STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL-AMERICAN FEDERATION OF TEACHERS, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. LA-CE-1103-H PERB Decision No. 2398-H November 17, 2014

Appearances: Leonard Carder by Matthew D. Ross, Attorney, for University Council-American Federation of Teachers; Paul, Plevin, Sullivan & Connaughton by Sandra L. McDonough, Attorney, for Regents of the University of California.

Before Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by University Council-American Federation of Teachers (UC-AFT or Union) to a proposed decision by a PERB administrative law judge (ALJ). The complaint alleged that the Regents of the University of California (UC or University) violated section 3571(a) and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by misclassifying part-time instructors as adjunct professors instead of lecturers, thereby repudiating a negotiated agreement regarding classification of bargaining unit members and unilaterally removing bargaining unit work.

The complaint also alleged that UC violated its duty to bargain in good faith by refusing to provide information necessary and relevant to the union in the course of its

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

collective bargaining and representational functions, viz., a list of the non-teaching duties of adjunct professors at University of California, Los Angeles (UCLA) Law School (Law School) and other documents pertaining to hiring decisions made by the UCLA Law School.

The ALJ dismissed the allegations concerning UC's unilateral change and removal of bargaining-unit work, holding that they were untimely filed, and that UC-AFT had not satisfied its burden to prove any exception to the statute of limitations (in this case, equitable tolling or continuing violation). Having so concluded, the ALJ did not reach the merits of the complaint concerning alleged unilateral change in the classification of unit members or alleged transfer of unit work. He did, however, find that the allegations regarding UC's refusal to provide information were timely and concluded that UC violated HEERA by refusing to provide requested information.

UC-AFT excepted to the ALJ's dismissal of the allegations regarding misclassifications of the instructors and removal of bargaining unit work. UC did not except to the ALJ's finding that it violated HEERA by refusing to provide information to UC-AFT.

The Board has reviewed the entire record in this case, including the complaint, the hearing record, the parties' post-hearing briefs and responses thereto, the ALJ's findings of fact and conclusions of law, UC-AFT's exceptions and UC's response thereto. Based on this review, we conclude that the ALJ's partial dismissal based on timeliness grounds should be reversed in light of the Board's decision in *Los Angeles Unified School District* (2014) PERB Decision No. 2359 (*Brown*), which held, in relevant part, that the statute of limitations is an affirmative defense and that a respondent to an unfair practice complaint carries the burden of proving that the complaint is not timely.

Because the parties litigated the merits of the complaint and made an adequate record on which to determine the merits, we do so here.[2] For reasons described more fully below, we conclude UC violated HEERA by repudiating the agreement between it and UC-AFT regarding the classification of lecturers and adjunct professors. However, we dismiss allegations that UC unlawfully transferred bargaining unit work. We also affirm the ALJ's determination that UC failed to adequately respond to UC-AFT's information request, and order it to do so.

PROCEDURAL HISTORY

UC-AFT represents lecturers, but not adjunct professors (adjuncts). This dispute over the classification of instructors at the Law School originated in March 2009 when the Union filed a grievance alleging: "UCLA School of Law has incorrectly placed faculty into . . . [adjunct faculty codes.] These adjunct faculty should be in assigned UC-AFT bargaining unit title codes." The history of this grievance is described in greater detail, *infra*.

By January 2010, UC-AFT withdrew its grievance. On May 13, 2010, it filed this unfair practice charge alleging that UC abandoned an agreed-upon policy intended to protect bargaining unit work by instructing University officials to refrain from using adjunct appointments to perform lecturer duties. This agreement, referred to as the Switkes Letter, requires adjuncts to be engaged in some level of research and University and public service, in addition to their teaching duties, according to the UC-AFT. The charge alleged that by classifying individuals as adjuncts when they did the same work as lecturers, UC had unilaterally changed the policy articulated in the Switkes Letter in violation of HEERA section 3571(c).

PERB's Office of the General Counsel issued a complaint alleging that on or about January 1, 2010, the University changed the policy embodied in the Switkes Letter when it

[2] PERB Regulation 32320(a)(1) authorizes the Board to issue a decision based upon the record of the hearing.

appointed individuals as adjuncts who did not meet the duties/criteria specified in section 280-4 of the Academic Personnel Manual (APM), a University policy manual not negotiated with UC-AFT, and in the Switkes Letter. The complaint also alleged that the same conduct unilaterally removed bargaining unit work (teaching-only) from lecturers and gave it to adjuncts.

An informal conference was held on April 1, 2011, but the case was not settled. A formal hearing was held on February 27-29, and March 1-2, 2012, during which the ALJ granted UC-AFT's motion to amend the complaint to allege that the alleged violations occurred six months before the grievance was filed, or September 9, 2008. The proposed decision issued on September 20, 2012, and UC-AFT filed timely exceptions on November 8, 2012. UC filed its response to those exceptions on December 24, 2012.

FACTUAL SUMMARY

UC-AFT represents Unit 18 at the University of California, which is composed of all non-academic senate instructional employees, including approximately 3,000 lecturers. Lecturers are considered a teaching-only classification, in that they are not expected to engage in academic research as part of their job with UC.[3] UC's academic policies covering adjuncts, who are not in the bargaining unit, include an expectation that adjuncts will engage in some research and University and public service, in addition to teaching. The distinction between these two classifications had been a matter of dispute between UC-AFT and UC for some time prior to the events in this case. Negotiations over the issue occupied most of three years and resulted in an agreement in 2003. Relevant portions of the parties' agreements are set forth below.

[3] See *Unit Determination for Professional Non-Academic Senate Instructional and Research Employees of the University of California* (1982) PERB Decision No. 270-H, pp. 9-10, noting that lecturers generally have no research responsibility.

The Memorandum of Understanding (MOU)

The parties' MOU provides, in pertinent part:

ARTICLE 5

A. GENERAL

This article provides a general description of the duties that correspond to the titles identified in Article 1, Recognition. The definitions are for purposes of illustration and not limitation, and are not full descriptions of all duties and responsibilities assigned to members of the bargaining unit during the course of their employment. No appointees to these titles are members of the Academic Senate. . . .

B. DEFINITIONS

1. The title Lecturer, whether used as an only title or as an additional title, shall be assigned to a professionally qualified appointee not under consideration for appointment in the Professional series (in contrast to the usual expectation of Acting Appointees) whose services are contracted for certain teaching duties.

C. The term "NSF or instructional faculty" shall be used throughout this MOU to refer to all instructional faculty and non-faculty employees within the unit. The use of the term "NSF or instructional faculty" shall not be understood to alter in any way the definition of the term "faculty" as used outside of the MOU, including in APM [Academic Personnel Manual] 110 and in reference to the Academic Senate.

D. In reviewing claims that an individual has been misclassified within the unit, or that a member of the unit has been assigned duties inappropriate for the position, an arbitrator shall interpret the above descriptions in the light of generally accepted normal duties associated with the position.

E. Claims that an NSF has been incorrectly appointed to a non-unit title shall be pursued solely through the Public Employment Relations Board. [emphasis added.]

With respect to this Section E, the parties jointly prepared a Contract Administration Manual (CAM) that was intended to be a guide for interpreting the MOU. It provides an interpretive gloss on this section as follows:

> Claims of improper classification should initially be brought to the University's attention through informal discussions or the grievance process. If the parties cannot resolve this issue(s), the AFT's mechanism to challenge the University's use of a non-NSF titles [sic] to teach is through PERB.[4]

The Academic Personnel Manual

Another document relevant to this dispute is the APM, a University policy manual not negotiated with AFT. It provides, in relevant part, with respect to adjuncts:

> APM 280-4:
>
> Titles in this series may be assigned (1) to individuals who are predominantly engaged in research or other creative work and who participate in teaching, or (2) to individuals who contribute primarily to teaching and have a limited responsibility for research or other creative work; these individuals may be professional practitioners of appropriate distinction. Appointees with titles in this series also engage in University and public service consistent with their assignments.

[Emphasis added.] APM 280-10, regarding criteria for selection and advancement of adjuncts, reiterates the research and service expectations. It provides, in relevant part:

> A candidate for appointment or advancement in this series [Adjunct Professor] shall be judged by the four criteria specified below. Evaluation of the candidate with respect to these criteria shall take appropriately into account the nature of the University assignment of duties and responsibilities and shall adjust accordingly the emphasis to be placed on each of the criteria. For example, a candidate may have a heavy workload in research and a relatively light workload in teaching.
>
> The four criteria are:

[4] UC objected to the CAM being introduced into evidence based on testimony by its witness that the parties agreed it would not be admissible in evidence. The ALJ implicitly overruled this objection by referring to the CAM in his decision. UC did not except to this.

a. Teaching

b. Research and creative work

c. Professional competence and activity

d. University and public service

APM 280-16, establishes certain restrictions regarding appointment of adjuncts. It provides, in relevant part:

> a. When participation in teaching is less than one course a year (or equivalent), the appointee should be considered for transfer to another academic title.
>
> Professional Researchers who teach less than one course a year, or equivalent, on a regular basis should hold a Lecturer title in conjunction with the research title. Individuals who are primarily researchers and who teach regularly at least one course a year (or equivalent) should be appointed in the Adjunct Professor series for their whole appointment. Clinical teaching may satisfy the teaching requirement.
>
> For appointments in which teaching is the main activity, it should be demonstrated clearly before appointment to the Adjunct Professor series that a "teaching only title" such as Lecturer is not appropriate (e.g., a faculty member who also has clinical responsibilities). If, during an appointment in the Adjunct Professor series, research ceases to be part of the appointee's duties, the individual should be considered for transfer to another academic title.

[Emphasis added.]

APM 283-20, "Conditions of Employment" for lecturers provides, in relevant part:

> a. A Lecturer or Senior Lecturer may teach courses of any grade.
>
> b. This appointment will not imply the responsibility of engaging in research; but if the appointee desires to do so and the department considers the appointee competent for such work, it may provide the appropriate facilities.
>
> c. In view of the limited responsibilities in areas other than teaching, a Lecturer or Senior Lecturer normally will be assigned

> a heavier instructional load (relative to full-time-equivalent service) than that normally given to an appointee in the professorial series.

[Emphasis added.]

The Switkes Letter

In 2003, the parties concluded negotiations for a successor agreement, believing they had settled the long-standing dispute over the boundaries between lecturers and adjuncts. UC-AFT considered obtaining limits on the appointments of adjuncts to be a critical part of establishing some job security for the lecturers. In the Union's view, adjuncts were being used to do lecturer work. Responding to the Union's interest in ensuring adjunct positions were only assigned if the responsibilities of the position were substantially similar to the responsibilities assigned to professors, UC was willing to reiterate that adjuncts must engage in research and University and community service, and that adjuncts should not be used in lieu of lecturers. UC proposed in May 2002 that Ellen Switkes, the assistant vice president for academic advancement for the office of the president, send a letter to the academic vice-chancellors and all UC campuses clarifying the distinctions between adjuncts and lecturers. There was further negotiation about various terms of the Switkes Letter, including discussion over the concept of what constituted individuals of "appropriate distinction."

The parties did not reach agreement until a year later, and circulation of the final negotiated version of the Switkes Letter was a critical part of the settlement of the MOU. This letter provides, in pertinent part:

> During the recently concluded Unit 18 negotiations between the University and the UC-AFT, the parties engaged in discussions regarding the University's use of Adjunct and Visiting Professor appointments. I write to affirm the University policy definitions for such titles set forth in the Academic Personnel Manual.
>
> APM – 280-4, Adjunct Professor Series, provides: Titles in this series may be assigned (1) to individuals who are predominately

> engaged in research or other creative work and who participate in teaching, or (2) to individuals who contribute primarily to teaching and have limited responsibility for research or other creative work, so long as these individuals are professional practitioners of appropriate distinction. Appointees with titles in this series also engage in University and public service consistent with their assignments.[5]
>
> . . . . APM – 220-4, Professor Series, provides: The professorial series is used for appointees who are members of the faculty of an academic or professional college or school of the University who have instructional as well as research, University, and public service responsibilities.
>
> Similar to the expectations placed on Academic Senate faculty, Adjunct and Visiting Professor appointees are expected to perform teaching, research and service that extend beyond class-related advising. As such, their annual teaching loads should not be the same as Lecturers in the same department. Adjunct and Visiting Professor appointments should not be used for those performing Lecturer duties.

(Switkes Ltr., Jt. Ex. V, emphasis added.)

The Grievance

In early 2009, UC-AFT began to suspect that the UC was not complying with the Switkes Letter at Law School when a Union representative learned of some faculty members with whom she was not familiar who were teaching classes, but were not on the list of Law School lecturers. The Union then requested the names from the University and title codes of everyone teaching at Law School. When the University responded on February 26, 2009, UC-AFT observed an abnormally high number of adjunct professors at Law School compared to the other University of California schools of law.

[5] It should be noted that the Switkes Letter differs from APM 280-4, which reads in pertinent part: "(2) to individuals who contribute primarily to teaching and have a limited responsibility for research or other creative work; these individuals may be professional practitioners of appropriate distinction." Unlike in the Switkes Letter, there is no conditional phrase, "so long as," in the APM.

UC-AFT filed a grievance on March 9, 2009, over what it considered the high number of adjuncts appointed at UCLA Law School. The grievance alleged: "UCLA School of Law has incorrectly placed faculty into [adjunct faculty codes]; these adjunct faculty should be in assigned UC-AFT bargaining unit title codes." Despite the fact that the Union conceded that it did not have sufficient information to determine whether all or any of the adjuncts were misclassified, it filed the grievance to preserve timelines.

The parties processed this grievance in accordance with the MOU, conducting a Step 1 meeting on April 23, 2009. UC denied the grievance at Step 2 on July 1, 2009 and the Union moved the grievance to Step 3 arbitration on July 27, 2009. UC asked for a Step 2 review on August 4, 2009, but according to the ALJ, the paper trail disappeared at that point. According to the testimony of Maria Elena Cortez (Cortez), UC-AFT's executive director, the grievance had been moved to arbitration by early August 2009.

At some point between August 2009 and January 2010, the parties had agreed upon an Arbitrator, Kenneth Perea, to hear this grievance. However, on January 15, 2010, UC-AFT wrote to UC withdrawing the request for arbitration, explaining that it "recognized that arbitration was not the correct forum for this matter." Article 5.E of the MOU provides that "[c]laims that an NSF has been incorrectly appointed to a non-unit title shall be pursued solely through the Public Employment Relations Board." UC did not object to the Union's withdrawal of the grievance.

UC-AFT informed UC that it intended to file a PERB charge, given the language in the MOU, but offered to delay filing for a couple of weeks so the parties could engage in settlement discussions. UC assented to this delay.

UC's Appointment Process at UCLA Law School

Over the five-to-ten-year period preceding the hearing, the Law School had more than doubled its advanced and specialized course offerings. According to a UC witness, Myra Saunders (Saunders), an associate dean at the Law School, the Law School started hiring more adjuncts in 2007, although it had always used them. The adjunct professors at issue here are hired for part-time instruction. They are legal practitioners, such as judges, senior partners in law firms, managing attorneys from public interest organizations, etc.[6]

When Law School determines its curricular needs, it reviews résumés obtained from advertising and from recommendations from faculty members, alumni and practicing attorneys. Associate Dean Saunders reviews résumés and applications to make an initial determination whether the applicant should be appointed as an adjunct or a lecturer. This process includes verifying the candidate's publications, and ascertaining information about the applicant's reputation and contributions to the profession. This information is forwarded to the Law School External Appointments Committee (Committee), which is typically composed of tenured faculty.

The Committee assesses candidates based on four factors: (1) teaching, (2) research and other creative work, (3) professional activity, and (4) University and public service. If the candidate does not meet the criteria for the adjunct series, but is otherwise a desirable candidate for some instructional position, the candidate's paperwork is processed for a lecturer position.

[6] As the ALJ noted, the dispute in this case centers primarily on the second clause of APM 280-4 and its interpretation in the Switkes Letter, viz.: "individuals who contribute primarily to teaching and have limited responsibility for research or other creative work, so long as these individuals are professional practitioners of appropriate distinction."

Recommendations for appointment of adjuncts are forwarded to the Dean of the Law School for her review and approval, and then finally reviewed by Carole Goldberg (Goldberg), vice-chancellor for academic personnel at UCLA.[7] Goldberg testified that she reviews the file developed by the Law School, including the letter that describes how a particular individual satisfies the criteria in the APM for appointment as an adjunct. Like Saunders, Goldberg explained that the research component in the APM is satisfied by part-time adjuncts when they continue "the work that they do in their distinguished practice." [R.T., vol. IV, p. 103.] The same is true for the public service and University service requirement. As Goldberg explained, because part-time adjuncts are not on campus as much as full-time professors, part-time adjuncts would not be appointed to serve on University committees.

Despite Goldberg's role as the final decision-maker for academic appointments at the Law School, she was not familiar with the Switkes Letter. When asked, without reference to "the Switkes letter," if she was generally familiar with a negotiated agreement pertaining to the hiring of adjuncts and lecturers, she replied, "I work with the APM and the CALL[8] as the authoritative documents. . . .". Another UC witness, Esther Hamil, associate director of the UCLA academic personnel office, was familiar with the Switkes Letter, but in her view, the letter did nothing to alter or clarify the APM with regard to adjuncts and lecturers. In her view, the Switkes Letter merely reiterates the APM.

When asked what the difference was between adjunct professors and lecturers, Goldberg said that a lecturer was expected to be exclusively focused on teaching. But the adjunct would be someone who is not just a skilled instructor, but one who has "achieved a

[7] Goldberg is also the Jonathan D. Varat distinguished professor of law at the Law School.

[8] The UCLA CALL, to which Goldberg referred, is the campus policies and procedures manual, which supplements the University's APM but does not incorporate the Switkes Letter.

certain degree of recognition and distinction in practice, and was continuing to do that on an ongoing basis." [R.T., vol. IV, p. 121.] This testimony sums up UC's position: it appoints the most distinguished, experienced applicants for part-time instructional positions in the Law School as adjunct professors. Others receive appointments as lecturers.

Implementation of the Appointments Process

According to documents provided by UC to the Union, the Law School employed between 28 and 30 part-time adjunct professors per year since the 2008-2009 academic year. The vast majority of these appointments are "by-agreement" appointments, meaning that they are not assigned an appointment percentage, such as 25 percent of a full time equivalent.[9] Nearly all of the part-time adjunct professors teach only one class per year, and they understood their duties to merely teach the single class for which they were hired. None of the adjuncts who testified at the administrative hearing were ever informed by UC that they were expected to perform any duties for UC beyond teaching and holding office hours. Nor were adjuncts who perform community service outside the University, such as sitting on various boards, ever informed by UC that they were expected to continue such service as part of their responsibilities as adjuncts.

The evidence showed a certain level of randomness in who was designated as an adjunct. Numerous adjuncts had few or no publications. (See CP Exh. 12; Resp. Exh. H.) There were a few instances in which two instructors taught the same class, either as team teachers or teaching separate classes on the same subject matter, but one was classified as an adjunct and the other as a lecturer. For example, Victor Jih, a partner at the eminent firm of O'Melveny and Myers (O'Melveny and Myers), who had extensive appellate experience, was hired as a lecturer to teach Ninth Circuit appellate advocacy. This same class was also taught

[9] According to the Union, it is the part-time "by-agreement" adjuncts at the Law School that have been mis-classified and should be considered lecturers.

by Charles Lifland (Lifland), another partner at O'Melveny and Myers. Both performed the same duties, lecturing and working with students on the appellate cases they were assigned. Yet Lifland was classified as an adjunct.

The same situation occurred with the Law School's immigration clinic, which was team taught by Judy London (London) and Kris Jackson (Jackson), both attorneys with Public Counsel, a public interest law firm. They both performed the same duties, and neither was assigned any additional responsibilities for research or service as part of their academic appointment. Yet London, who was the directing attorney at Public Counsel, was assigned as an adjunct, and Jackson was hired as a lecturer.

Information Requests

At the Step 1 grievance meeting, UC-AFT asked the University to provide it with a list of duties assigned to the adjuncts and to explain the process that the Law School used to decide who would be assigned as an adjunct. UC responded simply that it followed the APM. The Union followed up this request with a detailed written request on May 8, 2009, which sought, among other things, the names of adjunct professors at the Law School, funding sources of those positions, guidelines and policies relied on by the Law School for determining whether to classify the individual as a lecturer or adjunct, the specific teaching assignments of adjuncts, and the non-teaching duties and areas of research assigned to each adjunct.

On June 29, 2009, UC responded to this request, providing some, but not all, of the requested information. Specifically, it failed to respond to the request for the adjuncts' non-teaching duties and research areas, repeating the response it gave to the Union at the Step 1 grievance meeting: the non-teaching duties were assigned in accordance with the APM.

UC-AFT renewed this information request on March 30, 2010, two months before this unfair practice charge was filed, and UC's response was similar to its previous response. It

provided the names of the adjuncts appointed for that academic year, but did not provide copies of appointment letters or a list of non-teaching duties assigned to adjuncts, relying again on the APM. UC indicated that all adjuncts were expected to meet the research and creative work criteria listed in the APM 280-10-b. UC also asserted that it had no duty to provide the information sought by UC-AFT, because it did not represent adjuncts.

PROPOSED DECISION

The ALJ held that UC-AFT's allegations of unilateral change and transfer of bargaining-unit work were barred by HEERA's six-month statute of limitations. Relying on *Long Beach Community College District* (2009) PERB Decision No. 2002 (*Long Beach),* he held that UC-AFT carried the burden of proving an exception to the statute of limitations (equitable tolling of the limitations period or continuing violation), and that the Union had not met its burden of proving either exception.[10] The ALJ therefore dismissed these allegations as untimely. UC-AFT filed its unfair practice charge on May 13, 2010, four months after it withdrew its request for arbitration.

Based on his reading of the parties' MOU, Article 5.E and the CAM,[11] the ALJ concluded that the three-step grievance process contained in Article 32 of the MOU was appropriately utilized by the Union in its attempt to informally resolve the grievance over

[10] Noting that PERB has applied the doctrine of tolling under HEERA when the parties' dispute resolution procedure ends in binding arbitration, (*Trustees of the California State University (San Jose)* (2009) PERB Decision No. 2032-H (*Trustees*)), the ALJ ruled that tolling under HEERA should apply even if the parties are utilizing a non-binding dispute resolution procedure, citing to *Long Beach, supra,* PERB Decision No. 2002.

[11] The CAM adds the following footnote to Article 5.E:

> Claims of improper classification should initially be brought to the University's attention through informal discussions or the grievance process. If the parties cannot resolve the issue(s), the AFT's mechanism to challenge the University's use of a non-NSF titles [*sic*] to teach is through PERB.

incorrect assignment of adjunct professors. However, once the grievance steps were exhausted and the dispute became ripe for arbitration, this particular dispute was no longer covered by the MOU, the ALJ concluded. Article 33 provides for binding arbitration and did not apply to disputes over incorrect appointments, because Article 33 is no longer the "grievance process" in the ALJ's view. Because Article 5. E diverts to PERB claims of incorrect appointments to non-unit titles, the tolling period ends when the grievance moved to arbitration, reasoned the ALJ. He found nothing in the record showing when the case was moved to arbitration, and deemed that because the Union has the burden of establishing facts that would support equitable tolling but failed to do so, the charge was untimely.

With respect to the Union's information requests, the ALJ concluded that the unfair practice charge regarding UC's refusal to provide UC-AFT with the list of the non-teaching duties for adjuncts at UCLA Law School was timely and that UC had violated HEERA by refusing to provide this information.[12]

POSITIONS OF THE PARTIES

UC-AFT excepted to the ALJ's dismissal of the unilateral change and removal of bargaining work allegations as untimely. It asserts that the ALJ misapplied PERB's equitable tolling doctrine by adding a new requirement to the first prong of the equitable tolling test, i.e., that the negotiated agreement must be written to cover the particular dispute in question. UC-AFT argues that the limitations period was tolled for the entire time the grievance was pending, including when it was awaiting arbitration, because the parties were utilizing the dispute resolution procedure in the MOU and had agreed to arbitrate the dispute under the MOU.

[12] UC did not except to this finding and conclusion.

UC-AFT also urges that the doctrine of continuing violation applies in this case, so that each time UC misclassified a non-Senate faculty as an adjunct instead of a lecturer, the statute of limitations began anew.

UC responds that the ALJ correctly applied PERB's equitable tolling doctrine in concluding the complaint should not be tolled. Since the terms of the parties' CBA did not provide for arbitration of disputes over misclassification, instead sending those disputes to PERB, UC asserts that the ALJ correctly concluded that equitable tolling did not apply to these facts. UC also urges the Board to support the ALJ's conclusion that UC-AFT had not met its burden to show that the hiring and classification of each new adjunct professor constituted a continuing violation.

Because we decide this case on the merits, we summarize here the parties' arguments to the ALJ.

UC-AFT contends that UC unilaterally changed the terms of the Switkes Letter by not assigning adjuncts any responsibility for research or service. According to the Union, research and service requirements are what distinguishes adjuncts from lecturers, and the lack of those requirements for adjuncts shows that UC has repudiated the terms of the Switkes Letter. Adjuncts should not be hired to perform lecturer duties, and when the adjuncts perform only teaching and no research or service, they are performing the same duties as lecturers, according to UC-AFT. UC has made adjunct appointments based on prestige, instead of duties to be performed for the University, a consideration that UC-AFT was not notified of and not given an opportunity to negotiate over. Thus, UC has unilaterally changed agreed-upon terms and conditions of employment in violation of HEERA section 3571(c), according to UC-AFT.

UC asserts that there has been no change in its appointment practices at the Law School. Nothing changed in the hiring procedure at the Law School after the Switkes Letter was negotiated, as it simply ratified the practices UC already used, according to UC.

The APM and the Switkes Letter, according to UC, both permit the appointment of adjuncts if they are of "appropriate distinction." If they are of such distinction, they have limited responsibility for research and University and public service. Moreover, according to UC, the research and service the adjuncts perform and have performed as part of their distinguished careers, satisfy the research and service requirements prescribed in the APM and Switkes Letter. Any interference with UC's right to appoint individuals to the adjunct series interferes with academic freedom provided to the University and faculty by the First Amendment, according to UC. It asserts, "the Regents' appointment of Adjuncts, and not unduly constraining Adjuncts with regard to how they teach, research, or draft creative work, or perform University or public service is proper and lawful, and cannot be disturbed in this proceeding." (UC Post-Hearing Brief to ALJ, p. 2.)

UC further asserts that PERB does not have jurisdiction over this dispute because it is essentially an allegation that the MOU has been breached. Therefore, HEERA section 3563.2, which denies PERB authority to enforce agreements between the parties, disables PERB from adjudicating this dispute, especially in the absence of an unfair practice.

Finally, UC complains of the fact that the ALJ granted UC-AFT's motion to amend the complaint to move the date of the alleged violation from January 2010 to September 2008. This motion was granted after UC-AFT presented its case in chief, and UC claims that it was prejudiced by the ruling because September 2008 was beyond the statute of limitations for a charge filed in May 2010.

DISCUSSION

Timeliness of the Charge

PERB has applied the doctrine of equitable tolling under both the Educational Employment Relations Act (EERA) and HEERA under certain circumstances. In *Long Beach, supra,* PERB Decision No. 2002, the Board held that EERA's statute of limitations would be tolled to permit the parties to utilize a non-binding dispute resolution procedure, explaining:

> The health and stability of a collective bargaining relationship is better maintained by allowing the parties to resolve a dispute through negotiated, albeit non-binding, dispute resolution procedures than through an adversarial proceeding before PERB. Accordingly, equitable tolling can easily be reconciled with EERA's fundamental purpose of promoting harmonious labor relations.

(Long Beach, supra, PERB Decision No. 2002, p. 14.)

Thus, the statute of limitations will be tolled when all of the following factors are present:

(1) the procedure is contained in a written agreement negotiated by the parties;

(2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge;

(3) the charging party reasonably and in good faith pursues the procedure; and

(4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent.

(*Long Beach, supra,* PERB Decision No. 2002, p. 15.)

In *Trustees, supra,* PERB Decision No. 2032-H, PERB adopted the same test for tolling under HEERA "when the negotiated dispute resolution procedure ends in binding arbitration."[13] We note that in *Trustees*, PERB specifically did not make a determination as to whether there would be tolling under HEERA "where a negotiated dispute resolution

[13] Unlike in EERA, there is no statutorily-prescribed tolling for negotiated binding dispute resolution procedures in HEERA. (Compare EERA section 3541.5(a)(2) with HEERA section 3563.2.)

procedure does not end in binding arbitration." However, we affirm the ALJ's conclusion that for the legal and policy reasons fully discussed in *Long Beach*, *supra*, PERB Decision No. 2002 and *Trustees*, tolling under HEERA should apply even if the parties are utilizing a non-binding dispute resolution procedure.

Long Beach, supra, PERB Decision No. 2002 also held that the charging party has the burden of proving the elements of equitable tolling. This portion of *Long Beach* was overruled by *Brown*, *supra*, PERB Decision No. 2359, wherein the Board held that after the issuance of a complaint by the Office of the General Counsel, assertion of the statute of limitations is an affirmative defense and that the respondent has the burden of proving the unfair practice charge was untimely. Thus, "in satisfying its burden of proof on the timeliness issue where a grievance has been filed, the respondent must prove that the charge was filed outside the six-month limitations period and that the tolling exception does not apply." (*Brown,* p. 3.)

Therefore, we overturn the ALJ's ruling that placed the burden of proving the element of equitable tolling on UC-AFT. Under *Brown*, *supra*, PERB Decision No. 2359, the burden of proving that the complaint was untimely and that an exception to the statute of limitations does not apply rests with UC. In *Brown*, the Board ordered the case remanded to allow the respondent to present evidence in support of its affirmative defense, because the record was devoid of facts that would enable the Board to determine whether equitable tolling should apply in that case.

However, the factual differences between *Brown*, *supra*, PERB Decision No. 2359 and the current matter compel a different course of action. In *Brown*, "The determination of the point in time at which the parties exhausted the grievance machinery is the decisive issue in this case." (*Brown*, p. 11.) Since that "point in time" had not been established in the record in *Brown*, the Board remanded the case back to the ALJ to receive evidence on this key question.

In contrast to *Brown*, *supra*, PERB Decision No. 2359, the record in the present case indicates, without dispute, the point in time at which the parties exhausted the grievance/ arbitration machinery—on January 15, 2010, when UC-AFT withdrew its grievance from arbitration. Left undetermined by the ALJ was the date the grievance was advanced to the Article 33 arbitration level. But the UC-AFT Executive Director, Cortez, testified that by August 4, 2009, UC-AFT had already appealed the grievance to arbitration. (R.T., vol. III, 81-82.)

However, the exact date on which the parties moved the grievance to the arbitration procedure is irrelevant to determining the equitable tolling period. Regardless of whether the dispute was covered under the Article 33 arbitration provision, UC never objected to arbitration of the dispute or challenged the subject-matter arbitrability of the grievance. From this we can conclude that from March 9, 2009, when the grievance was filed, until January 15, 2010, when the Union withdrew the grievance from arbitration, the parties agreed to utilize the MOU dispute resolution procedure, including arbitration, to resolve UC-AFT's claim that UC had misclassified adjunct professors at the Law School.

Under these circumstances, we conclude that equitable tolling applies and the statute of limitations is suspended from March 9, 2009 until January 15, 2010. UC acquiesced in using the MOU, including its arbitration provisions, to resolve this dispute.

Applying the *Long Beach* elements of equitable tolling, we find, contrary to the ALJ, that they have been met in this case. First, the procedure is contained in the parties' MOU and further elucidated by the CAM, a jointly prepared guidance which states that claims of improper classification should be brought to the University's attention through the grievance process. We disagree with the ALJ's overly formalistic finding that because the arbitration procedure was in a different article in the MOU, equitable tolling ended when the grievance

was moved to arbitration. Arbitration is the end stage of the grievance continuum, regardless of where it appears in the MOU. This is especially true in this case, where the University raised no objections to the substantive arbitrability of the dispute. Regardless of the arbitrability of misclassification disputes, the parties in this case initially agreed to arbitrate UC-AFT's claim regarding misclassification of adjuncts. Nothing prevents parties to collective bargaining agreements from voluntarily agreeing to arbitrate matters that may otherwise not be subject to an arbitration clause.

Second, the parties used the grievance procedure to resolve the same dispute that is the subject of the unfair practice charge, i.e., the claim that UC was misclassifying part-time instructors as adjuncts when they were performing lecturer duties.

The third element, good faith pursuit of the procedure by the charging party, is evident from the Union's filing of the grievance almost as soon as it received some documentary indication that the Law School was appointing what the Union considered to be an abnormally large number of adjuncts. UC-AFT also diligently pursued its requests for information it believed was necessary to prevail in the grievance, and continued to move the grievance to the next steps when it believed UC was not responding quickly enough.

Tolling would not frustrate the purpose of the statute of limitations because UC could not be surprised or prejudiced by UC-AFT's pursuit of the unfair practice charge. UC was on notice since March, 2009, when the grievance was initially filed, that UC-AFT believed adjuncts had been misclassified. Between March 2009 and January 2010, UC-AFT did nothing to lull UC into a belief that the matter had been resolved. The Union moved the grievance through its steps, culminating in its demand that the matter be submitted to arbitration in early August 2009.[14] When UC-AFT withdrew its arbitration request in January 2010, it informed

[14] UC did not object to the grievance being moved to arbitration.

UC that it intended to file an unfair practice charge. For these reasons, we conclude that applying the doctrine of equitable tolling in this case would not cause surprise to UC. Neither would UC be prejudiced by our ruling, because it was fully aware of the Union's claims throughout the time between the filing of the grievance and the filing of this unfair practice charge.[15] Under these circumstances, evidence is not likely to be lost or destroyed, and UC was not likely to change its practices in detrimental reliance on any conduct by UC-AFT.

We hold that the equitable tolling period extended from March 9, 2009, the date UC-AFT filed its grievance until January 15, 2010, when UC-AFT withdrew the grievance from the contractual arbitration procedure (for a total of slightly more than 10 months). When we consider the period of time between UC-AFT's February 26, 2009, discovery of the unfair practice and the May 13, 2010 filing of the charge (a total of 14 ½ months), and subtract the 10-month tolling period, we find a 4 ½ month net period of time, well within the six-month statute of limitations period.[16]

In addition, we conclude that the University is also equitably estopped from asserting the statute of limitations defense in this case. See *San Dieguito Union High School District* (1982) PERB Decision No. 194, p. 15:

> The equitable doctrine of estoppel has been applied to deprive a defendant of the statute of limitations defense because of his own

---

[15] UC objected to the ALJ's granting the Union's motion to amend the complaint to encompass UC's actions from six months prior to the filing of the grievance, i.e., to September 2008. Because we conclude that the statute of limitations was tolled between the time the grievance was filed and when the UC-AFT withdrew its request for arbitration, it is correct to consider actions that occurred within six months of the grievance filing. UC was not prejudiced by this ruling because it had ample notice of the Union's claims from March 2009 onwards.

[16] We need not consider whether the nine-day period between UC-AFT's withdrawal of the grievance and parties' agreed-upon delay of approximately twelve days before UC-UFT filed its PERB charge should be included in the equitable tolling period, since the charge is timely even without including that twelve-day period.

> objectionable conduct. However, estoppel is applied in situations where the claimant has relied, to his/her detriment, on the representations or conduct of the other party.

UC's acquiescence to UC-AFT's pursuit of the grievance through the arbitration procedure induced UC-AFT to rely to its own detriment on UC's implicit representation that arbitration was the proper avenue for resolving the underlying dispute. UC may not now claim that UC-AFT's utilization of the incorrect grievance resolution procedure deprives it of the protections of equitable tolling. (See also, *People v. Accredited Surety and Casualty Company, Inc.* (2013) 220 Cal.App.4th 1137, 1150 ["There is substantial authority for the proposition that a party who has invoked or consented to the exercise of jurisdiction beyond the court's authority may be precluded from challenging it afterward, even on a direct attack by appeal. [Citation omitted.] Failure to object may be sufficient to indicate consent"]; *Bel Mar Estates v. California Coastal Com.* (1981) 115 Cal.App.3d 936, 940 ["A party cannot sit idly by and permit action to be taken and later say that it had not consented"].)

Because we hold as a matter of law that UC is estopped from asserting a statute of limitations defense in this circumstance, and because the facts necessary to assess the elements of equitable tolling were in the record, we need not remand the matter to the Division of Administrative Law to re-open the record. Neither do we need to address UC-AFT's claim that its filing is excused under the continuing violation doctrine, as we conclude the charge was timely filed for the reasons discussed.

Transfer of Bargaining Unit Work

The complaint alleged that UC impermissibly transferred unit work. To prevail on a claim of unilateral transfer of unit work where the duties overlap between unit and non-unit employees, the charging party must show that duties were transferred from unit employees to others. As the Board said in *Eureka City School District* (1985) PERB Decision No. 481:

> In our view, in order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed exclusively by unit employees. However, where, as here, unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty to negotiate in good faith merely by increasing the quantity of work which nonunit employees perform and decreasing the quantity of work which unit employees perform.

(*Id.* at p. 15; emphasis in original.)

(See also *Calistoga Joint Unified School District* (1989) PERB Decision No. 744 [unilateral transfer found where duties that were performed exclusively by classified employee (noon duty supervision) were eliminated and given to certificated employee]; *Desert Sands Unified School District* (2010) PERB Decision No. 2092 [employer obligated to negotiate transfer of duties that overlapped between positions when it laid off all of the employees in one of the classifications, thereby satisfying the first part of *Eureka, supra,* PERB Decision No. 481—unit employees ceased performing duties they had previously performed]; *City of Escondido* (2013) PERB Decision No. 2311; *City of Sacramento* (2013) PERB Decision No. 2351.)

In the present matter, the bargaining unit work in question is teaching, which is assigned to both bargaining unit lecturers and non-bargaining unit adjuncts. Lecturers and adjuncts have "traditionally had overlapping duties." The record fails to show that the lecturers at the Law School were laid off or had their hours reduced. Thus, the first part of the *Eureka* test — "unit employees cease performing duties that they previously performed" — has not been satisfied. At the most, UC has "merely . . . increase[ed] the quantity of work which [adjuncts] perform and decrease[ed] the quantity of work which [lecturers] perform." (*Eureka, supra,* PERB Decision No. 481, p. 15.) The Union has not proven that the adjuncts are now performing duties that were previously exclusively performed by unit employees. On this

basis and under our precedents, we dismiss the claim that there has been a unilateral transfer of unit work.

This conclusion, however, does not address whether UC unilaterally repudiated an agreement with UC-AFT concerning the classification of bargaining unit positions. We turn now to that question.

Unilateral Change in Negotiated Policy

The complaint alleges that by classifying part-time instructors as adjuncts instead of lecturers when the adjuncts performed the same job as lecturers, UC repudiated the terms of the Switkes Letter, thereby unilaterally changing negotiable terms and conditions of employment.

HEERA and other statutes over which PERB has jurisdiction are designed to foster bilateral good faith negotiations. Such a policy is undermined when one party to an agreement changes or modifies its terms without the consent of the other party. Therefore, a unilateral change in established policy which represents a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a contract or evident from the parties' past practice, runs afoul of the duty to bargain in good faith. (*Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 8 (*Grant*); *Standard School District* (2005) PERB Decision No. 1775, ALJ Dec., p. 16; *Regents of the University of California* (2012) PERB Decision No. 2300-H, pp. 19-20.) [17]

[17] As the Board held in *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9:

> To prove up a unilateral change, the charging party must establish that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a

Of course, not every breach of a contract or dispute over the application of the contract violates the HEERA. For a breach of contract to rise to an unfair practice it must be a change in policy, i.e., have a generalized effect or continuing impact on terms and conditions of employment.[18] "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 omitted.] By unilaterally altering or reversing a negotiated policy, the employer effectively repudiates the agreement." (*Grant, supra,* PERB Decision No. 196, p. 9.)

In *The Regents of the University of California* (1991) PERB Decision No. 907-H (*Regents*), PERB considered whether UC's unilateral imposition of an additional term regarding security of employment for lecturers violated HEERA. In that case, the terms of the MOU provided that after six years of employment, lecturers would be entitled to additional three-year appointments if there was an instructional need and the individual had been evaluated as being an excellent instructor. Shortly after the MOU had been agreed to, administrators at UCLA determined that they wanted to assure that new instructors were brought into the writing program. To that end, UCLA created a set ratio of longer-term instructors to those who were appointed only for one year. The ratio was not based on criteria agreed to in the MOU, and its application had the effect of denying eligible lecturers the additional three-year appointment. PERB held that the ratio, which was not announced to or negotiated with the union, was an alteration of the clear terms of the collective bargaining agreement, and therefore violated the duty to bargain in good faith.

---

generalized effect or continuing impact on terms and conditions of employment.

[18] As noted in *Grant, supra,* PERB Decision No. 196, p. 8, PERB has the authority to resolve an unfair practice charge even if it must interpret the terms of a CBA to do so.

More recently, PERB applied the same principle in *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H (*Davis*). In that case, the Board reiterated the criteria for establishing a unilateral change to include an employer breach or alteration of the parties' written agreement that amounts to a change in policy (i.e., has a generalized effect or continuing impact) on a matter within the scope of representation. In that case, the Board interpreted a contract provision regarding transfer of unit work, found that the provision was clear and unambiguous, and determined that UC's interpretation was overly narrow and contrary to the intended meaning of the language. UC's unannounced application of its incorrect interpretation therefore constituted an unlawful repudiation of the policy contained in the MOU.

As in *Regents, supra,* PERB Decision No. 907-H and *Davis, supra,* PERB Decision No. 2101-H, we must first determine in this case the meaning of the parties' negotiated agreement embodied in the Switkes Letter. We then determine whether UC repudiated the agreement with respect to part-time instructors at the Law School. Because the terms of the Switkes Letter, taken as a whole, are not necessarily clear and unambiguous on their face, we also examine the bargaining history and other extrinsic evidence to aid in our interpretation. (See, e.g., *County of Sonoma* (2012) PERB Decision No. 2242-M, p. 16.)

There is little doubt that the purpose of the letter was to articulate the circumstances that justify appointment as an adjunct professor, and to declare that adjunct appointments should not be used for those performing lecturer duties. Lecturer duties involve teaching only, as UC imposes no requirement of lecturers to perform research (although lecturers may do so, if they choose). Nor does UC require lecturers to perform community and University service.

The text of the Switkes Letter incorporates and reiterates relevant parts of the APM, i.e., sections 280-4 (Adjunct Professor Series), 230-4 (Visiting Appointments), and 220-4

(Professor Series). Thus, by its plain terms, the Switkes Letter distinguishes adjuncts from lecturers by what their respective functions are in the University, not by the qualifications they possessed when hired. For example, it explicitly provides with respect to adjuncts: "Appointees with titles in this series [adjunct professor] also engage in University and public service consistent with their assignments." Later in the Letter, it provides: "Similar to the expectations placed on Academic Senate faculty, adjunct and visiting professor appointees are expected to perform teaching, research, and service that extend beyond class-related advising." (Emphasis added.) No distinction is made here between full-time and part-time adjuncts that would permit part-timers to be relieved of the research and service portion of these expectations.

The final substantive sentence of the Switkes Letter explicitly directs: "Adjunct and Visiting Professor appointments should not be used for those performing Lecturer duties."

Though not specifically included in the Switkes Letter, APM 280-16, restrictions, states with regard to adjuncts, "For appointments in which teaching is the main activity, it should be demonstrated clearly before appointment to the Adjunct Professor series that a 'teaching only' title, such as Lecturer is not appropriate. (e.g. a faculty member who also has clinical responsibilities.)"

The terms of the Switkes Letter, together with the above-quoted portions of the APM, provide two concepts to guide appointment of adjuncts and lecturers. First, the University may assign adjunct professor titles to individuals who contribute primarily to teaching and have limited responsibility for research, so long as they are "professional practitioners of appropriate distinction." But by the terms of the Switkes Letter, these appointees are also expected to engage in research and University and public service.

Second, lecturer is the default classification for instructors who perform only teaching duties. Adjunct appointments should not be used for those performing lecturer duties, i.e., teaching-only duties. This conclusion is supported by the APM-280-16 quoted above, which clearly directs that adjunct appointments should not be used where teaching is the main activity.

Evidence of the bargaining history leading to agreement on the Switkes Letter supports this interpretation. Myron Okada (Okada), a director of academic personnel policy in the UC Office of the President, was a member of UC's bargaining team that negotiated the Switkes Letter. He reported to Switkes herself. Okada testified that the Switkes Letter intended to emphasize two things: (1) that anyone holding an adjunct professor title would have responsibilities in teaching, research and service, and (2) the teaching load of an adjunct would be different from a lecturer's teaching load.

When asked to recount what was said at the bargaining table concerning the last sentence of the Switkes Letter ("Adjunct and visiting professor appointments should not be used for those performing lecturer duties"), Okada explained that if individuals were being hired to simply perform teaching duties, "it was always our requirement that they be given a lecturer title. . . . If you were going to use a professor title, then the expectation is they would be assigned responsibilities in teaching, research and service." [R.T., vol. II, p. 128.]

Later, after UC-AFT filed its grievance in this case, Okada (who had moved to the Office of Labor Relations) spoke to Saunders about the grievance and expressed his concern that the adjunct title was not appropriate for part-time instructors appointed to the Law School who were not required to engage in research and service. According to Okada, Saunders defended UCLA's classification practices on the basis that the lawyers appointed as adjuncts satisfied the research and service requirements because they made presentations at conferences,

wrote journal articles, etc. In Okada's view, expressed to Saunders, that type of research was not the type of scholarly, cutting-edge research required for a professor title. Okada also expressed concern to Saunders that the part-time adjuncts who taught one or two courses could not possibly be engaged in performing the service requirement for the adjunct title.

Another witness who was at the bargaining table for UC, Patricia Price, conceded that Switkes herself offered assurance to the Union during negotiations regarding the over-classification of adjunct professors by saying, "Well, that can't happen because adjuncts are supposed to engage in research, but if you want, we'll give you a letter that will confirm that." (R.T., vol. I, p. 98.)

There was no evidence that UC ever notified adjunct professors at the Law School upon appointment that they were required or expected to engage in any research, to serve on University or department committees, or otherwise to render service to the University or to the public beyond teaching and holding office hours. According to UC, it did not need to notify adjuncts of any of these requirements because the research and service requirements mentioned in the Switkes Letter are satisfied by the adjuncts' distinguished accomplishments outside the University, the same accomplishments that justify their appointment as adjuncts pursuant to APM 280-4, as modified in the Switkes Letter. Yet this interpretation is belied by the term in the Switkes Letter that provides for a reduction in adjuncts' teaching load in recognition of the research and service requirement. As in *Regents, supra,* PERB Decision No. 907-H, the University has imposed its own reading of the Switkes Letter on its appointment process, which has resulted in the terms of that agreement being repudiated.

The University's reading of the Switkes Letter conflates the qualifications for an adjunct appointment—"appropriate distinction"—with the job requirements of the appointment, viz., teaching, research and University and public service. If the very traits that

qualified a part-time instructor to be classified as an adjunct professor, such as research of distinction, service to the profession, publication of scholarly articles, appointment to a judgeship, or other marks of professional accomplishment, are the same traits that satisfy the ongoing University requirements of research and service, the language in the Switkes Letter and APM that requires research and service of adjuncts would be surplusage.

UC's interpretation is further contradicted by the final sentence of the Switkes Letter, and by APM 280-16, both of which decree that adjunct appointments should not be used for those performing lecturer duties, i.e. teaching only.

Nor is UC's interpretation supported by the bargaining history, especially as recounted in the only testimony of a UC member of the bargaining team, Okada. The fact that one of the UCLA administrators responsible for appointing adjuncts, Goldberg, was not even familiar with the terms of the Switkes Letter adds additional support for the conclusion that UC altered the terms of the MOU by imposing its own unjustified interpretation on the parties' agreed-upon language.

We are further persuaded that this is the case by the fact that UCLA appointed far more adjuncts in relationship to lecturers than other UC law schools did. Evidence presented at the administrative hearing showed that UCLA's ratio of adjuncts to lecturers for the 2011-12 academic year was 38 adjuncts to 25 lecturers. At UC Berkeley School of Law, the ratio of adjuncts to lecturers was 12:104 for the same academic year. The law schools at UC Davis and UC Irvine had virtually no adjuncts.

We decline to pass on which instructors hired by UC since the 2008-2009 academic year are individuals of "appropriate distinction" because we do not view that as the relevant inquiry to determine whether the Law School repudiated the terms of the Switkes Letter. We conclude that the Law School did repudiate the terms because it appointed adjuncts to perform

the work reserved to lecturers. By not requiring adjuncts to engage in research and service in addition to what they did to qualify for the adjunct appointment in the first place, the Law School ignored the clear requirement that the adjunct assignment should not be used for teaching-only assignments. Instead, the Law School used the adjunct assignment as a status designation, reserving it for those applicants it believed were the most distinguished.

This was not what UC agreed to in drafting the Switkes Letter. The fact that the University does not expect adjuncts to engage in research or University and community service, other than what they do as part of their professional practice, erodes any difference between adjuncts and lecturers that the Switkes Letter intended to establish.

In sum, we conclude that the Switkes Letter was intended to direct that part-time appointments to non-Senate positions that require only teaching duties shall be classified as lecturers. By asserting that the research and service requirement are met by the adjuncts' pre-appointment professional achievements, UC conflates the concept of "individuals of appropriate distinction" with the research and service requirement, an interpretation that was not communicated to, much less agreed to by the Union.

We also reject the University's argument that its academic freedom permits it to appoint who it chooses as adjuncts and that freedom cannot be interfered with by PERB's adjudication of this case. Our decision here does not encroach on the University's exercise of its managerial discretion regarding whom to hire into its ranks of instructors. Instead, we simply find that it had agreed to a standard, in the form of the Switkes Letter, that establishes rules regarding the classification of instructors as either adjuncts or lecturers. Ordering UC to abide by the agreement it made does not interfere with its academic freedom.[19]

[19] It is noteworthy that UC never explained what interest it had in designating certain instructors as adjuncts as opposed to lecturers. No evidence was presented that it needed to

For these reasons we conclude that UC's appointment practices at UCLA School of Law during the 2008-2009 academic year and after repudiated the terms of the MOU as embodied in the Switkes Letter, thereby unilaterally changing negotiable terms and conditions of employment in violation of HEERA section 3571(c).

REMEDY

In a case in which PERB has determined that a unilateral change has occurred, the appropriate remedy is to order the party to cease and desist from implementing the change, restore the status quo as it existed before the change, and to make whole those parties and individuals injured by the change. (See, e.g., *Antelope Valley Community College District* (1979) PERB Decision No. 97; *Desert Sands Unified School District* (2004) PERB Decision No. 1682a; *Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652.)

UC-AFT urges the Board to reclassify all part-time and "by-agreement" adjuncts at the Law School as lecturers, as these instructors were assigned only teaching duties. Those adjuncts who were paid less than what they would have made as lecturers should be made whole, and those adjuncts who made more than they would have made as lecturers should be kept at the higher pay rate, according to UC-AFT. Because UC-AFT has not received dues from these mis-classified adjuncts, it asserts that UC should make it whole for the lost dues, with interest from January 17, 2009 to the present.

In the alternative, UC-AFT asserts that if PERB determines that there is a need to determine on an individual basis who is entitled to the adjunct classification, PERB should order UC to comply with the subpoenas requested by UC-AFT seeking various documents that purport to show the full range of duties required by adjuncts. The ALJ declined to enforce these subpoenas, demurring the issue for a compliance proceeding.

---

assign individuals as adjuncts in order to attract them to teach at the Law School, or that the adjunct appointment paid a higher salary, etc.

After UC produces these documents, UC-AFT urges PERB to order the parties to attempt to agree on which individuals have been properly classified as adjuncts. If the parties are unable to reach agreement, PERB should schedule further hearings to determine if a particular disputed appointment was proper.

UC contends that no remedy is appropriate because it did not violate HEERA, but in the event a violation is found, it urges that only a limited remedy be ordered. According to UC, the individuals who were misclassified as adjuncts should be assessed back dues owed to UC-AFT. Going forward, UC should be ordered to include in future adjunct's appointment letters the University's expectation regarding their duties as to teaching, research or creative work, and University or public service.

We agree with UC-AFT that the appropriate order in this case should require UC to cease and desist from its appointment practices at the Law School which repudiate the terms of the Switkes Letter.

To remedy UC's misclassification of adjuncts at the Law School, it is appropriate to order that all part-time instructors hired at the Law School between September 9, 2008 and the present who were classified as adjunct professors and who were not required to engage in research, or public or University service other than what they performed as part of their professional duties as attorneys or judges, shall be re-classified as lecturers. (*Davis, supra,* PERB Decision No. 2101-H.) Such reclassified individuals shall be paid the difference, if any, between the salaries earned as adjuncts and the salaries they would have received as lecturers, with interest at 7 percent per annum. Any adjunct who was paid above the lecturer salary scale will not suffer a loss in pay as a result of this reclassification. (*Marin Community College District* (1995) PERB Decision No. 1092, p. 10.) These individuals shall also be paid any

other benefits to which they would be entitled to under the MOU between UC-AFT and the University, with interest at the rate of 7 percent per annum.

After re-classifying the affected individuals to the lecturer series, if UC can demonstrate that particular individuals should be considered adjuncts because of duties that the Law School requires in addition to teaching, UC may re-appoint those individuals as adjuncts upon such a showing. If the parties are unable to resolve disputes concerning the placement of individuals who were appointed between September 2008 and the date of this decision, PERB will resolve such disputes in a compliance proceeding pursuant to PERB Regulation 32980.

However, as to disputes over appointments going forward, PERB will not assume jurisdiction over such matters, despite the parties' agreement in Article 5 E of the MOU. HEERA section 3563.2(b) provides:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

Having determined that by unilaterally imposing its own interpretation of the Switkes Letter, UC has unilaterally altered agreed-upon terms and conditions of employment that had a generalized effect or continuing impact, we order a remedy that potentially involves PERB in resolving disputes concerning compliance with that order.

However, future disputes between the parties over individual appointments in which UC determines that an instructor should be classified as an adjunct are not necessarily changes that have a generalized impact. Instead such individual classifications as applied to a particular individual are more accurately characterized as a violation of the MOU, i.e., a grievance.

Despite the terms of Article 5 E, the parties may not confer jurisdiction on PERB where the statute decrees that we have none. (*State of California, Department of the Youth Authority*

(1989) PERB Decision No. 749-S, pp. 7-8.) Thus, future disputes over particular classifications must be left to the parties' dispute resolution mechanisms. We therefore decline the Union's invitation to assert jurisdiction over such disputes.

UC shall remit to UC-AFT a sum equivalent to dues or agency fees, with interest at 7 percent per annum, that would have been remitted to the Union between September 9, 2008, and the present had the adjuncts at issue in this case been classified as lecturers. (*Hospitality Care Center* (1994) 314 NLRB 893, 895-896.) Contrary to UC's argument, it is not appropriate to penalize employees for the employer's unfair practice by requiring that they remit back dues.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this case, the Board reverses the proposed decision as to timeliness and finds that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(c) by repudiating terms of an agreement between it and the University Council-American Federation of Teachers (UC-AFT) by failing to classify as lectures those part-time instructors, hired by the University of California, Los Angeles (UCLA) Law School to engage in teaching-only duties and by failing to provide relevant information to UC-AFT. The above conduct also violated section 3571(a).

The University and its representatives shall:

A. CEASE AND DESIST FROM:

1. Repudiating the terms of the Switkes Letter by classifying part-time instructors at the UCLA Law School as adjunct professors when they should have been classified as lecturers.

2. Refusing to provide relevant information regarding the appointment of adjunct faculty at the UCLA Law School as requested by UC-AFT on March 30, 2010.

3. Interfering with the rights of employees in Unit 18 to form, join, and participate in the activities of the employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations.

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

1. Reclassify as lectures all part-time instructors, hired at the UCLA Law School between September 9, 2008 and the present who were hired to engage in teaching only duties.

2. Make whole for any loss in compensation and benefits, all persons who were mis-classified as adjunct professors between September 9, 2008 and the present. Such payment shall include interest at a rate of 7 percent per annum.

3. Remit to UC-AFT a sum equivalent to dues or agency fees, with interest at the rate of 7 percent per annum, that would have been remitted to UC-AFT between September 9, 2008 and the present had the adjuncts at issue in this case been classified as lecturers.

4. Provide UC-AFT with the information it requested on March 30, 2010, described in the proposed decision in this matter.

5. Within ten (10) workdays following service of this decision, post at all work locations where notices to employees in Unit 18 are customarily posted, copies of the Notice attached hereto as an Appendix, signed by an authorized agent of the University. Such posting shall be maintained for a period of at least thirty (30) consecutive workdays. The University and their representatives shall take reasonable steps to ensure that the posting Notice is not reduced in size, defaced, altered or covered by any other material. In addition to

physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the University to communicate with its employees in the bargaining unit represented by UC-AFT.

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

Members Huguenin and Banks joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-1103-H, *University Council-AFT v. Regents of the University of California*, in which all parties had the right to participate, it has been found that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq., by repudiating terms of an agreement between it and the University Council-American Federation of Teachers (UC-AFT) by failing to classify as lecturers part-time instructors hired by the University of California, Los Angeles (UCLA) Law School to engage in teaching-only duties. The above conduct violated subsections 3571(a) and (c).

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

A. CEASE AND DESIST FROM:

1. Repudiating the terms of the Switkes Letter by classifying part-time instructors at the UCLA Law School as adjunct professors when they should have been classified as lecturers.

2. Refusing to provide relevant information regarding the appointment of adjunct faculty at the UCLA Law School as requested by UC-AFT on March 30, 2010.

3. Interfering with the rights of employees in Unit 18 to form, join, and participate in the activities of the employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations.

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

1. Reclassify as lecturers all part-time instructors, hired at the UCLA Law School between September 9, 2008 and the present who were hired to engage in teaching only duties.

2. Make whole for any loss in compensation and benefits, all persons who were mis-classified as adjunct professors at the UCLA Law School between September 9, 2008 and the present. Such payment shall include interest at a rate of 7 percent per annum.

3. Remit to UC-AFT a sum equivalent to dues or agency fees, with interest at the rate of 7 percent per annum, that would have been remitted to UC-AFT between September 9, 2008 and the present had the adjuncts at issue in this case been classified as lecturers.

4. Provide UC-AFT with the information it requested on March 30, 2010.

Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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