if they were faced with a more "legalistic" process.

If employment related disputes are not resolved informally, a grievance may be filed. The grievance process for employment related grievances is 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 of 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 grievance 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 from lists provided by the American Arbitration Association).[12]

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[12]The 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,

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 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. University witnesses testified that they actively steer students away from using the grievance process and into the student's academic appeals process. For example, Dr. 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.

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reprisal, and procedural irregularity in the personnel review process.

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 at Madison, supported Switkes' testimony that any grievance process for student employees is problematic because of the potential for academic retaliation by faculty. Craig also 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. In addition, faculty members might avoid taking appropriate action simply out of fear that a grievance might be filed.

Dean Littlefield of UCSD 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 the process did not work as well as a result.

> 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. 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 is 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. In contrast, 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 individuals are challenged, called on the carpet, or embarrassed, they tend to become 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, the personal relationship deteriorated.

Duggan clearly prefers to resolve 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 formal appeals process are just too difficult 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 believes 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 Workers (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 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 judgements 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 less so. 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 of 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 involving personnel files, evaluation processes, assignment of pay levels, payroll issues, work environment, office equipment and supplies, use of telephones, and safety 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 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. 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, believes that contracts providing for grievance mechanisms escalated issues to the highest levels very rapidly. Craig believes 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 helpful. In contrast to the testimony of Dr. Craig, she feels representation was helpful to grievants. 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, teachers assistants 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 DeProsse is 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 bring 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 had any detrimental effect on 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 process resolved rather than exacerbated the conflict.

Dr. Daniel Julius, Associate Vice President for Academic Affairs and Director of the 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 are all 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, union management meetings are regularly scheduled each month in an effort to share information and concerns, and to 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

There are currently both campus and departmental committees upon which graduate students serve. Some student members are extended voting privileges while others are advisory only. Some student members are appointed by the Graduate Student Association and others are elected in departmental elections. Many of the committees deal with issues having economic and academic relevance to the disputed titles.

Several witnesses called by the Petitioner testified about how student employee 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, in order to be available to and build continuity for successor bargaining teams. 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.

The Rhetoric of Conflict

The University offered a series of newspaper articles seeking to show that supporters of the Petitioner have demonstrated a tendency to vilify the University and its administrators. In one extensive article entitled UCLA and Sexual Harassment, published in SAGE NEWS, the Petitioner's newsletter, the union stated:

> Since sexual harassment is so prevalent on the UCLA campus, the system would be overloaded with the complaints if the victims are properly informed about their rights and the university's responsibility. This is

> exactly what the administration does not want to occur.

The article was also critical of complaint resolution officers who were trained and employed by the University. The Petitioner argued that they might have greater loyalty to the University than to the victims of sexual harassment.

According to the University, these provocative statements could not have been made in good faith because there exists a sexual harassment committee composed of student, faculty and administrators which addresses this issue. According to the University, there also has been much training and considerable efforts to inform the University community in general, and victims in particular, about their rights.

The University was also very critical of two other SAGE articles appearing in the UCLA campus newspaper. One claimed that AGSE played a role in obtaining benefits at the UC Berkeley campus which were later adopted at UCLA. The other warned of a potential loss of student employee benefits being considered by the UC Office of the President.

In all three instances, however, it appears that the Petitioner was putting forth legitimately held views regarding issues of possible great concern to its current and potential membership. Additionally, the evidence strongly supports a finding that the Petitioner was much better informed about the facts of the disputes than was the University spokesperson. For example, in the article regarding AGSE, much of the Petitioner's claim was based upon the UC Berkeley Interim Agreement. Even up

to the time of her testimony, Dean Komar had not read the Interim Agreement and apparently based her position upon second hand reports from individuals not involved in the negotiations over the agreement.

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 policies 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 AGSE case, the University and AGSE engaged in a non-HEERA representation process at UC Berkeley. In August 1989, in an effort to limit the University's potential remedial liability if the AGSE decision

were reversed on appeal and to avoid additional recognition 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 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 HEERA and that the agreement expired upon final determination of the AGSE decision.

There is conflicting testimony about the negotiating process and rights provided in the Interim Agreement. It is clear, however, that the parties did meet in an effort to resolve problems of a collective bargaining nature which were of concern to the parties. Both sides had negotiating teams, exchanged proposals on various issues and reached agreements. Agreements 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.

AGSE and the University have been engaged in bargaining for an initial contract at Berkeley 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.[13] In April 1996, an impasse was determined to exist and a mediator was appointed by PERB.[14]

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 said there have been times when both parties have taken strong positions in negotiations. Mary Ann Massenburg testified that the

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[13]After 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.

[14]The parties are currently in mediation. (Regents of the University of California Case No. SF-M-2137-H.) It is appropriate to take official notice of information in PERB casefiles. (California State University, Hayward (1982) PERB Decision No. 231-H.)

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 which 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 either have 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 UAW and is a resource for local bargaining units on a wide range of collective bargaining issues. 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 was inconsistent 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 <u>management</u> 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's 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 teaching assistants 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 she feels 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 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, and other academic bargaining, which is clearly sanctioned by the Legislature under HEERA.

The credibility of another University witness, Provost Brian Copenhazer was also handicapped by his inability to distinguish between collective bargaining rights for faculty (which have been deemed appropriate by the Legislature) and coverage for disputed titles. His testimony was also extremely vague, consisting primarily of unqualified opinion testimony and broad generalizations, based upon very limited experience from the distant past.

Dr. Ellen Switkes' testimony was limited to mentoring issues and University processes.[15] 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 uninformed speculation. For example, she testified that the use of APM 140 was detrimental 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."

The testimony of Dean Kathleen Komar was generally credible, except in one major area. Her credibility about the series of newspaper articles in which she sparred with Petitioner was damaged because she was doing just what she was accusing the union of doing (i.e., taking reactionary and rigid positions without having all the facts).

Many student employee witnesses were asked a lengthy series of yes or no questions about their educational objectives. For example:

Q Is one of your educational objectives to learn whether or not you want to teach after you graduate with your Ph.D.?

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

Q Is one of your educational objectives in the ------Ph.D. program to learn research methods and skills in your discipline?

Q Is one of your educational objectives to develop your communication skills?

Q Is one of your educational objectives in the Ph.D. program to establish mentor relationships with one or more faculty members?

Q Is one of your educational objectives in the Ph.D. program to have as much time as possible to spend on your graduate work?

While these questions are appropriate, particularly on cross-examination, I found the answers somewhat less persuasive than those of individuals who were simply asked to formulate, in their own words, their educational objectives.

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

Finally, the University argues that Petitioner's portrayal of the evidence should be discounted because "a large percentage of the UAW's student witnesses are union activists as opposed to disinterested third parties." It is not surprising that a union of student employees would call as witnesses a number of union activist students. It can hardly be said that the University

chose to call only third party disinterested administrators. That University argument is rejected.

DISCUSSION

Indicia of Student vs. Employee Status

Before discussing the application of subsection (f) to the facts in this case, I want to dispose of three issues upon which the parties offered argument. The first is whether the facts are more an indicia of status as a student or as an employee.[16] It is clear that the individuals at issue are both. They possess all the attributes of both students and employees. The test is not whether they are more like students or employees, but rather a balancing of the value to educational objectives against the value of services rendered. 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 draws different conclusions from this evidence. Although the record reflects numerous similarities in the duties and terms and

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[16]In the UCSD hearing, the University argued that the facts supported a finding of "studentness" among the individuals in question. It has now adopted the UCSD standard that indicia of student or employee status are relevant only to the extent they reflect upon educational objectives and service to the University.

conditions of employment between the UC Berkeley unit and the one sought at UCLA, 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 UCLA. 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, the UC Berkeley Interim Agreement is not an admission that collective bargaining is appropriate at UCLA or any other location. That agreement did not amount to collective bargaining under HEERA. It was also a tactical effort to limit liability in an unfair practice case and an effort to avoid further strikes.

I also place little 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 also unit description issues not yet resolved, which make bargaining particularly difficult. It is simply inappropriate to draw any conclusions from bargaining at UC Berkeley, other than the fact

that the parties are engaged in a difficult first negotiations and are currently in mediation.

The third issue is that both parties make incorrect assumptions about what HEERA presumes. The University argues that HEERA's subsection (f) starts with a presumption that students are not employees. The Petitioner argues that the same statutory language presumes that some students will be covered. HEERA, however, makes no presumptions one way or the other. The Legislature clearly left that task to PERB. The Act simply offers criteria to be applied by PERB in making its determination about student employee coverage.

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: Is Employment Contingent Upon Student Status?

With one exception I find that status as a student is a requirement for employment in the disputed titles. That exception is the RT/LSC position. The best evidence reflecting whether employment in a disputed position is contingent upon "the status of the students" is whether non-students are hired into the disputed position. RT/LSC positions are filled by both students and non-students. According to Patricia Pratt, Director of Student Support Services, the program stopped using the remedial tutor title specifically because it wanted to be able to hire non-students for the summer program.

Although students may receive a hiring preference, this 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 RT/LSCs are employees under the Act.

Petitioner also argues that all remaining classifications are also staffed by non-students. This argument is rejected. The evidence reflects a limited number of non-student readers serving in the position after they dropped out of school, but

prior to the paperwork catching up to them. Thus, they were never hired into the position as non-students.

Tutors are allowed to remain in their position for a set length of time after they graduate or take a semester off. At that point, technically speaking, non-students may be serving in the disputed positions. However, they would not be in the positions if they had not been students <u>at the time they were hired</u>. This evidence is dramatically different from UCSD where individuals who were not students and had never even been students were routinely hired into the disputed positions.

Petitioner argues that non-students also perform GSI and GSR duties and cites the use of post docs, lecturers, and staff research assistants to fill in for the disputed titles when the need arises. There is, however, a long established overlapping of job responsibilities among numerous University employees. Even if other non-students perform duties similar to GSIs and GSRs, they are doing so clearly employed in a different position, usually at a different rate of pay and with differing levels of responsibilities. The most obvious example of this practice is the use of faculty to perform grading, teach lab sections, and lead discussion sections in courses where enrollment is small. The record is clear that the University hires non-students such as post docs or lecturers to perform the functions of teachers assistants when students are not available to fill the University's needs. However, when such non-students are hired into those positions they are not hired as teachers assistants.

Second Test: Are Services Related to Educational Objectives?

In contrast to the findings in UCSD, I find here that the services provided by employees in all the disputed titles are related in some manner to the educational objectives of student employees. In UCSD I held that services provided by readers were unrelated to their educational objectives. Here, the record includes reader witnesses who used their positions to build relationships with faculty and incorporated their grading skills into future teaching plans to a greater extent than to UCSD.

Although the relationship is very marginal, it cannot be said, based upon this record, that employment as a reader at UCLA is unrelated to educational objectives.

Third Test: Are Educational Objectives Subordinate to Services (Prong One) and Would Coverage Under the Act Further the Purposes of the Act (Prong Two)?

In Regents, the Supreme Court reviewed HEERA legislative history, noting that the Legislature had created a new standard for determining this issue, rather than follow 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, 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. [Fn. ommitted; Regents at p. 614.]

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.[17] Yet, the Board

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[17]The Administrative Law Judge (ALJ) in that case noted:

> [A]ll housestaff witnesses testified [that] their educational objectives in choosing

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

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 its 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. (q).) Such issues will undoubtedly arise in specific factual contexts in which one side wishes to bargain over a certain subject and the other side does not. These scope-of-

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> and participating in a residency program are to receive the best medical training and qualify for specialty or subspecialty certification. . . . [Regents at p. 640, fn. 14.]

> 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." (Section 3563, subd. (b).) [Regents at p. 623, emphasis in original, fn. omitted.]

The court 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 GSIs and 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. [AGSE Bd Dec. at 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 the interest (academic and employment) independently, a more helpful approach is to examine how the two interests inter-relate 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 a conclusion. . .
>
> Weighing the facts of this case in our newly calibrated scale, we find that in cases of conflict between the 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 granting employee status would further the purposes of the Act. It concluded:

> Thus, the academic nature of the GSI and GSR appointments, which promotes a 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. . . . (AGSE Bd Dec. at 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 (1977) 229 NLRB 1000 [95 LRRM 1180], 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 others' written work. [AGSE Bd Dec. at 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 would promote harmonious and cooperative labor

> relations among the GSIs, there is no evidence that collective bargaining would encourage the pursuit of excellence in teaching. [AGSE Bd Dec. at 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.]

The Board found collective bargaining would not promote harmonious and cooperative labor relations among GSIs and GSRs because of the continuous movement among graduate students in and out of these positions. The Board felt graduate students would be split into two groups; those in bargaining unit positions and those who are not. Membership would change frequently, depending upon the availability of appointments, causing instability.

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

On appeal, the court in AGSE held that the Board's "recalibration of the scales" had so distorted the first prong of subsection (f) that the its 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 relied heavily 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 affect 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 involving 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 in each case.

Prong One--Are Educational Objectives Subordinate to Services?

In this next section I will discuss the first prong of subsection (f), i.e., whether the educational objectives of student employees are subordinate to the services provided to the University. I start with GSRs, then discuss all the other disputed titles (except tutor supervisors) as a single group.

GSRs

After considering the ways in which GSR employment meets the educational objectives of students compared to the ways the employment provides services to the University, I find that the educational objectives of GSRs are not subordinate to the services provided and therefore, coverage under the Act should be denied.

Employment as a GSR meets practically every educational objective that students possess. Most GSRs are being funded to perform virtually the same work that they would have to perform as students, regardless of whether they were being paid. The

role of the faculty member in relation to the GSR is more like a patron than a typical supervisor. As GSRs, students are not simply learning skills that will be helpful to them in later career choices. They are learning the very skills essential for them to complete their dissertation and obtain their degree.

In contrast to all other academic apprentice appointments, it would be virtually impossible for an outside observer to determine whether the GSR is performing paid duties "on the clock" as a GSR or rather is simply performing scholarly research as an unpaid student. Nor would it even be possible for most GSRs to make the distinction in any way other than artificially for purposes of a time/pay voucher. Unlike GSIs who can easily distinguish between unpaid time as a student and paid time teaching a course or correcting papers, GSRs perform duties leading directly to their dissertation and degree and receives pay as a means of support for a fungible portion of that work.

Secondary educational objectives are also met perfectly through employment as a GSR. GSRs regularly co-author research papers with their faculty supervisors, are often sent to conferences, have the opportunity to establish networks with professional contacts and enhance both their curriculum vitae and future employment opportunities.

Unlike all other academic apprentice appointments, the value of GSR positions accrue primarily to the GSRs and their educational objectives. The value of the services received by the University is not nearly as significant.

To the extent that hourly GSRs provide research support to faculty, they do provide service to the University. That is an extremely small portion of GSR funding, however, and it is not reflective of the value of GSR services to the University in this balancing test.

Petitioner argues that GSRs are hired to fulfill the terms of research grants awarded to faculty and that these grants are essential to the University's research mission and the career of the principal investigator. While there is some support for this argument, the weight of evidence in the existing record is that one of the primary purposes of seeking grants is to provide support for students and to create a vehicle for their dissertation research.

At least one professor seemed to be baffled by questions about hiring non-students to perform GSR work, because the whole point of the GSR work is to benefit the GSRs. This contrasts with GSIs, for example, where the main purpose of their employment is to assist in the undergraduate teaching mission of the University.

Petitioner also argues that the services provided by GSRs generate a substantial portion of the University's essential revenues. Research grants usually include several components, including a portion of the principal investigator's salary and a huge portion for University overhead. According to the Petitioner, the intellectual labor of the GSRs fuels the grants. While the GSRs no doubt play an important role in University

research, that argument is akin to the tail that wags the dog. The weight of evidence in this record supports a conclusion that the research grants support the GSRs rather than vice versa.

I therefore conclude that services provided to the University are subordinate to the educational objectives of most GSRs. The only exceptions to this conclusion might be the limited number of hourly GSRs not working in their field of research. For reasons articulated in the Prong II section of this decision, however, I exclude those individuals from coverage as well.

GSIs, Special Readers, Readers, RT/LSCs and Tutors

Although there are some major differences among the remaining classifications, there are also many similarities. On balance there are enough common factors to deal with them as a single group. Most individuals in these classifications are drawn to their jobs for economic reasons, seeking income and reduced fees. Most find the jobs significantly more convenient and less disruptive to their educational program than other available employment off campus. The jobs typically also allow student employees the opportunity to better position themselves for whatever next steps they may seek.

GSIs gain valuable teaching skills which will be beneficial to them after they complete their degree programs, leave UCLA and seek employment elsewhere. While there was conflicting testimony about the value of teaching experience compared to research experience when seeking future employment in higher education,

just about every GSI indicated they were placing their GSI experience on their curriculum vitae, which indicates it is given value in the search for employment.

Undergraduates may gain the distinction of being selected for an academic apprentice position which may prove valuable in applying for graduate school. Readers may become more proficient at the grading process and tutors can also improve their teaching and communication skills.

All positions provide the opportunity to review academic material within a chosen field and offer an opportunity to gain skill working with other students.

Individuals in all the titles gain exposure to faculty in varying degrees. Although tutors, readers and GSIs teaching a course have only minimal exposure to faculty, section leader GSIs and special readers typically interact with their supervisory faculty member weekly, if not more often. For graduate students trying to assemble a dissertation committee, this provides an opportunity to relate to faculty members in a manner unlike other students. It not only distinguishes them in the eyes of the faculty, but it gives students insight into whether particular faculty members would make good committee members.

Other than this potential help in assembling a dissertation committee, however, employment in the disputed titles does very little or nothing at all in meeting the most fundamental educational objective of all student employees, which is to complete their degree program. In all but rare circumstances it

satisfies no coursework requirements. None of the titles will significantly increase research skills, nor will they provide an opportunity for any original research.

It is not the norm for student employees to develop mentor student relationships based solely upon employment in these disputed titles. That depth of relationship is usually reserved for a student's dissertation chairperson. Occasionally, it involved other individuals on a dissertation committee.

Student employees no doubt learn the subject matter better each time they teach it. Numerous witnesses, both faculty and student employees, testified that the best way to learn a subject thoroughly is to teach it to others. Student employees in these titles, however, are typically teaching, reading or tutoring subjects where they already have a great deal of expertise. Although there are some exceptions, in most situations the individuals would not have been selected without that expertise. The educational level at which they are teaching, reading, or tutoring, is also usually significantly less sophisticated than their own coursework and research. Individuals preparing for qualifying exams could, no doubt, benefit from teaching the subjects of their exams. In some cases, however, individuals with that motivation were actually screened out of employment possibilities.

The writing of a student employee's dissertation is not fostered at all by employment in these titles. Quite the opposite is true. Time spent teaching an undergraduate course is

time necessarily taken away from one's dissertation, as would any other employment. The extensive efforts made by the University to restrict GSI hours to 20, as compared to GSR hours which everyone acknowledges far exceed 20 per week, is an implicit admission that GSI employment cuts into the time available for the student employee's own research and dissertation work.

Employment in these titles does not develop or enhance writing skills, unless perhaps the student employee is teaching or tutoring a composition course. Nor does employment in the titles advance the publication of papers, either individually or with faculty. Witnesses did not fill the record with stories of joint publications between supervising faculty members and student employees in the titles, as was common with GSRs and their supervisors. Neither does such employment promote attendance at conferences for the presentation of papers. Such publications and presentations are usually reserved for the student's dissertation field and done jointly with a dissertation chair or research supervisor.

The inadequacy of employment in these titles to meet educational objectives is again vividly demonstrated by a comparison to employment as a GSR. GSRs are paid to complete their degree program. They learn research skills directly related to their body of original research for their dissertation. They select their topic, do their research, form their committee, write their dissertation, and then defend it, all within the aegis of GSR employment. As well as directly

supporting the completion of the GSR's degree program, the employment also meets almost all other educational objectives. GSRs gain demonstrable skills of research and writing. Their curriculum vitaes are developed through the publishing of papers, both jointly with faculty supervisors and individually, as well as presentations of their research at conferences. Finally, GSRs enjoy a greater opportunity to develop strong mentor/student relationships with faculty supervisors, who more often than not are also the GSRs dissertation chair.

Almost 100 percent of a student's educational objectives can be met through employment as a GSR. In stark contrast, it is significantly less than a 50-50 proposition, at best, for all other disputed titles. Since readers and tutors typically gain far less teaching experience and have less interaction with faculty, employment in those titles provide even less opportunity for meeting educational objectives. While not true in every case, a fairly accurate generalization is that GSRs are paid to educate themselves, while GSI (and other disputed titles) are paid to educate undergraduate students.

The limited value that employment in these titles has in meeting educational objectives must be balanced against the great value of services provided to the University by employees in these titles.

The University could not continue in its current structure without the services of the disputed titles. The evidence is clear that there are simply too many undergraduate students and

too few faculty to provide a first class education without the services of GSIs and readers, for example. The University could not accomplish its mission of undergraduate education without a course structure providing for a combination of large lecture classes and smaller section meetings. Similarly, faculty could not assign the same kinds of valuable written course assignments without readers to assist with the grading in larger courses. Assignments would have to be fewer and of a different type (e.g., multiple choice and graded mechanically).

Undergraduates would also receive significantly less personal attention than they do now. GSIs are one of the main sources of contact between the University and undergraduate students. In some significant fields they are literally the only contact between the University and the undergraduate student.

In almost all situations, it is the educational needs of undergraduate students which determine the staffing requirements for the disputed positions. The University does not determine how many graduate students need this experience offered through employment and then find positions for them. Rather, it determines the number of undergraduate courses that need to be staffed and then finds an appropriate number of student employees to staff those vacant positions.

It also appears that the value of providing graduate students with this rich training experience does not seem to be as high a priority in departments which are rich in GSR funding and which have small or non-existent undergraduate enrollments.

An exception to the practice of determining staffing by undergraduate needs is the Collegium program. There the motivation for the program is clearly to give teaching fellows the opportunity to develop and teach their own course. However, the Collegium is a good example for application of the Supreme Court's analysis in Regents.

> [E]ven 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.]

Here, the University argues that the value of services received by the University is not great. According to the University:

> There is no evidence that the undergraduate seminars provided by graduate students participating in one of the Collegium programs are of any great value to the overall curriculum provided by the University.

Or course, considering the thousands of courses offered each year, it could also be argued that no single course is of any great value to the overall curriculum provided by the University. That, however, would probably be hotly contested by the undergraduate students taking the course who have paid tuition and are counting on the course credit they receive toward their own graduation.

Regardless of the motivation for teaching a Collegium course, the teaching fellow has responsibility for all aspects of

the course, including designing the curriculum, selecting textbooks, assigning coursework, grading assignments and developing and grading exams, with as much responsibility as any other new faculty member.

While teaching in the Collegium may offer greater experience to the teaching fellow, and thus be of more value to their educational objectives than a typical GSI assignment, the service provided is also significantly more valuable to the University's teaching mission. There are few services that would be of greater value to the University's teaching mission than having responsibility for teaching an entire course to undergraduate students. What could be of greater value to the University's teaching mission?

The University also specifically downplays the value of the tutoring services offered. According to the University:

> There is no showing that tutoring is essential to the University's educational mission. The tutoring programs do not provide basic instruction, but merely provide supplemental help to those who think they need it.

This position is contrary to material published by CTS and AAP, which emphasize the valuable role of the programs in meeting the needs of students. Furthermore, when an extremely disproportionate number of tutors are assigned to the special tutoring needs of 400 UCLA athletes, it is simply not credible to argue that services provided to the athletes are of less value than the educational benefits derived by the tutors themselves. The tutors, all top students in their field, assist the athletes

with their studies, take notes for them when athletes are gone on sports trips, and even personally take steps to ensure that athletes do not miss the tutoring sessions. Clearly, the greater value is received by those delivering the services, rather than by those giving the service. This program was not established to cater to the educational objectives of the tutors. It was established to foster the University's athletic program, particularly in large cash generating sports. Any benefit derived by the tutors is incidental to the services performed.[18]

The same can be said of the AAP. No doubt AAP tutors reap benefits from their jobs. They learn from their teaching and gain the satisfaction of supporting a program they fundamentally believe in at a time the program's goals are being severely tested. But these tutors are not chosen so they will benefit educationally from the AAP. Quite the contrary is true. They are chosen as role models for AAP tutees because they have successfully navigated the University environment. Any value they receive is clearly subordinate to the services they provide the AAP and UCLA's affirmative action commitment.

The University seeks to minimize the value of readers by pointing out that, "the instructor in charge of a course is

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[18]This should not be read as criticism of UCLA's athletic tutorial. All the evidence indicated it is an effective and laudable program to assist the very realistic special needs of athletes who are often traveling away from their courses on University sponsored sports events and otherwise devoting enormous personal time and energy to the University through its various sports programs. The University's credibility vanishes, however, when it argues this is a program offering greater value to the tutors than to the University.

responsible for determining the grade of each student in the course," and that the services could be provided by other sources:

> To begin with, the course instructors could evaluate all of their student's work. Just as graduate student's testified that their ability to evaluate or "grade" improved with experience [citations] it would be expected that the course instructor would be significantly more efficient in accomplishing these grading responsibilities.

However, the University's argument that professors could suddenly handle all the grading because they are more efficient is totally devoid of credibility, and completely unsupported by the record.

The University's most consistent argument for all the disputed titles, however, is that it could replace student employees with non-student replacement workers in a more educationally effective and cost efficient manner. In support of this argument, the University offered numerous witnesses who testified that there was a large candidate pool of potential workers in the Los Angeles area who would be available to perform the work currently done in the disputed titles.

The University argues that: (1) it would be cheaper to use non-students; (2) non-students would perform better as teachers because their primary focus would not be on completing their education as is currently the case with graduate students, but rather their primary focus would be on their teaching assignments; and (3) non-students could be selected based solely on demonstrated teaching skills rather than on academic standing.

Thus, the University argues that it could accomplish the work more cheaply and skillfully by not using student employees. According to the University, this shows that its main interest is not in obtaining these services in the most effective and cost efficient manner. Rather, it is most interested in providing important training experiences for graduate students. Therefore, the University claims it reaps little value from the current practice.

In this UCLA decision, I am dealing with this argument differently than I did in the UCSD decision for two reasons. First, based on the UCSD record, I was unconvinced that a candidate pool existed from which UCSD could draw potential replacement workers. Thus, there was no need to deal with the University's claim in any greater depth. At UCLA, however, the University offered credible evidence that a candidate pool existed from which UCLA could recruit non-students into the disputed titles.[19]

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[19]While I find credible the University's claim that a viable candidate pool exists and that the cost of hiring from that pool could be competitive, I am not as convinced as the University is that replacing current student employees with non-students would increase the educational benefits for undergraduates. For example, I do not believe that the University has dealt effectively with the potential loss of benefits from the concept of peer teaching, nor do I think the University has shown it is equipped to deal with the logistical problems of hiring so many new non-students. A candidate pool is not easily transformed into a viable workforce. However, in light of my rejection of the University's legal theory regarding non-student replacement workers, it is unnecessary for me to draw any conclusions regarding its educational effectiveness.

Second, the University has articulated its argument more clearly and more thoroughly explained its theory under the existing evidence. As a result, it is more apparent that the argument is incorrect.

There are two major flaws with the University's argument on this point; one legal and one factual. The argument is flawed legally because the University is seeking to have the Board once again "recalibrate the scales" by adding an additional test to the balance. Instead of having me balance the value to the educational objectives of the students with the value of services provided to the University, the University would have me also balance the value of employing students in the jobs against the value of employing non-students.

According to the University:

> The analysis of the "services provided" does not end with a finding that the services provided by GSIs are or are not of some benefit to the University. Rather, there must be a further assessment of the value and effectiveness <u>of employing students</u> to provide these services as compared to alternative means for securing the services. [Emphasis in original.]

The additional step that the University seeks to add to the balancing test is not supported by the Supreme Court in <u>Regents</u>, by the Court of Appeal in <u>AGSE</u>, by the Board in any of its decisions, nor by the statute itself. Clearly the Act, as interpreted by the courts, looks to the value of the <u>services provided</u> to the University. It does not require a balancing between the value of employing students to perform those services

against the value of employing non-students. My obligation is to determine whether the value of the services currently received by the University, as provided under the current structure, outweighs the value to the current educational objectives of the existing students. It is no more helpful in this task to weigh how the University might reinvent itself if it chose to do things differently in the future by hiring non-students in the disputed titles, than to balance those alternative staffing decisions against the potential educational objectives of students if no jobs were available at UCLA and the only students applying to UCLA graduate schools were those with independent financial support.

The possibility that the University could hire non-students to perform these essential services at a competitive cost does not in any way lead to the conclusion that the current use of student employees provides little value to the University. Quite the contrary is true. The fact that the University would have to either dramatically alter its teaching mission or hire a huge replacement workforce highlights just how important these services are to the University.

The University's argument is also undermined by a factual issue. Clearly, both the University and the student employees value the learning experiences of work in the disputed titles. However, there is intense competition among top Universities for the best graduate students. Because one of the strongest motivating factors for students seeking these positions is

economic support, if the University did not offer employment to graduate students, a likely result is that UCLA graduate programs would be filled primarily with students who are either rich or mediocre. The best and the brightest students without independent financial support couldn't afford to go to UCLA. Only those with an independent means of support or those who had been rejected by other universities offering better employment or better support packages would end up at UCLA. This leads me to conclude that the University is motivated to use student employees in the disputed titles at least as much, if not more, by a concern that a failure to provide economic support through employment would diminish the University's ability to attract the best graduate students.

I therefore conclude that while there is value to the educational objectives received by all the student employees in the remaining disputed titles, the value received by the University is even greater. Thus, the educational objectives of student employees in these titles are subordinate to the services received by the University.

Prong Two--Will Coverage Further the Purposes of the Act?

The University put on most of its Prong Two case during the UCSD portion of the hearing. Therefore, much of this discussion will refer to evidence and arguments already rejected in the UCSD decision.

GSRs

Having found that the educational objectives of most GSRS are not subordinate to the services provided, it is unnecessary to decide Prong Two issues except for those small number of GSRs doing hourly research for faculty projects unrelated to their dissertation topic. For those hourly GSRs, I do not believe under Prong Two of this test that it would further the purposes of the Act to split the class and provide coverage for some hourly employed GSRs. Hourly GSRs account for a very small portion of expended GSR support funds. Thus, splitting the class would impact only a limited number of students. There is also no practical method of determining which GSRs are performing research which may at some time overlap with their own dissertation research. Even some hourly funded GSRs are hired more to support the student than for the actual research they provide to the faculty.

Thus, because there is no administratively practical method for the parties to clearly and easily determine on a person-by-person, hour-by-hour basis which hourly GSRs might be subject to coverage, and because this group constitutes a small portion of the total expended GSR funds, I feel that it would not further the purposes of the Act to split the class and provide coverage to some hourly GSRs. I do so based upon the above listed reasons only and do not find it necessary to address other University arguments under Prong Two of this test for GSRs.

GSIs, Special Readers, Readers, RT/LSCs, Tutors

The arguments applicable to the second prong are similar for the remaining positions in dispute in this hearing. I therefore do not distinguish between them 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 assures that those responsibilities will be carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them.

It is a purpose of the Act to create a system of collective bargaining which includes impasse mechanisms and unfair practice processes. It is 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 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 to the University as well as to the Petitioner, the policy prohibiting 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 by student employees.

I therefore conclude that extending coverage will further the Act's purpose 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 correctly argues that both PERB and the court in AGSE have 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.

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, I must find that coverage encourages excellence within the University.

In determining that excellence within the University will be encouraged by extending coverage, I will review several factors such as the impact on the free flow of information, the student faculty mentor relationship, the disruption caused by work stoppages, problems separating employment from academic issues, potential damage to the stature of the University, conflict rhetoric, issues of intermittent employees, resolution of economic/academic conflict, and the potential strain on the University's limited resources.

Freeflow of Information

Collective bargaining, as envisioned under HEERA, 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 to be brought to the table. Representative bargaining teams are selected. Surveys are taken among the 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.[20] In that one instance, the University proposed to AGSE at the bargaining 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 not exist as we know it. In any event, the University's argument in this regard is somewhat misplaced. Collective bargaining with an exclusive representative does not

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[20]Both 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.

prohibit the employer from communicating with employees. (Electromation, Inc. (1992) 309 NLRB No. 163 [142 LRRM 1001]; E.I. du Pont de Nemours & Co. (1993) 311 NLRB 893 [143 LRRM 1121].)

The University also argues that collective bargaining will eliminate broad participation throughout the University and instead centralize communications between small groups of students willing to expend time necessary to be on the bargaining team, the UAW agent and a small group of campus administrators. According to the University:

> The only new voice to be added to the consultation and decision making process by the advent of a collective bargaining relationship would be the Union's voice.

The University believes this would diminish the number of and variety of shared viewpoints. This ignores the fact that the union is given its voice by its members. Employee decisions regarding exclusive representation will no doubt be based in some part on what they feel will be the most effective way of getting their views heard within the University system. I therefore reject these arguments and find that the collective bargaining process will increase the freeflow 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 HEERA coverage is virtually non-existent.

While there were many examples of student employees seeking out certain faculty members for advice, guidance, specific knowledge or letters of recommendation, most of these relationships did not rise to the level of a true mentor relationship.

The University argues that the UCSD decision adopted too narrow a definition of a mentor relationship, limiting it to the relationship "between a graduate student and a dissertation chair or sometimes a committee member." That finding was, however, simply reflective of the testimony of many students as well as University witnesses. What was apparent was that a great many faculty and University administrators overestimated their impact as mentors upon students. While not always the case, a more accurate assessment of a mentor relationship usually comes from the individual receiving the mentoring rather than the person who believes the guidance they are giving is so valuable.

Even if evidence indicated that a large number of mentor relationships overlapped with employment relationships, extending coverage would not damage those relationships. There is nothing inherent in collective bargaining that precludes a supervisor

from being a mentor or a mentor from being a supervisor. Conversely, denying coverage would not enhance the relationships.

Potential conflict is a natural part of any relationship, be it employer-employee, or faculty-student. As testified 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 or open discourse between the University and an employee chosen representative, 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 employment rules are extremely helpful in avoidance of conflict. While such guidelines might be accomplished through a good faculty handbook or personnel policy manual, providing employees with greater input into the issues and decisions tends to make any such

document more effective and more accepted 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 academic or employment disputes between faculty and student 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 reached 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.

The University states that UCLA's experience has been that student complaints are most effectively resolved through informal channels. However, there is nothing inherent in collective bargaining which precludes informal resolution of disputes. Quite the contrary is true. Every negotiated grievance procedure offered into this record provides for informal conflict resolution stages. It is only if informal methods fail to lead to a mutually agreeable solution that more formal procedures are available.

Student employees are no doubt aware of the potentially 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 highly valued mentors.

The unsupported fear that collective bargaining could unduly restrict the hiring process and therefore negatively impact the mentor relationship does not justify denying coverage. There currently exists many restrictions in the hiring process that do not damage 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. Moreover, 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 does HEERA compel the University to agree to this or any other proposal.

The University expressed concern that "the apparent need for unions to use the grievance process to justify their continued existence" will generate conflict between faculty and students. Both parties cited a particular workload grievance filed by a GSI

in the earth and space science department in support of their positions on this issue. While I make no findings whatsoever about the underlying merits of the grievance, I do conclude that the process used only marginally fostered the free flow of information. For example, a special ad hoc committee established by the department to investigate the matter seemed to make its findings and draw conclusions without ever even talking to the grievant.

No doubt some unions have filed grievances and both employers and unions have filed unfair practice charges for tactical reasons. In most cases, however, as stated by several witnesses, <u>it is the conflict which generates the grievance, not the grievance which generates the conflict</u>. This is particularly true in conflicts involving individual students and individual faculty members, where the organizational impact is less than it would be with larger group grievances. Thus, in situations where grievances are increased and the rhetoric is ratcheted up in an effort 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 to show how collective bargaining at UC Berkeley 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, 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 a faculty member had acted inappropriately, illegally, or contrary to provisions in a contract, that faculty member might retaliate academically against the student. Since faculty members play such a vital role in 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, is unpersuasive. 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.

After 71 days of formal hearing, involving approximately 200 witnesses, there is simply no <u>credible</u> evidence in this record to support a finding that mentor relationships will deteriorate if

the students in question are found to be employees under the Act.

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 a negotiation pressure tactic (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 aspects 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. Strikes can also disrupt the educational process of members of the bargaining unit, whether or not they honor the strike by pitting student against student. 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 segments of 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 may have ramifications beyond that particular quarter. While perhaps not as important to many students, delays in submission of grades can also be crucial to students ready to graduate or dealing with prerequisite requirements.

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 have the opportunity to negotiate over academic issues, providing a mechanism for the avoidance of

strikes is a significant and 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 Association[21] 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.

The University also argues that Petitioner's greatest bargaining power comes from a strike, and that exercise of that

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

power would not further excellence in the University because it would hurt other students. That, of course, is the same bargaining power that all the other University unions have as well and the Legislature has not decided that existence of that power destroys excellence in the University. And, as stated above, it is well established in California law that collective bargaining is seen as a method of reducing the risk of strikes.

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 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 vs. 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. 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 exaggerated 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, concerns issues 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 one of

the most anti-union, anti-collective bargaining witnesses to testify 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." . . . [Regents at p. 623.]

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 twenty years ago. Numerous scope of representation issues have also been decided under HEERA and the Dills Act. Thus a large, well settled body of law exists in this

area. The mere potential for scope of representation disputes is not a reason to deny coverage, given the dispute resolution mechanisms available to the parties.

As well as believing it is impossible to separate academic from economic issues, the University argues that Petitioner will not attempt to avoid academic issues. It cites as one example of the Petitioner's intrusion into a "purely academic concern," the Petitioner's involvement along with other unions in the UCLA Affirmative Action Coalition, which has organized numerous campus activities in support of affirmative action policies.

If a union is eventually certified as an exclusive representative, its membership will be made up of UCLA employees. In joining the union, those individuals do not give up their basic free speech rights to take positions on issues of concern within the academic community. If one wants to speak out either for or against affirmative action policies, either individually or organizationally, for example, one should be free to do so whether one is an undergraduate tutor or chancellor of UCLA. That freedom of expression goes hand in hand with an increased "free exchange of ideas among the faculty, students and staff".

It is a separate issue, however, whether the University must bargain with the union over issues which may be outside the scope of negotiation. As discussed earlier, provisions of the Act provide the parties with other procedures for resolving such scope issues. Thus, fear of the union's political advocacy does not form a legitimate basis for denying rights under the Act.

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 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 an enhancement to potential student employees, rather than a deterrent.

There is nothing in the record supporting a finding 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. This is particularly true in light of the fact that faculty themselves are covered under HEERA.

Conflicts Between Services and Educational Objectives

The University argues that it sacrifices lower labor costs in order to give adequate financial support to student employees.

As suggested earlier, this argument overlooks the competitive nature of recruiting top students. If the University did not give adequate financial support to its students it would not have the same outstanding students that it now has. Resolving this conflict in any other way would be as detrimental to the University's graduate program as it would to the student employees.

The University also argues that it gives these positions to the top students rather than to those with the best teaching ability, thus sacrificing its interest in obtaining the best teachers in favor of the student's educational objectives. First, the claim that it gives these positions to the best students rather than the best teachers is not entirely supported by the record. There are numerous methods of selecting student employees, from complex algorithms taking much more than academic standing into account, to a mad scramble to find anyone willing to teach the course. Furthermore, the very best students are often supported by fellowships, requiring no work in return. In some cases, more difficult courses are only given to more experienced and better qualified GSIs. This does not appear to create any great conflict which is resolved in favor of the student's educational objectives.

According to the University, policies applicable to GSI appointments encourage students to make progress toward their degree rather than enable the University to obtain services from the best teachers. Policies limiting appointments to 12

quarters, requiring a 3.0 GPA, and limiting hours to 20 per week are all designed to make sure that precedence is given to the GSI's progress toward their degree. Also, significant effort is taken to ensure that departments and individual instructors adhere to the workload hours limit.

This, however, is a hollow argument when compared to the University's efforts to encourage GSRs to make progress toward their degrees. GSRs are paid to complete their own research and write their dissertation. If the same standards were applied to GSIs the University would not be worrying about enforcing the 20 hour work load limit. It is noteworthy that complaints involving workload seemed to only arise in GSI type of employment and were unheard of from GSRs, whose employment directly supported their educational objectives rather than took time away from them. No one complained that they needed to cut down on their GSR hours because it was interfering with dissertation research. The fact that the University makes such an effort to enforce these limits with respect to GSIs supports the Petitioner's claim that the work takes time away from pursuit of their degree, rather than encouraging it. Ensuring that only half of GSIs' time is devoted to something other than their degree program is not the same thing as encouraging them to make progress on their degree.

Furthermore, when the University hires an individual to work 20 hours per week and then discovers that the job takes 25 hours per week because of larger than expected enrollment for example, it is hard for me to see how reducing the workload back to 20

hours per week damages the interests of the University, unless it claims some entitlement to that extra time. A fair resolution of a legitimate workload dispute can hardly be seen as sacrificing University services for the educational objectives of the GSI.

Another example offered by the University is that scheduling conflicts are resolved in favor of the student's academic interests rather than their employment responsibilities. Flexible schedules is the nature of the beast when employing students. This is so whether they are employed in the cafeteria, on a grounds crew, or in the disputed titles. The University seems to be able to cope with this issue without any great detriment to the University. In fact given the nature of the jobs student employees perform and the clientele they serve (other students), a flexible work schedule may actually work to the University's advantage.

Overall, given the way potential conflicts are resolved, I do not conclude that service considerations are sacrificed to educational objectives.

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 (1981) PERB Decision No. 144 and Long Beach Community College District (1989) PERB Decision No. 765.[22] 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.[23]

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[22]Part-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. 292.

[23]See, e.g., Redwood City School District (1979) PERB Decision No. 107; El Monte Unified School District (1980) PERB Decision No. 142; Dixie Unified School District (1981) PERB Decision No. 171; Palo Alto Unified School District (1983) PERB

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. The University cites the UCLA practice of using undergraduate students in GSI positions when the University cannot hire enough graduate students to fill all the vacant "GSI opportunities." This, according to the University, supports the Board's conclusion in AGSE that collective bargaining could create arbitrary distinctions between paid and unpaid students.

However, this record is clear that collective bargaining has not created those arbitrary distinctions. The University has already done that. For example, some students have GSHIP, others do not. Some have fee remissions, others do not. Some receive fellowships, others have to work for their paychecks. Some receive pay for educating themselves, others get paid for educating others. These differences do not seem to have created insurmountable problems for the University or its student employees, otherwise it is safe to assume that the University would not have done it. Furthermore, the most inconsistency between paid and unpaid status falls within the GSR ranks, which have already been excluded from coverage for other reasons.

Limited Resources of the University

Another reason advanced by the University for denying coverage was that bargaining would put increased strain on the

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Decision No. 352; Fairfield-Suisun Unified School District (1983) PERB Decision No. 370.

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 in an election campaign or at the bargaining table, but are not reasons to deny coverage under HEERA.

Union Rhetoric

The University argues that the rhetoric used by unions is counterproductive to a University environment. According to the University:

> In a collegial environment, there are shared assumptions about how colleagues address one another when attempting to resolve a conflict. The rhetoric traditionally employed by unions is antithetical to this collegial tradition, and the clash is like the proverbial fingernail on a chalkboard.

It cites the Petitioner's treatment of the sexual harassment issue in the SAGE NEWS as an example of Petitioner's demonstrated tendency to vilify the University and its administrators, and asserts that such rhetoric can diminish a collegial atmosphere.

For an institution that prides itself on academic freedom and the benefits of diverse viewpoints, the University has rather thin skin in this area and seems rather intolerant of the viewpoints of the union, particularly when they are critical of the University administration. The record reflects that the University's rhetoric can be just as positional and closed minded as any of that of the Petitioner. If anything, this evidence supports a finding that the University's actions have decreased the free exchange of information.

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 of California is clearly a dynamic status quo subject to change at any given time.

Coverage Will Further the Purposes of the Act

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 of information rather than a lessening of information and ideas. Clarity over employment issues provided through collective bargaining agreements 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 aspects of collective bargaining, the work stoppage. These affirmative encouragements of excellence will be gained without other significant negative impacts.

A good portion of the University's Prong Two arguments seem to be based upon a distaste for collective bargaining in general, rather than a specific application of the law to the facts in this case. For example, the University's arguments about a lack of union bargaining power, the nature of unions in a conflicted

situation, organizing issues, the strain on finances or administrators time, the negative impact of strikes, and the rhetoric of conflict are merely generalized arguments against unions and collective bargaining and not focused so much on the student employee question. As such, they are applicable to bargaining within units of faculty, skilled crafts, technical, housestaff, clerical and maintenance employees, etc., yet all of these have been found to be appropriate for collective bargaining within the University.

For these reasons, I find that the educational objectives of GSIs, readers, tutors, special readers, and RT/LSCs 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.

TUTOR SUPERVISORS

Findings of Fact

There are approximately 32 tutor supervisors employed within CTS and AAP. They are typically students who are hired for a full year. They earn more than tutors because of their additional responsibilities. Tutor supervisors have responsibility over the day-to-day operation of the tutoring programs. They set up work schedules and assign work to tutors. They play a significant role in the training of new tutors and they are expected to evaluate tutors in writing once per year. It appears, however, that once passed the initial quarter, evaluations may be spotty for veteran tutors.

Among other duties, tutor supervisors also have responsibility for recruiting, interviewing and selecting tutors. Tutor supervisors recruit applicants and decide which candidates will be interviewed. The first interview is usually conducted in a group setting with several tutor supervisors and several tutor applicants. If candidates are successful at this stage, they are interviewed individually by tutor supervisors.[24] Tutor supervisors make their selection, and then set up an interview with either a tutorial lab director or the director of the program.

The interviewing process conducted by the tutor supervisors reduces the number of candidates considerably. Out of 90 applicants for the math/science program, only approximately 15 might be selected. Out of 30 or 40 applicants in the English composition program, only about a dozen might be hired.

Judith Collas, director of CTS, testified that she has never disagreed with one of the selections sent to her by the tutor supervisors. The only times she has not accepted a recommendation is when there was not enough money to hire all the tutors. Maria Ramas, coordinator of social science tutorials within AAP, could recall only a single instance several years ago where a selection decision of the tutor supervisor was rejected. That case seemed to be a reflection of poor supervisory judgement

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[24]There was some testimony that some lab supervisors sit in on the interview process, but this does not appear to occur in many cases.

on the part of the tutor supervisor, rather than evidence of a lack of supervisory authority.

Most tutor supervisors continue to perform some tutoring at a reduced level. Some, however, do no tutoring at all.

Discussion and Conclusion

The criteria for supervisory status is enumerated in section 3580.3 of the Act.

> "Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. . . .
>
> Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

The Board has held that the various indicia of supervisory status are to be evaluated in the disjunctive. (Lawrence Livermore National Laboratory (1983) PERB Decision No. 241-C-H, Unit Determination for the State of California (1980) PERB Decision No. 110c-S (State of California).[25] Nominal exercise of the statutory criteria is not sufficient to qualify for supervisory status. The employee must demonstrate independent judgement in the exercise of these functions. (State of

[25]Indicia of supervisory status in HEERA parallels that found in the Ralph C. Dills Act (Government Code section 3513(g)).

California at p. 8.) Independent judgement is marked by "the opportunity to make a clear choice between two or more significant alternative courses of action and the power to make that choice without broad review and approval." (State of California at p. 9.) An employee exercises independent judgement by demonstrating significant autonomy and control over the decisionmaking and recommendation processes.

If a purported supervisor meets at least one of the statutory criteria, the claim of supervisory status must then be tested against the substantial similarity requirements. The Board has not applied a standard of percentages in interpreting this requirement. Rather, the Board has concluded that substantial similarity occurs at "the point at which the employees' supervisory obligation to the employer outweighs their entitlement to the rights afforded rank-and-file employees." (Id. at pp. 7-8.) Where supervisory obligations exist to the degree that they outweigh rights to organize, an employee no longer performs duties substantially similar to his/her subordinates.

Finally, in evaluation of any claim of supervisory status, it is important to keep in mind the purpose behind the statutory exclusion of supervisors.

> [E]xclusions are designed to prevent a division of supervisors' loyalties that might occur because of the negotiating relationship of the parties, concerned as it is with wages, hours, and working conditions. . . . (Id. at pp. 9-10.)

The potential for conflict of interest lies in the authority to control personnel decisions, as distinguished from control over work processes, which is at the core of supervisory status. (State of California at p. 10.)

The University argues that tutor supervisors meet several criteria for supervisory status. According to the University, tutor supervisors have complete responsibility for assigning work to tutors and evaluating them as well as having effective authority to recommend discipline, including dismissal and hiring authority.

The record does not support the University's claim on all of these criteria, but it does on some. Evaluations of the tutors, for example, does not meet the supervisory criteria for two reasons. First, it appears to be inconsistently exercised. Second, the evaluations appear to have little effect on any personnel decisions impacting the tutors. The tutor supervisors authority to recommend disciplinary action, including dismissal, is theoretical at best and no concrete examples have been provided.

Tutor supervisors do, however, have authority to assign work. While much of the process appears to be a collaborative effort at building a mutually acceptable schedule, tutor supervisors are given wide latitude to "run the program." This includes some budgetary and staffing decisions.

The clearest example of their supervisory authority, however, is their ability to effectively recommend the hiring of

tutors. Tutor supervisors start by recruiting applicants, then screen applications and interview potential tutors. After the interview process, the tutor supervisors effectively select the tutors to be hired. They start with a candidate pool of hundreds and make clear choices rejecting many and selecting few. Although their selections must be approved by either lab supervisors or the CTS director, approval is routinely given.

Some tutor supervisors do no tutoring at all. Therefore, there is no question about them performing duties substantially similar to their subordinates. Of the tutor supervisors who have continued to perform tutoring duties, their authority to control significant personnel decisions creates a supervisory obligation to the University outweighing their entitlement to rights afforded rank and file employees, such as tutors.

Tutor supervisors are therefore excluded from the unit as supervisory employees.

CONCLUSION

Based upon the above findings of fact, discussion and the entire record in this case:

1. GSRs are not employees as defined by section 3562(f) of HEERA;
2. GSIs, special readers, readers, RT/LSCs, and tutors are employees as defined by section 3562(f) of HEERA;
3. Tutor supervisors are supervisory employees as defined by section 3580.3 of HEERA.

The unit description listed in the PROPOSED ORDER below is appropriate for negotiating with the University at the Los Angeles 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 San Francisco Regional Director unless the University grants voluntary recognition to Petitioner.

PROPOSED ORDER

The following student employee unit is found to be appropriate for meeting and negotiating at the Regents of the University of California Los Angeles campus.

Shall Include:

Graduate Student Instructors
Special Readers
Readers
Remedial Tutors
Part-Time Learning Skills Counselors
Tutors

Shall Exclude:

Graduate Student Researchers (GSR)
Tutor Supervisors and 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 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