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August 10, 2022

Randy Erickson, Esq.
Erickson Law Firm
2878 Camino Del Rio South, Suite 115
San Diego, California 92108

Re: **FAYCCD Response to Erickson Law Firm Letter of August 2, 2022**

Dear Mr. Erickson,

This office represents the Faculty Association of the Yuba Community College District (FAYCCD or Union). Your letter of August 2, 2022 was forwarded here for a response. We disagree with your claims that any so-called District right of assignment permits it to bypass negotiations with the FAYCCD, and unilaterally change the current assignment process and workload for both regular and overload/extra pay assignments. Contrary to your claim concerning the scope of the District's managerial prerogative, PERB holds that subjects like assignment processes, workload and overtime are negotiable. Further, your reliance on *Davis Joint Unified School District* (1995) PERB Decision No. 1106 is outdated since it was overruled in relevant part by *County of Santa Clara* (2022) PERB Decision No. 2820-M and *Cerritos Community College District* (2022) PERB Decision No. 2819.

Below, please see the relevant legal authorities.

A. The method to assign work is negotiable.

The District does not have plenary authority to determine faculty assignments, including the right to unilaterally change the current assignment process codified in Articles 12 and 13 without first negotiating with the Union. PERB has held that "the method to assign work is negotiable," so not a permissive subject of bargaining, but a mandatory subject of bargaining. In *Mt. San Antonio Community College District* (1983) PERB Decision No. 297, another District tried to unilaterally change the procedure for making teaching assignments by altering an existing practice of assigning summer school classes on a departmental "rotation" basis without negotiating with the Union. This District, instead, assigned these classes to instructors who had lost their classes due to emergency cancellations.

Foremost, PERB found (and had determined in other cases) that the procedure for making teaching assignments was closely related to wages and hours of employment, and thus triggered the District's duty to negotiate any changes under the Educational Employment Relations Act

(EERA).¹ In arguing it had no such duty, the Mt. San Antonio College District relied on Education Code section 72413 which it claimed gave districts “the power to make unilateral assignments of instructors and therefore precludes negotiations,” much like Yuba Community College District claims section 72400 does here. *Id.* at p. 4. However, PERB disagreed holding that,

“Such - powers must be consistent with the District's other legal obligations, including the requirement that it negotiate with the Association in good faith. There is nothing, therefore, in this provision which is inconsistent with a bargaining duty on the part of the District. Accordingly, we reject the District's argument that Education Code section 72413 relieves it of the duty to bargain over teaching assignments.”² *Id.* at pp. 4-7.

The limited scope of a District’s “right of assignment” was also discussed in two recent cases, *County of Santa Clara* (2022) PERB Decision No. 2820-M, p. 7 and *Cerritos Community College District* (2022) PERB Decision No. 2819, p. 31. The latter case is especially relevant as the Cerritos Community College District claimed that Education Code section 72400 (“right of assignment”) gave it an “unfettered grant of authority” to reassign or take assignments away from faculty just like the Yuba Community College District claims that section 72400 gives it the authority to unilaterally eliminate faculty right of first refusal to assignments without bargaining. PERB disagreed with Cerritos’ interpretation of the scope of section 72400 stating that,

“Education Code section 72400 is thus a quintessential example of an Education Code provision that grants a governing board discretion to determine employment terms or conditions, without specifying the terms that shall apply, and therefore does not extinguish the employer’s bargaining duty.” *Id.* at p. 32.

The Cerritos Community College District also attempted to rely on *Davis Joint Unified School District* for the proposition that “an employer need not bargain over work assignments” to

¹ PERB noted that the decision that the procedure for making teaching assignments is within the scope of representation was consistent with the analysis set forth in *Anaheim Union High School District*, and the Board's previous decisions in *Palos Verdes Peninsula Unified School District/Pleasant Valley School District* (1979) PERB Decision No. 96 and *Jefferson School District* (1980) PERB Decision No. 133 (petition for review filed 7/29/80, 1 Civil 50223). *Id.* at pp. 3-4. See also *Healdsburg Union High School District* (1984) PERB Decision No. 375, p. 82 (“The Board has previously found that the procedure for making work assignments to bus drivers is negotiable. We, therefore, find this proposal negotiable.”)

² Although Education Code sections 72413 and 72400 are different, Districts have interpreted both provisions as granting them a “right of assignment.” Section 72413 used to state that, “Subject to the approval of the governing board, assign all employees of the district employed in positions requiring certification qualifications, to the positions in which they are to serve.” Whereas section 72400 states that, “The governing board of each community college district shall fix and prescribe the duties to be performed by all persons in community college service in the district.” As discussed herein, PERB has held that neither trumps the duty to bargain in the EERA.

support its claim that it could unilaterally reassign or take assignments away from faculty. In response, PERB overruled that portion of the *Davis* case, holding that “Davis’ thrust was thus more muted than the ALJ’s characterization suggested, **and we disavow any categorical rule that work assignments are outside the scope of representation.**” *Id.* at p. 31, emphasis added. Thus, PERB has aligned its decision with previous decisions like *Mt. San Antonio*.

Since the method to assign work is negotiable, the assignment process codified in Articles 12 and 13, including faculty right of first refusal over their regular assignments, survives the June 30, 2022 contract expiration, and the Parties are required to engage in good faith bargaining until an agreement is reached, or if no agreement is reached, until the impasse process is concluded. Until then, the FAYCCD faculty retain “the first right of refusal with respect to continued teaching, counseling, and librarian duties that they have performed historically.” Article 12.1 of the Parties’ July 1, 2019-June 30, 2022 Contract.

B. Overtime/overload pay and the assignment of overtime/overload hours is negotiable.

The District’s “right of assignment” does not permit it to unilaterally change the assignment process for overload/extra pay assignments codified in Article 13, including eliminating the right of first refusal for such assignments. PERB has held that both overtime and specifically, the assignment of overtime hours are negotiable.³ In *Oakland Unified School District* (1983) PERB Decision No. 367, the Oakland Unified School District unilaterally changed the procedure for weekend and holiday overtime work from assigning shifts from a list of volunteers each week, and employees at a particular site had first choice of working overtime at that site, to a rotation system. The new rotation system denied certain employees overtime they had previously and regularly worked.

PERB held that because the assignment of overtime is negotiable, citing prior precedent, *Walnut, supra* and *Pittsburg, supra*, the Oakland Unified School District violated the EERA by unilaterally changing its established procedures for assigning weekend and holiday overtime work without negotiating with the Union. *Id.* at pp. 29-30.

Since the method to assign overtime/extra pay assignments is also negotiable, the assignment process codified in Article 13, including the faculty right of first refusal for overtime/extra pay assignments, survives the June 30, 2022 contract expiration, and the Parties are required to engage in good faith bargaining until an agreement is reached, or if no agreement is reached, until the impasse process is concluded. Until then, the FAYCCD faculty retain “first rights of refusal to all EP, intersession, and/or summer session assignments” as defined by the right to continue to counsel or to teach a class that one is teaching. Article 13.4 of the Parties’ July 1, 2019-June 30, 2022 Contract.

³ It is well established that overtime is directly related to wages and hours of employment and is a negotiable subject. *Jefferson School District* (1980), PERB Decision No. 133, rev. den. (9/23/83) 1 Civ. 50225; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, and *Pittsburg Unified School District* (1982) PERB Decision No. 199.

C. The District's August 2, 2022 "Notice" is untimely.

Even if only the impacts of the District's proposed changes to Article 12 and 13 are negotiable (which is not correct), the District's August 2, 2022 notice of its intent to implement such changes on September 1, 2022, is untimely. Under PERB precedent, a District's notice of any such changes must allow sufficient time to conclude negotiations. Here, the District's belated notice does not allow such time. There is also no "immutable" deadline which applies as the District has long been aware of the state of its finances.

In *AFT v. Regents of the University of California* (2021), PERB Decision No. 2783, PERB held that "[a]lthough the amount of time varies depending on the circumstances of each case, 'an employer must give notice sufficiently in advance of reaching a firm decision to allow the representative an opportunity to consult its members and decide whether to request information, demand bargaining, acquiesce to the change, or take other action,'" citing *Regents of the University of California* (2018) PERB Decision No. 2610-H, p. 45. In *City of Milpitas* (2015) PERB Decision No. 244, 3 PERB concluded that six weeks advance notice was inadequate.

Here, there is no excuse for the District's late notice. The District has long had in its possession all relevant financial information underlying its claims of financial necessity. The Parties have been in negotiations since March 2022, with the District waiting over five months to provide notice of its proposed changes to Articles 12 and 13. Four weeks is insufficient to conclude negotiations so we reject your September 1, 2022 deadline. However, the FAYCCD plans to engage in negotiations over the District's proposed changes to Articles 12 and 13, despite the Parties' disagreement over whether such negotiations are mandatory negotiations or are limited to impacts negotiations.

D. Conclusion

Should the District follow through on its threat to unilaterally implement a new assignment policy on September 1, 2022, violating Articles 12 and 13 of the Parties' Contract and the EERA, the Union will pursue all legal recourse to protect faculty input over their workload, including regular and overload/extra pay assignments. We sincerely hope it does not come to this.

To be clear: the FAYCCD remains willing, as always, to engage in negotiations over all mandatory subjects of bargaining, as well as impacts bargaining over the proposed Article 12 and 13 changes, despite the District's threat to act unilaterally. Accordingly, we plan to provide you with the Union's counterproposal to the District's proposed Articles 12 and 13 - which were provided to us only a week ago -- once we have had adequate time to review the proposals and the information the District will presumably be providing in response to FAYCCD's request for information related to these negotiations. In the meantime, the Union looks forward to the Parties' next meeting, and also continuing negotiations on FAYCCD's Articles 10, 25, 6, 14 and 18 proposals, which were provided to the District back in March and April 2022, and to which we have not yet received any response.

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Letter to Randy Erickson, Esq.
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Sincerely,

Patricia Lim

Patricia Lim
Law Office of David Conway

cc: Georgie O'Keefe, President, FAYCCD, by electronic mail
 Travis Smith, Chief Negotiator, FAYCCD, by electronic mail