STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL-AMERICAN FEDERATION OF TEACHERS, Charging Party, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case No. LA-CE-180-H PERB Decision No. 771-H September 28, 1989

Appearances: Lawrence Rosenzweig, Attorney, for the University Council-American Federation of Teachers; Marcia J. Canning, Attorney, for The Regents of the University of California.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the Regents of the University of California (University) to the proposed decision of an administrative law judge (ALJ). The case arose out of an unfair practice charge filed by the University Council-American Federation of Teachers (UCAFT) against the University alleging violations of the Higher Education Employer-Employee Relations Act (HEERA).[1] Specifically, UCAFT alleges that the University:

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571 states in pertinent part:

> It shall be unlawful for the higher education employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with,

(a) set a uniform campuswide workload standard of nine "instructional workload courses," over three academic quarters, at the University of California San Diego (UCSD) campus, while the past practice was to permit academic departments to set the standard at less than nine; and (b) unilaterally determined that all freshman writing courses are not the equivalent of an instructional workload course.

The ALJ found that UCAFT failed to show that there was an established policy giving departments primary or final authority to set courseload maximums and dismissed that portion of the complaint. The ALJ further found that the bargaining history demonstrates that the University obtained the right to decide whether departmental standards would vary or whether they would be uniform, and to insist upon any courseload level, so long as it did not exceed nine instructional workload courses.

The ALJ found that the University was not free to give a value of less than 1.0 instructional workload course once the three components of the definition were met.

The Board, after review of the entire record, finds the ALJ's findings of fact to be free from prejudicial error and adopts them as its own. The Board affirms that portion of the

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restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

ALJ's attached proposed decision, dismissing the allegation that the University unilaterally set a uniform campuswide workload standard of nine instructional workload courses over three academic quarters at the UCSD campus. We reverse the ALJ's finding that the University unilaterally determined that writing courses are not the equivalent of an instructional workload course for the reasons set forth below.

The University filed seven general exceptions to the ALJ's finding that it unilaterally determined that writing courses are not the equivalent of an instructional workload course. UCAFT filed a response to the University's exceptions.

DISCUSSION

The ALJ found that the University misapplied the language of the memorandum of understanding (MOU) between the parties, when the University concluded that all freshman writing courses are not the equivalent of a "traditional" instructional workload course. The ALJ further considered the bargaining history of the parties and the record as a whole to determine what was intended as an instructional workload course.[2]

Article XXV, section A, of the MOU sets forth the instructional workload standard, course definition and equivalencies:

> 1. The full-time (100%) instructional workload standard for faculty/instructors in

[2]Extrinsic evidence is properly considered when the contract language is ambiguous. (Victor Valley Community College District (1986) PERB Decision No. 570.) Since we find no ambiguity in the MOU, we will not consider the bargaining history.

the unit for an academic year shall not exceed nine (9) instructional workload courses over three (3) quarters or six (6) instructional workload courses over two (2) semesters, or the equivalent. Instructional workloads may be lower, based upon the instructional workload standard of the department, program or board.

2. For the purpose of this Article, a course as referred to in Section A.1. above shall be called an instructional workload course and shall be defined as an instructional offering that is regularly scheduled, requires significant academic preparation outside the class by the instructor, and meets a minimum of three (3) hours per week.

3. It is recognized that some instruction does not fit the definition of an instructional workload course as defined in Section A.2. above. Examples of instructional offerings which do not conform to the definition in Section A.2. above are laboratory supervision, supervision of teaching assistants, studio instruction, and clinical instruction. The University shall determine whether a course conforms to the definition of an instructional workload course in Section A.2. above, and shall establish the equivalencies for the instructional offerings which do not conform to the definition of an instructional workload course. Equivalencies for these instructional offerings will be defined proportionate to the instructional workload course as defined in Section A.2. above.

4. The workload of the unit member in non-lecturer titles as defined in Article V. Non-Lecturer Unit Members, shall continue to be determined in accordance with current campus procedures. Should the University propose changes to these campus procedures, the University will meet and discuss over the changes.

5. In determining the relative workload value of instructional offerings and course equivalencies, the University shall consider the instructional and evaluation methods employed, the nature of the courses assigned,

> the preparations required, the number of students expected to enroll, and the availability of support employees. In addition, the University may consider other factors.
>
> 6. In determining workload, the University shall consider other duties that have been assigned.
>
> 7. Workload values of instructional offerings and course equivalencies based upon the provisions of this section shall be established for each department, program or board. Workload values, by department, will be forwarded to the UC/AFT by February 1, 1987. The UC/AFT will be notified of any changes. At the time of appointment the faculty/instructor in the unit will be informed of the applicable workload values in effect at the time.

The ALJ determined that the University's interpretation of the MOU was not supported by the bargaining history. The University interprets the MOU as allowing it to determine whether a course fits the definition of an instructional workload course and to value a course at less than 1.0 instructional workload course, if the course was determined not to fit the definition. The plain language of the MOU is most susceptible to the interpretation offered by the University.

Article XXV, section A.3. recognizes that some courses do not fit the instructional workload course definition, specifically authorizes the University to determine whether a course is an instructional workload course, and authorizes the University to value courses that do not conform. Section A.3. provides that:

> . . . The University shall determine whether a course conforms to the definition of an

> instructional workload course in Section A.2. above, and shall establish equivalencies for the instructional offerings which do not conform to the definition of an instructional workload course. Equivalencies for these instructional offerings will be defined proportionate to the instructional workload course as defined in section A.2. above.

Section A.5. establishes guidelines that the University must consider in determining the relative workload value of instructional offerings and course equivalencies and allows the University to consider "other factors" at its discretion. The record shows that the University decided that freshman writing courses did not meet the instructional workload course definition based upon the recommendation of its staff and various deans. Witnesses for UCAFT testified as to the work involved in teaching a writing course and recommended that writing courses systemwide be equivalent to 1.25 - 1.50 of the instructional workload course described in the MOU.

The University's interpretation is consistent with the plain language of the MOU. Article XXV clearly authorizes the University to determine equivalency standards. There is no language limiting the University's authority or establishing an abuse of discretion standard. Therefore, the University did not violate HEERA section 3571 when it determined that all UCSD writing program courses were not instructional workload courses and when it accorded the writing courses a value of less than 1.0 instructional workload course.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record, Case No. LA-CE-180-H is hereby DISMISSED.

Chairperson Hesse's concurrence begins on page 8.

Member Craib's dissent begins on page 14.

Hesse, Chairperson, concurring: Although I agree with Member Shank that the Regents of the University of California (University) did not violate section 3571(c) of the Higher Education Employer-Employee Relations Act (HEERA) when it valued all freshmen writing courses at the University of California, San Diego (UCSD) at 75 percent of one instructional workload course (IWC), I write separately to present my analysis on this issue.

Regarding the issue of the nine-course maximum workload, the administrative law judge (ALJ) found that the University Council-American Federation of Teachers (UCAFT) had failed to show a unilateral change because, under the memorandum of understanding (MOU), the University had chosen one of two viable interpretations of the workload provision. With regard to the University's valuation of the freshmen writing courses, the ALJ found that the University did not merely interpret the language of the MOU, but, that its conduct constituted a "repudiation of the workload article as a whole." Specifically, when the University valued all writing courses at less than one IWC, the ALJ concluded that the University engaged in a "unilateral alteration of a term and condition of employment (workload) established by the MOU."

Like the issue of the nine-course workload standard, I find that UCAFT has only shown that the University made one of two viable interpretations of the MOU, and that evidence of the bargaining history supports the University's interpretation of Article XXV of the MOU.

In Grant Joint Union High School District (1982) PERB Decision No. 196, the Board clarified the test for proving a unilateral change, and made a distinction between a breach of contract and a change of policy having a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. Specifically, the Board stated:

> This is not to say that every breach of contract also violates the [Educational Employment Relations] Act. Such a breach must amount to a change of policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act. The evil of the employer's conduct, therefore, is not the breaching of the contract per se, but the altering of an established policy mutually agreed upon by the parties during the negotiation process. [Citations.] By unilaterally altering or reversing a negotiated policy, the employer effectively repudiates the agreement. [Citation.]
> (Id., at p. 9.)

In determining whether the University's conduct constitutes a breach of contract or a change of policy, one must examine the bargaining history underlying Article XXV of the MOU.[1]

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[1]As the ALJ granted UCAFT's motion to amend the complaint to rely solely on the theory that the established policy regarding instructional workload was specifically embodied in the MOU rather than past practice, past practice will not be considered in deciding this issue.

Bargaining between the University and UCAFT over the newly created Unit 18 (the non-academic senate instructional employees) began in October 1984. Bargaining continued until May 1986 when the parties reached their final item, workload standards and workload equivalency evaluations under Article XXV.

Negotiators for both sides testified at length as to the positions taken by the University and UCAFT at the bargaining table. The University intended to maintain flexibility in determining workload standards and course equivalency. UCAFT, on the other hand, intended to actively participate in the decision-making process so that the University's decisions would not be arbitrary. The negotiations reflected these two positions as each side attempted to trade language and proposals. On May 24, 1986, the two bargaining teams presented themselves for negotiations, but no across-the-table discussions occurred. Instead, both teams caucused from approximately 10 a.m. to 7 p.m. During these discussions, Robert Bickal, the University negotiator, told Marde Gregory, the UCAFT negotiator, that the University would not agree to any provision that identified the individual or entity with the delegated authority to determine maximum workload. Gregory, however, insisted that the University remove the phrase "sole discretion" from paragraph A.3. because she felt that ratification of the contract would be problematic with the "sole discretion" language.

On May 29, the parties reconvened. The University submitted its final workload proposal which incorporated a nine-course

workload maximum. The proposal also deleted the "sole discretion" language, but included a corresponding change in the grievability section of Article XXV. This section prevented bargaining unit members from grieving the University's establishment of workload standards or workload values. On May 30, after many proposals and continuous discussions, UCAFT approved the University's May 29 workload proposal.

There is ample testimony in the record that UCSD administrative officials discussed workload standards with their department chairs during the fall of 1986. UCSD administration officials also discussed workload equivalency standards for their freshmen writing courses. By February 1987, UCSD administrative officials decided that workload standards for most of their departments would be set at the nine-course maximum workload as provided in the MOU. Additionally, UCSD decided that all freshmen writing courses would be valued at 75 percent of one IWC, and that lecturers would be required to teach four courses per quarter to be at 100 percent appointment.[2]

As is evident from the bargaining history, the University did not intend to give up its authority to decide workload standards and course equivalencies. Rather, the removal of the "sole discretion" language for ratification purposes must be considered in light of the corresponding change in the

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[2]An IWC is defined in the MOU as follows: "An instructional offering that is regularly scheduled, requires significant academic preparation outside the class by the instructor, and meets a minimum of three hours per week." (See Article XXV A.2.)

Grievability and Arbitrability section of Article XXV.[3] By limiting the grievability of Article XXV to the procedural applications, the University retained its authority to determine the instructional workload standards and workload values of instructional offerings and course equivalencies. Further, there is no language in Article XXV limiting the University's authority or establishing a standard of review.

The record also demonstrates that, in determining whether the freshmen writing courses at UCSD satisfied the definition of an IWC, the University consulted with the departments. In applying the criteria of the IWC definition, the University and UCAFT disagreed over the application of the term "significant academic preparation." The fact that the parties disagree over the amount of academic preparation required in the freshmen writing courses at UCSD does not constitute a repudiation of the

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[3] G. Grievability and Arbitrability

1. Grievability shall be limited to the procedural application of this Article and not to the establishment of instructional workload standards or workload values of instructional offerings or course equivalencies as determined by the University. In the event that a faculty/instructor in the unit believes that the workload that has been assigned is in violation of the workload values established pursuant to A.7. for the department, program or board, the faculty/instructor in the unit shall perform the duties as assigned and may pursue the issue through the grievance procedure as specified in Article XXXIII Grievance Procedure.

2. The provisions of this Article are not subject to Article XXXIV Arbitration.

MOU, but, at most, the conduct is no more than a contract dispute.

As the bargaining history demonstrates, the University and UCAFT had a different understanding of Article XXV of the MOU. The University did not clearly repudiate any prior understanding or agreement, but merely interpreted the meaning of the contract language in a reasonable way, albeit differently than did UCAFT. While Article XXV of the MOU can be viewed as somewhat ambiguous, my review of the record, nonetheless, compels me to conclude that UCAFT failed to establish, through evidence of negotiation history, that the University's conduct violated section 3571(c) of HEERA. For these reasons, I would reverse the ALJ on this issue and dismiss the complaint.

Member Craib, dissenting: I must dissent from the lead decision's simplistic application of the plain meaning rule. Although we need not necessarily go beyond the plain language of the contract to ascertain its meaning when the contract language is clear and unambiguous on its face (Marysville Joint Unified School District (1983) PERB Decision No. 314), we must reconcile all portions of the contract, if possible. If the contract provisions cannot easily be reconciled, we may look to the parties' bargaining history to ascertain their intent. (Ibid.) Although I believe that the analytical framework employed in the concurring opinion is more appropriate to reach the proper result, I also must dissent from that opinion because I believe that the Regents of the University of California (University) did change a policy which has a continuing impact upon the terms and conditions of employment of bargaining unit members. (Grant Joint Union High School District (1982) PERB Decision No. 196, at p. 9.)

At issue, in this case, is the appropriate courseload for a full-time freshman writing lecturer at the University. To ascertain that course load, we must examine Article XXV of the parties' most recent memorandum of understanding (MOU). This article was negotiated for the first time in this MOU.[1] Prior to

[1]The topic of a lecturer's workload has been a source of ongoing controversy since approximately 1980, when the Vice Chancellor promulgated a directive that a full-time lecturer should teach nine courses. This conflict pitted department heads against the vice chancellors and deans. The departments uniformly felt that a nine-course teaching load was excessive. An uneasy truce was reached because the departments were able to

the current agreement, the appropriate workload was determined pursuant to the University's Policy and Procedures Manual.

Article XXV, section A.1. sets nine instructional workload courses per year as the teaching maximum for a full-time lecturer. Instructional workload courses are defined as:

> an instructional offering that is regularly scheduled, requires significant academic preparation outside the class by the instructor, and meets a minimum of three (3) hours per week.

The University has determined that all freshman writing courses are not the equivalent of one "instructional workload course" but, rather, have the equivalency of .75. Thus, under the University's approach, in order to be considered full-time, a writing instructor must teach 12 courses per year.

The majority has read Article XXV, section A.3. in isolation and determined that, on its face, it grants the University the exclusive authority to determine that writing courses are not the equivalent of an "instructional workload course" as defined in Article XXV, section A.2.

The majority's reading of the MOU essentially ignores the language in Article XXV, section A.1., which sets nine instructional workload courses as the maximum, full-time teaching requirement. If the University is free to determine that any individual course does not fall within the definition of an

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carve out exceptions to the nine-course limit which permitted each department to reduce the teaching load of its lecturers. The department heads, however, never had final approval authority.

"instructional workload course," the nine-course limit is illusory. In effect, the majority has given the University carte blanche to determine the value of every course on campus. Without some limit on the University's discretion, the definition of "instructional workload course" and the nine-course limit become meaningless.

While an initial reading of the language in section A.3. and A.5. may lend itself to an interpretation that sole, unfettered discretion was given to the University, a review of the context in which it was made tempers that reading. University Council, American Federation of Teachers (UCAFT) insisted that a workload limit be placed in the collective bargaining agreement in order to protect its members from an overload of work. UCAFT was also concerned about who would make the final determination of course valuation. The parties negotiated the workload issues for a number of days. Significantly, they spent substantial time negotiating over maximum courseloads, and discussing the decision-making process. Finally, they agreed upon a nine-course maximum. In related negotiations, the issue of course equivalencies and valuations was discussed. Again, significant discussions took place regarding the decision-making process. Finally, language giving the University "sole" discretion was eliminated from the MOU.[2]

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[2]The University negotiator even indicated that he

> did not have any realistic hope of bargaining an unlimited right to establish any kind of workload we wanted, but what [he] did want to

The bargaining history suggests that the University represented that primary and initial determinations regarding equivalencies and valuations would be made by the departments. Although the University administration, after the implementation of the MOU, sought input from the various departments, the departmental recommendations were not adopted. Indeed, it appears from the record that there was a wholesale rejection of departmental opinion. The Dean of Humanities and Arts did not even present these recommendations to the vice chancellor during the deliberations on course valuations. It appears from the dean's testimony that the .75 valuation came about solely from the dean's own recommendation. The University, thus, contrary to its representations to the UCAFT, disregarded the departmental recommendations and substituted its independent judgment. The format bargained for by the parties was not utilized. Without the assurances that an agreed-upon standard would be applied to

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> preserve was our ability to, <u>within the limits that were agreed to</u>, establish what that workload would be . . . .

(Emphasis added.) Although the record does reflect that UCAFT and the University agreed to remove the "sole discretion" language in exchange for the inclusion of a restriction on the right to grieve course valuations (see concurring opinion at pp. 4-5), I do not believe that the Grievability and Arbitrability article can reasonably be read to preclude grieving a "workload that . . . violat[es] the workload values established pursuant to A.7." Furthermore, even if the parties precluded themselves from pursuing a remedy through the grievance machinery, it does not preclude UCAFT from filing an unfair labor practice based on a change in the policy embodied in the negotiated agreement.

determine an "instructional workload course," the MOU's language is meaningless.

Given the MOU's language and the bargaining history, it is reasonable to assume that, although the University had the authority to determine valuations and equivalencies, such authority was limited. While the University was given the ability to make the valuation determinations, it had to apply the criteria set forth in the collective bargaining agreement in a fair and reasonable manner. If those criteria were not applied as negotiated by the parties, the University has repudiated the contractual provision and, thus, violated section 3571, subdivision (c) of the Higher Education Employer-Employee Relations Act.

I agree with the administrative law judge and would affirm his decision. As he succinctly stated in his proposed decision:

> [t]he misapplication [of the A.1. through A.5. provisions of the contract] amounted to a repudiation of the workload article as a whole. If the UCSD, at its sole discretion, could decide that any course is nonstandard or that it could accord any weight less than 1.0 without regard to bargaining history and clear contract definition, the nine-course maximum would have no purpose and meaning.

(Proposed decision, p. 56.) The language contained in Article XXV resulted from days of negotiating and a history of conflict over courseload maximums. Given the negotiating history, the language in sections A.1., setting forth a maximum courseload, and A.2. which sets forth a standard to define an instructional workload course, the discretion afforded the

University in section A.3. cannot reasonably be read to be unlimited. The collective bargaining agreement must be read to reconcile all of Article XXV, which requires that the University give effect to sections A.1. and A.2. The University's ability to determine that an instructional offering does not meet the parameters set forth in section A.2. is not unfettered. To hold otherwise effectively negates the negotiated standards in sections A.1. and A.2.

I would, therefore, hold that the University violated its duty to bargain in good faith by unilaterally changing the policy, embodied in the Article XXV, section A.2. of the collective bargaining agreement, which established the method for course valuation.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL, AMERICAN FEDERATION OF TEACHERS, Charging Party, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Unfair Practice Case No. LA-CE-180-H PROPOSED DECISION (4/15/88)

Appearances: Lawrence Rosenzweig, Attorney, for University Council, American Federation of Teachers; Marcia J. Canning, Attorney, Office of the General Counsel for the Regents of the University of California.

Before Manuel M. Melgoza, Administrative Law Judge.

I. PROCEDURAL HISTORY

The University Council, American Federation of Teachers (Union, Charging Party or UCAFT) filed the above-entitled Unfair Practice Charge on December 16, 1986, alleging that the Regents of the University of California (Respondent, Employer or University), through its San Diego campus (UCSD), unilaterally changed workload (courseload) policies embodied in a recently-negotiated memorandum of understanding (MOU). The Public Employment Relations Board (PERB or Board) issued a Complaint on May 27, 1987, alleging that the Respondent had violated the Higher Education Employer-Employee Relations Act

(HEERA or Act)[1] by essentially: a) setting a uniform campus-wide workload standard of nine "instructional workload courses", over three academic quarters, at the San Diego campus, while the past practice was to permit academic departments to set the standard at less than nine, and; b) unilaterally determining that writing courses are not the equivalent of an instructional workload course.

The University filed an Answer to the Complaint on June 15, 1987, denying certain allegations and asserting, inter alia, that the actions taken by UCSD in requiring a nine course workload were in compliance with the MOU.

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[1] The HEERA is codified at Government Code section 3560, et.seq. Section 3571 states, in pertinent part: It shall be unlawful for the higher education employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interefere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

The Charging Party filed a motion to amend the Complaint accompanied by a First Amended Unfair Practice Charge on July 13, 1987. A response to the motion was received from the University on August 28, 1987. On September 15, 1987 after a conference call with the parties, the motion was granted. The amendment focused on the theory that the established policy regarding instructional workload was specifically embodied in the MOU rather than in general past practice. After the issuance of the September 15, 1987 ruling granting the above motion, the Respondent filed an answer to the amended Complaint (October 7, 1987) denying any violation of HEERA and asserting that its conduct was in compliance with the terms of the MOU.

An informal conference conducted on June 23, 1987, failed to result in a settlement of the above disputes. Thereafter, an evidentiary hearing was held in San Diego, California on October 13-16 and 27, 1987, before the undersigned.

Post-hearing briefs and reply briefs were submitted by both parties. Upon the receipt of the last briefs on February 18, 1988, the case was submitted for proposed decision.

II. INTRODUCTION

The issues in this case involve the subject of workload for lecturers of Unit 18 at the University of California's San Diego Campus. Specifically, the controversy centers around the

question of what is the appropriate courseload that full-time (100-percent appointments) lecturers can be required to teach in an academic year. Of primary focus will be Article XXV of a 1986-1988 MOU between the parties, and the bargaining history related to it. Previous practice regarding workloads will also be used to describe the background surrounding negotiations. The pertinent portions of the contractual provision at issue are as follows:

> Article XXV. INSTRUCTIONAL WORKLOAD
>
> A. Instructional Workload Standard, Course Definition and Equivalencies
>
> 1. The full-time (100%) instructional workload standard for faculty/instructors in the unit for an academic year shall not exceed nine (9) instructional workload courses over three (3) quarters or six (6) instructional workload courses over two (2) semesters, or the equivalent. Instructional workloads may be lower, based upon the instructional workload standard of the department, program or board.
>
> 2. For purposes of this Article, a course as referred to in Section A.1. above shall be called an instructional workload course and shall be defined as an instructional offering that is regularly scheduled, requires significant academic preparation outside the class by the instructor, and meets a minimum of three (3) hours per week.
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> 3. It is recognized that some instruction does not fit the definition of an instructional workload course as defined in Section A.2. above. Examples of instructional offerings which do not conform to the definition in Section A.2. above are laboratory supervision, supervision of teaching assistants, studio instruction, and clinical instruction. The University shall determine whether a course conforms to the definition of an instructional workload course in

Section A.2. above, and shall establish the equivalencies for the instructional offerings which do not conform to the definition of an instructional workload course. Equivalencies for these instructional offerings will be defined proportionate to the instructional workload course as defined in Section A.2. above.

4. . . . . .

5. In determining the relative workload value of instructional offerings and course equivalencies, the University shall consider the instructional and evaluation methods employed, the nature of the courses assigned, the preparations required, the number of students expected to enroll, and the availability of support employees. In addition, the University may consider other factors.

6. In determining workload, the University shall consider other duties that have been assigned.

7. Workload values of instructional offerings and course equivalencies based upon the provisions of this section shall be established for each department, program or board. Workload values, by department, will be forwarded to the UC/AFT by February 1, 1987. The UC/AFT will be notified of any changes. At the time of appointment the faculty/instructor in the unit will be informed of the applicable workload values in effect at the time.

B. Consultation

Faculty/instructors in the unit may consult by providing written or oral comments and suggestions regarding workload values to their departments.

During April 1987 each campus upon request, will hold a meeting with the UC-AFT to discuss any workload issues they may wish to raise.

F. Effective Date

1. Any workload commitments made prior to July 1, 1986 or the execution of this Memorandum of Understanding, whichever is later, shall be honored for the duration of the commitment.

2. The provisions of this Article will become effective no later than January 1, 1987.

G. Grievability and Arbitrability

1. Grievability shall be limited to the procedural applications of this Article and not to the establishment of instructional workload standards or workload values of instructional offerings or course equivalencies as determined by the University. In the event that a faculty/instructor in the unit believes that the workload that has been assigned is in violation of the workload values established pursuant to Section A.7. for the department, program or board, the faculty/instructor in the unit shall perform the duties as assigned and may pursue the issue through the grievance procedure as specified in Article XXXIII. Grievance Procedure.

2. The provisions of this Article are not subject to Article XXXIV Arbitration.

The Charging Party claims that the UCSD departed from these provisions of the MOU by setting an inflexible courseload of nine and by ruling that all writing courses, despite differences from one college to another, are not the equivalent of one instructional workload course. The University contends it retained the right, through bargaining, to set the workload at any number up to a maximum of nine instructional workload courses and according to the MOU, only the University can determine whether any course was equivalent to one (1) instructional workload course.

III. FACTUAL BACKGROUND

A. The Unit

The UCAFT is the exclusive representative of a unit (Unit 18) of non-academic senate instructional employees. Prior to the MOU in question, the members of the unit had various titles, including, inter alia, visiting lecturer and adjunct lecturer. After the MOU, the titles were unified into the single term "lecturer."

In the pre-MOU era, most Unit 18 members held titles that did not come with, nor lead to, security of employment. Instead, they were usually appointed for one-year terms with no promise that their contracts would be renewed for the following year, and without a possibility of obtaining tenure.

Unlike "regular" or "ladder-rank" faculty, lecturers had no voice in the University's Academic Senate, a body that has been delegated significant powers by the Regents over policies in the areas of courses and curricula. In addition, whereas department chairpersons have the final decision over the workload of regular faculty (in consultation with that department's faculty members), lecturers' workloads were subject to final approval by a dean or equivalent counterpart within the University administration. Similarly, the authority over the appointment (hiring) of a lecturer rested with a dean or a vice chancellor.

PERB initially gave lecturers bargaining unit status in 1984. They entered into their first collective bargaining agreement about June 1986.

B. The Prior Workload Procedures

At UCSD, the topic of lecturer courseload has been a source of ongoing controversy since at least 1980 when Vice Chancellor John Miles promulgated a directive that a full-time lecturer should teach nine courses. The conflict pitted departments and department heads (or program heads) against vice-chancellors and deans attempting to carry out the directives of their (deans) superiors.

Donald Wesling, chairman of the department of literature at UCSD and a long-time member of the department's faculty, testified that his department had taken a consistent position that a nine-course workload for lecturers was excessive. Allan Kaprow, UCSD art department faculty member for 14 years and current chairperson, testified that his department opposed the nine-course load from its inception on several bases. According to Kaprow, the department "accepted the mandate with severe reservations." The history department, now chaired by Michael Parrish, expressed to the vice-chancellor that in its

view, that department's standard lecturer load was six- courses, not nine.[2] Vice-chancellor Harold Ticho, Miles' successor, rejected that view and insisted on a nine-course, campus-wide standard. Each of the dissenting departments continued to adhere to its position, but reluctantly complied with the vice-chancellor's office's directive.

The vice-chancellors and departments objecting to the nine-course requirement lived in an "uneasy peace" for years before the MOU. This was possible because certain "exceptions" enabled department heads to devise means of justifying a lower workload. These exceptions were contained in the Campus' Policy and Procedure Manual (PPM), and allowed the number of courses required to be taught by full-time lecturers to be less than nine under any of the following circumstances:

a. For lecturers teaching classes with 250 or more students;

b. For appointees teaching the courses for the first time;

c. For certain courses (e.g., laboratory courses) requiring more-than-normal contact hours.

Some departments "stretched" these exceptions in order to accomplish a lower teaching load. For example, chairperson Michael Schudson had to "invent" some new courses in order to

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[2] The record indicates that other departments shared the view of the excessiveness of the nine-course standard.

have lecturer Esteban Diaz reappointed for a subsequent full-time term to teach seven courses. Diaz would thus be eligible for a lower courseload under exception "b" above, in his first and subsequent years. In other departments, such as history, almost all appointments were for one-year terms or less, with few cases involving the reappointment of lecturers to teach history courses. As a practical matter, the vast majority of lecturers qualified for a less-than-nine courseload standard under the first exception. Although some witnesses could not recall whether the nine-courseload standard was enforced in some departments, the record indicates that the vice-chancellor's office enforced the requirement consistently, and on a campus-wide basis, incorporating the above exceptions.

Those departments seeking exceptions to the nine-course requirement accomplished a lower courseload by giving extra value to courses being taught by lecturers for the first time or for courses with heavy enrollments or for those requiring a great deal of student contact hours. For example, a newly hired lecturer's courses might be weighed at 1.5, enabling him/her to effectively teach a maximum of six classes in the academic year at full-time.

In some departments and academic units, however, the nine-course standard actually ended up equalling twelve courses. This resulted from administrative decisions that gave

some lecturer courses a fraction of the value of a course, such as .75 of a course.

The final authority to grant exceptions to the standard rested with the vice-chancellor of academic affairs in the initial years and later with the deans. Departments and programs, through the chairpersons, developed the recommendations, but possessed no final approval authority in this regard.

C. The Negotiations

The negotiations resulting in the MOU at issue commenced in the spring of 1984 and concluded on about the first day of June 1986. Marde Gregory was the chief negotiator for the UCAFT and Robert Bickal for the University. Although the Union introduced workload as a separate article during the initial months of bargaining (October 1984), there was little, if any, discussion on that topic until the spring of 1986. Bickal characterized the subject of workload as "the last big issue that [the parties] had to get over". [3]

Prior to these negotiations, there was considerable variation in lecturer workloads from campus to campus and from department to department. In addition, there was no formal,

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[3] Earlier, the parties had reached a tentative agreement on a management's rights article that touched on workload in a general way. In reaching that agreement, however, both sides contemplated later negotiations on a comprehensive workload provision which, if agreed to, would modify the management's rights article.

comprehensive set of criteria which the University could use to give courses a certain "workload value".

Marde Gregory insisted on the inclusion of a comprehensive workload provision in the MOU. One of the Union's goals was to negoiate a maximum courseload provision as a guarantee that its constituents would not be overloaded with work. The UCAFT was also concerned about where and by whom the decision would be made on the appropriateness of one's workload. The Unionwanted individual faculty unit members to have some rights to prior consulation in the matter.

The University's team was interested in preserving a degree of autonomy enjoyed by each of the campuses in the system. In particular, they wanted to preserve the flexibility that enabled their campus subdivisions (departments, programs and boards) to have varying workload standards, tailored to the instructional and academic needs of those subdivisions. Bickal's strategy was to resist bargaining away the University's then-existent internal delegations of authority. He felt that it was outside the scope of representation to negotiate over the identity of who exercised authority on behalf of "the University". Bickal testified that his intent was as follows:

> . . . I did not have any realistic hope of bargaining an unlimited right to establish any kind of workload we wanted, but what I did want to preserve was our ability to, within the limits that were agreed to,

> establish what that workload would be . . .
>
> . . . whatever we agreed to as the standard maximum workload that they [lecturers] had, that the University had flexibility to establish workloads as it saw appropriate so long as they didn't exceed whatever we determined to be the maximum . . .

The Union's initial workload proposal of October 1984 set the maximum full-time lecturer workload at five courses per year on the quarter system (3 quarters per academic year) or seven courses over two academic years on the semester system. The proposal defined a course as a class that meets no more than 250 minutes per week. Multiple sections of a course would be counted as multiple courses. Laboratory and studio classes would equal one course per lab or studio.

The University's first counterproposal specified that a full-time unit member would "customarily" carry nine "instructional workload courses" over three quarters or six instructional workload courses over two semesters, "or the equivalent." It went on to state that the University had sole discretion to raise or lower the workloads based upon standards "of the department, program or board," but that the workloads shall not exceed 12 courses over 3 quarters or 9 courses over 2 semesters.

That proposal defined an "instructional workload course" (IWC) as an instructional offering that is regularly scheduled, requires significant academic preparation outside the class by the instructor, and meets a minimum of three hours per week.

A subsequent provision delineated the workload-setting procedure for those courses that did not "fit" the IWC definition. Examples of such courses - laboratory supervision, supervision of other teachers (e.g., teacher's assistants (TA's,)) student teachers, etc.), studio instruction, clinical instruction, field-work coordination and field-work supervision - were listed. The University would identify such courses that did not "fit" the IWC definition and establish an "equivalency", in proportion to the IWC. For example, such a course may be given a value of .50 IWC or 1.50 IWC, depending on a list of factors - instructional methods employed, nature of course, extent of necessary preparation, number of students, etc. - delineated in paragraph A4 of the proposal.

During bargaining, Bickal explained that he used the term "customary workload" to recognize a degree of workload variation. He said the IWC was a device for measurement, a benchmark by which other instructional situations would be weighed. Bickal described the IWC as the "traditional, conventional, academic course" as compared to things such as "individual oboe [instrumental music] instruction." The number of customary and maximum courses would be expressed in terms of an IWC (the IWC equalling 1.0 value).

Bickal also explained that the those types of instructional offerings not fitting the IWC definition could vary in value from discipline to discipline and from department to department. Thus, the evaluation of courses not conforming to the definition of IWC would be "a departmental matter."

In explaining paragraph A4, which described factors to be considered in reaching a workload value, Bickal stated that the provision would allow the University to deviate from the 1.0 value in order to equitably assess, for example, courses with very large enrollments, time-consuming evaluations, and innovative instruction.

After Bickal's presentation, Gregory raised several concerns. First, regarding paragraph A6, she asked who would establish the workload values.[4] Bickal replied that they would be established "by whatever the decision-making process is within the department, program or board. It is within the contemplation and jurisdiction of the department, program or board." Seeking further clarification, Gregory asked whether "for each department" really meant "by each department". Bickal replied that he wanted to be sure before responding.

Gregory also asked who he meant by "the University" in paragraph A3, where the language seemed to indicate that "the University," at its sole discretion, would determine whether a course conforms to the IWC definition. Bickal stated that he would consult with his team before responding.

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[4] The pertinent portion of A6 read: "Workload values of instructional offerings and course equivalencies . . . shall be established <u>for</u> each department, program or board." [Emphasis added.]

Gregory asked several other questions about the proposal's salary impact, about how workload would be determined and who was meant by "the University" in paragraphs A1, A4 and A5. The University's bargaining team caucused to consider Gregory's questions.

When the parties returned Bickal gave a narrative answer to those inquiries. He stated that the University's authority to take action was delegated down from the Regents and that those delegations would vary. He stated that it was "our" expectation that equivalence workload policies "for" departments would be "typically, but not necessarily universally" developed by the departments and submitted up the line to a dean and perhaps beyond that. He added that there would be an effort to achieve equity and, therefore, some level of review would be needed. He explained that departments would have an important role ("jurisdiction") in developing these policies, with some general policy direction from above, but would not have "untrammeled, unilateral power" in that regard. Bickal cited an example at the Santa Clara campus, where he envisioned that the dean of humanities would be closely involved in monitoring workload values and equivalencies.

Bickal proceeded to discuss the proposal's intended impact on instructors of courses that did not conform to the IWC definition. For unit members teaching one highly specialized course at less than full (100%) time, that course would be evaluated and its workload value might be different than the

percentage of time currently given. It could result in a higher or lower percentage of time (for salary purposes). The salary level could be adjusted up or down to maintain equality of salary with current levels.

With respect to the situation of the "oboe teacher," Bickal stated that those courses were currently assessed at a percentage of time which was related to the number of students and the amount of time required to teach the course. He added that that arrangement would continue as it then existed.

With regard to laboratory courses, Bickal expressed recognition that there were different kinds of lab courses, some were lab only and some (e.g., electron microscopy) were all instruction although occurring within a lab. As to those labs, each would be evaluated and the differences assessed, but uniformity would not be anticipated.

Finally, addressing the other hypotheticals of non-IWC courses, Bickal stated that some courses, like dance instruction, might be equivalent to a traditional course and some studio instruction might be valued at half a course. The control, he explained, was its relation to the instructional workload course. To illustrate the instructional workload course, Bickal gave an example of a lecture class in Chaucer which meets Mondays, Wednesdays and Fridays for 50 minutes (each) "with 32 shining faces, a paper, mid-term and a final." He concluded that "that's a course [IWC] and there's little fiddling with that."

Gregory expressed difficulty with not knowing who would dictate individual unit members' workloads under the proposal. Another problematic area was the absence of a mechanism to prevent the University from abandoning the "customary" workload and using the maximum as the standard - i.e., that the maximum could become the customary load.

Gregory voiced dissatisfaction with the proposal's leaving open the possibility that workload decisions could be made via a recommendation to the administration, distant from individual unit members, without a vehicle to challenge the decisions made at those remote levels.

Bickal reassured Gregory that a bilateral agreement contained enforceable standards, that within academic departments workload levels would be rational and equitable even though there could be variations between departments, and that workload determinations could not be arbitrary. He said it was a mistake to assume there would be an onerous increase in workload. Bickal also stated that he did not envision individual lecturer workload determinations "going up the hierarchical route" from departments to deans or provosts and to vice-chancellors. Nevertheless, Gregory insisted on more concrete language on the workload issues.[5]

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[5] Although there was no evidence that the University expressed its reasons for rejecting the Union's initial proposal, Bickal testified that he believed its consultation provisions were inappropriate and that he had no interest in modifying the existent decision making process viv-a-vis workload.

The parties met again on the following day, May 23, 1986. Gregory began the discussion by questioning the University's language describing a customary and a maximum workload. She advised Bickal, after reviewing statistical data, that only 35% of the unit would fall within the customary norm of nine courses, and the "customary courseload" was therefore misleading.

Bickal responded that he expected most workloads to remain at current levels under his proposal, but that there would be some adjustments "at the margins" - those entities where highest and lowest workloads currently prevailed.

Gregory also questioned Bickal as to where a unit member could direct input for setting workload equivalencies for courses such as oboe instruction, fine arts, etc. Bickal indicated that he would respond to that concern at a later time. After a caucus, the Union made a new proposal, which read, in pertinent part, as follows:

> A. Instructional Workload, Course Definition and Equivalencies
>
> 1. The full time (100%) instructional workload for faculty/instructors in the unit for an academic year shall not exceed nine (9) courses over three (3) quarters or six (6) courses over two (2) semesters or the equivalent. Instructional workloads <u>may be lower</u> based upon the instructional workload standard <u>adopted by the department, program, or board in consultation with</u> faculty/instructor(s) in each <u>unit</u>.

2. . . . a course as referred to in A.1. above shall be called an instructional workload course and shall be defined as an instructional offering that is regularly scheduled, requires academic preparation outside the course by the instructor and meets a minimum of three (3) hours per week.

3. It is recognized that some instruction does not fit the definition of an instructional workload course as defined in A.2. above. The University, in consultation with the faculty/instructor(s) in the unit, shall determine whether a course conforms to the definition of an instructional workload course. Equivalencies for these instructional offerings will be defined proportionate to the instructional workload course as defined in A.2. above.

4. . . . . .

5. In determining the relative workload value of an instructional offering and course equivalencies, the University shall, in consultation with faculty/instructor(s), makes its determination based upon pedagogical factors including, but not limited to, instructional and evaluation methods employed, the nature and level of the courses being taught, the extent, nature, and number of the preparations required, the number of students expected to enroll, the supervision of other teachers, the availability of instructional and evaluation support employees (teaching assistants and readers), the instruction and supervision of laboratories and studio courses, independent, field, tutorial, or supervised instruction, and/or development of specialized instructional materials, and instructional practices to meet curricular requirements.

6. In determining workload, the University, in consultation with faculty/instructors in the unit, shall consider other duties that have been assigned.

7. Workload values of instructional offerings and course equivalencies based upon the provisions of this section shall be established in consultation with faculty/instructor(s) in the unit for each department, program, or board. . . . [Emphasis added]

In presenting the proposal, Gregory explained that the Union had eliminated use of "customary workload" because it was reflective of only 35% of the unit. Instead, only a maximum workload was included, along with consultation rights for unit instructors. She said that the University's need for flexibility had already been addressed in paragraphs 3-6. The University called a caucus to prepare a response.

There was little discussion of the Union's proposal after the caucus, except in connection with the presentation of the following counterproposal (quoted in pertinent part) by the University.

1. The full-time (100%) instructional workload standard for unit members for an academic year shall not exceed ten (10) instructional workload courses over three (3) quarters or seven (7) instructional workload courses over two (2) semesters, or the equivalent. Instructional workloads may be lower, based upon the instructional workload standard of the department, program or board.

2 .. . . a course . . . in A.1. above shall be called an instructional workload course and shall be defined an an instructional offering that is regularly scheduled, requires significant academic preparation outside the class by the instructor, and meets a minimum of three (3) hours per week.

3. It is recognized that some instruction does not fit the definition of an instructional workload course as defined in A.2. above. Examples of instructional offerings which do not conform to the definition in A.2. above are laboratory supervision, supervision of teaching assistants, studio instruction, and clinical instruction. The University shall <u>at its sole discretion</u> determine whether a course conforms to the definition of an instructional workload course in A.2. above, and shall establish the equivalencies for the instructional offerings which do not conform to the definition of an instructonal workload course. . . .

4. . . . . .

5. In determining the relative workload value of instructional offerings and course equivalencies, the University may take into account such factors as the instructional and evaluation methods employed, the nature of the courses being taught, the preparations required, the number of students expected to enroll, and the availability of support employees.

6. . . . . .

7. Workload values of instructional offerings and course equivalencies based upon the provisions of this section shall be established for each department, program or board. Unit members may provide written comments and suggestions regarding workload values to their departments. . . .

F. <u>Grievability</u>

Grievability shall be limited to the procedural applications of this Article and not to instructional workload standards or

> workload values of instructional offerings or course equivalencies as determined. In the event that a unit member believes that the workload that has been assigned is in violation of the workload values established pursuant to A.7. for the department, program or board, the unit member shall perform the duties as assigned and may pursue the issue through the grievance procedure as specified in Article _____, Grievance Procedure.

In presenting the latest proposal, Bickal highlighted areas of change - such as the acceptance of a maximum standard with a modest change in numbers from twelve to ten - but did not detail the rationale for each one. In testimony, he explained that the term "adopted by" (i.e. the department, etc.) was deleted based upon his stated position that workload standards would be established through a process, and not limited to the department. The ultimate authority to set these standards, he added, rested with the University and it (University's bargaining team) would not specify that it was the responsibility of the department. Bickal also explained that he dropped earlier proposed language in paragraph A1 that said workloads "may be higher" to correspond with the University's abandonment of a 12-course maximum and a 9-course customary standard. He added that it would have been nonsensical to keep the entire phrase "workloads may be higher or lower" because in the proposal's present form, "there was no possibility of there being [a workload] higher than 9". [Emphasis added]

The parties caucused after Bickal's presentation and adjourned, without more substantive discussions, until the following day.

On May 24, 1986, the two bargaining teams presented themselves for negotiations, but no across-the-table discussions occurred. Rather, they caucused from about ten o'clock in the morning until about seven o'clock in the evening. What occurred was a series of away-from-the-table meetings between Gregory and Bickal, with periodic reporting to the respective teams, for the purpose of trying to resolve the differences in the two proposals presently on the table.

During those discussions, Bickal told Gregory that the University would not agree to any provision that identified the department or anyone else as the determiner of the maximum workload. He added he could persuade his principals to drop the maximum to nine courses, but only if she "could deliver" on not designating who had the authority to determine workload.

Gregory told Bickal that she thought she could deliver on that. She insisted, however, that the University remove the phrase "sole discretion" from paragraph A3 - which gave the University the sole discretion to determine whether a course conforms to the IWC definition - because she felt that ratification of the contract would be problematical with it present. There was also some debate over the Union's attempt to give unit members the right to be consulted at each step of the workload process.

Gregory later reported to her bargaining team that the University would agree to a course load "cap", to "ameliorate" the "sole discretion" language, and to include some avenue for unit members to consult on appropriate workloads, in exchange for agreement on the approximately 12 outstanding articles.

As a result of the discussion on May 24, the parties agreed to reconvene on May 29, at which time the workload article would again be on the agenda, along with all other outstanding proposals.

On that latter date, the University submitted its final workload proposal. It incorporated a nine course work load maximum, but eliminated the Union's language that workload standards be "adopted by the department", etc. It also reflected the removal of language in previous University proposals which gave the Employer the "sole discretion" to determine whether a course conforms to the IWC definition. A corresponding change was made in the grievability section which now prevented unit members from grieving the University's establishment of workload standards or workload values.

The Union's previous language, calling for individual unit member consultation at every step of the workload determination process, was not incorporated. Instead, the University retained language it had proposed in its two earlier articles (May 23 and May 24) under paragraphs A7 and B. That language provided unit members a limited right to provide written or oral comments to their departments regarding workload values.

The retained language also allowed the Union to convene a meeting with individual campuses once each year to "discuss workload issues."

This workload proposal was one of about 11 or 12 that were transmitted to the UCAFT a the May 29 meeting. Bickal gave a brief description of the status of each one. After pointing out some of the latest changes in the workload proposal, he stated to Gregory: "Workload is the linchpin. Our agreement last week was if we get authority for this, the other articles, with some discussion, would follow."

There was no further discussion at the table about the meaning of the final language on workload. After a brief discussion of some modifications in other articles, the parties adjourned with an agreement to return on the following day.

The following morning, Marde Gregory approved the University's last workload proposal. It was initialled as a tentative agreement that afternoon, along with the remaining package of proposals. The arbitration article, the only outstanding issue, was finally agreed to on either May 31 or on June 1, 1986.

D. Events Subsequent To Negotiations

The terms of the MOU became effective on July 1, 1986, except for the workload article. The provisions of the latter were to be effective no later than January 1, 1987, in order to allow each campus to establish the workload standards and equivalencies. In addition, the MOU stipulated that unit

members who had been appointed prior to July 1, 1986, to work the following term, would not be affected by the workload provisions for the duration of the appointment. An understanding was also reached to the effect that those appointed after July 1, but before the workload article went into effect, would be appointed on the basis of workload policies in effect prior to the execution of the MOU. Campuses could, when ready, implement the workload article prior to January 1, 1987, but only one campus, not UCSD, was able to do that.

In the interim period, the University attempted to lay the foundation for implementation of the workload article in two ways. One was a program designed to train and inform academic administrators on the meaning of the new MOU. The other was the process of deciding what workloads would govern in which departments and what workload values courses would have. Both avenues were fraught with controversy, not only emanating from the Union, but also from within the administration.

At UCSD, the first encounter with the new workload provisions occurred over the History Department's attempts (between May 15, 1986 and late July 1986), through Chairman Michael Parrish, to reappoint lecturers Russell Hvolbek, Mary Lou Locke, Dean Kingsley and Leon Slota. On May 15, 1986, Parrish submitted a letter to Stanley Chodorow, dean of Arts and Sciences, recommending that Locke be reappointed full-time for the 1986-87 academic year to teach six history courses. In

response, Dean Chodorow told Parrish that Locke should teach more than six courses in order to be reappointed at 100% time.

On June 6, 1986, after receiving a copy of the recent MOU, Parrish wrote a strong letter of protest to Chodorow which included the following:

> I would like to set forth in this memorandum our position on both the specific case of Locke and the more general issue of teaching loads for Visiting Lecturers in history.
>
> The tentative agreement reached between the AFT and the University states clearly in section A, paragraph 1 that "the full-time (100%) instructional workload standard for unit members for an academic year shall not exceed nine (9) instructional workload courses over three (3) quarters. . . . "Instructional workloads may be lower, based upon the instructional workload standard of the department, program or board." The "workload standard" of our department for Visiting Lectuers teaching a full year in their initial year has been six courses, a standard approved by the administration in our three most recent cases: Dean Kingsley (Japanese history), Leon Slota (Medieval) and Russell Hvolbek (Early Modern). In their second year, Slota and Hvolbek taught seven courses. Since this will be Locke's first full year of teaching in the department, we believe she is clearly covered by this provision. The six-course load in the first year has been traditionally justified on the grounds that the faculty involved will be teaching new courses for the first time on the campus and that they are therefore entitled to adequate preparation time for these courses. This is also the case with respect to Locke . . .
>
> In view of the tentative agreement and past approval of the six-course standard in history for the first full year, we believe that to treat Locke otherwise would violate the letter and spirit of the tentative agreement . . .

> On the general issue, we believe that the question of teaching loads for visiting lecturers should be left to the judgment of department chairmen as is the case with respect to all other instructional personnel. Chairmen are best able to judge the relevant factors that call for flexibility in this area . . . We see no reason why a chairman should be entrusted with this task in the case of senior professors holding endowed chairs, but not in the case of temporary faculty. [Emphasis in original.]

In testimony, Parrish recalled being pleased when he read the new MOU because he believed it confirmed what the department had been arguing for a long time about where workloads ought to be determined - i.e., within departments.

In a June 23, 1986, responsive letter, Chodorow wrote that the MOU's language was not intended to make departments solely responsible for setting their own workload policies. Rather, its intent was to have workload policies established through the vice-chancellor of academic affairs, and Vice Chancellor Ticho had established a nine-course load which could be modified under exceptions listed in PPM Section 230-20.[6] Chodorow concluded that his decision regarding the teaching load of Locke and Hvolbek would stand, and that Locke ought to carry a nine-course load.

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[6] The exceptions are listed, supra, at page 9.

Parrish wrote a reply on June 25, indicating that as chairman, he continued to reject the nine-course standard for lecturers, and urged Chodorow to reconsider. He followed with another letter on July 9, arguing that the MOU permitted delegation of determining teaching loads to departments. He accused Chodorow of insisting on a single, campus-wide standard of nine courses for all lecturers and predicted that, in the coming full term, the department would reject it. In conclusion, he wrote:

> We have therefore reached something of an impass [sic] with respect to the loads to be required next year of Russel Hvolbek, Mary Lou Locke and others. I am very loathe myself to ask them to teach on a nine-course basis because I feel this will defy the sentiments in the department and may also sacrifice a certain degree of departmental authority . . .

Ultimately, neither Chodrow nor Parrish relented. Locke was reappointed but not at 100% time, in large part because Parrish refused to require her to teach nine courses and because Chodorow insisted that she be compensated on the basis of a nine-course standard. As a result, she received approximately $4400 less than what she would have earned if she had been given a full-time appointment as requested by the department.

The controversy was not isolated within Parrish's department. Allan Kaprow, Chairman of the Visual Arts Department, wrote to Chodorow that his department had formed the position that the proper maximum courseload was six, explaining:

> We note that past practices with regard to temporary faculty have varied widely among UC campuses, some requiring only 6 courses and others as many as 12. However, the recent agreement between the AFT union and UC . . . specifies 9 courses per year as an upper limit for such faculty, while providing that "instructional workload be lower, based upon the instructional workload standards of the department . . . Our [department] policy is thus completely in accord with this agreement.
>
> The department has always favored the 6-course 100% load. It is only since 1980, under pressure from the then [Vice Chancellor of Academic Affairs] that we were compelled to impose the higher load, and our experience with it has been discouraging. We urgently desire to return to our normal workload standard, as mandated by departmental needs.

In a later communication regarding workload standands, Kaprow told Chodorow that he felt it was the responsibility of departments, acting within campus guidelines, to interpret variations of such guidelines as they related to each discipline and departmental philosophy.

Donald Wesling, chairman of the Literature Department, wrote to Chodorow, informing him of the department's preference for an eight-course maximum workload. He also informed him that the writing courses currently taught by lecturers should equal 1.0 IWC or more.

Michael Schudson, chairman of the Department of Communications, testified that he was one of about half a dozen department chairpersons who voiced strong opposition to the nine-course campus standard in a large meeting of department

chairpersons. Concern about the nine-course workload was also expressed by some department chairs in a November 1986 meeting with Vice Chancellor Ticho.

Schudson, among others, believed the proper courseload to be six. He expressed that viewpoint to Dean Michael Rothschild and to Vice Chancellor Ticho.

In June, shortly after the conclusion of the negotiations, Jeffery Frumkin, a senior analyst in the University's office of labor relations as well as assistant negotiator and chronologer during bargaining, began to prepare a Contract Administration Manual. The manual contained excerpts from the MOU with a corresponding text attempting to explain its practical meaning as a day-to-day guide for campus administrators. Before its issuance in July, it went through several drafts and was reviewed by other members of the University's bargaining team.

Some advance copies were sent to key University officials and, shortly thereafter, a final version was distributed to the various campuses. This manual caused a great deal of controversy and confusion because it, too, left the impression that jurisdiction to set workload policies was within departments. The statements causing the confusion include the following text attempting to explain the meaning of language of the workload article:

[A1] The campus may establish [workload] standards on a departmental basis for a full-time instructional workload that is lower than nine (9) or six (6) respectively . . . If the department standard is established at a lower number, this standard must apply to all unit members in the department. For example, if a department establishes a full-time standard of eight (8) . . . a unit member whose workload is less than the equivalent of eight (8) IWC's cannot be considered full-time (100%).

[A3] . . . Each department that employes members of this unit must develop a set of course equivalencies . . . These equivalencies are specific to the department, and comparisons to other departments or other campuses by a unit member or the UC-AFT is not appropriate.

[A4] If a department intends to modify its workload policy or practice for these unit members, the University is obligated to provide notice to the UC-AFT of the proposed change . . . . [Emphasis added.]

Frumkin testified that the language in the manual was not intended to suggest that the jurisdiction to make workload determinations resided within departments, but he received a sufficient number of communications which led him to conclude that that unintended result was occurring and that the manual needed to be redrafted. However, it was not redrafted until after the conclusion of MOU training sessions at the various campuses, at which, predictably, many in attendance reached the same "unintended" conclusion regarding the departmental roles. At the training sessions, he routinely stated that the ultimate authority to determine workload did not rest within

departments, but within the campus administration and that the manual would be modified to reflect that viewpoint.

The manual was redrafted in September 1986 and reissued in October. The phrases underlined above in paragraph A1 were deleted ("on a departmental basis" and "if a department establishes"). The latter was replaced by a sentence reading: "For example, if a full-time standard of eight (8) . . . courses is established for a department . . ." Each of the remaining quoted passages was modified to eliminate mention of the specific departmental function in setting workload standards. Both contract administration manuals were internal documents of the University administration and did not express the views of the UCAFT.

The University's attempts to establish workload standards and equivalencies on the various campuses ran concurrently with the foregoing controversies. At UCSD, Vice Chancellor of Academic Affairs Harold Ticho and his immediate staff came to the preliminary (July) conclusion that the MOU permitted the campus to proceed with the workload policies previously in effect (nine-course load). He consulted with the academic senate Committee on Academic Personnel (CAP) on two occasions and it (CAP) concurred on the nine course load.[7]

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[7] At the first meeting, CAP recommended that Ticho look into complaints from Unit 18 members about the intended interpretation of the workload policy.

After these consultations, Ticho initiated a series of discussions, primarily with the deans, designed to develop a workload policy in accordance with the MOU. He asked the deans to consult with department chairpersons and to ask for discussion and recommendations on the subject. In addition, Ticho attended meetings involving department chairs and members of Ticho's immediate staff, at which workload issues were discussed.

At the end of October 1986, Ticho wrote to the various deans, requesting that they prepare a list of all courses that did not meet the IWC definition ("non-standard courses") and to propose a workload value for each of them. In turn, Dean Chodorow met with his department chairpersons (in literature, philosophy, history, visual arts, music, theater arts, and physical education) to talk about workload issues and to discuss feedback from the faculty within those departments. That information was relayed back to the vice-chancellor.

The actions of Chairmen Parrish, Kaprow, Wesling, and Schudson typified the opposition to Ticho's attempts to implement a uniform, nine-course, campus-wide workload standard. In spite of the resistance, Ticho's position prevailed and a campus-wide standard of nine was adopted. A clash of views within this broader controversy occurred in connection with the issue of the writing (composition) courses.

1. The Writing Programs And Courses

There are four colleges within the structure of UCSD - Warren College, Third College, Muir College, and Ravell College. Each has a writing program, headed by a director, and each program is somewhat different. The programs in Muir, Warren and Third resemble each other more than that of Ravell's. At Ravell, there are lecture courses taught mainly by regular faculty and companion writing courses taught, in many cases, by lecturers.[8] At the other colleges, the writing sections are esentially independent.

All students in the four colleges are required to enroll in the writing programs. Those courses, such as Warren Writing 10A and Warren Writing 10B are very similar to traditional freshman English composition courses where students write a minimum number of papers based upon assigned readings and/or lectures. The main goal of writing courses is to further develop analytical writing skills of the students.

A large number of classes within the writing programs are taught by graduate students (Teaching Assistants or TA's). However, the maximum number they are allowed to teach is much lower and the level of responsibility and independence is significantly less than that expected of lecturers teaching those courses.

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[8] At Ravell students in a writing section (class) write papers related to the lectures they attend.

According to Vice-Chancellor Ticho's testimony, he decided, upon recommendation of his staff and the various deans, to consider all freshman writing courses in all the colleges as nonstandard courses - i.e., they did not meet the definition of an instructional workload course. They were then valued uniformly at .75 IWC. This essentially allowed the campus to require all writing program lecturers to teach 12 courses per year in order to be considered full-time.

As noted earlier, the "bargaining history meaning" of an instructional workload course ("regularly scheduled, requires significant academic preparation outside class, meets a minimum of three hours/week was meant to describe the "traditional, conventional academic course" as contrasted to such things as "individual oboe instruction", "studio-classes", and the like. University witnesses' attempts to justify the uniform labelling of all freshman composition writing courses as nonstandard was not convincing.

Kimberly Scott Davis is chairman of the University of California Council of Writing Programs and academic coordinator of a writing program and lecturer in such. He testified that, pursuant to a resolution arrived at at a conference of writing program directors and writing program lecturers from throughout the University system, the council recommended that writing courses systemwide be equivalent to 1.25 - 1.50 of the "benchmark" [IWC] course described in the MOU. The resolution was unanimously passed on November 14, 1986.

The testimony of Deborah Small (lecturer in the Warren Writing Program), James Degan (lecturer in the Third College Writing Program and its assistant coordinator), and Christine Norris (assistant coordinator and lecturer in the Ravell Writing Program) provides abundant and detailed support for the conclusion that the writing courses easily fall within the intended definition of an instructional workload course.

Even Literature Department Chairman Donald Wesling, employed by the University of California as an English professor for some 19 years, testified that he taught one of the writing courses in the Warren College Program in the fall of 1986 in order to familiarize himself with what went on in the program. In assessing the degree of work necessary to teach the course, he "made a point of punctiliously doing everything" that other writing program lecturers did and followed the same routine. Even without counting a five-day preparation session lecturers are required to attend prior to the academic year, and considering his background of teaching other analogous courses in the writing or English major, he concluded that the total time involved in teaching the writing course exceeded that of his upper division courses. He wrote that these courses should have a workload value of at least 1.0 IWC.

The most vivid example of the work involved in teaching the writing courses is illustrated by James Degan's testimony. It is not necessary to describe it in its entirety.

In summary, the Third College writing courses meet four hours per week except during those weeks when the lecturers have one-on-one conferences with students regarding their work. Students are required to write four formal essays for each course, varying from four to five to ten to fifteen typewritten pages. In addition, they must write responses to assigned readings in a "writer's journal." Typically three such responses per week are demanded for a total of 30 per quarter. Students are asked to read from a basic text, St. Martin's Guide to Writing. In addition, three supplemental books called "trade books" are assigned in their entirety, at the choosing of the instructor and usually from a compiled list of other works. Generally, students write about 15,000 words and read about 1000 pages to meet minimum standards.

All essays go through several drafts, each of which is "workshopped" in class and reviewed by the instructor. Journal entries are also required to be turned in for the lecturer's review.

A lecturer is required to hold scheduled tutorials with each student three times during each quarter to discuss work in progress, completed work and any other problems an individual student may be having. The courses are also characterized by a hectic pace and require strict adherence to pre-set deadlines. Class sizes range between 12 and 18.

In preparation, lecturers spend a considerable amount of time reading and responding to individual essays and individual journal entries, preparing and reading new texts, writing journal questions to assign, and preparing to conduct class discussion of the readings. Lecturers are required to grade and make critical comments on all essays.[9] When critiquing formal essays, lecturers also review all work done by students in preparation for the essay, all of which must be turned in at the same time. This includes pre-writing exercises, invention exercises, several drafts, workshop responses from classmates, and a self-evaluation of the student's own work.

Lecturers attempt to introduce new material (texts) each term and to rotate assignments from different texts from one section to another during the same term if they are teaching multiple sections during one quarter. In some cases, lecturers supervise the work of TA's teaching other writing courses.

The following exerpt from the cross-examination of Degan by Respondent, characterizes the nature of these writing courses:

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[9] Graduate students (TA's) are not given the same degree of leeway in grading. Their grading is closely supervised by writing coordinators and/or directors.

Q. Well, in the writing program isn't it true that your teaching as a part of the writing program is quite different than if you were a lecturer in the English department teaching other English courses?

A. No, I don't think so. I'm teaching students to read and respond to a text just as I would in any literature course.

Q. But the level of your responsibility with respect to what you get to do in the course in the writing program, what choices you have and what the goals of that program are are quite different than the level of responsibility you would have as the instructor, faculty instructor of a more typical English course?

A. No, I don't agree with that.

Q. Does Professor Cooper have the final grading authority for the writing program in Third College?

A. Only in the case of a disputed grade, otherwise grading is the responsibility of the instructor.

Q. What about with respect to TA's?

A. I'm not sure I understand your question, I'm sorry.

Q. With respect to TA's, do they have the final grading authority in their sections?

A. In their sections, yes, they do.

Q. So that's the same then for lecturers, as well?

A. Yes, just more grades to enter as a lecturer.

Ticho and Chodorow's testimony that the writing courses are uniformly nonstandard, is far less precise and does not deserve the evidentiary weight given that of Degan, Wesling, Small and Norris, all of whom have been recent teachers of those courses. Ticho demonstrated a lack of familiarity with the writing programs during testimony. He essentially relied upon the advice of his staff and deans in reaching the conclusion that writing courses were nonstandard.

In attempting to support his determination, he frequently retreated from a position taken when later questioned more closely. For example, one of the supporting reasons he gave was that a large part of the responsibility for teaching the courses, taught in large part by TA's, fell on the writing coordinators. When asked whether the level of responsibility was greater in writing sections taught by lecturers as opposed to TA's, he acknowledged, "Oh, sure. Certainly. A lecturer is ordinarily responsible for preparation of the course and everything else." His initial conclusion that all lecturers teaching multiple writing sections in one quarter had less preparation to do because the courses were identical was rebutted by more specific testimony. He modified his earlier statement on cross-examination. In response to a question as to whether all lecturers who teach more than one section teach the same subject matter in each section, he stated: "I can't testify to that in any particular case. I suppose an instructor could decide to teach the same thing in three

classes and do something different in the fourth".

Ticho's testimony that freshman writing courses involve much less academic preparation outside the class by an instructor was specifically refuted by the testimony of Wesling. Ticho's blanket conclusion that writing program lecturers work from an already prepared syllabus rather than having to make one up, a view shared by Chodorow, is contrasted by Degan's testimony indicating that he prepared his own syllabus in order to conduct lecture courses, and only he used that syllabus.

Chodorow's last experience teaching a writing course was in 1981. His testimony that the faculty in the writing program "don't run their own courses" turned out to be an overgeneralization not founded in fact and not applicable to every writing program. The statement is generally true of graduate students teaching the writing courses. His testimony that writing instructors at Ravell College are not primarily responsible for grading and have to be monitored carefully in that regard by the coordinator is not applicable to Third College. That testimony was also refuted by Christine Norris who recently taught at Ravell's writing program. As Ravell's current writing program assistant coordinator, she testified that although TA's are closely monitored, including monitoring of their grading, lecturers' grading is not at all supervised.

Under cross-examination Chodorow acknowledged that the writing programs in the various colleges were not all the same and that he did not know precisely what reading materials were being used in the Warren Writing Program, although his review of syllabi, etc., indicated that lecturers in that program used "similar" materials. When pressed to explain a previous answer that indicated materials used for these courses were largely pre-determined by the coordinators, he qualified it by acknowledging that lecturers do make decisions as to what materials to use in class, "but under the guidance of the coordinator."

Examples diminishing the weight of Chodorow's testimony regarding the courseload value of writing courses abound in the record and are too voluminous to list herein.

The factual conclusion drawn by Ticho and the administration, viewed in its proper context, was not that the writing courses did not require significant preparation by a lecturer outside of class, but that they required <u>less</u> preparation than other "traditional" courses. This conclusion was unsupported, and even Chodorow was willing to concede that teaching writing courses required significant preparation at least when being taught for the first time.[10]

The product of the meeting process between the deans, the department chairpersons and the vice chancellor's office was a

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[10] There is no dispute that all writing courses meet a minimum of three hours per week and are regularly scheduled.

document which became UCSD's workload policy under the MOU effective in January 1987. The instrument dictated that, at UCSD, unit 18 lecturers shall teach nine instructional workload courses (on a quarter system) per academic year when employed 100% time. In addition, it stipulated that four sections of composition are equivalent to three instructional workload courses, and that the workload of a 100% time appointee was twelve sections. The policy applied to freshman writing courses as well as to "comparable" writing sections offered by departments. Thus, as Ticho testified, writing courses came to be valued at .75 IWC across the board. Separate provisions in the policy allowed additional weight to be given courses when taught for the first time and for courses with unusually large enrollment, subject to a dean's approval.

The University of California English Council appealed to UCSD's chancellor, seeking to lower the maximum workload of composition lecturers to seven courses and to value each course at 1.285 IWC. That plea was not successful.[11]

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[11] The English Council is comprised of the chairpersons of English departments from the various campuses in the University system. Although the evidence regarding the workload policies of other campuses was incomplete, the evidence available does not indicate that any other campus required any writing program lecturer to carry as many as 12 courses at full time or that any writing course was valued at less than 1 IWC.

IV. DISCUSSION

Section 3570 of the HEERA imposes a duty upon higher education employers to meet and confer with employees' exclusive representatives on all matters within the scope of representation. This duty is analogous to the duty to bargain imposed upon public school employers under the Educational Employment Relations Act and upon private sector employers by the National Labor Relations Act.[12]

In Regents of the University of California v. Statewide University Police Association (1985) PERB Decision No. 520-H, the Board reiterated its standards of analysis for alleged violations of HEERA's meet and confer provisions. Accordingly, in determining whether a party's negotiating conduct constitutes an unfair practice, the Board uses both a "per se" and a "totality of the conduct" test, depending on the conduct involved and on its effect on the negotiating process.

An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate. Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.

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[12] The Educational Employment Relations Act is codified at California Government Code section 3540, et seq. The National Labor Relations Act (NLRA) is codified at 29 U.S.C. Section 151, et seq. The construction of provisions of the NLRA is useful guidance in interpreting parallel provisions of collective bargaining statutes administered by the PERB. See San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 12-13; Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616.

Established policy relating to terms and conditions of employment may be embodied in a collective bargaining agreement (Grant Joint Union High School District (1982) PERB Decision No. 196) or, where a contract is silent or ambiguous, it may be determined from past practice or bargaining history (Rio Hondo Community College District (1982) PERB Decision No. 279).

In determining whether the University violated HEERA section 3571 as alleged, the foregoing principles will be kept in mind.

A. The Nine-Course Maximum Load

UCAFT contends that the University's San Diego campus has repudiated the workload provision of the MOU, turning that article "on its head" in imposing a uniform campus-wide workload standard of nine courses on departments through the Vice Chancellor's office. It argues that the provisions of the contract were meant to give departments jurisdiction to set a workload up to the maximum of nine courses, and because departments were not given untrammelled rights, higher levels of the University administration would have some veto powers in some instances. Hence, by imposing an across-the-board standard, they have turned the contract upside down, disallowing departments to have the primary role in setting workloads and directly impacting the terms and conditions of employment for unit 18.

The University contends that the language of the MOU and its meaning are plain, authorizing it to take the actions alleged to be unlawful. Indeed, it seeks to recover attorneys' fees in partial reliance on this premise.

A close examination of the MOU's provisions makes it clear that it does not address the central issue in this dispute - at which level within the University structure is the maximum standard to be set? The parties have advanced different interpretations of the contract to support their views. However, PERB is concerned only with unilateral changes in established policy which represent conscious or apparent reversals of previous understandings, whether the latter are embodied in a contract or evident from the parties' past practice. Grant Joint Union High School District, supra, at p. 8. Here, the Charging Party has failed to show that a policy giving departments primary or final authority to set courseload maximums was established. It has only shown that the Employer made one of two or more arguable interpretations of the MOU. These competing claims do not amount to a "policy change. "Even assuming, arguendo, that the contract is ambiguous (not merely silent) on this issue, other evidence demonstrates no unilateral change of a previous understanding took place.

As the Board held in Marysville Joint Unified School District (1983) PERB Decision No. 314, when ambiguous contract language appears, PERB will next consider evidence of the

bargaining history underlying a particular contract provision, or evidence of the employer's actual practice. Since the Charging Party elected to amend the Complaint to rely solely upon the contractual negotiations, past practice will not be considered in deciding this issue.

The evidence is not totally one-sided. In explaining the language he proposed during negotiations, Bickal stated that departments would have an important role in developing the workload policies, with some "general policy direction from above", but would not have untrammelled, unilateral power. When Gregory sought clarification by giving a hypothetical situation where an individual unit member's workload was determined by a department via a recommendation to higher levels of the administration, Bickal explained that he did not envision determinations of lecturer workloads going up the hierarchical route from departments to deans or provosts to vice-chancellors. Bickal's statements in this regard tend to support the Charging Party's interpretation of the language.

However, the most persuasive evidence leads to a conclusion at variance with that proffered by the Charging Party. Most convincing are the events surrounding UCAFT's proposal that spelled out the "locus" of authority regarding workloads. That proposal specified that workloads may be lower based upon the standard <u>adopted by</u> the <u>department</u>, <u>program, or board</u> in consultation with unit instructors. The evidence indicated that Gregory agreed to the deletion of the language based upon

Bickal's objections to identifying an individual or agent of the University who was required to carry out some commitment in the MOU. He specifically conditioned agreement on eliminating language designating who within the academic administration (department chairpersons, deans, vice-chancellors, etc.) had the authority to determine the maximum courseload. Gregory concurred and the language earlier proposed by the UCAFT was dropped. A full agreement followed.

Having failed to obtain a contractual guarantee that departments would have the primary or the final authority to develop their own maximum workloads, did the Union nevertheless have a basis under the MOU to insist that the University refrain from setting uniform campus-wide maximums of nine courses? The bargaining history demonstrates that one of the University's goals was to retain flexibility between departments in determining maximum workloads and to preserve the automony of the campuses in this regard. It also shows that both parties obtained hard-fought limitations on maximum and minimum loads - i.e., the University retained flexibility to set varying workload levels as appropriate to a particular department or campus and the Union obtained a companion right not to have that level exceed nine instructional workload courses. While the Union may have formed the impression that workloads would probably vary from department to department or campus to campus, the University never agreed to guarantee that workloads <u>would</u> vary. In essence, the University obtained the

right to decide whether departmental standards would vary or whether they would be uniform, and to insist on any courseload level, so long as it did not exceed nine.

B. The Writing Courses

The evidence demonstrates that both parties obtained important workload guarantees under Article XXV. Reciprocal to the University's right to decide the maximum courseload was, as University negotiator Ellen Switkes testified, a guarantee against abuse of that maximum - a guarantee that lecturers would not be overloaded with courses. She confirmed, under cross-examination, that the "equivalency portion" of Article XXV - the setting of equivalencies and workload values for courses (sections A3, A5, A6, and A7) - was not intended to alter, or "get around" the nine-course maximum load under paragraphs A1 and A2. As a preventative measure against abuse, the Union obtained the elimination of language that would have given the University "sole" discretion to determine whether a course did not constitute an "instructional workload course" - i.e., that it was nonstandard. Both parties walked away from the bargaining table believing that each had been successful in obtaining these workload guarantees.

Contrary to the opinion testimony of Ticho and Chodorow, and to some extent testimony of Switkes (which was based upon conclusions rather than statements made during bargaining), the University is not free to give courses a value of less than 1.0 IWC ("downgrade") once the three components of the definition

are met - regularly scheduled, significant preparation outside the class, and meeting a minimum of three hours per week. There was no discussion at the bargaining table as to what "significant academic preparation" meant. However, there is a great deal of evidence over what was intended as an instructional workload course.

Although the list was not all-inclusive, the contract itself gives a clear expression of what non-standard courses were (aside from those that clearly did not meet three hours/week and were not regularly scheduled): laboratory supervision, supervision of teaching assistants, studio instruction, and clinical instruction. The types of courses referred to during bargaining as nonstandard were courses such as one-on-one "oboe instruction". Studio dance courses and "highly individualized" instruction courses were included. What is clear from the bargaining history is that "the traditional, conventional academic course" was intended to underlie the IWC definition. The evidence demonstrates that writing courses are the type of conventional courses which clearly fall within the bilaterally agreed-upon definition of an IWC.

Sections A5-7 of the workload article plainly do not authorize the downgrading of courses to a workload value of less than 1.0 IWC if those courses meet the definition in section A2. It was implicit throughout bargaining that instructional offerings varied from course to course and

department to department due to a multitude of factors. Essentially no two courses are exactly alike. The parties did not agree that a course be weighed at less than 1.0 IWC simply because it is less demanding in one area compared to another. Nothing in the agreement supports the conclusion that, once a course meets the three components of the contractual definition, it could be reduced in value simply because the number of students enrolled in the class is somewhat less than that of another or because the outside preparation required of the instructor, although significant, is comparatively less than for another class.

It is axiomatic that a collective bargaining agreement must be read as a whole document. Specifically, all sections, A1-A7, were meant to be read together. The totality of the record and the plain contract language demonstrate that paragraphs A3 and A5 allow the University to set workload equivalencies for courses that are nonstandard - at levels below, at, or above 1.0 IWC - and to give a greater value to those courses which have higher than normal enrollments (e.g. over 200), require an unusual degree of contact hours, etc. In other words, the latter provisions allow the University to attach <u>greater</u> value to courses which already meet the IWC definition but which place unusually heavy demands upon the instructors.

However, when read in conjunction with section A1, there is nothing in the contract which <u>diminishes</u> the value of

"traditional" academic courses below 1.0 IWC. Nor do the contractual provisions vest the University administration the unrestricted power to subjectively determine whether a course is "standard" or whether the preparation required to teach it is "significant". As represented by Bickal during negotiations, the bilateral agreement contained enforceable standards, and workload levels would be rational and not arbitrary.

Contrary to Respondent's argument, simply because the agreed-to language restricted unit/UCAFT participation in setting workload values and equivalencies and prevented grievances/arbitrations in that area, the contract did not give unlimited power ("authorize only the University") to determine whether a course fits the IWC definition. The University is the party responsible for such determinations, but is required to act within the confines of the express language of the MOU, giving deference to its intended meaning, and must also operate within the legal collective bargaining framework of the HEERA. Bickal's conclusion, during testimony, that the "concept" of "sole discretion" was retained in the MOU, is simply not supported by evidence of statements during bargaining or other objective negotiations conduct. To the extent that it is inconsistent with the above, it is not credited. By deciding that all writing courses (at UCSD) taught by unit members were uniformly nonstandard and by deciding that all such writing courses had a workload value of less than 1.0 IWC, the campus

administration deviated from the plain language of the MOU in such a fundamental way that it abrogated the terms of the agreement. First, although there was abundant testimony from both sides regarding the writing courses, no one went so far as to say that they did not entail "significant academic preparation" outside the class by the instructor. Indeed, University witnesses acknowledged that at least during a lecturer's first year teaching these courses, the required preparation was significant. Much of the lecturers' testimony regarding the level of preparation needed for writing courses went uncontradicted.

The most that can be concluded from Chodorow's and Ticho's testimony is that some writing courses, in some of the UCSD colleges, under some circumstances, when taught by some instructors, entailed less significant academic preparation outside the class than a "traditional" course might. The UCSD's blanket determination that all writing courses did not meet the IWC definition and/or did require less preparation than all traditional 1.0 courses has no basis in this evidentiary record. It also was not "rational" to conclude that all lecture sections did not require significant academic preparation simply because some did not.

The UCSD's misapplication of this aspect of the workload article cannot be dismissed as a mere "default of a contractual obligation." Grant Joint Union High School District, supra. In contrast to the MOU's silence on the authority to set

maximum courseloads, the agreement expressly defines an IWC. Abundant bargaining history supports the definition in the contract.

The misapplication amounted to a repudiation of the workload article as a whole. If the UCSD, at its sole discretion, could decide that any course is nonstandard or that it could accord any weight less than 1.0 without regard to bargaining history and clear contract definition, the nine-course maximum would have no purpose and meaning. Any writing course taught by a unit member could be valued at any quantity down to zero according to the University's interpretation. Hypothetically, a lecturer could be required to teach 18 (9/.5 IWC) or 36 (9/.25 IWC) courses, with no right to grieve that courseload so long as the values were "duly" established for the department. The so-called "guarantees" against abuse - overloading a lecturer - would be nonexistent under that interpretation. As evidenced by contract language and bargaining history, the parties did not intend this result.

In its apparent haste to promulgate a campus-wide workload policy under the new MOU without disrupting the previous workload directive, the UCSD administration infringed on the actual workload policy established through the bilateral negotiations process. When it issued its campus-wide standards in January 1987, deeming all writing courses as nonstandard and valuating them at less than 1.0 IWC, it thus engaged in a unilateral alteration of a term and condition of employment (workload) established by the MOU.

C. The Workloads of Lecturers During the 1987-1988 Academic Year

The Union alleged that UCSD's imposition of workloads upon lecturers Locke, Hvolbek, etc., of greater than six courses was a unilateral change in the established practice requiring a maximum courseload of six in their departments. The evidence demonstrates that the workloads of each of those lecturers were determined in the interim period when the old policy under the PPM was still regarded as controlling. The parties had agreed that, in such cases, the maximum load could vary. Even the evidence of past practice leads to the conclusion that there was no unilateral change resulting from the history department's requiring Locke and other lecturers in the department to teach more than six courses for the 1987-88 academic year.

For the same reasons, with respect to other lecturers at UCSD whose workloads for the entire 1986-87 academic year were established during the interim period before the issuance of UCSD's workload policy in January of 1987, those workloads cannot be used as a basis for a violation of HEERA.

D. Request to Make a Portion of the Record Confidential

The University moved to delete from a portion of Charging Party's Exhibit M the opening phrase of the sentence, "With the unanimous support of the department, I am writing to recommend the reappointment of Dr. Mary Lou Locke as a visiting lecturer

for the academic year 1986-1987". The Respondent asserted that the phrase "with the unanimous support of the department" discloses the identity of Locke's evaluators in the peer review system, a process which is intended to be kept confidential. In support of its motion, Respondent cites Kahn v. Superior Court of the County of Santa Clara (1987) 188 Cal.App.3d 752; Board of Trustees v. Superior Court (1981) 119 Cal.App.3d 516; and King v. Regents of University of California (1982) 138 Cal.App.3d 812.

In King v. Regents, the Court of Appeal held that an unsuccessful candidate for tenure was not entitled to complete disclosure of his personnel file for the purposes of discovering the names of his evaluators where he had already been provided a summary of that file.

In Kahn v. Superior Court, supra, the Court refused to allow an unsuccessful candidate for a faculty position to depose a tenured faculty professor for the purpose of inquiring into his statements, motives and conduct in a meeting that resulted in the plaintiff's rejection for the appointment. The Court held that the tenured professor's evaluative comments at the meeting were constitutionally protected from disclosure.

In Board of Trustees v. Superior Court, a defamation litigant was disallowed the blanket right to discover all personnel, tenure, promotion, and investigative files related to his former employment with the University, in part on the basis that much of the information was confidential.

The Charging Party is not here seeking disclosure of any document generated from the University's tenure review process. There is no evidence that the author's recommendation was based upon information that carried any promise of confidentiality or that the information was a product of the University's peer review system. The letter itself was never meant to be confidential. Its author testified that there was nothing confidential about the letter and that he had made it available to all of his departmental colleagues. Mary Lou Locke, the subject of the letter, testified extensively about the related set of facts. The Charging Party had a copy of the letter prior to this hearing. The letter does not disclose the identities of any individuals, their subjective deliberations, or thought processes. At most, it indicates a general conclusion of the department's recommendation. Even in cases such as King v. Regents, the Court recognized an unsuccessful tenure candidate's right to receive a comprehensive summary of the tenure file. The letter at issue herein does not even remotely approach the type of information allowed to be discovered under the cases cited by Respondent. For all of the above reasons, the motion is denied.

E. Attorneys' Fees

The Respondent requested attorneys' fees on the grounds that the Charging Party's evidence failed to support even a recognizable legal theory and that its litigation was frivolous.

The PERB will order a Charging Party to pay attorneys fees in unfair labor practice cases where the charge is without arguable merit and was brought in bad faith. Chula Vista City School District (1982) PERB Decision No. 256. That standard has not been met here. Even that aspect of the charge that has been deemed not to constitute a violation - the imposition of a uniform nine-course maximum by the Vice-Chancellor's office - was not without arguable merit. As noted earlier, not all of the evidence on that issue was one-sided. Pursuit of a "weak issue" does not constitute the indefensible form of litigiousness warranting an award of attorneys' fees.

V. CONCLUSION

Based upon the foregong discussion, and the entire evidentiary record, it is determined that the Respondent did not violate the HEERA by setting a uniform campus-wide workload standard of nine instructional workload courses (over three academic quarters) at the UC San Diego campus. That allegation is hereby dismissed.

It is concluded that the Respondent repudiated vital aspects of the MOU's workload provision when it made a blanket determination that at UCSD all writing program courses taught by lecturers were nonstandard - i.e., they did not conform to the definition of an instructional workload course - and when it accorded all such courses a value of less than 1.0 IWC. By this conduct, the University violated HEERA section 3571(c) and, derivatively, 3571(a) and (b).

VI. REMEDY

The PERB is empowered to issue a decision and order directing an offending party to take such affirmative action as will effectuate the policies of the HEERA. Accordingly, the University is ordered to cease and desist from unilaterally changing the workload policy embodied in the MOU.

The University's valuation of the writing courses at less than 1.0 IWC had adverse effects upon the wages of lecturers at UCSD. It is appropriate that writing program lecturers who received workload commitments from the University on or after January 1, 1987, and who were adversely affected by the improper valuation of their courses at less than 1.0 IWC be made whole via a monetary compensation. All amounts awarded to affected unit members pursuant to the above must additionally include interest at ten (10) percent per annum. Writing program lecturers entitled to compensation under the above shall also be made whole for any other losses, such as benefits, leave credits, etc., they may have suffered as a result of the improper valuation of the writing courses. Disputes regarding make-whole provisions above can be resolved in compliance proceedings before the PERB.

It is also appropriate that the University be required to post a notice incorporating the terms of this order. The notice should be subscribed by an authorized agent of the Employer, indicating that it will comply with the terms thereof. The notice shall not be reduced in size, defaced,

altered or covered by any other material. Posting such a notice will provide employees with notice that the Employer has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the Employer's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587 the California District Court of Appeals approved a similar posting requirement. See also NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

VII. PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to HEERA section 3563.3, it is hereby ORDERED that the Respondent, its agents and its representative shall:

A. CEASE AND DESIST FROM:

Misapplying Article XXV of the Memorandum of Understanding between the Regents of the University of California and the University Council, American Federation of Teachers in such a way as to value writing program classes at less than 1.0 of an instructional workload course.

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

(1) Compensate all University of California San Diego writing program lecturers who received workload commitments

from the University on or after January 1, 1987, for all losses sustained as a result of the unlawful interpretation of the memorandum of understanding. To this amount shall be added interest at ten (10) percent per annum.

(2) Make whole all lecturers in the category immediately above for any other losses - benefits, leave credits, etc. - they may have suffered as a result of the University's valuation of their writing classes at below 1.0 IWC.

(3) Sign and post copies of the attached Notice marked "Appendix" in conspicuous places where Notices to employees are customarily placed at its headquarters office and at each of its campuses and all other work locations for thirty (30) consecutive workdays. Copies of this notice, after being duly signed by an authorized agent of the University, shall be posted within ten (10) workdays from service of the final decision in this matter. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other materials.

(4) Upon issuance of a final decision, make written notification of the actions taken to comply with these orders to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

Pursuant to California Administrative Code, title 8, part III, 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 California Administrative Code, title 8, part III, section 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 California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 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 California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: April 15, 1988

Manuel M. Melgoza
Administrative Law Judge

PROOF OF SERVICE BY MAIL
C.C.P. 1013a

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, California, 95814-4174. I am readily familiar with the ordinary practice of the business in collecting, processing and depositing correspondence in the United States Postal Service and that the correspondence will be deposited the same day with postage thereon fully prepaid.

On September 28, 1989, I served the attached PERB Decision No. 771-H in Regents of the University of California, Case No. LA-CE-180-H on the parties listed below by placing a true copy thereof enclosed in a sealed envelope for collection and mailing in the United States Postal Service following ordinary business practices at Sacramento, California, addressed as follows:

Michael Melman, Director,
Labor Relations
University of San Diego
La Jolla, CA 92093

Thomas Dublin, President
University Council-AFT
P.O. Box 2181
Del Mar, CA 92014

Marcia J. Canning, Attorney
Office of the General Counsel
University of California
590 University Hall
Berkeley, CA 94720

Lawrence Rosenzweig, Attorney
2001 Wilshire Blvd., Suite 600
Santa Monica, CA 90403

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 28, 1989, at Sacramento, California.

Annette Bridges
(Type or print name)

(Signature)