



**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: University Council - American Federation of Teachers

b. Mailing address: Leonard Carder, LLP, 1999 Harrison Street, Suite 2700, Oakland, CA 94612

c. Telephone number: (510) 272-0169

d. Name and title of person filing charge: Afroz Baig, Attorney E-mail Address: abaig@leonardcarder.com
Telephone number: (510) 272-0169 Fax No.: (510) 272-0174

e. Bargaining unit(s) involved: Unit 18 (non-Senate faculty)

2. CHARGE FILED AGAINST: (mark one only) EMPLOYEE ORGANIZATION EMPLOYER

a. Full name: Regents of the University of California

b. Mailing address: University of California, Office of the President, 1111 Franklin St., 8th Floor, Oakland, CA 94607

c. Telephone number: (510) 987-0933

d. Name and title of agent to contact: Allison Woodall, Deputy General Counsel E-mail Address: Allison.Woodall@ucop.edu
Telephone number: (510) 987-0933 Fax No.: (510) 987-9757

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.
PERB-61 (4/3/2020) SEE REVERSE SIDE

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: Gov. Code Section 3571(a), (b) and (c).

- 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.)*
 See attachment.

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 09/14/2020 (Date)

at Oakland, CA (City and State)

Afroz Baig
(Type or Print Name)


(Signature)

Title, if any: Attorney

Mailing address: Leonard Carder, LLP, 1999 Harrison Street, Suite 2700, Oakland, CA 94612

Telephone Number: (510) 272-0169 E-Mail Address: abaig@leonardcarder.com

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 Street, Suite 2700, Oakland, CA 94612

On 09/14/2020, 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
Tonya Cole
UC General Counsel Office
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
email: Allison.Woodall@ucop.edu
email: Tonya.Cole@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 09/14/2020, at
(Date)
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 unilateral repudiation of the terms of Article 8 and Article 24 of the parties’ expired Memorandum of Understanding (“MOU”) by directing UC-AFT bargaining members to shoulder the costs of working remotely during the COVID-19 pandemic, and to perform additional uncompensated work. Article 8 requires that the University provide Lecturers with material support necessary to perform their instructional work. Article 24 requires that the University compensate them for work above and beyond their normally assigned duties. The University has done neither in this case, while refusing the Union’s requests for information and demands to bargain.

A complaint should issue because there is no clearer case of unilateral change than an employer repudiating agreed-upon terms embodied in an MOU. The University’s unlawful unilateral conduct plainly violated HEERA section 3571(a), (b), and (c). The University’s unlawful conduct will continue to cause injury, as the same issues will present themselves for Union-represented Lecturers providing online instruction for future semesters and/or quarters.

II. FACTUAL BACKGROUND

UC-AFT represents 6,500 employees at the University of California campuses. The represented workers affected by the University’s unlawful unilateral change are those in Unit 18 (non-Senate Faculty), and employed at all ten campuses in the UC system. NSF’s are non-tenure track instructional faculty who teach approximately one-third of all undergraduate credit hours at the University of California. NSF’s teach many of the lower division courses, including almost all writing and language courses, and some upper division courses. NSF’s also teach graduate courses in many departments, with significant numbers teaching in the professional schools. Unit 18 also includes some non-faculty employees at UC, such as Demonstration Teachers who are employed in the University Elementary Schools. (*See* Exh. 1, Unit 18 MOU, Article 1, Recognition); Exh. 2, Unit 18 MOU, Article 5, Description of Titles.)

A. Expired Article 8 and Article 24

The MOU between the University and UC-AFT for NSF’s was in effect from February 27, 2016, to January 31, 2020.¹ The parties have been in negotiations for a successor agreement since April 17, 2019, but have not finalized a new contract. Due to the expiration of the agreement, the MOU’s arbitration procedure is not in effect.

Article 8 of the MOU is titled “instructional support,” and states “the University shall provide access to facilities, services, texts, and instructional support that is reasonably necessary for NSF to complete their assigned duties and responsibilities.” (*See* Exh. 3, Unit 18 MOU,

¹ The Unit 18 MOU can be viewed in its entirety here: <https://ucaft.org/content/unit-18-mou>.

Article 8(A), Instructional Resources.) Specifically, the University is required to provide instructional resources for, but are not limited to:

- Office and desk space, telephone, and answering equipment;
- Computer and internet connection;
- Training and support for web-based tools;
- Storage space;
- Office, laboratory, and instructional equipment;
- Mailbox and email;
- Office supplies;
- Text, and/or reading materials;
- Photocopying equipment

(*Id.*)

Article 24 of the MOU sets the terms of NSF's instructional workload. Article 24(B), titled "Other Assigned Duties," states:

In determining workload, the University shall provide workload equivalencies to an NSF whenever s/he is required or clearly expected by the University to perform duties in addition to her/his assigned teaching duties...that are neither provided for in the NSF's appointment percentage, the IWC assigned to the course, or compensated for under another title. Normally, an NSF employed at less than 100% appointment shall be compensated via equivalencies. Such equivalencies shall be based on the NSF's annual salary rate. However, should a campus practice be to acknowledge these duties by other forms of compensation, then it may continue to do so instead of providing an equivalency.

(*See* Exh. 4, Unit 18 MOU, Article 24(B), Other Assigned Duties.) A list of representative duties includes "course, curriculum or program development, e.g., on-line instructional materials, course redesign, or website content." (*Id.*) Article 24(B) explicitly states that the list of duties included is not exhaustive, and "equivalencies may be awarded in any situation where an NSF is *required or clearly expected by the University to perform duties in addition to his or her assigned teaching duties.*"² (*Id.* [emphasis added].)

Further, Article 42 of the expired MOU makes clear that the terms and conditions of the MOU apply to NSFs who perform online instruction. (Exh. 5, Unit 18 MOU, Article 42(A), Online Instruction.)

B. COVID-19 Related Instructional Changes in March 2020

On March 9, 2020, the Office of the Chancellor at UC San Diego issued a campus notice that stated:

² Pursuant to Article 7(C) of the MOU, NSFs receive a "letter of continuing appointment" outlining their assigned teaching duties. Article 7 is appended to this filing as Exh. 30.

For the last week of Winter Quarter, courses are continuing to meet in person, but instructors will no longer use attendance-based points in their grading. Starting in the Spring Quarter, all lecture and discussion courses will be delivered remotely. In the context of our campus, this will mainly involve offering conventional courses via online teaching and learning tools. Zoom can be used to deliver real-time online lectures, hold interactive sessions and office hours, or to pre-record short lectures. Course materials of all types will be placed on or linked to the Canvas LMS, including videos or podcasts of lecturers, readings, and assignments; Canvas can also mediate tests and chat-based discussions. Laboratory and studio courses for which remote instruction is not possible will continue to meet in person, for the time being.

(Exh. 6, UC San Diego, Campus Notice, March 9, 2020.) Similar notices were distributed at other UC campuses. (See Exh. 7, March 10, 2020 UCLA Transition to Online Instruction, and March 12, 2020 UC Davis New Campus Directives.)

Two days later, on March 11, 2020, the Office of the Chancellor at UC San Diego issued another campus notice titled “Winter Quarter and Final Exam Update.” This notice stated:

Each instructor of record must use either an online final exam, a take-home final exam or an exam-equivalent alternative assessment. The instructor will determine the mode for their final exam that best serves the academic needs of their class. Instructors should maintain compatibility with accommodations previously approved by OSD.

(Exh. 8, UC San Diego, Campus Notice, March 11, 2020.) The University’s notices instructed UC-AFT members that they were required or clearly expected to alter final examinations for their students to take them online. (See Exh. 7, March 10, 2020 UCLA Transition to Online Instruction [“Winter Quarter final exams will be offered remotely. Instructors are asked to communicate with students how final exams, if applicable, will be offered without the need to assemble in person...”].)

The University also released a “COVID-19 FAQ on Educational Continuity.” (Exh. 9, COVID-19 FAQ on Educational Continuity, June 3, 2020.) This document instructs that remote course delivery “has mainly involved offering conventional courses via remote teaching and learning tools, such as the Canvas LMS and Zoom.” (*Id.*) Importantly, this document recognizes that Unit 18 members are providing online instruction to students.

Q: Should remote teaching be synchronous or asynchronous?

A: Remote teaching does not need to be fully synchronous. Indeed, any lectures delivered in real-time must also be made available in an asynchronous format via Canvas to ensure students who are ill or in another time zone can fully participate in the course. For options and resources, see <https://keep-teaching.ucsd.edu>.

...

Q: If a class cannot be delivered online will it be canceled?

A: During the Spring Quarter 2020, all *lecture and discussion courses* at UC San Diego will be delivered remotely. While they will be offered in a remote-delivery format, our Spring Quarter courses will go forward, as originally scheduled and enrolled.

...

- Enrollments will be maintained at the original sizes. We are teaching our usual, conventional classes in a remote-delivery format. The original number of faculty and instructional staff (including teaching assistants) will still be needed to serve the original number of students.

(*Id.*) UC’s guidance clarifies that Unit 18 bargaining members were expected to serve the same number of students while providing online instruction, as they were for in-person courses. The most recent iteration of the FAQ was updated on September 4, 2020.

The University’s instructional changes resulted in significant workload increases for UC-AFT members. This included additional work to learn online formats and technology, modifying and redesigning course structure and content to accommodate the online format, transferring course materials online and working with department staff and colleagues to ensure consistency and quality, among other tasks. (Exh. 10, Grievances filed at UCSC, UCI, UC Merced, and UCSD.) In addition to the excess work performed to carry out teaching duties, members also spent increased amounts of time making contact with students to address the demand for technological, content, and emotional support. (*Id.*; *see also* Exh. 28, Insights from Spring 2020 Remote Instruction, UC Davis Center for Educational Effectiveness, Section 3.2 Additional time and responsibilities, p. 21; Exh. 29, Academic Senate Instructor and Student Survey Responses on Remote Teaching and Learning, p. 6 [“Seventy-three percent of instructors reported that their workload was higher or much higher compared to in-person classes...”].)

For example, some Unit 18 members reported spending a significant amount of time redesigning their syllabus and creating new assignments to fit the online format. Others reported having to spend additional time to learn Zoom, Canvas, and other software, and uploading materials for the course and lectures. Some also reported having to expend additional time holding expanded office hours to respond to student concerns. While some NSFs reported performing 2-3 hours of additional work per week, others reported performing as much as 30 hours per week.

The University’s instructional changes also resulted in increased costs for Unit 18 members who paid for internet connections, internet augmentations, a variety of home office supplies, and equipment and technology, necessary to complete required and expected duties. (Exh. 10, Grievances filed at UCSC, UCI, UC Merced, and UCSD.) While some campuses may be providing *some* reimbursement to Unit-18 members, the Union has received reports that most members are not receiving reimbursements for instructional support and resources.

C. UC-AFT's Efforts to Engage UC in Bargaining Over Article 8 and Article 24 Implementation During COVID-Related Campus Closures and Remote Work

On March 10, 2020, Mia McIver, UC-AFT's President, sent an e-mail to Nadine Fishel, Associate Director of Labor Relations at UC, demanding to bargain over the impacts of the University's COVID-19 policies on negotiable terms and conditions of employment. (Exh. 11, McIver e-mail dated March 10, 2020.) Her e-mail stated:

UC-AFT demands to bargain over the effects of campus closures and conversion of classes and exams to remote formats. The effects we have identified thus far include but are not limited to: extraordinary hours of uncompensated work, lack of availability of training and other concrete assistance, out of pocket costs for equipment purchases, negative responses on student evaluations of teaching and their corresponding effect in performance reviews for advancement and promotion, need for paid family leave to care for children and elders whose schools and care facilities are closed, health and safety risks that need to be mitigated.

(*Id.*) To date, the parties have engaged in twelve COVID-19 effects bargaining sessions since March 20, 2020. COVID-19 effects were also discussed in some of the parties' successor agreement bargaining sessions. For several months, the University took the position that the effects bargaining sessions between the parties were "discussions," and offered a letter containing commitments while refusing to refer to the process and product as negotiating a side letter agreement.

UC instead has repeatedly directed UC-AFT's negotiating team back to campus-level Labor Relations to address COVID-related implementation of Article 8 and Article 24. (Exh. 12, UCSD Request for Information; Exh. 13, Nancy Kaczmarek E-mail of UC-AFT RFI to UCLA.) Given UC's refusal to even address the effects of COVID-19 on union members' workload at a statewide level, UC-AFT submitted to UC campuses (1) a request for information, (2) a grievance, and (3) a request for labor management meeting in order to reach a campus wide agreement on the implementation of MOU Article 8 and 24. (*See* Exh. 12 and 13, UCSD and UCLA RFI.) Grievances and requests for information were also submitted by UC-AFT at other campuses.

During effects bargaining, UC has consistently taken the position that Article 8 of the MOU only applies to on-campus teaching, despite the existence of Article 42 stating that the terms and conditions of the MOU apply to NSFs who perform online instruction. (*See* Exh. 5, Unit 18 MOU, Article 42.) Similarly, in effects bargaining related to Article 24, UC taken the position that online instruction and remote instruction are somehow distinguishable. Recently, in order to support this position, UC has begun to release policies attempting to delineate differences between online instruction and remote instruction. (Exh. 14, UC Davis Remote Instruction vs. Online Instruction; Exh. 15, UCSD Remote Instruction v. Online Instruction.) The policies were developed post-COVID-19, and as a result, established during the status quo period of the expired MOU. UC's recently advanced proposals during effects bargaining make

reimbursement subject to campus policy on a case-by-case basis, and seek to define online instruction as part of Unit 18 members' assigned duties.

1. UC-AFT's Requests for Information Submitted to at Multiple Campuses

UC-AFT submitted requests for information ("RFI") to UC at several campuses. The purpose of the requests was to "ensure that we have complete data on any additional COVID-related workload compensation or instructional support reimbursement that may have been provided to members of our bargaining unit to date..." (Exh. 12, UCSD Request for Information; Exh. 13, Nancy Kaczmarek E-mail of UC-AFT RFI to UCLA.) UC-AFT made the following requests related to Article 24 of the MOU:

1. A list of all Unit 18 teaching faculty **who have requested** equivalency or other forms of payment for work expected in addition to their assigned teaching duties that could reasonably be expected to be covered by Article 24 B of the Unit 18 MOU.
2. A list of all Unit 18 teaching faculty **who have received** equivalency or other forms of payment for work expected in addition to their assigned teaching duties that could reasonably be expected to be covered by Article 24 of the Unit 18 MOU.

(See Exh. 12 and 13, UC-AFT RFIs; Exh. 16, UCSC RFI Acknowledgement May 22, 2020.) In these requests, the Union also sought information related to payment or reimbursement for necessary equipment related to Article 8 of the MOU. (*Id.*)

UC's responses to UC-AFT's requests for information are crucially revealing, as they express UC's explicit refusal to provide information in response to the Union's RFI, while further providing written documentation of UC's unilateral repudiation of Article 8 and Article 24. (Exh. 17, UCSD's Response to Request for Information, dated June 5, 2020; Exh. 18, UCLA Response to RFI June 30, 2020.) UC's response inaccurately characterized the RFI as "essentially requesting the same information twice except for in item #2, the detail of the type and amount of compensation received for each NSF listed in item #1 is also requested." (*Id.*; See also Exh. 18, UCLA Response to RFI June 30, 2020.) Further, the University stated that the online instruction Unit 18 members were expected to perform was not additional work within the meaning of Article 24 of the MOU.

Article 24, Instructional Workload, Section B., describes the types of other assigned duties for which an NSF 'is required or clearly expected by the University to perform duties in addition to her/his assigned teaching duties.' When UCLA transitioned to remote instruction in March 2020, UCLA did not require or expect NSF to perform additional duties, as described in Article 24, Section B., Other Assigned Duties.

As exempt employees, NSF were expected to exercise their discretion in teaching courses remotely for the remainder of the winter quarter or spring semester. NSF were given the latitude to adjust their courses as they deemed appropriate and were given flexibility to prepare for the spring quarter. **Since the University did not require or clearly expect NSF to perform duties in addition to her/his assigned teaching duties, there is no information responsive to items #1 and #2.**

(Exh. 18, UCLA Response to RFI June 30, 2020; *see also* Exh. 17 UCSD’s Response to Request for Information, dated June 5, 2020 [“Because the University did not require or clearly expect NSF to perform duties in addition to the NSF’s’ assigned teaching duties, there is no information responsive to items #1 and #2”].) Based on this, the University has refused to provide UC-AFT with any information responsive to its Article 24 requests.

2. UC-AFT’s Grievances at Multiple Campuses Alleging Violations of Article 8 and Article 24

On May 18, 2020, UC-AFT submitted a grievance to UCSC Labor Relations on behalf of all Unit 18 titles alleging violations of Article 24(B)(1)(h) and Article 8(A)(1). (*See* Exh. 10, UCSC Grievance and Amended Grievance.) Specifically, the grievance alleged that Article 24 was violated because:

. . . the university has failed to provide equivalencies or other forms of compensation for required and clearly expected duties in addition to assigned teaching duties and related to moving courses to remote and/or online formats during Winter and Spring terms 2020.

At the end of the Winter term 2020, instructors were required to move final days of instruction online and to perform additional work in modifying formats for final exams.

For Spring term 2020, full courses were converted from in-person to online formats over spring break. The move to online formats required additional work to learn new online formats, modify course structure and content to accommodate the online format, transfer course materials online and work with department staff and colleagues to ensure consistency, quality, etc.

In addition, there is ongoing work in excess of assigned teaching duties as outlined in appointment letters associate with increased student contact hours due to increased demand for technological, content and emotional support.

In violation of Article 8 A.1, the university has failed to provide access to facilities, services and instruction support necessary for NSF to complete their assigned duties and responsibilities while teaching online from home offices and other locations provided for by the faculty member. Unit 18 members have utilized and paid for internet connections, internet augmentations, a variety of

home office supplies and equipment and technology necessary to complete expected duties and responsibilities.

(*Id.*) The remedy requested by the grievance was that the affected bargaining unit members be made whole. (*Id.*) Similar grievances were filed at other UC campuses such as UCSD and UCI. (*See* Exh. 10, Grievances filed at UCSC, UCI, UC Merced, and UCSD.)

UCSD issued its Step 1 response on June 5, 2020. (Exh. 19, UCSD Step 1 Response to UC-AFT Grievance dated June 5, 2020.) UC made a number of objections to the grievance, but also responded to the merits of the grievance. In its response, UC doubled down on the notion that the switch to remote learning did not mean that Unit 18 members were “required or clearly expected to perform additional duties; rather, they performed modified duties within the existing expectations.” (*Id.*) The University also stated that UC San Diego directed faculty to structure teaching in a remote environment “in a manner that approximates the expected total faculty-student contact hours for the regular course.” (*Id.*)

Additionally, the UCSD Step 1 response created a distinction between remote delivery of standard courses and online instruction – the former consisting of “moving content designed for face-to-face instruction online” and the latter an “intentional design and implementation of course content . . . tailored to effective student learning experiences online.” (*Id.* [emphasis added].)

Work undertaken by an NSF to instruct their regular course(s) in a remote environment *is part of* the assigned teaching duties. UC-AFT has not provided evidence that any lecturer was required or clearly expected to create online materials or engage in any other additional duties as contemplated by Article 24(B)(1). **Specifically, in the context of Article 24(B)(1)(h), the transition to remote learning does not constitute ‘course, curriculum, or program development,’ as Unit 18 members were not required or clearly expected to redesign or alter course material (e.g., change material to be taught or modify emphasis).** Remote delivery of UCSD courses is not online instruction, but a temporary way to address state and local orders. The fact that lecturers would temporarily not be able to present instruction in the same physical space as their students does not qualify as a course redesign. . . . The University did not require or clearly expect NSF to perform duties in addition to the NSF’s assigned teaching duties in order to provide remote instruction; therefore, no additional compensation is owed.

(*Id.*)

UC responded similarly to grievances filed at other campuses by attempting to create a distinction between remote delivery of standard courses and online instruction. UCSC’s Step 2 response stated: “Article 24(B)(1)(h), which provides additional compensation for *course, curriculum or program development, e.g., on-line instructional materials, course redesign, or website content* was not intended for this remote learning situation and therefore does not apply.”

(Exh. 20, USCS Step 2 Response to UC-AFT Grievance.) UCLA’s Step 1 response likewise stated:

Specifically, in the context of Section B.1.h, the transition to remote learning does not constitute ‘course, curriculum, or program development,’ as Unit 18 members were not required or clearly expected to redesign or alter course material (e.g. change material to be taught or modify emphasis). Remote delivery of UCLA courses is not online instruction, but a temporary way to address state and local orders.

(Exh. 21, UCLA Step 1 Response to UC-AFT Grievance; *see also* Exh. 22, UC Riverside Step 1 Response to UC-AFT Grievance [“Remote delivery of UC Riverside’s courses is not online instruction but allows a temporary way to address local and state mandates due to COVID 19”].) UC Irvine’s Step 1 response concluded, “we have made it clear that ‘[t]he switch to remote learning is not considered online course development, but an alternative mechanism to delivering an existing course. This applies to Unit 18 lecturers.’” (Exh. 23, UCI Step 1 Response to UC-AFT Grievance.)

UC thereby affirmed its position that requiring courses to be taught online in the Winter and Spring terms is not compensable as additional work pursuant to Article 24(B)(1)(h). UC denied the grievances and the requested remedies. (Exh. 19, UCSD Step 1 Response to UC-AFT Grievance dated June 5, 2020. [“As written, this grievance is ineligible for processing and for the reasons articulated above, there is insufficient information to determine that Articles 24 or 8 were violated and no remedies are warranted. Had violations been confirmed, the remedies requested are not supported by the Agreement. Therefore, the grievance and its requested remedies are denied”]; Exh. 23, UCI Step 1 Response to UC-AFT Grievance [“Based on the above analysis, the grievance and the remedy requested are denied in their totality”]; *see also* Exh. 24, UCLA Step 2 Response to UC-AFT Grievance [“The grievance is denied in its entirety”].)

III. DISCUSSION

The University violated Gov. Code Section 3571(c) by implementing a unilateral change. The violation of Gov. Code Section 3571(c) also results in a derivative violation of Gov. Code Section 3571(a) and (b) because the Unit 18 members were denied their right to representation and the Union was denied its right to bargain with an employer. A unilateral change of a policy or practice within the scope of representation is a per se violation of the duty to meet and confer in good faith. (*California State Employees’ Assn. v. Public Employee Relations Bd.* (1996) 51 Cal.App.4th 923, 934-35 [“CSEA”] [“An employer’s unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and a violation of HEERA”].) In order to establish a *prima facie* case, the union must show:

(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.

(*Ibid.* [citing *Grant Joint Union High School Dist.* (1982) PERB Dec. No. 196]; see also *Regents of the University of California (Davis)* (2010) PERB Dec. No. 2101-H, p. 23.)

A. UC's Repudiation of Article 8 and Article 24 Is Blatantly Apparent Under a Plain Reading of Article 8 and Article 24 of The Parties' Expired MOU

The first *prima facie* element under *CSEA* is whether UC "breached or altered the parties' written agreement, or own established past practice," which UC-AFT clearly satisfies. (See *CSEA, supra*, 51 Cal.App.4th at 934-35.) The terms of an expired agreement establish the status quo between the parties for as long as they remain out-of-contract. (*Regents of the University of California* (2004) PERB Dec. No. 1689-H, Proposed Dec. pp. 24-27.) The employer cannot make changes to terms and conditions without completing negotiations on a new agreement. (*Ibid.*)

Repudiating provisions of the parties' expired MOU or collective bargaining agreement is an especially clear unlawful unilateral change. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Dec. No. 2231-M, p. 15 ["There is no better illustration of the District's act of repudiation than its taking an electronic version of scissors and cutting the disputed provision right out of the very document intended to memorialize the parties' agreement"]; see also *Grant Joint High School Dist., supra*, PERB Dec. No. 196, p. 8 [observing a unilateral change to established policy is unlawful whether the policy is embodied in the terms of the parties' MOU or collective bargaining agreement, or evidenced in the parties' past practice].) While PERB does not enforce the terms of negotiated agreements, it may interpret contract language as necessary to decide the alleged unfair practices by applying traditional rules of contract interpretation. (*City of Davis* (2016) PERB Dec. No. 2494-M, p. 18 [citing *County of Sonoma* (2011) PERB Dec. No. 2173-M, p. 16].)

Here, the Unit 18 MOU expired on January 31, 2020, and the parties remain in negotiations over a successor agreement. Article 8 and Article 24 therefore establish the status quo for purposes of this unfair practice charge. Both Articles are explicit and do not need interpretation beyond their express meaning for PERB to find that UC-AFT has met its *prima facie* burden. It is plain on their face that UC has repudiated both Article 8 and Article 24.

Under Article 8, "Instructional Support," the University must provide all material resources that are "reasonable necessary" for NSFs to carry out their teaching responsibilities, "*including but not limited to*" a non-exhaustive list of items that expressly includes "computer and internet connection," as well as "office supplies." (See Exh. 3, Unit 18 MOU, Article 8 [emphasis added].) The plain language of Article 8—"including but not limited to"—furthermore makes clear that the parties did not intend the lengthy list of examples to be a limitation on what "reasonabl[y] necessary" resources UC would be obligated to provide. Lastly, Article 42 of the

MOU makes clear that Article 8 is applicable to Unit 18 members regardless of whether they are teaching on-campus or online.

Article 24 is similarly explicit and expansive. Article 24 requires the University to compensate NSF's with what is known as "IWC equivalencies"³ for duties above and beyond their regular teaching assignments. (See Exh. 4, Unit 18 MOU, Article 24(B).) The parties expressly envisioned that such duties would include: "Course, curriculum or program development, *e.g.*, on-line instructional materials, course redesign, or website content." (*Id.* at Article 24.B.1.h., [emphasis added].) By use of the expression "*e.g.*"—short for "for example"—UC and UC-AFT clearly agreed that compensable "[c]ourse, curriculum or program development" would not be limited to only to "on-line instructional materials, course redesign, or website content." (See *ibid.*) The broad scope of that category is affirmed by the parties' agreement that the entire list of compensable duties under Article 24.B.1 was "representative" and not exclusive. (See *ibid.*)

UC has expressly repudiated both Article 8 and Article 24, staking out a position that lacks any justification in the parties' expired agreement. UC makes the novel contention that remote delivery of courses differs from providing "online instruction" as that term is used in Article 24, and therefore Unit 18 members are not owed additional compensation: "remote delivery of standard courses is different than providing online instruction." (See Exh. 21, UCLA Step 1 Response to UC-AFT Grievance dated June 8, 2020; Exh. 23, UCI Step 1 Response to UC-AFT Grievance ["...remote learning is not considered online course development, but an alternative mechanism to delivering an existing course"].) Even if this distinction had any meaning under the expired MOU—which it plainly does not—the expired MOU by its terms does not merely require UC to additionally compensate for "providing online instruction." Article 24 requires UC to provide IWC equivalencies for all work beyond NSF's regular teaching duties. UC's self-serving and cynical stance could not possibly fit within the plain language of Article 24. As for Article 8, UC has not provided any justification at all for its total abandonment of its obligation to provide "reasonabl[y] necessary" instructional support, as codified in Article 8. (See Exh. 25, Feng Huang, Senior Financial Analyst at UCLA English Department, E-mail May 26, 2020 [Requests for reimbursement of office chairs, desks or other furniture for home offices will not be allowed]; Exh. 26, Ari Kelman, Dean of the College of Letters and Sciences at UC Davis, E-mail April 3, 2020 [University not "in any position to buy people furniture at this time"]; Exh. 27, UCI HR Policy Regarding Equipment for Remote Work E-mail.) Specifically, employees have reported to the Union that requests for equipment such as desks and chairs are being denied by UC. (See Exh. 27, UCI HR Policy Regarding Equipment for Remote Work E-mail.) Given this, UC's repudiation of the status quo established by expired Article 8 and Article 24 is explicit.

B. UC Repudiated Article 8 and Article 24 as A *Fait Accompli* Providing No Notice and An Opportunity to Bargain to UC-AFT

The second *prima facie* element under *CSEA* is whether UC provided UC-AFT with notice and an opportunity to bargain prior to repudiating the status quo embodied in Article 8 and Article 24. (See *CSEA*, *supra*, 51 Cal.App.4th at 934-35; also *City of Sacramento* (2013) PERB

³ "IWC" stands for instructional workload credit.

Dec. No. 2351-M, p. 28.) It is beyond question that UC failed and refused to do so. An employer does not cure its failure to bargain a *fait accompli* in its attempts to bargain post-unilateral change. (*Porta-King Buildings Systems* (1993) 310 NLRB 539, 539-540, *enfd.* (8th Cir. 1994) 14 F.3d 1258, 1264.

Here, UC expressly denied that Article 8 and Article 24 apply to increased costs and workload associated with COVID-19 in its refusal to bargain with UC-AFT. (*See* Exh. 17, UCSD Step 1 Response to UC-AFT Grievance dated June 5, 2020)⁴; Exh. 21 UCLA Step 1 Response to UC-AFT Grievance dated June 8, 2020.) UC's announcement of its repudiation in its refusal to bargain came as a *fait accompli*, after UC had reached a firm position, thereby precluding prior notice to UC-AFT. In *Porta-King Building Systems*, the NLRB held:

An offer to bargain over layoffs *after* they have occurred is no substitute for such prior notice. Once the layoffs have taken place and unit jobs lost, the union's position has been seriously undermined and it cannot engage in the meaningful bargaining that could have occurred if the Respondent had offered to bargain at the time the Act required it to do so. ... Therefore, we find that the Respondent's offer to bargain about the layoffs after they occurred is insufficient to undo the effects of [the violation] of the Act...

(*Porta-King Buildings Systems, supra*, 310 NLRB at 539-540 [internal quotations and citations omitted].) In the instant matter, the harm occurred when UC repudiated Article 8 and 24. Subsequent discussions between the parties are not sufficient to remedy the harm caused by UC's unilateral conduct.

UC's repudiation as a *fait accompli* also precluded bargaining with UC-AFT. UC-AFT specifically demanded to bargain over the effects of campus closures and conversion of classes and exams to online platforms. (*See* Exh. 11, McIver e-mail dated March 10, 2020.) This was in addition to the parties' on-going successor negotiations. Further, UC-AFT proposed language to address the compensation issues related to the increased workloads of its members because of the need to provide online instruction. (*See* Exh. 12, UCSD Request for Information; Exh. 13, Nancy Kaczmarek E-mail of UC-AFT RFI to UCLA.) Despite UC-AFT's efforts to engage the University in discussions about these issues, UC directed the Union's negotiating teams back to local processes for redress of COVID-19 impacts related to Article 8 and 24. Further, in its RFIs, UC-AFT requested a meeting with labor management in order to reach a campus wide agreement on the implementation Article 8 and 24. (Exh. 13, Nancy Kaczmarek E-mail of UC-AFT RFI to UCLA ["UC-AFT objects to the university's refusal to negotiate a statewide agreement to address the effects of COVID-19 on workload and instructional support. That said, further delay in addressing these issues is not acceptable. We are, therefore, per the direction of Nadine Fishel and UCOP, submitting a grievance (attached hereto), this request for information and this request for a labor management meeting in order to reach a campus wide agreement on implementation

⁴ In denying UC-AFT's allegation that Article 24(B)(1)(h) was violated, UC stated: "This section of the Agreement provides for additional compensation when duties 'in addition to' an NSF's 'assigned teaching duties' are 'required or clearly expected.' A requirement or clear expectation of duties in addition to teaching would be documented as an assignment. Here, NSF were not required or clearly expected to perform additional duties; rather, they performed modified duties within the existing expectations."

of Article 24 and Article 8 with respect to COVID related workload increases and instructional support needs”.) UC’s failure to bargain extends to the positions it has taken during effects bargaining – that Article 8 is only applicable to on-campus instruction, and online instruction performed during terms affected by COVID-19 is not considered “online” as the term is used in Article 24.

C. The Imposed Changes Have a Generalized Effect and Ongoing Impact

The third *CSEA* element requires that UC-AFT show that UC’s conduct is not “merely an isolated breach of contract, but . . . has a generalized effect or continuing impact on bargaining unit members’ terms and conditions of employment.” (See *CSEA, supra*, 51 Cal.App.4th at 934-35; also *City of Davis, supra*, PERB Dec. No. 2494-M, pp. 19-20 [“...the Board and courts have established in numerous cases that an alleged unlawful change must be more than an isolated breach of contract or practice, but instead must constitute a change of policy that had a generalized effect or continuing impact upon terms and conditions of employment of bargaining unit members”].) PERB’s inquiry is focused on the effect of the change, not necessarily on the length of time the change is in effect or the number of employees affected by the change. (*San Jacinto Unified School District* (1994) PERB Dec. No. 1078, p. 20 [“It is the ‘effect’ of an employer’s unilateral action, not necessarily its period of duration, that determines whether it constitutes a change of policy”]; *Jamestown Elementary School District* (1990) PERB Dec. No. 795, p. 6 [“While, in some cases, the number of employees affected might be indicative of whether there has been a policy change, that is not always true. The proper focus must be on identifying the relevant established policies and determining if, under the circumstances presented, the disputed action is in the nature of a policy change”].) Further, the Board has found a “continuing impact” where the breaching party asserts that the change was authorized by the collective bargaining agreement. (*Fremont Unified School District* (1997) PERB Dec. No. 1240, pp. 5-6.)

Here, there can be no doubt that UC’s repudiation of Article 8 and Article 24 has a generalized effect and ongoing impact on Unit 18 members. Given the COVID-19 pandemic, Unit 18 members were instructed to convert their Winter Term exams to a take-home or online final exam format. Instructors were additionally told that Spring Term courses would all be online and delivered remotely using platforms such as Canvas LMS and Zoom. This imposed additional costs and created additional work for Unit 18 members, compensation for which is contemplated by the unambiguous language of Article 8 and Article 24. Further, UC justified its exclusion of this additional work from the compensation contemplated by Article 24 by stating:

Remote delivery of standard courses is different than providing online instruction. Remote instruction is moving content designed for face-to-face instruction online. Online education is the intentional design and implementation of course content, assessments, and interactions tailored to effective student learning experiences online.

....

Remote delivery of the UCSD courses is not online instruction, but a temporary way to address state and local orders. The fact that lecturers would temporarily not be able to present instruction in the same physical space as their students does not qualify as a course redesign.

(See Exh. 17, UCSD Step 1 Response to UC-AFT Grievance dated June 5, 2020; Exh. 21, UCLA Step 1 Response to UC-AFT Grievance [“Remote delivery of UCLA courses is not online instruction, but a temporary way to address state and local orders”]; Exh. 20, USCS Step 2 Response to UC-AFT Grievance.) UC is forthright in asserting that it views its conduct to be lawful under the status quo, which conclusively establishes a generalized and continuing impact in this case. (*San Jacinto Unified School District, supra*, PERB Dec. No. 1078, pp. 20-21 [“During the two-month period...it clearly had a generalized effect or continuing impact upon bargaining members’ terms and conditions of employment...the Board has determined that a unilateral change, to be found unlawful, need not affect every member of the unit”].) This interpretation of Article 24 amounts to a continuing change in policy that will harm Unit 18 members moving forward, as many will be teaching Fall Term courses online as well. (See *Grant Joint Union High School District, supra*, PERB Dec. No. 196.) UC’s refusal to abide by the express terms of Article 24 is divorced from the language of the article itself, and represents a repudiation of the longstanding status quo between the parties. (Compare *Regents of the University of California* (2014) PERB Dec. No. 2398-H, p. 31 [employer imposed its own interpretation of side letter intended to distinguish criteria for designating instructors as lecturers or adjunct professors, which amounted to a repudiation of that side letter]; *Regents of the University of California* (1991) PERB Dec. No. 907-H [unilateral creation of a hiring ratio not based on agreed upon criteria constituted an unlawful alteration of the terms of agreement].)

Similarly, UC’s refusal to abide by the express terms of Article 8 amounts to a change in policy that has a generalized effect and ongoing impact on Unit 18 members. Article 8 states the University will provide instructional resources necessary for NSF’s to complete their assigned duties and responsibilities. The University has repudiated the status quo by implementing new directives about what resources it will provide to NSF’s. (See Exh. 25-27). UC has further repudiated the status quo by taking the position that only on-campus instruction falls within the purview of Article 8.

D. Issues of Compensation Covered by Article 8 and Article 24 Are Within the Scope of Representation

The fourth and final *CSEA* element asks whether the unilateral change falls within the scope of representation. (See *CSEA, supra*, 51 Cal.App.4th at 934-35.) Under HEERA, the “scope of representation” includes wages, hours of employment, and other terms and conditions of employment. (Gov. Code 3562(q).)

Article 24 governs the instructional workload, and specifically course definition and equivalencies, as well as assigned duties for bargaining unit members. Workload and compensation are clearly within the scope of representation, thus implementation of Article 24 during COVID-19 is also within the scope as well.

Article 8 governs the instructional resources the University is required to provide to NSF's. This includes the University's payment or reimbursement to NSF's for necessary equipment or other forms of instructional resources required to complete their assigned duties. Article 8, as a result, is within the scope of representation because it addresses compensation, which is a term and condition of employment for NSF's. (*San Mateo City School District* (1984) PERB Dec. No. 375, pp. 28-30 ["The above cited proposals concern job-related employee expenses...we find that work-related expenses, uniforms, tools, and other materials are 'wages' ..."].) Article 8 also addresses the material conditions of employees' work environments, including ergonomic concerns, which is also an issue within the scope of representation (*Ibid.* [proposals that the employer provide tools, equipment, and supplies reasonably necessary for an employee's performance of employment are within the scope of bargaining].)

IV. REQUESTED REMEDY

The University committed an unfair practice by refusing to abide by the express terms of Article 24, and failing to apply Article 24 to the additional duties Unit 18 members are required or clearly expected to perform. The University has committed an unfair practice by refusing to abide by the express terms of Article 8 and failing to provide NSF's with instructional support required to complete their assigned duties and responsibilities. UC-AFT asks that the status quo be restored, with workers made whole for equivalences owed to them for performing additional duties, reimbursement for instructional support costs, and that the University be ordered to bargain in good faith. In addition to other remedies it finds appropriate, PERB should require UC to post a system-wide notice, both physically and electronically, acknowledging that it violated HEERA and is required to bargain over these and other terms and conditions of employment.