

In the Matter of an Arbitration Between

University Council -AFT
Union

- and -

University of California
Employer

**AWARD & OPINION ON
ARBITRABILITY**

NB 4006
(Article 21C.4.)

Arbitrator: Norman Brand, Esq.

Appearances:

For University Council -AFT
Bogatin, Corman & Gold
by **William Corman, Esq.**

For University of California
Paul, Plevin, Sullivan & Connaughton, LLP
by **Sandra L. McDonough, Esq.**

Date: October 12, 2020

Background

On July 26, 2019, University Council -AFT (“UCAFT”) filed a grievance with the University of California (“UC”), alleging a violation of Article 21.C.4 of the 2016-2020 Agreement between the parties (“Agreement”). (J-16) When the parties were unable to resolve the grievance, UCAFT moved it to arbitration on October 24, 2019. (J-4) . By agreement of the parties, the Arbitrator held hearings on the Zoom platform on June 29 and July 2, 2020. Both parties attended and were represented by counsel. Each had a full opportunity to examine and cross-examine witnesses, present evidence, and argue its position. Neither party objected to the conduct of the hearing. A court reporter recorded the proceedings. At the close of the hearing the parties asked to file post-hearing briefs. The Arbitrator declared the hearing closed when he received the last brief on August 31, 2020.

Issue

1. Was the 2019-2020 increase to ladder-rank faculty salary scales a general range adjustment of 3% and a non-general range adjustment of 1%?
2. If it was a general range adjustment of 3% and a non-general range adjustment of 1%, the grievance is not arbitrable under Article 21.G.
3. If it was a general range adjustment of 4%, is the grievance arbitrable under Article 21.G?

Contract Language

ARTICLE 21 COMPENSATION (2016-2020)

A. GENERAL PROVISIONS

7. The University may provide non-general range adjustments to other academic employees and such adjustments will not be provided to members of this unit.

C. GENERAL RANGE ADJUSTMENTS FOR 2016, 2017, 2018 and 2019

1. Effective July 1, 2016, the University shall adjust all NSF¹ salary ranges by three (3.0%).

2. Effective July 1, 2017, the University shall adjust all NSF salary ranges by two and a half percent (2.5%)

3. Effective July 1, 2018, the University shall adjust all NSF salary ranges by two and a half percent (2.5%).

4. During Fiscal Year 2019-20, NSF shall receive general range adjustments in an amount equal to and on the same date as any general range adjustments provided for non-represented academic employees, including Senate Faculty.

G. GRIEVABILITY

Decisions related to the amount and timing of general range adjustments, merit adjustments, and all aspects of the non-general range adjustment provided to other academic employees are not grievable. The implementation of the amount and timing of the general range adjustments, one-time adjustments and special salary adjustments is subject to grievance and arbitration.

ARTICLE 21 COMPENSATION (2011-2015)

D. 2014 General Range Adjustments

1. During calendar year 2014, NSF will receive general range adjustment(s) in an amount equal to and on the same date as any general range adjustments provided for non-represented academic employees, including Senate Faculty.

¹ Non-Senate Faculty. The initialism NSF is used throughout this Award.

During the course of the contract, the University may allocate funds to provide non-general range adjustments to non-represented academic employees and that such adjustments will not be provided to members of this unit except through completion of the bargaining process.

2. For Calendar Year 2014 Only: In the event that both: (1) a general range adjustment does not issue pursuant to Section D.1 above; and (ii) a systemwide salary program is implemented affecting non-represented academic employees, including Senate Faculty, but excludes NSF, the University agrees to meet and confer with respect to wages and employee rates of contribution for health and welfare benefits for calendar year 2015 in accordance with the specific provisions outlined in Article 40- *Duration* addressing conditional reopener negotiations.

Facts

In a letter dated May 24, 2018, Vice Provost Carlson reported that President Napolitano had “announced year one of a three-year academic salary program that focuses on rebuilding competitive salaries for ladder-rank faculty and certain other non-represented academic appointees.”² Under that plan, “ladder rank faculty salary scales” were “adjusted by approximately 4% effective July 1, 2018.”³ (U-3) Non-represented faculty and academic personnel had their salary scales adjusted by 3%. NSF received a general range adjustment of 2.5%, as required by the Agreement. (U-3).

By letter dated June 26, 2019, UC President Janet Napolitano announced the academic salary program for 2019-20. For ladder-rank faculty it was the “continuation of a special salary plan... initiated in 2018-9...[that] increased scales by four percent” She approved their salary scales increasing “by the general range adjustment of three percent and an additional special targeted one percent for a total annual rate of four

² Napolitano’s announcement letter of May 3, 2018 is referenced in Carlson’s letter but not in evidence.

³ Senate Faculty are “ladder-rank faculty.” The same 4% increase applied to faculty and other academic appointees with salaries tied to those scales.

percent to the scales.” As to “other non-represented faculty and academic personnel salary scales...” those increased “by the general range adjustment of three percent.” Represented academic personnel had an increase “according to their contracts.” (J-5) Vice Provost Carlson directed the campuses to increase the salary scales of specific groups according to President Napolitano’s salary program. Ladder-rank non-represented employees and those non-represented employees whose titles were tied to ladder-rank faculty had their salary scales adjusted by 4%. All other non-represented academic employees had their salary scales adjusted by 3%. (J-6) The NSF Agreement does not provide a specific percentage general range adjustment for 2019. It contains a “me too” clause requiring a general range adjustment on the same date and amount as the non-represented academic employees, including Senate Faculty. UC implemented the clause by providing a general range adjustment of 3% effective July 1, 2019. This grievance followed.

Discussion

The parties disagree about the meaning of the terms general range adjustment and non-general range adjustment. UCAFT makes four arguments to show the 2019 4% increase to ladder-rank faculty schedules was a general range adjustment, not a non-general range adjustment.

First, UCAFT asserts the parties understood the term general range adjustment to mean any uniform percentage adjustment to a salary scale or salary range table. In 2014, UCAFT agreed to a general range adjustment “equal to and on the same date” as “any general range adjustments provided for non-represented academic employees,

including Senate Faculty” That year the salary scales for ladder-rank faculty were adjusted by 3% and “pursuant to the terms of their contract” NSF was “awarded a 3% increase.” (U-6, Tr. 153:2-6). UC consistently used the terminology “adjustment to ladder-rank salary scales” to denominate general salary scale increases that equate to general range adjustments. By their consistent interpretation of the term over time, the parties demonstrated their understanding of its meaning. In 2019, for the first time, UC attempted to re-define the term. It denominated a portion of a uniform percentage increase to the ladder-rank faculty schedule a “special salary adjustment” and claimed that transmuted part of the general salary increase into a non-general range adjustment. It did not.

Second, UCAFT cites the Academic Personnel Manual (“APM”)⁴ to show that UC categorizes all salary increases as merit increases, promotional increases, “Off-Scale Increases,” or “General Scale Increases.” (J-21) In UCAFT’s view, a “General Scale Increase” is a general range adjustment. It argues the 4% increase given the “ladder rank faculty” was a general range adjustment because it was applied uniformly to each component of the relevant salary scales or ranges. Calling 1% of the general range adjustment a “special salary adjustment” did nothing to change the fact there was a 4% increase applied uniformly to the salary scales or ranges, making it a general range adjustment.

Third, UCAFT argues, a non-general range adjustment is one that applies only to a portion of the salary scale or range. UCAFT cites the increases for faculty and non-represented academic employees in 2007 and 2016-17 as examples of non-general

⁴ The APM does not apply to Unit 18 bargaining unit members. UCAFT asserts the APM helps clarify what the parties meant by the term general range adjustment in Article 21.

range adjustments. In 2007 UC provided a "COLA" of 2.5% that was uniformly applied to the salary scales and ranges. In addition, it provided a .7% "Market Adjustment" to "faculty whose COLA-adjusted salary falls below the new base salary scales." (U-31) The "market adjustment" was a non-general range adjustment because it only applied to some steps on the salary scale. In 2016-17 UC provided a general range adjustment of 1.5% and an additional 1.5% not applied uniformly but used to redress inequities, inversions, or compressions in faculty salaries. (U-29) These non-uniform changes to the salary scales were a non-general range adjustment. The 1% "special salary adjustment," however, because it applied uniformly to the salary scales and ranges, was a general range adjustment.

Fourth, UCAFT argues, the bargaining history does not support UC's position the 1% ladder-rank faculty "targeted increase" is a non-general range adjustment. The testimony of Mr. Chester (Executive Director of University-Wide Labor Relations) was not about bargaining history and is flatly contradicted by the documentary evidence. He asserted that an increase to only NSF salary tables is a non-general range adjustment. The Agreements and UC announcements, however, refer to them as general range adjustments. (J-16, 17; U-3, 27, 28, 30) He cited no examples of bargaining table discussions in which UC provided UCAFT an example of a non-general range adjustment. Ms. Lee (the diversity labor and employee relations director in academic personnel and programs) testified the parties negotiated Article 21.D.2 in the 2011-2015 Agreement because the UCAFT feared there would be:

...a market-based adjustment made for academic appointees that would not include them and that we would provide no general range adjustment, which is the COLA, and that as a result they would get no increase. (Tr. 250:4-8)

Article 21.D.2 (ii), however, makes no reference to a “market-based adjustment” but speaks to implementing:

... a systemwide salary program ... affecting non-represented academic employees, including Senate Faculty but exclude[ing] NSF. (J-17, p.3)

If the parties meant “non-general range adjustments” that excluded NSF, they would not have used the term “systemwide salary program.” Either the provision is superfluous because “systemwide salary program” means “non-general range adjustment,” which is covered in the previous paragraph; or, “systemwide salary program” refers to something other than a non-general range adjustment. Thus, Article 21.D.2 does not show UCAFT agreed that a “market based increase” is a non-general range adjustment.

UC makes five arguments to show UCAFT failed to establish the 2019 1% “special salary adjustment” was not a non-general range adjustment.⁵ First, it asserts “UCAFT agreed, across the table and as memorialized in the contract, that non-general range adjustments included special salary programs across salary scales for appointees other than NSF.”⁶ (Brief, at 2) UC characterizes the agreement about 2014 increases this way:

...if a (1) general range adjustment (cost-of-living increase) was not provided to non-represented academic appointees, including Senate Faculty and (2) non-general range adjustment (*i.e.* a special salary program) was implemented for non-represented employees and not for NSF, they would meet and confer regarding any additional compensation for NSF. (Brief, p.3)

By agreeing to the 2014 contract language, UCAFT:

... expressly and impliedly acknowledged that there could be a special salary program only applicable to certain titles and scales (i.e. a “non-

⁵ The circumstances that led to the 2019 “special targeted one percent” additional adjustment to the salary scale are irrelevant to determining whether it was a non-general range adjustment and are not considered further.

⁶ The contract is the 2011-2015 Agreement.

general range adjustment”) that did not apply across the board as a cost of living adjustment or “general range adjustment.” (Brief, p. 8)

Thus, the 1% “special salary scale adjustment” for ladder-rank faculty was a non-general range adjustment and is not grievable.

Second, UC argues that a “general range adjustment” is not synonymous with the APM’s “general salary increase.”⁷ It asserts that Article 21.D.2 in the 2011-15 Agreement (J-17):

... recognizes that Senate Faculty ... can receive *both* a general range adjustment *and* compensation under a systemwide salary program... (Brief, p. 8)[emphasis in original]

Thus, the “general salary increase,” described in APM 600-8 as one of four basic ways an appointee receives an increase, encompasses more than a general range adjustment. It can include “equity based adjustments” to the entire salary schedule that are “non-general range adjustments.”

Third, UC asserts that UCAFT’s argument is that a “systemwide salary program” is a general range adjustment. If one substitutes “general range adjustment” for “systemwide salary program” in Article 21.D.2 in the 2011-15 Agreement, it is nonsensical. If one substitutes “non-general range adjustment” for “systemwide salary program”, however, the language makes sense. This demonstrates that UCAFT agreed there could be a “program affecting a large group of non-represented employees, separate and apart from a general range adjustment.” (Brief, p.9)

Fourth, UC argues that if non-general range adjustments included only merit, promotion, and off scale increases, portions of the contract would be rendered

⁷ UC notes APM 600 and 610 do not apply to NSF. (J-16, Art. 37)

meaningless. UCAFT, it asserts, could provide only the hypothetical example of increasing the bottom of the scale as a non-general range adjustment. By interpreting general range adjustment as a “cost of living” adjustment and an equity adjustment as a non-general range adjustment, UC gives meaning to all the terms of the contract.

Finally, UC argues that even if the 4% adjustment to ladder-rank faculty salary scales was a general range adjustment, the matter is not grievable or arbitrable because UCAFT is contesting a decision related to the amount and timing of general range adjustments. That is, UCAFT contends it should have received a 4% raise on July 1, 2019 instead of October 1, when the ladder-rank faculty received it. Thus, the grievance is over the timing of general range adjustments and not arbitrable.

The Arbitrator finds the grievance is arbitrable because the 2019 increase of 4% to ladder-rank faculty salary schedules was a general range adjustment. It was not a 3% general range adjustment and a 1% non-general range adjustment. There are five reasons for this finding. First, the language of the Agreement and its previous interpretation support finding the 4% increase was a general range adjustment. The Agreement distinguishes between general range adjustments and non-general range adjustments. Article 21.C is titled “General Range Adjustments for 2016, 2017, 2018 and 2019.” It describes three specific percentage adjustments of “all NSF salary ranges” for the first three years. For 2019-20 it ties the NSF general range adjustment to whatever general range adjustment UC provides to “non-represented academic employees including Senate Faculty.” The language of 21.C creates an equivalency between “adjusting all salary ranges” and “general range adjustments.” That is how the parties interpreted similar “me too” language in their 2011-2016 Agreement. When UC

uniformly adjusted the salary scales for “non-represented academic employees including Senate Faculty” by 3% in 2014, it raised NSF salary scales by 3% as of the same date. (U-6)

Second, UC’s assertion the 4% general scale increases is comprised of a 3% “COLA” (a general range adjustment) and a 1% “equity adjustment” (non-general range adjustment) is inconsistent with the Academic Personnel Manual (“APM”). While the APM does not apply to NSF, it governs UC’s salary relationship with non-represented academic employees. Consequently, UC’s claims about the nature of its increase to non-represented academic employees should be consistent with the APM. UC does not use the term “general range adjustment” in its APM; it uses “general scale increases.” The way it uses that term, however, demonstrates that it is the equivalent of “general range adjustment.” In describing the types of salary increases it lists “general scale increase,” “merit increase,” “promotion increase,” and “off scale increase.” A general scale increase is a uniform percentage increase by “rank and salary level” while the other increases are specific to individuals.⁸ (U-22, 23) In describing how general scale increases are provided, the APM requires the President to advise “The Regents of any general scale increase required to maintain the University’s relative salary position....” (J-22) Relative salary position can be eroded by inflation, market factors related to increases at the schools with whom UC competes for faculty, and other factors. The APM makes no distinctions among potential reasons increases are needed to maintain relative salary position. All are simply “general scale increases.”

⁸ They are one type of non-general range adjustment.

When Increases to portions of the salary schedule or individual steps are necessary to repair defects in the salary schedule that impair UC's relative salary position, UC addresses those through changes that are not general range adjustments. The 2016-17 salary program for faculty and non-represented academic appointees provided a "1.5 percent increase to the academic salary scales" and a "discretionary salary program ...[to]...address issues of equity, inversion, and compression as well as issues of competitiveness." (U-29) The discretionary program was authorized to expend approximately 1.5% of overall salaries. (Tr. 139:3-5) It applied to ladder-rank faculty and non-represented academic employees. To the extent that these adjustments were applied to a specific step, or a range for a specific title (e.g. law school assistant professor) they adjusted only that specific range and were non-general range adjustments.⁹ Similarly, in 2007, UC made "market adjustments" to only those steps that the general range adjustment left below the level of the new salary schedule after a general "COLA" salary scale increase. UC's previous actions show there are general salary increases that are general range adjustments and other increases that are non-general range adjustments. The 4% salary increase falls into the category of a general range adjustment.

Third, UC failed to show that in the "Calendar Year 2014 Only" agreement UCAFT acknowledges there could be a "special salary program," applicable only to certain titles and scales, that is a non-general range adjustment. UC's argument relies on re-writing the 2014 agreement. In part (1) of that agreement it re-defines a "general range adjustment" as a "cost of living increase." In part (2) it first substitutes "non-

⁹ Because NSF did not have a "me too" clause that year the issue did not come up. The Agreement provided a 3% adjustment to their salary ranges. (U-27)

general range adjustment” for “a systemwide salary program” and re-defines “non-general range adjustment “ as a “special salary program.” Using this re-written 2014 language, UC concludes that a “special salary program applicable to certain titles and scales” is a non-general range adjustment. Through this logical alchemy UC “proves” UCAFT agreed the “special targeted one percent” salary increase in 2019 was a non-general range adjustment. The proof is unconvincing.

Fourth, the changes in language and structure between the 2018 and 2019 announcements undercut the credibility of UC’s argument that there was a 3% general range adjustment and a 1% non-general range adjustment in 2019. In 2018 President Napolitano announced “year one of a three year academic salary program” that focused on “rebuilding competitive salaries for ladder-rank faculty and other non-represented academic employees.....” In year one, “ladder-rank faculty salary scales ...[were] adjusted by approximately 4.0% effective July 1, 2018.” For “other non-represented faculty and academic personnel” salary scales were adjusted by 3% as of the same date. In 2019, the second year of the three year program, President Napolitano characterizes the same 4% increase to the same ladder-rank faculty groups as a “general range adjustment” of 3% and a “special salary scale adjustment above the three percent general range adjustment.” Three aspects of this announcement are notable. First, the 2018 announcement uses the terminology “general range adjustment increase” only to describe NSF increases.¹⁰ (U-3, p. 2) All other increases are “salary scale adjustments.” That is understandable because “general range adjustment” is language used in the Agreement, not the APM. That language distinction disappears in

¹⁰ UC generally used general range adjustment only to refer to NSF increases.

2019. Second, although this is the “continuation” of the “three year academic salary program” that provided a 4% raise in 2018, it is now a two-part “special salary plan” that continues the 4% increase. Third, in 2018 the NSF had a 2.5% salary range increase in its Agreement, In 2019 it had a “me too” clause tied to non-represented faculty’s “general range adjustments.” UC asserts the “three-year academic salary program” that provided a salary adjustment of 4% in its first year was transmogrified to a 3% general range adjustment and 1% “special salary scale adjustment” in its second year. The assertion lacks credibility.

Finally, UC argues the grievance is not arbitrable because it is about the timing of a general range adjustment. That is, UCAFT is asking for a July 1, 2019 general range adjustment and the ladder-rank faculty got their general range adjustment on October 1. The argument embodies an inaccuracy. President Napolitano’s announcement reads:

Due to the complexity involved with ladder-rank salaries, the effective date will be October 1, 2019. So that faculty are not negatively affected by the October 1 date, the scale rates will be set higher to provide an annual four percent adjustment over nine months. (J-5)

The annual adjustment date must be July 1, if setting the scale higher is to ensure ladder-rank faculty receive a 4% increase over nine months beginning on October 1.¹¹

Thus, the grievance is over the “implementation of the amount and timing of the general range adjustment” and therefore grievable.

¹¹ UCAFT asks for the announced 4% increase for July 1, 2019. It does not seek the higher actual percentage increase ladder-rank faculty received by virtue of UC adjusting salary schedules on October 1.

Award

1. The 2019-2020 increase to ladder-rank faculty salary scales was a general range adjustment of 4%
2. The grievance is over the "implementation of the amount and timing of the general range adjustment." It is grievable and arbitrable under Article 21.G.

San Francisco, California
October 12, 2020


Norman Brand