



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD
UNFAIR PRACTICE CHARGE

DO NOT WRITE IN THIS SPACE:

Case No:

Date Filed:

INSTRUCTIONS: File the original and one copy of this charge form in the appropriate PERB regional office (see PERB Regulation 32075), with proof of service attached to each copy. Proper filing includes concurrent service and proof of service of the charge as required by PERB Regulation 32615(c). All forms are available from the regional offices or PERB's website at www.perb.ca.gov. If more space is needed for any item on this form, attach additional sheets and number items.

IS THIS AN AMENDED CHARGE?

YES

If so, Case No.

NO

1. CHARGING PARTY:

EMPLOYEE

EMPLOYEE ORGANIZATION

EMPLOYER

PUBLIC¹

a. Full name:

b. Mailing address:

c. Telephone number:

d. Name and title of
person filing charge:

Telephone number:

E-mail Address:

Fax No.:

e. Bargaining unit(s)
involved:

2. CHARGE FILED AGAINST: (mark one only)

EMPLOYEE ORGANIZATION

EMPLOYER

a. Full name:

b. Mailing address:

c. Telephone number:

d. Name and title of
agent to contact:

Telephone number:

E-mail Address:

Fax No.:

3. NAME OF EMPLOYER (Complete this section only if the charge is filed against an employee organization.)

a. Full name:

b. Mailing address:

4. APPOINTING POWER: (Complete this section only if the employer is the State of California. See Gov. Code, § 18524.)

a. Full name:

b. Mailing address:

c. Agent:

¹ An affected member of the public may only file a charge relating to an alleged public notice violation, pursuant to Government Code section 3523, 3547, 3547.5, or 3595, or Public Utilities Code section 99569.

5. GRIEVANCE PROCEDURE

Are the parties covered by an agreement containing a grievance procedure which ends in binding arbitration?

Yes _____ No _____

6. STATEMENT OF CHARGE

- a. The charging party hereby alleges that the above-named respondent is under the jurisdiction of: (check one)
 - Educational Employment Relations Act (EERA) (Gov. Code, § 3540 et seq.)
 - Ralph C. Dills Act (Gov. Code, § 3512 et seq.)
 - Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code, § 3560 et seq.)
 - Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.)
 - Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) (Pub. Utilities Code, § 99560 et seq.)
 - Trial Court Employment Protection and Governance Act (Trial Court Act) (Article 3; Gov. Code, § 71630 – 71639.5)
 - Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) (Gov. Code, § 71800 et seq.)
- b. The specific Government or Public Utilities Code section(s), or PERB regulation section(s) alleged to have been violated is/are: _____
- c. For MMBA, Trial Court Act and Court Interpreter Act cases, if applicable, the specific local rule(s) alleged to have been violated is/are **(a copy of the applicable local rule(s) MUST be attached to the charge):** _____
- d. Provide a clear and concise statement of the conduct alleged to constitute an unfair practice including, where known, the time and place of each instance of respondent’s conduct, and the name and capacity of each person involved. This must be a statement of the facts that support your claim and *not conclusions of law*. A statement of the remedy sought must also be provided. *(Use and attach additional sheets of paper if necessary.)*

DECLARATION

I declare under penalty of perjury that I have read the above charge and that the statements herein are true and complete to the best of my knowledge and belief and that this declaration was executed on _____ (Date)

at _____ (City and State)

(Type or Print Name) /s/ Andrew J. Ziaja
(Signature)

Title, if any: _____

Mailing address: _____

Telephone Number: _____ E-Mail Address: _____

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Alameda,
State of California. I am over the age of 18 years. The name and address of my
Residence or business is Leonard Carder, LLP; 1999 Harrison St., Suite 2700, Oakland,

On Sept. 9, 2019, I served the Unfair Practice Charge
(Date) *(Description of document(s))*
_____ in Case No. _____
(Description of document(s) continued) *(PERB Case No.)*

on the parties listed below by (check the applicable method(s)):

- placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;
- personal delivery;
- facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).
- electronic service (e-mail) - I served a copy of the above-listed document(s) by transmitting via electronic mail (e-mail) to the electronic service address(es) listed below on the date indicated. *(May be used only if the party being served has filed and served a notice consenting to electronic service or has electronically filed a document with the Board. See PERB Regulation 32140(b).)*

(Include here the name, address, e-mail address and/or fax number of the Respondent and/or any other parties served.)

Allison Woodall, Attny
UC General Counsel Office
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
email: Allison.Woodall@ucop.edu

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on Sept 9, 2020, at
Concord CA
(City) *(State)*

Carol Edgerton /s/CEdgeron

(Type or print name)

(Signature)

Attachment to Unfair Practice Charge

I. Introduction

Charging Party University Council – American Federation of Teachers (“UC-AFT” or “the Union”) brings this charge against Respondent Regents of the University of California (“UC” or “the University”). This charge arises from the University’s unlawful unilateral failure to make retirement contributions before implementing a supposed correction without first bargaining with the Union. The University’s inadequate correction furthermore fails to account for the market gains of which bargaining unit members were deprived, in some cases for as much as two years. The University’s actions violate HEERA, Gov. Code §§ 3571(a), (b), and (c) by interfering with employee rights, by denying UC-AFT rights guaranteed to it under HEERA, and by failing and refusing to bargain over mandatory subjects.

II. Statement of Facts

UC-AFT is the exclusive representative of two systemwide bargaining units at the University: Unit 17 (or “LX Unit”), Professional Librarians; and Unit 18 (or “IX Unit”), non-tenure-track faculty members, otherwise known as non-Senate Faculty (“NSFs”) or Lecturers. Professional Librarians total between 300 and 400 individuals. NSFs meanwhile total approximately 6,500 over the course of an academic year. This case concerns both bargaining units.

The University of California Retirement Program (“UCRP”) provides a supplemental benefit for eligible academic appointees, whereby the University makes a contribution equal to 5% of an employee’s income to that employee’s 401k-style defined-contribution account. This supplement is known as the 5% Defined Contribution Retirement Supplement (“DCRS”) in University documentation. It is in addition to the employee’s defined-benefit pension benefits under UCRP. The DCRS contribution is a benefit available to eligible UC AFT-represented Librarians in Unit 17 and Lecturers in Unit 18.

On May 5, 2020, UC Labor Relations Manager Ian Smith sent a letter to UC-AFT President Mia McIver, a true and correct copy of which is attached hereto as **Exhibit A-1** (“May 5 Letter”). Without context or much detail, the letter stated that the University discovered it had failed to make the DRCS contribution for “certain employees” including some “UC-AFT populations.” (*See* Exhibit A-1.) The University provided a spreadsheet listing the UC-AFT-represented employees who it claimed were impacted. The University also attributed its error to “an incorrect programming configuration in UCPath.” (*Ibid.*) But the University went no further in providing an explanation.

The May 5 Letter is startlingly undetailed. The University offered no description whatsoever of the “incorrect programing configuration in UCPath,” let alone a full explanation of what caused the error. With only the information in the May 5 Letter, the Union could not possibly have begun to conduct an investigation, let alone fully informed negotiations: Had the University correctly identified all impacted bargaining-unit members? Could the programming error have impacted other bargaining-unit members, or other bargaining units? Were there

patterns among the impacted employees that could indicate unlawful discrimination, for instance on the basis of membership in a protected class (e.g. marital status, age, gender, race or ethnicity) or union participation (e.g. dues deduction authorization)? Did the University correctly identify the full time period when the programming error was in effect? Was the University actually correct that its failure to make contributions was due to a UCPath programming error, or was there another cause? Could other retirement contributions have been impacted? The May 5 Letter answers none of these questions, which are only some examples of the types of issues the Union still needs to resolve with the University through bargaining.

The May 5 Letter also only vaguely stated that it had “corrected this error” and that “[r]etroactive employer contributions, including adjusted assumed earnings or losses based on the employee’s current investments or assumed Pathways fund, will be deposited into their Pension Choice DC Supplemental account.” (See Exhibit A-1.) The May 5 Letter ultimately announced the University’s unilateral “correction” as a *fait accompli*.

The May 5 Letter further included a pre-drafted letter UC intended to send to affected employees after making its unilaterally planned retroactive corrections, a true and correct copy of which is attached hereto as **Exhibit A-2**. The letter announced UC’s plan to make retroactive contributions directly to affected employees. (*Ibid.*) Purportedly, this would include “adjusted assumed earnings or losses based on [an employee’s] current investments or assumed Pathways fund,” although the Union would eventually learn that the University did not in fact do this. (See discussion of **Exhibits D and E** *infra*.) The letter concluded by directing employee questions not to the Union, but to the DC Supplemental account administrator, Fidelity, and the University’s own Retirement Administration Service Center. (*Ibid.*)

On May 11, 2020, only six days later, UC-AFT Executive Director Bill Quirk sent an RFI to UC Director of Labor Relations Peter Chester, a true and correct copy of which is attached hereto as **Exhibit B**. The RFI sought:

1. The total amount of missed DCP contributions.
2. The total amount of DCP contributions to be made in the correction process.
3. Current employment status (Active/inactive/separated).

...

4. A list of all IX and LX employees with earnings above the PEPR cap who have been appropriately receiving the 5% DCRS (i.e., no missing employer contributions).
5. A month-by-month audit of the 5% DCRS for all employees in the IX and LX bargaining units since 6/30/2017.
6. Any formulae to be used to calculate assumed or expected gains and losses.

...

- A) If this problem was caused by an incorrect configuration in UCPath, why, in some cases, did the [5% DCRS] inappropriately cease prior to the activation of UCPath at the employee’s campus?

- B) In addition to earnings above the PEPRA cap, what do these listed employees have in common, i.e., what accounts for the pattern of missing employer contributions for these employees and/or what attributes caused them to be affected?
- C) How were the listed employees coded/configured in UCPATH, and how ought they have been coded/configured?
- D) Are there any employees who should have received but did not receive the 5% DCRS who are no longer on payroll?

(Exhibit B, pp. 1-2.) UC-AFT also demanded that UC respond to the RFI before “any corrective contributions are made” to allow the parties to first negotiate. (*Id.* at p. 2.)

On May 14, 2020, Labor Relations Manager Patty Donnelly acknowledged receipt of the Union’s RFI, a true and correct copy of this email is attached hereto as **Exhibit C**.

On May 28, 2020, the University provided a partial response (“May 28 Response”), a true and correct copy of which is attached hereto as **Exhibit D**. The May 28 Response did clarify the University’s position in some respects. The University stated that “[t]here are 213 affected IX and [*sic*] employees, with a total of 2140 missed contributions in the sum of \$652,029.93. (*Ibid.*) UC gave essentially this same response, verbatim, in answering the total amount of contributions to be made in the correction process, indicating that it would not be making additional contributions to compensate employees for market gains. (See *ibid.*) This contradicted the University’s May 5 Letter, asserting that contributions would include “adjusted assumed earnings or losses based on the employee’s current investments or assumed Pathways fund.” (Exhibit A-1.)

As for what accounted for the error, the University gave the same shallow non-explanation as in its May 5 Letter: “The job codes were not configured correctly in UCPath.” (Exhibit D, p. 2.) The Union asked specifically how the employees were coded/configured in UCPath, “and how ought they to have been coded/configured.” UC replied just as obtusely as in the May 5 Letter: “There was a missing configuration in the job code table for DC Supplemental Plan since UCPath went live, which has since been updated.” (*Ibid.*) UC-AFT additionally asked why some contributions ceased prior to UCPath’s implementation, which the University simply denied. (*Ibid.*) Apart from answering that none of the affected employees were at or above the PEPRA cap, the University otherwise stated that it would provide a complete response to the Union’s remaining four out of the ten total inquiries at a later date. (*Id.* at Items 3, 5, 6, 10.)

On June 17, 2020, Quirk wrote again to Donnelly, noting that it had been more than three weeks since the University’s initial response to the Union’s RFI, and it had still not yet provided a complete response. A true and correct copy of this email is attached as **Exhibit E**. In this letter, Quirk also sought confirmation that the University would only be making \$652,029.93 in corrected contributions, excluding any contributions to account for market gains.

On June 23, 2020, Donnelly provided a supplemental RFI response, a true and correct copy of which is attached as **Exhibit F**. For the first time, the University indicated that both Unit 17 (LX) and Unit 18 (IX) members were impacted. (*Ibid.*) Previously, the University had only informed the Union that Unit 18 (IX) Lecturers had been impacted. (Exhibit D.) The University

also purported to answer UC-AFT's RFI item 3, which sought the current employment status of impacted members. (Exhibit F.) The University provided no further information in response to the Union's remaining questions—whether in the original RFI or in Quirk's June 17 letter. (*Ibid.*)

On July 2, 2020, Quirk wrote yet again to Donnelly, a true and correct copy of which is attached as **Exhibit G**. Quirk outlined the remaining outstanding issues with UC's RFI response, identifying items 2, 3, 4, and 5 as lacking adequate responses. (*Ibid.*) In addition, Quirk made an explicit demand to bargain based on the incomplete information UC had thus far provided. He wrote,

The University has failed to provide adequate information to establish that the corrections made at the end of May to the employer contribution for the supplemental DCP are in fact equivalent to the contributions owed plus investment gains during the affected period. This leaves us with the determination that the University has modified the supplemental DCP for our members. As such, *UC-AFT is demanding to meet and confer* per Article 11 A.4.b. We would like to meet between July 6 and 10 to discuss the remaining information and *to negotiate final resolution*. Please provide some times when you are available next week.

(*Ibid* [emphasis added].)

On July 7, 2020, Quirk wrote to UC Labor Relations Manager Ian Smith, noting that he had learned that Patty Donnelly had retired. A true and correct copy is attached hereto as **Exhibit H**. Quirk accordingly forwarded the email he had sent to Donnelly on July 2, including the express demand to bargain, to Smith. (*Ibid.*)

As of the date of this charge, UC-AFT has received no further response to its RFI. The Union also has not received any response at all to its multiple demands to bargain, which it first articulated in its May 11 letter and RFI to Peter Chester, and again on July 2 to Patty Donnelly, which on July 7 it then reiterated to Ian Smith.

III. Argument

HEERA section 3571(a) makes it HEERA section 3571(b) makes it unlawful for the University to deny UC-AFT its rights under HEERA. HEERA section 3571(c) makes it unlawful for the University to refuse or fail to meet and confer with the Union on any matter within the scope of representation. (Gov. Code §§ 3570, 3571(c).) The University has violated these provisions by implementing unlawful unilateral changes as a *fait accompli*, by ignoring the Union's demands to bargain, and by bypassing the Union to directly deal with bargaining-unit members over matters within the scope of representation.

It is beyond dispute that the Pension Choice DC Supplemental account contributions at issue in this case are within the scope of bargaining. “[T]he future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.” (*County of Sacramento* (2008) PERB Dec. No. 1943-M, p.11 [“*Sacramento*”] [quoting *Madera Unified School District* (2007) PERB Dec. No. 1907] [marks

omitted].) It is equally well-established that the timing and amount of benefits contributions are mandatory subjects of bargaining. (*Oakland Unified School District* (1982) PERB Dec. No. 236 [“*OUSD*”], pp. 8-9.)

A. Unlawful Unilateral Changes

A charging party meets the prima facie elements of an unlawful unilateral change by showing that (1) the employer breached or altered the parties’ written agreement, or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy, i.e., the change has a generalized effect or continuing impact on bargaining unit members’ terms and conditions of employment; and (4) the change in policy concerns a matter within the scope of representation. (*California State Employees’ Association v. PERB* [“*CSEA*”] (1996) 51 Cal.App.4th 923, 935.) Changes to established past practices are equally subject to the duty to meet and confer. (*West Covina Unified School District* (1993) PERB Dec. No. 973, p. 8, 15 [unilateral change in long-standing practice was unlawful and a per se violation of the duty to meet and confer].) An employer commits a *per se* violation of the duty to bargain by imposing a unilateral change without notice as a *fait accompli*. (*County of Santa Clara* (2013) PERB Dec. No. 2321-M, p. 22 [if employer has already made a firm decision to implement unilateral change, union has no obligation to demand to bargain, as any demand would be futile].)

In *OUSD*, the School District adopted a budget that deferred a portion of employer retirement contributions as a cost-saving measure. (*OUSD, supra*, PERB Dec. No. 236 at p. 7.) The School District did so without negotiating with the union, taking the position that it had no obligation to bargain, since it planned on making up the deferred contributions in a subsequent fiscal year. (*Id.* at p. 12.) PERB rejected this argument, as the deferred contributions themselves constituted a change in terms and conditions of employment. (*Id.* at pp. 12-13.) Depriving the employees of the contributions constituted no less of a change in terms and conditions because the District expected it to be temporary. (*Ibid.*) PERB ordered the District to make the affected employees whole for all deferred contributions, with interest at 7 percent per annum, and to continue making future contributions in accordance with past practice. (*Id.* at p. 19.)

Here, the University committed at least two unilateral changes that are clearly unlawful under PERB’s *CSEA* and *OUSD* rationales: (1) its unilateral cessation of supplemental retirement contributions; and (2) its unilateral decision to implement make-up contributions.

The unilateral cessation and making-up of contributions each unquestionably meet the *CSEA* prima facie elements. By the University’s own account, its failure to make contributions altered the status quo and ceased its past practice of making 5% contributions to the Pension Choice DC Supplemental accounts of eligible UC-AFT represented employees, going back as far in some cases as 2018. When the University determined it would provide a lump-sum make-up contribution, it again committed itself to altering the status quo. In both cases, it did so without providing UC-AFT with prior notice and an opportunity to bargain. UC-AFT was only notified after each decision had been made, in May 2020, in both cases as a *fait accompli*. There is no disputing that the University’s unilateral changes amount to policy changes with widespread

effects, impacting by UC's count 213 employees over multiple years. There is likewise no disputing that both the cessation of retirement contributions and the University's "fix" were within the scope of bargaining. (*Sacramento, supra*, PERB Dec. No. 1943-M at p. 11; *OUSD, supra*, PERB Dec. No. 236 at pp. 8-9.) The *CSEA* prima facie elements are therefore met.

PERB's reasoning in *OUSD* reinforces that the University has committed these unlawful unilateral changes. The University may try to argue that employees suffered no injury because its failure to make supplemental retirement contributions was only temporary; it ultimately made the missing contributions in or around June 2020, albeit many months and years late. *OUSD* makes clear that *the timing* of retirement contributions is itself a bargainable term and condition of employment, however. *OUSD* further makes clear that delaying contributions requires an award of interest in order to make the impacted employees whole.

B. Direct Dealing

OUSD additionally urges that PERB find violations of HEERA sections 3571(a), (b), and (c) on the basis that the University bypassed UC-AFT to directly negotiate a resolution with bargaining unit employees. As PERB observed in *OUSD*, "the circumvention of the negotiating obligation in itself has a direct adverse impact on the employees by denying them the opportunity to have their interests represented by their exclusive representative." (*OUSD, supra*, PERB Dec. No. 236 at p. 13.)

It is well settled that an employer may not communicate directly with employees or bypass the exclusive representative over matters within the scope of bargaining. (*Muroc Unified School District* (1978) PERB Dec. No. 80; *Walnut Valley Unified School District* (1981) PERB Dec. No. 160.) Employer speech directed at employees over matters within the scope of bargaining that contains threats of reprisal or promise of benefit is unprotected and constitutes unlawful interference with employee and union rights under HEERA sections 3571(a) and (b). (See *Rio Hondo Community College District* (1980) PERB Dec. No. 128; also *Walnut Valley Unified School District* (1981) PERB Dec. No. 160.) Bypassing the Union's negotiators is also a *per se* violation of the employer's duty to bargain in good faith. (Gov. Code § 3571(c).)

While an employer has the right to "express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate," its right to communicate directly with employees is not absolute. (*Rio Hondo, supra*, PERB Dec. No. 128.) "[E]mployer speech that goes beyond mere expression of opinions or communication of existing facts, but instead advocates or solicits a course of action, is not subject to employer speech protections." (*City of San Diego (Office of the City Attorney)* (2010) PERB Dec. No. 2103-M, citing *State of California (Department of Transportation)* (1996) PERB Dec. No. 1176-S.)

Here, only after it had developed its plan as a *fait accompli*, the University sent notice to the Union along with a pre-drafted letter it intended to send to affected employees. (Exhibit A-2.) Although the problem had been festering for months and years, the University gave the Union mere weeks to respond, after which the University would move forward with its plan and begin distributing its unilateral letter. (Exhibit A-1.) The Union immediately requested additional

information to allow it to bargain meaningfully, instructing UC not to move forward with its plan until the parties negotiated. (Exhibit B.) The University only ever provided a partial response to the Union's RFI, however. (Exhibits D, F, G, H.) The University meanwhile moved forward with its plan and distributed its direct communication to employees, starting on or about May 30, 2020.

The University's attempt to write the Union entirely out of the picture is clear in the text of its communication to employees. (Exhibit A-2.) The letter makes no mention of UC-AFT. (See *ibid.*) It instead presents UC's proposal to provide make-up contributions directly to employees, essentially telling them to take it or leave it. (See *id.*) The University's effort to stand between bargaining unit members and the Union is further clear in its instruction to direct questions to Fidelity and the University's own Retirement Administration Service Center, but not UC-AFT. (See *ibid.*)

The need for Union representation in the face of a communication like this should be strongly evident. The University has tried to dictate bargainable terms and conditions of employment by overpowering individual employees, who of course lack the University's bargaining power standing alone. The University has acted as though the affected employees had no right to representation and a collective voice at the table. The University has therefore violated HEERA on the additional basis of bypassing UC-AFT and dealing directly with its bargaining unit members. (See Gov. Code § 3571(a), (b), and (c).)

C. Failing and Refusing to Respond Completely to UC-AFT's RFI

An exclusive representative is entitled to all the information that it is "necessary and relevant" to the discharge of its duty of representation. (See Gov. Code § 3571(c); also *Stockton Unified School District* (1980) PERB Dec. No. 143, p. 13.) PERB uses a liberal, discovery-type standard to determine the relevance of requested information. (*California State University*, (1987) PERB Dec. No. 613-H, p. 17.) An employer must provide information regarding mandatory subjects of bargaining unless the employer can demonstrate that the information is irrelevant or burdensome to produce, or otherwise privileged or confidential. (*Chula Vista City School District* (1990) PERB Dec. No. 834, p. 52.) An employer moreover must exercise "reasonable diligence" in gathering information and providing it in a useful form. (*Id.* at p. 68 [employer failed to provide union with copy of insurance contract].)

Here, the University has failed and refused to provide a complete response to UC-AFT's May 11 RFI. (See Exhibit B.) The University's May 28 response was only partial. (Exhibit D.) Worse, the May 28 response contradicted the University's position in its initial May 5 Letter on the issue of providing employees with additional sums to compensate for the market gains they lost through UC's failure to make contributions. (Compare Exhibit A with Exhibit D.) This reversal in position only increased the Union's need for information, which the University has continued to withhold. Nearly four months have now passed since the Union's May 11 RFI, over the course of which the parties continued to correspond before UC went totally silent after Bill Quirk's July 7 email to Ian Smith. (Exhibit H.) The University has violated HEERA through its failure to fully respond to UC-AFT's RFI. (See Gov. Code § 3571(b) and (c).)

D. Bad-Faith Bargaining by Ignoring UC-AFT's Demands to Bargain

Bad-faith bargaining is examined under a “totality of conduct” test that looks to the entire course of negotiations to determine whether the parties “negotiated with the requisite subjective intention of reaching an agreement.” (*Pajaro Valley Unified School Dist.* (1978) PERB Dec. No. 51, p. 5; *San Bernardino City Unified School District* (1998) PERB Dec. No. 1270, p. 83.) Surface bargaining, whereby an employer merely goes through the motions with no genuine intent to fully explore the issues constitutes a per se violation of the duty to bargain. (*City of San Jose* (2013) PERB Dec. No. 2341-M, p. 39.)

Here, UC has failed even to come up to the level of *surface* bargaining. It has completely failed and refused even to “go through the motions.” From the outset, the University only invited the Union to meet and “discuss” its proposed changes to DRCS contributions. (*See Exhibit A-1.*) Under HEERA, “meet and discuss” is the standard that applies only to permissive subjects, rather than mandatory subjects, over which the employer must “meet and confer.” (Gov. Code §§ 3570, 3571(c).) The Union’s May 11 letter to UC by contrast made clear its desire to fully explore the issues and negotiate *prior* to UC taking any action, demanding information “before any corrective contributions are made.” (Exhibit B.) The University’s response was to only partially fulfill the Union’s RFI and then plow ahead with its unilateral plan. (Exhibit D.)

As UC had ignored its insistence on bargaining since May, UC-AFT made its demand yet again in unmistakable terms. On July 2, 2020, the Union wrote to make clear it was “demanding to meet and confer . . . between July 6 and 10 to discuss the remaining information and to negotiate final resolution. Please provide some times when you are available next week.” (Exhibit G.) When UC-AFT learned of Patty Donnelly’s retirement, Bill Quirk escalated the same demand to Ian Smith on July 7. (Exhibit H.) UC has *never* responded to this demand.

UC has steadfastly refused since the outset to acknowledge UC-AFT’s demands to bargain. As discussed above, it has also denied UC-AFT its right to be fully informed, thus further defeating bargaining before it could properly start. Indeed, the University’s initial notice of the DCRS problem was crafted to stifle bargaining, not to initiate it. UC concealed the situation from UC-AFT, waiting to spring the surprise until it was poised to immediately implement its unilateral resolution, and giving UC-AFT mere weeks to formulate its response. (Exhibit A-1.) Offering only to “discuss” the DCRS problem, UC blatantly sidestepped its obligation to invite true bargaining over its proposed changes to terms and conditions within the scope of representation. UC’s stonewalling continues even now, as it has failed to even acknowledge UC-AFT’s most recent demand to bargain, which it made on July 2 and then reiterated on July 7. UC’s breach of the duty to bargain is therefore clear. (Gov. Code § 3571(c).)

IV. Conclusion

For the foregoing reasons, the Union asks that PERB issue a complaint against the University for its unlawful unilateral failure to make retirement contributions, its unlawful unilateral correction, its unlawful and unilateral denial of months if not years of market gains to bargaining unit members, and its refusal to bargain over mandatory subjects. The Union further asks that PERB order the University to remedy, and cease and desist from, all of its unlawful

conduct. The remedy must include measures necessary to restore the status quo and make whole all affected employees, including but not limited to an award of interest on the University's untimely retirement contributions.

EXHIBIT A-1



OFFICE OF THE VICE PRESIDENT
HUMAN RESOURCES

OFFICE OF THE PRESIDENT
300 Lakeside Drive, 10th Floor
Oakland, CA 94612-3550

May 5, 2020
Via Electronic Mail

Mia McIver
UC-AFT
mmciver@ucaft.org

Notice Re: UCPath Configuration Error | DC Supplement

Dear Mia:

It has recently come to the University's attention that during recent location transitions to UCPath, certain employees who qualified for and received the 5% Defined Contribution Retirement Supplement, stopped receiving this benefit as a result of an incorrect programming configuration in UCPath. The University has corrected this error and identified the UC-AFT populations that were affected (please see attached spreadsheet). Retroactive employer contributions, including adjusted assumed earnings or losses based on the employee's current investments or assumed Pathways fund, will be deposited into their Pension Choice DC Supplemental account.

In addition, the University plans to send the attached communication to each affected employee.

If you have any questions about this matter or would like to discuss further, please contact Ian.Smith@ucop.edu as soon as possible but no later than Thursday, June 4th.

Sincerely,

A handwritten signature in blue ink that reads "Ian J. Smith".

Ian J. Smith
Manager – Labor Relations

c:

Executive Director Chester
Director Lee
Associate Director Fishel
Labor Relations Managers

EXHIBIT A-2

<DATE>

<Academic Appointee Name>

<Address>

<Address>

Re: UCRP Pension Choice DC Supplemental Employer Contribution

Dear <Appointee Name>:

This letter is in regards to the University's employer contributions to your University of California Defined Contribution Plan supplemental account (DC Supplemental) as a member of the University of California Retirement Plan (UCRP) - Pension Choice.

You served in a [Librarian LX/Lecturer IX] title that was eligible for the 5% Pension Choice DC Supplemental employer contribution for faculty between [DATE] and [DATE], but you did not receive the supplemental employer contribution to your account because certain academic titles were coded incorrectly in our payroll system. The error has now been corrected. You should have seen the employer contribution to your Pension Choice DC Supplemental account beginning with your [DATE] paycheck.

Retroactive employer contributions, including adjusted assumed earnings or losses based on your current investments or assumed Pathways fund, were deposited into your Pension Choice DC Supplemental account in the month of [DATE].

Please note that while your contributions to your DC Supplemental account vest immediately, the University's contributions will vest after you have earned five years of UCRP service credit.

For questions regarding the DC Supplemental account and investments, please contact Fidelity at 1-866-682-7787. For questions regarding Pension Choice please refer to UCNet at <https://ucnet.universityofcalifornia.edu/compensation-and-benefits/retirement-benefits/2016-retirement-choice/index.html> or contact the Retirement Administration Service Center (RASC) at 1-800-888-8267.

EXHIBIT B

Bill Quirk May 11

Mon, May 11, 3:38 PM

<bquirk@ucaft.org>

to Peter, Mia

Dear Peter,

Thank you for bringing the missed DCP contributions to our attention and for your work to correct the problem and make our members whole.

In order to ensure that our members are made whole, UC-AFT requires the following necessary and relevant information for every individual listed on the spreadsheet you provided:

1. The total amount of missed DCP contributions.
2. The total amount of DCP contributions to be made in the correction process.
3. Current employment status (Active/inactive/separated).

Please also provide:

4. A list of all IX and LX employees with earnings above the PEPRA cap who have been appropriately receiving the 5% DCRS (i.e., no missing employer contributions).
5. A monthly-by-month audit of the 5% DCRS for all employees in the IX and LX bargaining units since 6/30/2017.
6. Any formulae to be used to calculate assumed or expected gains and losses.

In addition, please provide complete answers to the following questions:

- A) If this problem was caused by an incorrect configuration in UCPATH, why, in some cases, did the 5% employer Defined Contribution Retirement Supplement (DCRS) inappropriately cease prior to the activation of UCPATH at the employee's campus?
- B) In addition to earnings above the PEPRA cap, what do these listed employees have in common, i.e., what accounts for the pattern of missing employer contributions for these employees and/or what attributes caused them to be affected?
- C) How were the listed employees coded/configured in UCPATH, and how ought they to have been coded/configured?
- D) Are there any employees who should have received but did not receive the 5% DCRS who are no longer on payroll?

It is UC-AFT's position that in no case will our members receive less in employer contributions to the DCP than would have been contributed during the period of missed contributions. In other words, assumed losses during this period will not result in a reduction in the amount of contribution owed to the employee.

Please provide this information within five business days and before any corrective contributions are made. UC-AFT will likely request a meeting to discuss the information when we receive it.

Thank you.

Bill

--

Bill Quirk
Executive Director, UC-AFT
805-689-0645
ucaft.org

EXHIBIT C

Patty Donnelly May 14

Hi Bill & Mia –

I am writing to acknowledge receipt of the request for information (RFI) below, regarding DCP contributions affecting IX and LX employees. It has been assigned RFI#AFT-20-023.

I am reviewing the request and beginning the search for information responsive to the request. If there are questions regarding relevancy or clarity, I will get back to you.

Thank you.

Patty

Patty Donnelly

Labor Relations Manager

Human Resources - Labor Relations Unit

University of California Office of the President

300 Lakeside Drive #1006

Oakland, CA 94612

Work: 510-987-0671 | Cell: 510-912-0726 | Email: patty.donnelly@ucop.edu

EXHIBIT D



OFFICE OF THE EXECUTIVE DIRECTOR —
LABOR RELATIONS

OFFICE OF THE PRESIDENT
300 Lakeside Drive, Suite 1045
Oakland, California 94612-3550

May 28, 2020

Via Electronic Mail

Bill Quirk
Executive Director
UC-AFT
bquirk@ucaft.org

RE: University Response to UC-AFT Request for Information #AFT-20-023: UCRP Pension Choice DC Supplemental Employer Contribution

Dear Bill:

This is the University's initial response to the UC-AFT's request for information regarding the University's supplemental employer contributions to Pension Choice DC Supplemental accounts of Unit 17 (LX) and Unit 18 (IX) employees. During recent location transitions to UCPath, certain employees who qualified for and received the 5% Defined Contribution Retirement Supplement, stopped receiving this benefit as a result of an incorrect programming configuration in UCPath. The University previously sent to the UC-AFT a list of the UC-AFT populations that were affected.

Each item that the UC-AFT requested is listed below, followed by the University's response.

1. The total amount of missed DCP contributions.

The attached file "IX_LX DCSFAC Adj Calculations" shows that there are 213 affected IX and employees, with a total of 2140 missed contributions in the sum of \$652,029.93. (DCSFAC is the deduction code for the DC Supplemental Plan for Faculty.)

2. The total amount of DCP contributions to be made in the correction process.

There are 213 affected employees, with a total of 2140 missed contributions in the sum of \$652,029.93.

3. Current employment status (Active/inactive/separated).

The University is still gathering this information and will provide it to you as soon as it is available.

4. A list of all IX and LX employees with earnings above the PEPRA cap who have been appropriately receiving the 5% DCRS (i.e., no missing employer contributions).

None of the affected employees reached Pepra Max during times of eligibility/enrollment into DCSFAC.

5. A monthly-by-month audit of the 5% DCRS for all employees in the IX and LX bargaining units since 6/30/2017.

The University is working on gathering information responsive to this request.

6. Any formulae to be used to calculate assumed or expected gains and losses.

The University will provide this information once the adjustments are processed in UCPath

7. If this problem was caused by an incorrect configuration in UCPATH, why, in some cases, did the 5% employer Defined Contribution Retirement Supplement (DCRS) inappropriately cease prior to the activation of UCPATH at the employee's campus?

The University is not aware of any instances in which the employer contribution ceased prior to conversion to UC Path. If you are aware of specific cases, please provide the employee name and job title code, and we will be happy to look into them.

8. In addition to earnings above the PEPRA cap, what do these listed employees have in common, i.e., what accounts for the pattern of missing employer contributions for these employees and/or what attributes caused them to be affected?

The job codes were not configured correctly in UCPath.

9. How were the listed employees coded/configured in UCPATH, and how ought they to have been coded/configured?

There was a missing configuration in the job code table for DC Supplemental Plan since UCPath went live, which has since been updated.

10. Are there any employees who should have received but did not receive the 5% DCRS who are no longer on payroll?

The University is working on the response to #3 above, and will provide updated information as soon as it is available.

Bill Quirk
UC Response RFI#AFT-20-023
May 28, 2020
Page 3 of 3

The University will continue to respond to the Union's information request as information is compiled. If you have any questions related to this response, please contact me at patty.donnelly@ucop.edu or 510-987-0671.

Sincerely,

/s/

Patty Donnelly
Labor Relations Manager

Attachment

Cc: Director Lee
Associate Director Fishel
Manager Yun
IX Management Bargaining Team
File

EXHIBIT E

Bill Quirk June 17

Wed, Jun 17, 4:58 PM

to Patty, Nadine,
Amy

Hi Patty,

I have not heard back from you on the information yet to be provided from this RFI. It has been a full three weeks since May 28, when you said you hoped to have it to me in one week. Please let me know when I can expect the remainder of the information.

Also, your response to question number 2 in the RFI (see below) seems to indicate that the University believes its obligation for repayment is limited to the total amount of the missed contributions. Is this interpretation of your responses to 1 and 2 below correct?

Each item that the UC-AFT requested is listed below, followed by the University's response.

1. The total amount of missed DCP contributions.

The attached file "IX_LX DCSFAC Adj Calculations" shows that there are 213 affected IX and employees, with a total of 2140 missed contributions in the sum of \$652,029.93. (DCSFAC is the deduction code for the DC Supplemental Plan for Faculty.)

2. The total amount of DCP contributions to be made in the correction process.

There are 213 affected employees, with a total of 2140 missed contributions in the sum of \$652,029.93.

Thank you.

Bill

EXHIBIT F

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OFFICE OF THE EXECUTIVE DIRECTOR —
LABOR RELATIONS

OFFICE OF THE PRESIDENT
300 Lakeside Drive, Suite 1045
Oakland, California 94612-3550

June 23, 2020

Via Electronic Mail

Bill Quirk
Executive Director
UC-AFT
bquirk@ucaft.org

RE: University Response to UC-AFT Request for Information (RFI) #AFT-20-023: UCRP Pension Choice DC Supplemental Employer Contribution

Dear Bill:

This is the University's continuing response to the UC-AFT's RFI regarding the University's supplemental employer contributions to Pension Choice DC Supplemental accounts of Unit 17 (LX) and Unit 18 (IX) employees.

Attached is a list of IX/LX employees, including their employment status. This responds to item #3 of the UC-AFT's RFI item #3: Current employment status (Active/inactive/separated).

The University will continue to respond to the Union's information request as information is compiled. If you have any questions related to this response, please contact me at patty.donnelly@ucop.edu or 510-987-0671.

Sincerely,

/s/

Patty Donnelly
Labor Relations Manager

Attachment

Cc: Director Lee
Associate Director Fishel
Manager Yun
IX Management Bargaining Team
File

EXHIBIT G

Bill Quirk July 2

Jul 2, 2020,
5:26 PM

to Mia,
Patty, Amy,
Nadine,
Karren

Hi Patty,

Thank you for this additional information. I'm providing an outline below of the outstanding issues with RFI response as well as a demand to bargain over changes to the retirement plan.

#2: In my previous email on this topic, I asked for clarification of your response to question 2 in the RFI. You have not responded to my request for clarification, so I've copied it below.

#3: Your response to question #3 about the employment status of affected individuals indicates that only four people are no longer active. As you know, there is a lot of turnover in our bargaining unit. People eligible for the supplemental contribution may be more stable, but 4 out of 213 is a very low number.

#4: The university has provided no information responsive to #4, which is for a month by month audit of the employer supplemental contribution for UC-AFT represented employees since 2017.

#5: The university has provided no information responsive to #5, which is for the formula used to calculate the corrected contribution amounts.

The University has failed to provide adequate information to establish that the corrections made at the end of May to the employer contribution for the supplemental DCP are in fact equivalent to the contributions owed plus investment gains during the affected period. This leaves us with the determination that the University has modified the supplemental DCP for our members. As such, UC-AFT is demanding to meet and confer per Article 11 A.4.b. We would like to meet between July 6 and 10 to discuss the remaining information and to negotiate final resolution. Please provide some times when you are available next week.

Thank you.

Bill

EXHIBIT H

Jul 7, 2020,
2:42 PM

Bill Quirk July 7

to Ian

Hi Ian,

I heard this morning that Patty retired. Her auto responder indicated that you and Nadine should be contacted in her place. So, I'm forwarding an email I sent her on July 2. See thread below. Thanks.

Bill