



2878 Camino Del Rio South, Suite 115 | San Diego, California 92108

August 2, 2022

Client No.: 209.01

VIA EMAIL

FAYCCD

Re: Right of Assignment

Georgie, Travis, and FAYCCD Team:

As you know, the District is facing a number of fiscal challenges. The District has identified – and continues to identify – significant gaps in physical and resource infrastructure. Known gaps include the ability to appropriately staff District and College functions, maintain District and college facilities, provide a healthy and safe environment for the YCCD community, and attract and retain a highly qualified and diverse workforce across all employee categories. These gaps were addressed more fully in the FCMAT report shared by the Board of Trustees on October 14, 2021, in which recommendations primarily related to increasing instructional efficiency and decreasing personnel costs. These recommendations were reinforced and supported by the DC3 working group.

While the District has/will be benefitting from temporary funding, the District lacks sufficient FTES to support our current structure and any relief provided by temporary funds is, by definition, temporary. Without addressing the above issues, as well as implementing focused outreach and online initiatives, the District's fiscal future remains bleak. Accordingly, the District considers time of the essence in determining next steps to address these issues.

In light of the foregoing, the District has determined that some steps must be taken in the near term, and is hereby providing you notice that the District intends to exercise its management rights to:

1. Fully reclaim the right of assignment. This includes the District's right to exercise managerial and academic judgment regarding which courses will be offered, when they will be offered, which modality they will be offered in, and which faculty member is best suited to teach a particular course;
2. Fully eliminate the contractual right of first refusal, including the application of the right of first refusal to regular load and overload/EP, as those terms were included in the CBA that expired on June 30, 2022; and
3. Fully recapture the District's discretion, as provided by Ed Code section 87484, in offering extra-contractual overload assignments, and eliminating any contractual or perceived entitlement to overload.

For additional details, please refer to the memorandum dated September 27, 2019, and presented to the Association on October 11, 2019. (Attachment A.)

Please note that, as the District has maintained during prior bargaining cycles and in the aforementioned memorandum to FAYCCD, the existing "right of refusal" language constitutes a waiver of management rights with respect to the District's statutory discretion to assign its employees. As a waiver is a permissive (non-mandatory) subject of negotiation, the parties are bound by the terms of the agreement

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only until the expiration of the agreement or until it is modified by the parties. (*Eureka City School District* (1992) PERB Decision No. 955.) The Association is therefore entitled to demand to bargain impacts of this decision, not the decision itself. Alternatively, if the Association has any authority regarding the mandatory and continuing effect of permissive terms, please provide it for our consideration.

As noted in the attached language (Attachment B), scheduling and assignments are to accommodate the needs of students, ensure the quality of education, and to utilize our facilities efficiently. We must, as zealously advocated by the Association in our first bargaining session, put our current students, prospective students, and service to our communities first. We must ensure that the District has the appropriate discretion to determine how best to serve our students, while ensuring that we exercise appropriate stewardship of public funds.

This change will be implemented on September 1, 2022, prior to the finalization of the Spring 2023 schedule, regardless of the status of ongoing negotiations.

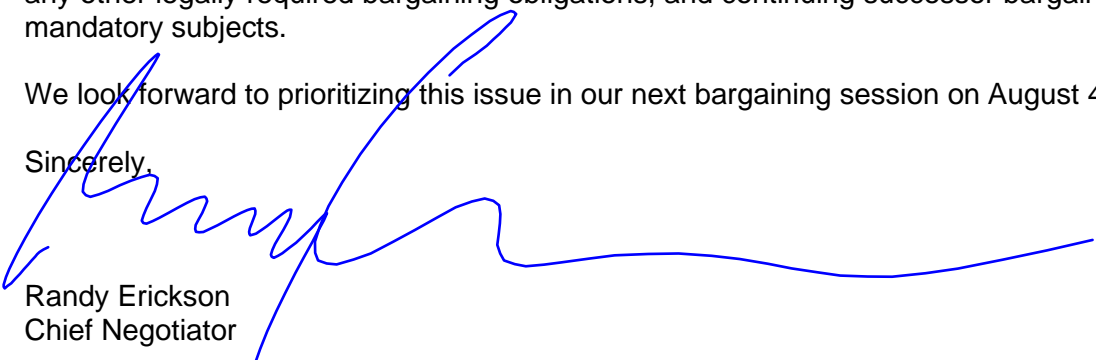
The consultation process for developing faculty schedules will continue, and efforts will be made to accommodate individual scheduling preferences, but the District will no longer waive its discretion in determining its educational mission and program offerings.

It is anticipated that the Association will want to bargain the effects of this decision, including the manner and timing of faculty input into the scheduling process. The District has included in the attached language a proposal regarding the timing and manner of such input. The anticipated implementation date, September 1, 2022, will allow for such input while meeting immovable deadlines finalizing the Spring 2023 schedule and faculty assignments.

If impact negotiations are not finalized by September 1st, the District will implement its non-negotiable decision to sunset the expired terms, reclaim the right of assignment, and eliminate the right of first refusal. The District will also continue to bargain negotiable impacts of this decision with the Association in good faith, until such time as we may reach agreement. Of course, the District is committed to meeting any other legally required bargaining obligations, and continuing successor bargaining in good faith on mandatory subjects.

We look forward to prioritizing this issue in our next bargaining session on August 4, 2022.

Sincerely,



Randy Erickson
Chief Negotiator

CC: Chancellor Houpis
District Bargaining Team
President Dotson
President Pimentel

Attachments: Att. A: Memo, Sept 27, 2019
Att. B: Language/Proposal

ATTACHMENT A

Memo

From: Rex Randall Erickson, Erickson Law Firm A.P.C.

Date: September 27, 2019

Re: Right of Assignment and Expiration of Permissive Contract Terms

I. Right of Assignment of Community College Faculty Employees

As a general rule, a community college district is authorized to "initiate and carry on any program, activity, or may otherwise act in any manner that is not in conflict with or inconsistent with, or preempted by, any law and that is not in conflict with the purposes for which community college districts are established." (Educ. Code § 70902(a); Cal. Constitution Article IX § 14; SEIU, Local 715 v. Bd. of Trs. of the W. Valley/Mission Cmty. College Dist. (1996) 47 Cal.App.4th 1661, 1665.) In addition, Section 70902 also gives a community college district the authority to "[m]anage and control district property" and to "contract for the procurement of goods and services as authorized by law." (§ 70902 (b)(6).) Accordingly, a community college district is permitted to act under its general authority without specific statutory authorization. (Id.) The only limitation placed on a community college district's authority is that it may not act in any manner "in conflict with, or inconsistent with, or preempted by, any law." (Id., Educ. Code § 70902 (a).)

Education Code Section 72400 further gives the governing board broad, general power to "fix and prescribe" the duties to be performed by its employees. Within this authority is the power of the governing board of a community college district "to govern the colleges of the district, including the assignment of instructors employed by the district." (Education Code § 87715.)

When the Education Code gives discretion over a specific subject to the district, regardless of whether it was specific or general, that subject may not thereafter be a subject of bargaining, and any provision in a collective bargaining agreement that contradicts or dilutes the discretion of the district is void and unenforceable. (Sunnyvale Unified School District v. Jacobs (2009) 171 Cal. App. 4th 168, 180; United Teachers of Los Angeles v. Los Angeles Unified School District (2012) 54 Cal. 4th 504, 507 (holding that collective bargaining provisions which annul, set aside, replaces or "directly conflicts with" provisions of the Education Code cannot be enforced).)

In this regard, numerous California courts have held that school and college districts have the inherent power to assign faculty employees to any assignment within their qualifications. In Clark v. Yosemite Community College Dist., (9th Cir. 1984) 785 F.2d 781, 789-790, the court further held that a tenured teacher in California has no vested right in a particular teaching assignment. (Id., citing Thompson v. Modesto City High School District (1977) 19 Cal. 3d 620, 623-24 (school district has broad power to reassign tenured teachers); Malynn v. Morgan Hill Unified School District (1982) 137 Cal. App. 3d 785, 786-89 (same).) Similarly, in Adelt v. Richmond Sch. Dist. (1967) 250 Cal. App. 2d 149, the court held that "[t]enure does not bestow on the school teacher a vested right to a specific school or to a specific class level of students within any school." (Adelt, at 152.) Rather, "[t]he welfare of school districts demands that they have broad discretion to assign their teachers in the best interests of the school system." (Adelt, at 153.)

PERB too has recognized that direction of work force and determination of what work is to be performed by employees is a managerial prerogative, at the core of managerial control, and not subject to bargaining. (Davis Joint Unified School District (1984) PERB Decision No. 393; Trustees of the California State University (2006) PERB Dec. No.1853.) PERB has further

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rejected union proposals which serve to give the union a role in assigning work, holding that it is at the core of managerial control. (Davis Joint Unified School District (1984) PERB Decision No. 393.)

While broad, the governing board's authority is not without limits. For example, Education Code Section 87400 limits the Board's power to hiring only faculty members "who possess the qualifications therefor prescribed by regulation of the board of governors," as indicated by the established list of disciplines of instruction and minimum qualifications that are "reasonably related" to each. (Educ. Code § 87357.) The Education Code further authorizes a district to establish its own minimum qualifications and equivalency standards for faculty positions. (Educ. Code § 87359.) Additionally, under Education Code 87715, a classroom instructor may not be assigned to work on Saturday or Sunday if he or she has objected in writing based upon religious beliefs or practices. (Id.)

Similarly, PERB has held that the right of assignment does not give a District the right to assign employees to extra-duty work or overtime work without bargaining. (Mammoth Unified School District (1983) PERB Decision No. 371.) Also, an employee may not be transferred in retaliation for union activity (San Leandro Unified School District (1983) PERB Decision No. 288), as such a transfer would not have been made in the best interests of the district. (Novato Unified School District (1982) PERB Decision No. 210.)

Finally, it should be noted that a district also has the right to terminate extra-duty assignments in excess of a faculty member's load. Specifically, Education Code 87474 provides:

- (a) In the event a regular employee of a community college district has tenure as a full-time regular employee of the district, any assignment or employment of such employee in addition to his or her full-time regular assignment may be terminated by the governing board of the district at any time.
- (b) Any assignment or employment of a contract employee in addition to his or her full-time assignment may be terminated by the governing board of the district at any time.

In summary, the Legislature has granted the District the right of assignment with respect to academic employees. While the terms and conditions of employment, relating to the hours, wages, and working conditions of academic employees are within the scope of representation and mandatory subject of negotiation, the selection of specific teaching assignment is not.

II. Expiration of Permissive Terms Relating to Right of Assignment

Under the Educational Employment Relations Act ("EERA"), public school employees are entitled to bargain regarding working conditions. (Govt. Code § 3540 *et seq.*) The scope of representation is limited to matters relating to wages, hours of employment, and other terms and conditions of employment. (Govt. Code § 3543.2(a).) Those matters not specifically enumerated are reserved to the District and may not be a subject of meeting and negotiating. (Id.) Additional subjects may be found to be within the scope of representation if they are:

- 1) Logically and reasonably related to hours, wages or an enumerated term or condition of employment, and

- 2) The subject is of such concern to both management and employees that “conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict”, and
- 3) The employer’s obligation to negotiate would not “significantly abridge” the employer’s freedom to exercise those prerogatives necessary to achieve the District’s mission.

(Anaheim Union High School District (1981) PERB Dec. No. 177; see also San Mateo City School Dist. v. Public Employment Relations Bd. (1983) 33 Cal.3d 850, 858 (adopting the Anaheim test).)

The District and FAYCCD each have a mutual obligation to bargain in good faith at the request of either party, and to endeavor to reach agreement on matters within the scope of representation. (Govt. Code §§ 3543.5(c); 3543.6(c).) Upon the expiration of a collective bargaining agreement, mandatory subjects of negotiation remain in effect until a successor agreement, or impasse, is reached. (Pajaro Valley Unified School District (1978) PERB Decision No. 51, pp. 5-7, citing NLRB v. Katz (1962) 369 U.S. 736.) The imposition of a change from the “status quo” on a mandatory subject, without notice and an opportunity to bargain, is an unlawful unilateral change and an unfair labor practice. (Pajaro Valley, supra.) The status quo must take into account the regular and consistent past practices between the parties regarding the terms and conditions of employment. (Id.)

As discussed above, community college districts have the inherent power to assign faculty employees to any assignment within their qualifications. (Educ. Code §§ 70902; 72400; 87003; 87715.) Faculty have no vested right to a particular teaching assignment, only to continued employment within their qualifications. (Clark, supra.) As PERB has recognized, the direction of work force and determination of what work is performed by employees is a managerial prerogative, at the core of managerial control, and not subject to bargaining. (Davis Joint Unified School District (1984) PERB Decision No. 393; Trustees of the California State University (2006) PERB Dec. No. 1853.) These rights are recognized and enumerated in Article 3 (“District Rights”) of the expired 2016-2019 FAYCCD collective bargaining agreement. These “District Rights” include the right to determine staffing levels, to determine the kinds and levels of service to provide, to direct the work of District employees, and to maintain the efficient operation of the District. (Id.) While the District has previously agreed to negotiate a non-mandatory “right of refusal,” the District believes that the “right of refusal” has significantly abridged its exercise of managerial prerogatives and impacted the efficient operation of the District.

The prior waiver of the District’s management rights and authority to direct the workforce does not turn these subjects into mandatory subjects of negotiation. PERB has held that express bargaining waivers do not survive the term of the prior contract. (Rowland Unified School Dist. (1994) PERB Decision No. 1053.) Further, as “permissive” (e.g. non-mandatory) subjects of negotiation, the parties are bound by the negotiated terms of an agreement only until the expiration of the agreement, or until an agreement is modified by the parties. (Eureka City School District (1992) PERB Decision No. 955; City and County of San Francisco (2004) PERB Decision No. 1608-M.) Further, once an agreement containing a permissive subject has expired, PERB has held that there is no obligation imposed on either party to adhere to the terms regarding the permissive subject, or to compel bargaining over new terms on the permissive subject. (Eureka, supra.) The party’s past agreement to bargain a permissive subject does not transform the subject from “permissive” to “mandatory” for future bargaining. (Chula Vista City School District (1990) PERB Decision No. 834; Poway Unified School District (1988) PERB Decision No. 680.)

Finally, while there is nothing illegal about a party making a proposal as to a permissive subject, and the responding party agreeing to such a proposal, (See Lake Elsinore School District (1986) PERB Decision No. 603; Chula Vista City School District (1990) PERB Decision No. 834; Poway Unified School District (1988) PERB Decision No. 680), there is no obligation on either party to negotiate over permissive subjects of bargaining. (City & County of San Francisco (2004) PERB Decision No. 1608-M.) A party further may not insist to impasse over such permissive subjects. (Poway, supra.)

In the instant matter, the "right of refusal" language in the expired FAYCCD agreement represents a past agreement on a permissive subject of negotiation. With the expiration of the agreement, the "right of refusal" is not part of the mandatory "status quo" that survives until a successor agreement is reached.

III. Conclusion

In summary, the District's authority to determine what work is to be performed by employees includes the right to assign faculty members as part of their regular load to any course, class or discipline for which the instructor meets minimum qualifications or equivalency standards. (Educ. Code §§ 72400; 87400; 87357; and 87715.) Additionally, a tenured instructor has no vested right in a particular teaching assignment. (Clark, supra; Adelt v. Richmond Sch. Dist. (1967) 250 Cal. App. 2d 149, 152-153.) However, this right does not extend to the assignment of duties outside the employee's job description or regular load, such as extra-duty work or overtime work, without bargaining. (Mammoth, supra.)

An express bargaining waiver does not survive the term of the prior contract. (Rowland Unified School Dist. (1994) PERB Decision No. 1053.) The parties were bound by the negotiated terms of the agreement only until its expiration. (Eureka City School District (1992) PERB Decision No. 955.) The prior agreement on a "right of refusal" does not transform the topic from "permissive" to "mandatory" for future bargaining. (Chula Vista City School District (1990) PERB Decision No. 834.) The permissive waiver of the District's right of assignment has expired with the prior collective bargaining agreement.

ATTACHMENT B

ARTICLE 12.0
SCHEDULE DEVELOPMENT

12.1 ~~Schedules for each semester shall be planned to accommodate the needs of students, to ensure the quality of education, and to utilize facilities efficiently. This article applies to all faculty members, including without limitation instructional faculty, resource faculty, counselors, and librarians. Unit Members shall be entitled to continue with teaching, counseling, and librarian duties to the extent that the program continues to have such needs. That is to say that the Unit Member shall have first right of refusal with respect to continued teaching, counseling, and librarian duties that they have performed historically, provided such duties remain a part of the program requirements. ***~~

It is the ~~scheduling supervising Dean or appropriate administrator's~~ responsibility to ~~make the final decisions regarding complete~~ the schedule, ~~in consultation with Unit Member(s), based on the need of the specific program.~~

~~12.1.1 First right of refusal is defined as the right to continue to counsel or to teach a class that one is teaching. ***~~

~~12.1.2 Unit Members shall retain first right of refusal to all EP, intersession, and/or summer assignments. ***~~

12.2 ~~Before individual course schedules and assignments are finalized, the currently employed Unit Members will be provided an opportunity to present input, in writing, regarding the curriculum offered, assignments, modalities, technology and/or other equipment needs, specialized classroom characteristics, time and day of offerings, location of assignments, maximum number of teaching hours per day, and interest in overload. The supervising Dean or appropriate administrator will consider the Unit Member's input in making individual schedules and assignments.~~

~~While recommendations of all personnel will be seriously considered, it is the responsibility of the supervising Dean or administrator to make the decisions for a schedule.~~

~~12.3 In the event of impasse of opinion, the Unit Member may request a conference be held with the Dean and appropriate College Vice President, or Yuba Community College President in the case of the Sutter County Campus, and Woodland Community College President in the case of the Lake County Campus. The appropriate College Vice President, or Yuba Community College President in the case of the Sutter County Campus, and Woodland Community College President in the case of the Lake County Campus, will render a decision. Consultation shall not override a Unit Member's first right of refusal. ***~~

ARTICLE 13.0
OVERLOAD/-(EP)EXTRA-PAY, INTERSESSION, AND SUMMER TEACHING,
COUNSELING, AND LIBRARIAN ASSIGNMENTS

13.1 Fifteen (15) load units (or equivalent) a semester represents the full regular load for a full-time Unit member at a minimum the 40-hour work week as stated provided in Article 7.1. An overload assignment is any assignment in excess of the full regular

52 load of a full-time Unit Member, including summer session and intersession
53 assignments, with the exception of special projects. The terms “overload” and
54 “extra-pay” have the same meaning throughout this Agreement unless otherwise
55 specified. However, the Association recognizes that it may be necessary and
56 prudent for Unit Members to teach or perform EP assignments to meet the needs of
57 their programs as well as to meet the needs of the District.

58
59 ~~13.1 Unit Members have first rights of refusal to continue teaching courses or~~
60 ~~performing assignments they have taught or performed in the past (refer to Articles~~
61 ~~12.1 and 12.2). ***~~

62
63 ~~13.2~~ Prior to being provided EP overload assignments, Unit Members must have a full regular
64 load, as stated in Article 7.1. ~~Unit members will make the determination as to which~~
65 ~~units are considered load and EP. ***~~ The terms “overload” and “extra-pay” have
66 the same meaning throughout this Agreement unless otherwise specified.

67
68 ~~13.23~~ Overload assignments shall be compensated at the rates specified in Exhibit B.2.
69 Non-instructional overload assignments shall be paid at the Lab rate of the Exhibit
70 B2 schedule for each clock hour of non-teaching duties.

71
72 Extra-pay Load Limits

73 ~~13.3.1 In an academic year, in consultation with the appropriate administrator, Unit~~
74 ~~Members may teach no more than eighteen (18) EP load units during any~~
75 ~~year of this contract, and no more than nine (9) EP load units in any one~~
76 ~~semester, exclusive of intersession and summer session. Subject to mutual~~
77 ~~consent between the District and the Association, the appropriate College~~
78 ~~President may authorize excess of this limit in extenuating circumstances.~~

79
80 ~~13.3.2 Unit Members in the Reduced Workload Program (Article 16.1.7) shall be~~
81 ~~subject to the load requirements and limitations set forth in the Education~~
82 ~~Code and any other applicable law.~~

83
84 13.4 Maximum overload is six (6) contract hours in any given term, including
85 intersession and summer session. Exceptions may be granted by the appropriate
86 Vice President.

87 Unit Members retain first rights of refusal to all EP, intersession, and/or summer
88 session assignments. ***

89 First right of refusal is defined as the right to continue to counsel or to teach a class
90 that one is teaching. ***

91
92 13.5 Unit Members on performance improvement plans are not eligible for overload
93 assignments. Exceptions may be granted by the appropriate Vice President.

94 First right of refusal for filling an EP, intersession, and/or summer session
95 assignment shall be given to a Unit Member. ***

96 ~~13.6 The Unit Member shall retain first rights of refusal as long as he/she continues to~~
97 ~~teach the class or counsel except as noted in Articles 13.7 and 13.8. ***~~

98
99 ~~13.7 In order to allow for flexibility both for the Unit Member and for the benefit of the~~
100 ~~program, Unit Members with first right of refusal status may mutually agree with the~~
101 ~~assigning Dean to not teach or to substitute other assignment(s) for those normally~~
102 ~~worked for a one-semester period without losing first right of refusal status for the~~

~~vacated continuing assignment(s). In such cases, the Unit Member taking the continuing assignment(s) will not gain first right of refusal for such assignment(s) and shall be informed of this at the time of employment. ***~~

~~13.8 The Unit Member with first right of refusal status and the assigning Dean (with the approval of the appropriate College Vice President or Clear Lake Executive Dean) may mutually agree that the Unit Member may, for one semester, not take the assignment(s) and still retain his/her first right of refusal status. The Unit Member hired to teach such course(s) shall be informed at the time of employment that he/she will not gain first right of refusal status for the assignment. ***~~

~~13.9 A Unit Member will not lose first-consideration rights to a course under any one of the following conditions: ***~~

~~13.9.1 A course which the Unit Member has developed but was not able to teach at the first two offerings, or ***~~

~~13.9.2 While on sabbatical or other approved leave, or ***~~

~~13.9.3 Where core rotation does not allow a Unit Member to continually teach the course, or ***~~

~~13.9.4 When one Unit Member voluntarily relinquishes a class to another Unit Member who needs the class for load. ***~~

~~13.10 Non-instructional EP assignments shall be paid at the Lab rate of the Exhibit B2 schedule for each clock hour of EP non-teaching duties.~~

*** Note: Sections denoted with *** are sections that are only subject to impact bargaining. The *** only applies to the elimination of right of assignment waiver/right of first refusal/entitlement to overload/EP. "Right of refusal" language constitutes a waiver of management rights with respect to the District's statutory power to assign its employees. As a waiver is a permissive (non-mandatory) subject of negotiation, the parties are bound by the terms of the agreement until the expiration of the agreement or until it is modified by the parties. (Eureka City School District (1992) PERB Decision No. 955.) See also, Ed Code section 87484:

(a) In the event a regular employee of a community college district has tenure as a full-time regular employee of the district, any assignment or employment of such employee in addition to his or her full-time regular assignment may be terminated by the governing board of the district at any time.

(b) Any assignment or employment of a contract employee in addition to his or her full-time assignment may be terminated by the governing board of the district at any time.