ALASKA LABOR RELATIONS AGENCY
STATE OF ALASKA

UNIVERSITY OF ALASKA,

Petitioner,

and

UNIVERSITY OF ALASKA
FEDERATION OF TEACHERS, LOCAL
2404,

Respondent,

and

UNITED ACADEMICS,

Intervenor.

NO. 08-1537-UC

UAFT'S HEARING BRIEF

INTRODUCTION

"The principal question [in a unit clarification proceeding] is whether the employees
... share a community of interest." Northwest Arctic Education Association, Decision and
Order 162 (1993). Determining community of interest requires:

looking at such factors as similarity in employment benefits, hours of work
and other terms and conditions of employment; (1) similarity in the scale and
manner of determining earnings; (2) similarity in employment benefits, hours
of work and other terms and conditions of employment; (3) similarity in the
kind of work performed; (4) similarity in the qualifications, skills and training
of the employees; (5) frequency of contact or interchange among the
employees; (6) geographic proximity; (7) continuity or integration of
production processes; (8) common supervision and determination of labor-
relations policy; (9) relationship to the administrative organization of the
employer; (10) history of collective bargaining; (11) desires of the affected
employees; (12) extent of union organization.
Id., citing N.L.R.B. v. Saint Francis College, 562 F.2d 246, 249, 96 L.R.R.M.(BNA) 2134, 2136 (3d Cir. 1977), quoting R. Gorman, Labor Law: Organization and Collective Bargaining 69 (1976). Here, there is only one distinction that separates faculty on the University’s main campuses on the basis of their community of interest. That distinction has been the separation of the two units for decades. That distinction is whether the faculty member carries a bipartite or tripartite workload. Upon that distinction many of the community-of-interest factors depend, as will be shown at hearing. The University and United Academics contend the boundary between the two bargaining units must ride on whether the faculty member teaches upper or lower division courses, but as the evidence will show, that has never been the distinction between the two units. And significantly, it never could provide a stable boundary because it is not only impracticable, it is nearly impossible to maintain.

The University has sought a wall-to-wall faculty bargaining unit since it first was required to bargain with UAFT. However, given that two bargaining units exist, the question is how to shape the boundary between the two units. Because United Academics claims that all faculty who teach upper division courses belong in its bargaining unit, the group of faculty that are in dispute are all bipartite faculty members who teach a mixture of upper and lower division courses, whether on the main campuses or at extended sites.

Because the bipartite faculty teaching any courses at extended sites have always been within the UAFT bargaining unit (with a few non-conforming ad hoc exceptions) there is no ambiguity about their unit placement. Their actual working conditions, and historical experience, has made their community of interest the same as other UAFT-represented faculty, and their integration within departments that have bipartite faculty on the main campuses just strengthens their community of interest with their fellow bipartite faculty.

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The ambiguity that must be resolved in this proceeding concerns the bipartite faculty teaching a mix of upper and lower division courses on the main campuses. Historically, those faculty members teaching a mix, but predominately lower division courses, have been placed in the UAFT bargaining unit. Those bipartite faculty members teaching a mix, but predominately upper division courses, have been placed in United Academics bargaining unit, along with the tripartite faculty members. This division of the bipartite faculty has never been successful and has been the source of controversy after controversy. Separating bipartite faculty into two bargaining units along the artificial line between upper and lower division course work is pernicious is several ways.

First, as the evidence at hearing will show, there is no special community of interest among those that teach exclusively lower division courses that divides them from other bipartite faculty members. Second, nearly all the factors relevant to community of interest are contingent upon whether the workload is bipartite or tripartite. Thus, skills and training; similarity in the qualifications, earnings; similarity in the kind of work performed; evaluation and promotion, tenure, frequency of interchange among the employees; hours of work, benefits, other terms and conditions of employment—all are linked to whether or not the faculty members carry tripartite workloads that include research or whether the faculty members carry bipartite workloads which emphasize teaching rather than research. Third, the upper/lower division divide has never been observed in fact because it is not practical, does not serve the interests of the University, the faculty or the students. For that reason it is an unstable boundary, which simply causes friction and dispute rather than cohesiveness for purposes of collective bargaining.

**STATEMENT OF FACTS**

University of Alaska Federation of Teachers, Local 2404 (formerly Alaska Community College Federation of Teachers, Local 2404, but throughout referred to as

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“UAFT”) represents teachers employed by the University and is party to a collective bargaining agreement with the University. The University is comprised of three main campuses—Fairbanks (“UAF”), Anchorage (“UAA”) and Juneau or Southeast (“UAS”)—and Community Campuses and Affiliated Sites commonly known as “extended sites.” As shown below in graphic form, UAF has six extended sites and seven education centers; UAA has five extended sites and seven educational centers; and UAS has two extended sites.

http://www.alaska.edu/active/about-ua/

In Article 9.1A of the current collective bargaining agreement between UAFT and UA, the University recognizes UAFT as the exclusive bargaining representative of:

faculty, librarians and counselors of a community college\(^1\) established by the University of Alaska Board of Regents; faculty, academic counselors and librarians whose principal assignment is at an extended site of the University of Alaska\(^2\); faculty whose principal assignment is vocational-technical instruction; and faculty who are employed to teach exclusively at the lower division level, that is 200 level courses or below, or are employed to teach exclusively at the lower division level

\(^1\) “Community College means the physical facility or facilities of a community college established by the Board of Regents pursuant to the Alaska Community Colleges Act, AS14.40.560, et seq., including but not limited to Prince William Sound Community College.” See Ex. 508, Art. 2, Definitions, 2010 CBA (hereinafter “2010 CBA”). The exhibits filed with that unfair labor practice complaint are cited herein by appropriate letter. Exhibits included with this memorandum are numbered and cited by appropriate number.

\(^2\) “Extended Site means an educational facility or facilities not located on the principal campuses of the University of Alaska Anchorage, the University of Alaska Fairbanks and the Juneau campuses of the University of Alaska Southeast . . .” See, Ex. 508, Art. 2, 2010 CBA.

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with a single part service assignment; but excluding department heads, chairs, supervisors, cooperative extension personnel, temporary personnel, aides, assistants, office clericals, those administrators who are not elected by the faculty and other persons not employed as instructional personnel or counselors as described above for more than fifty (50) percent of a full-time workload assignment or of the full-time workload assignment for the counselors and librarians described above.

Except for a reduction from 60 to 50 percent of full-time workload assignments to qualify for inclusion, this language has remained unchanged since 1992. ³

Significantly, both prior to and after the merger of community colleges into the University system, UAFT faculty members occasionally taught upper division ⁴ classes, although they rarely had a significant research component to their workload; that is, they rarely had a tripartite workload. See, Ex. 502, Bornstein, Phase III, at 57 and footnote 1. See also, Ex. 501 Bornstein, Phase II, at 9. Although Article 9.1A addresses UAFT representation on the main campuses as “faculty who are employed to teach exclusively at the lower division level, that is 200 level courses or below, or are employed to teach exclusively at the lower division level with a single part service assignment,” the parties have always understood that UAFT faculty had, could, and would teach upper division classes. They expressed that understanding in other CBA provisions that supplement the language of Article 9.1.

From 1992 the parties’ CBA has provided for UAFT faculty to teach upper division courses. The 1992 CBA provided in Article 5.1 that:

The assignment of an upper division course or courses which would otherwise exclude a Faculty Member from the bargaining unit is permitted without

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³ The 1992 contract was the first between the parties after the University merged the community colleges into the university system and followed a three-phased arbitration of grievances brought by UAFT to force the University to continue to recognize the Union and bargain with it. The decisions in that arbitration are found as joint exhibits and are cited herein with reference to exhibit, phase and page number: Ex. 500 is Phase I, ACCFT, Local 2404 and University of Alaska, Decision and Award (Bornstein, 1988) (concerning the ability of the university to restructure) (hereinafter “Bornstein, Phase I”). Ex. 501 is Phase II ACCFT, Local 2404 and University of Alaska, Decision and Award (Bornstein, 1990) (University’s withdrawal of recognition held invalid) (hereinafter “Bornstein, Phase II”). Ex. 502 is Phase III ACCFT, Local 2404 and University of Alaska, Decision and Award (Bornstein, 1991) (remedy stage) (hereinafter “Bornstein, Phase III”).

⁴ The term “upper division course” means 300 and 400 level courses. Graduate level courses are numbered in the 600s. 500 level courses are professional development courses.
exclusion from the bargaining unit, provided that the Faculty Member and appropriate University administrator agree to the assignment and such agreement is reduced to writing.

HISTORY OF BARGAINING UNITS

In 1973, ALRA certified UAFT as the collective bargaining representative of "all of the statewide community college faculty of UA, including all permanent academic and vocational instructional personnel, librarians, and counselors." Exhibit 4, p. 1. At that time there were eight community colleges covered by the contract. As the State created more community colleges, the faculty at those colleges came into the bargaining unit. Although the language was modified in 1997, this provision for UAFT faculty members teaching upper division courses has remained in all subsequent contracts.

The University's recognition, found in Article 5.1, of UAFT's representational status for some faculty teaching upper division courses is the result of the historical role of UAFT faculty in teaching upper division courses, the result of binding arbitration decisions which compelled the University to recognize UAFT as representative of faculty with bipartite workloads (regardless of whether they taught upper or lower division courses), and the result of the practical necessity of utilizing bipartite faculty to teach upper division courses both at the time the 1992 contract was negotiated and now. Those factors are explained more fully below.

Article 1.2 of the 1974-1976 UAFT-UA collective bargaining agreement, Ex. 510, defined the bargaining unit as "All of the statewide community college faculty of the

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5 See, Ex. 500 Bornstein, Phase I, 6, 31.

6 The University will attempt to attach great significance to a change in the language in Article 5.1 in the 1997 CBA which removed the reference to being excluded from the bargaining unit if teaching upper division courses. The University's misinterpretation of the significance of that deletion ignores the context in which that change occurred, as will be explained at trial and as is explained below.

7 A bipartite workload ordinarily consists of teaching and service. UAFT's members' bipartite workload typically consists of four parts teaching, one part service. A tripartite work load consists of teaching, research, and service or other components. Tripartite workloads typically consist of three parts teaching, one part service or other duty, and one part research. See, See Ex. 501, Bornstein, Phase II, at 7.

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University of Alaska, including all permanent academic and vocational instructional personnel, librarians, and counselors, and excluding supervisors, temporary personnel, aides, assistants, office clericals, those administrators who are not elected by the faculty, and all other persons not employed as instructional personnel, librarians, or counselors for at least 60% of fulltime." That language remained unchanged in the 1976-79 agreement, which was then extended until 1984. See. Ex. 511. The successor 1984-1987 CBA continued Art 1.2 forward unchanged. Ex. 512, p. 1.

In 1986 there were 13 accredited community colleges at which 70% of all higher education students in Alaska were enrolled and taught by some 300 full-time faculty represented by UAFT. The University and the community college in Anchorage shared a campus but were housed in different buildings. Similarly in Fairbanks, the campus was shared by the University and the community college.

In 1987 the University Board of Regents merged the community colleges with the University of Alaska creating three main regional universities (Anchorage, Fairbanks, Juneau), each with its own cluster of extended sites (community colleges). After the merger only one independent community college, Prince William Sound Community College, remained. Many UAFT-represented faculty members remained at the extended campuses, but some already worked on what became a main campus or were transferred or were hired to work at the main campuses. Most of the faculty members on the main campuses prior to the merger had tripartite workloads including a research component.

Although UAFT faculty members now worked on the main campuses, the UAFT members on those campuses remained a distinct unit because of their bipartite workload, which typically involved a heavier teaching load and one part service, and no (or minimal) research component. UAFT faculty members typically taught four classes a semester. Non-
UAFT faculty members typically taught three classes and had one research unit. Some of the former community college two-year programs that had been co-sited with main campuses became two-year plus two-year programs, providing associate and bachelor degrees. UAFT faculty members taught upper division courses in those 2+2 programs, just as they had before the merger. The University also hired new main campus bipartite faculty to teach primarily in the lower division, but who were also utilized to teach upper division. Also, post-merger, UAFT faculty members at the extended sites continued to teach both lower and upper division classes.

Upon announcement of the merger, the University withdrew recognition of UAFT and repudiated the UAFT-UA CBA, which was not scheduled to expire until March 31, 1989, except as to Prince William Sound Community College. UAFT filed a contractual grievance, which resulted in the three-phased Bornstein arbitration concerning recognition of UAFT's bargaining unit.

In Bornstein, Phase I, the arbitrator held that the CBA did not forbid the restructuring that had occurred. Ex. 500. A significant reason for that conclusion was Bornstein's finding that "the restructuring had been largely bureaucratic and had not significantly changed the job content or working environment of the transferred community college faculty." See Ex. 502, Bornstein, Phase III, at p. 6 referencing his decision in Phase I.

In Bornstein, Phase II, the Arbitrator was called upon to determine whether the UAFT bargaining unit retained its community of interest in a way that distinguished it from the remaining faculty, and thus whether it remained a stand-alone bargaining unit sufficient to retain its right to enforce its CBA. See Ex. 501, Bornstein, Phase II, at 5-6. The Arbitrator held that the UAFT bargaining unit retained its integrity, and rejected the University's

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8 Prior to the merger, faculty teaching at the main campuses were not represented for collective bargaining purposes.

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contention that the bipartite/tripartite distinction between UAFT-represented faculty and the unrepresented faculty was no longer material.

They carry the same teaching loads (four courses per semester) that they did in the past, and significantly they have not been rewarded with the lighter teaching load (three courses per semester) enjoyed before and after the restructuring by other faculty members of the University of Alaska system. This factor is especially important, for in American higher education a primary distinction between community colleges, four year undergraduate colleges and senior research institutions is the relative teaching load of faculty members. Teachers in community colleges in Alaska and elsewhere have historically carried heavier teaching loads than teachers in four year and other schools, for community college teachers typically are not expected or required to engage in scholarly research. Community colleges are known primarily as teaching institutions, in contradistinction to so-called senior research institutions where faculty members are expected to engage in scholarly research and to publish extensively.

Id. at 7 (underscoring in original).

Following the decision in Bornstein Phase II, Ex. 501, the University resumed recognition of UAFT as the representative of all faculty teaching at the extended campuses and of all faculty teaching on the main campuses who had a bipartite workload. See Ex. 501, Bornstein, Phase II, at 6-9. However, the parties were not able to work out an agreement on remedy and returned to the Arbitrator.

In his phase-three decision, the Arbitrator rejected the University's contention that the community of interest common to UAFT faculty had "ceased to exist after the close of the hearing in Phase II." Ex. 502, Bornstein, Phase III at 29. Instead, the Arbitrator specifically found that the bipartite/tripartite distinction continued to exist as the defining boundary between the UAFT bargaining unit and the other, at that time unrepresented, faculty employed by the University. See Ex. 502, Bornstein, Phase III (1991), at 6, 53-57, 59. The workload factor determined the boundary of the bargaining unit:

I respectfully reject the University's argument that the bargaining unit ceased to exist before the expiration of the contract. I also reject its argument that faculty hired to replace transferred faculty may not properly be viewed as unit members.

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9 The Phase III hearing occurred in November 1990 and January 1991, and the Arbitrator's findings are pertinent to that time period. Ex. 502, Bornstein, Phase III, at 7.
While hiring criteria may have been somewhat different, as University witnesses indicated, the unit was still defined. For purposes of determining remedies in this proceeding, **faculty members hired to teach the courses traditionally taught by former community college faculty on the basis of a bipartite workload must be considered unit members entitled to the benefit of the remedies awarded in this Phase III decision.**

Ex. 502, *Bornstein, Phase III*, at 58-59 (emphasis added). Significantly, the Arbitrator recognized that some UAFT bargaining unit faculty (bipartite faculty) had taught, and continued to teach, upper division coursework and that the percentage of those who taught upper division courses had increased. *See* Ex. 502, *Bornstein, Phase III* (1991), at 9 (UAFT faculty were those who taught four, not three, mainly, not exclusively, lower division classes); and at 57 (“While there was an increase in the percentage of former community college faculty who taught upper level courses, three-quarters did not.”)

In 1991, the University filed a unit clarification proceeding. That case did not proceed to hearing. Rather, the parties reached an agreement on the scope of the bargaining unit in collective bargaining in May 1992. Ex. 505. UAFT had filed unfair labor practices, which were proceeding to hearing, and had supported a legislative effort to remedy the University’s treatment of the bargaining unit. Under significant legal, legislative and political pressure, the University finally sat down with UAFT to bargain collectively.

On May 1, 1992, the University proposed a unit definition, a plan for transition to the bargaining unit, and a collective bargaining agreement. Over the next few days UAFT and the University reached agreement on the unit definition to be included in both the collective bargaining agreement and a stipulated certification to resolve the outstanding unit clarification proceeding. Ex. 505.

On May 8, 1992, the parties also agreed to an interim procedure that would occur in Fiscal Year 1992 to make the initial bargaining unit assignments. That “Transition Agreement” provided:

For purposes of implementing the stipulated unit definition, the following apply:
1. Persons who were included in the Bornstein remedy unit are included in the bargaining unit, unless they presently, i.e. 1991-92 academic year, have a tripartite assignment or any other assignment not included in the unit under the stipulated definition, in which case such persons shall be permitted to choose whether they wish to maintain their current assignment or accept an assignment that would include them in the unit.

2. Except for extended site and vocational-technical unit faculty, faculty who were included in the Bornstein remedy unit who are currently teaching upper division courses but who do not have a tripartite assignment, will be assigned to teach exclusively lower division courses unless agreed to otherwise under the terms of the collective bargaining agreement.

3. Persons employed by the University who meet the stipulated unit definition, but who were not part of the Bornstein remedy unit can request the University assign them responsibilities which would exclude them from the unit.

4. Counselors and librarians who transferred to the restructured University of Alaska as of July 1, 1987, will be grandfathered into the unit; however, librarians and counselors other than at a community college or extended site are not part of the unit.

5. Disagreements about whether a person should have been included in the remedy unit are to be determined by Tim Bornstein.

The parties also reached agreement on the CBA, which was ratified on May 12, 1992, which contained the unit description found in Art. 1.2, as understood to include the ability to teach upper division courses and remain in the unit per Article 5.1. The parties then entered a stipulation to the same description of the bargaining unit in order to settle the outstanding unit clarification proceeding.

The parties had anticipated cooperation in implementing the Transition Agreement, and toward that end the University had agreed to provide the Union with UA faculty workloads for school year 1991-92 so that over the summer of 1992 the parties could determine eligibility for the bargaining unit for the coming academic year, 1992-1993. However, although the University had allowed UAFT to review those during negotiations, thereafter the University refused to provide ACCFT with the workload documents necessary to carry out the task. UAFT continued over the next two years to seek the information, but the University never complied.

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The dispute continued into 1994, as the University continued to claim it was reviewing the list and attempting to gather the workload information, while maintaining that the information was not readily available and that its higher priority was resolution of Bornstein, Phase III, remedy issues. It stated that once those matters had been settled, it would then be able to address the Union's unit concerns. Id. The University never provided the information, and the transition agreement procedures were never implemented because the University so frustrated the process as to make it impossible.

While the University continued its refusal to cooperate with UAFT regarding its obligations under the Transition Agreement, in 1992 it proceeded unilaterally to develop a protocol and form to use for UAFT faculty members to teach upper division courses. The University valued the flexibility it had in assigning UAFT faculty to teach upper division courses, and continued its practice of doing so in 1993, when it issued a guide to its administrators concerning the nature of the UAFT bargaining unit and the process for assigning upper division courses in particular.

The University’s 1993 guide includes a Table of Contents that references both Articles 1.2 and 5.1 as the description of the bargaining unit and the Transition Agreement. The University’s guidance to its administrators acknowledged that the teaching of an upper division course did not disqualify a faculty member from unit inclusion. The guidance lists several assignments that, in the University’s interpretation of the unit description, would disqualify a faculty member:

When a CBU member accepts a non-qualifying position, such as Department Head, regular upper division courses, or a tripartite workload, the non-eligible assignment paragraph should be used.

Id.10 Significantly, a tripartite assignment would disqualify a faculty member from the UAFT bargaining unit, but teaching upper division courses did not.

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10 It is clear also that the University acknowledged that the one-time ability of faculty members who were not part of the Bornstein, Phase III, remedy unit, to request an assignment that would disqualify them from the unit,

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Although the University came eventually to argue that regularity in teaching upper division courses would somehow disqualify a UAFT bargaining unit member from the unit, UAFT bargaining unit members in 1994, after this guide was issued, routinely taught upper division courses utilizing Art. 5.1, and bargaining unit members continue to do so, without being removed from the bargaining unit, as will be shown at trial.

The University’s understanding in the 1990’s was that a faculty member with a bipartite workload belonged in the UAFT bargaining unit regardless of whether he or she were assigned upper division courses, as is demonstrated by the resolution of a grievance brought by UAFT in 1994.

In the fall of 1994, the UAA Mathematics Department consolidated two new-hire and two vacated full-time faculty positions into one job description for four open positions. Although the positions were to perform a bipartite teaching assignment with predominantly lower division courses (one upper division class), during the hiring process members of the hiring committee added one upper division course to the second semester workload in attempt to keep new faculty members out of the bargaining unit. This effort was premised on those hiring committee members’ erroneous belief that one upper division course would disqualify the faculty members from bargaining unit placement. The University hired two faculty members for two of those positions, but it did not place the new faculty members within the UAFT bargaining unit. See Exhibit 10.

Therefore, in 1994, UAFT filed a grievance (“Narang grievance”), contending that the two new faculty members should be placed in its bargaining unit and that the two positions which had not yet been filled also belonged in the unit. The University agreed that

did not carry forward after the academic year 1992-1993. See the last page of the form, which will be introduced at trial.

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the positions belonged in the UAFT bargaining unit. The UAA Chancellor made the following findings in acceding to the grievance:

"Finding #1: Pursuant to Art. 1.2.A, a newly hired faculty member becomes a member of the bargaining unit based exclusively upon the nature of the appointment and workload, both of which become binding upon the offer and acceptance of a letter of appointment and the corresponding workload agreement."

In Finding #3: Consistent with Finding #1; the provisions of Article 5.1, Professional Assignment; past UAA/ACCFT practices; and pursuant to the signed workload agreements, I find that the department chair and the two faculty members in question agreed to teach upper division courses as a permissible exception to the faculty's normal and expected workload assignments."

This outcome is consistent with other documentary evidence of the University’s understanding of the relationship between Articles 1.2.A and 5.1. The Associate Dean who investigated the grievance and met with the hiring committee concerning the grievance told them that the University viewed UAFT’s bargaining unit “as being 4-1 [bipartite], primarily lower division.”

However, the Dean of the Mathematics Department sent a memo to the UAA Assistant Vice President for Employee Relations stating that the four positions involved in the Narang grievance were “advertised as bipartite. That being the case, my understanding of the union/non-union issue is that it rests solely on the teaching schedule for each individual instructor: solely lower division means union membership; a mix of lower division and upper division on a regular basis means non-union.” Exhibit 13, p. 1. The Dean then asked for clarification from the Employee Relations office: “What, precisely, constitutes regular teaching of upper division courses? Is it at least one course per semester? One course per academic year?” Ex. 13, p. 2.

If there was an answer given, UAFT does not know what it was. What UAFT does know is that, consistent with the parties’ agreement, its bargaining unit members continued thereafter to teach upper division courses, and some UAFT faculty have taught upper
division courses every semester without the University attempting to remove them from the bargaining unit.

Thus, the University knew that the UAFT bargaining unit on the main campuses included those with a bipartite workload with a predominantly (not exclusively) lower division course load, as is reflected in this Agency’s decision in ACCFT v. University of Alaska, Decision & Order 204 (August 20, 1996). There the Agency’s description of the origins of the Narang grievance stated that, “Although the positions in the mathematics department were hired to perform a predominantly lower division, bipartite, teaching assignment, the University assigned the positions to the nonrepresented group.” The University corrected the unit assignments of the two faculty members who had been hired when the Narang grievance was filed and correctly placed the third faculty member who had been hired into the third bipartite position, with a predominantly lower division teaching assignment, in the bargaining unit.11

In the meantime, in May 1995, at the same time that the University acceded to the Union’s position in the Narang grievance, Arbitrator Corbett denied grievances of three teachers that UAFT contended should have been in its bargaining unit. However, the decision did not, as the University will content, hold that teaching upper division classes disqualified a faculty member from inclusion in the UAFT unit. Rather, the arbitrator denied the grievances because the faculty members did not have teaching loads of at least 60% of full-time workload, a requirement for unit membership. He noted also that the professors

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11 Those three faculty members retained counsel to negotiate with the University about their assignment to the UAFT bargaining unit. In the settlements reached with the three, the University amended their employment contracts by adjusting their pay, assuming agency fees, and excluding union members and two named faculty members from any peer review committee evaluating their performance. UAFT filed an unfair labor practice complaint that resulted in the decision in ACCFT v. University of Alaska, Decision & Order 204 (August 20, 1996), holding that the University had committed “serious[] violations, which go to the heart of the ACCFT’s status as the exclusive bargaining representative of these employees....” and therefore issuing “a broad order requiring the University to cease and desist from infringing in any other manner the rights guaranteed under AS 23.40.070 – AS 23.40.060.” citing Opportunity Homes, Inc. (Service Employees Local 627), 315 NLRB No 156, 148 LRRM 1306 (1994).
involved were not teaching exclusively lower division courses, and while written agreement
to do so under Article 5.1 would allow them to remain in the bargaining unit if they were
otherwise qualified, they had not executed those agreements. Patently, the Corbett
arbitration decision does not limit the UAFT bargaining unit to faculty members teaching
only lower division courses; if it did so, the arbitrator would not have recognized that the
UAFT CBA included a provision for faculty members to teach upper division courses and
remain in the bargaining unit (Article 5.1).

Because of the direct dealing it had engaged in with the UAFT bargaining unit
members whose positions were the subject of the Narang grievance, UAFT filed an unfair
labor practice complaint against the University. In 1996 following the certification of United
Academics as collective bargaining representative for faculty not represented by UAFT,
ALRA issued its decision holding that the University had violated its duty to bargain with
UAFT when it circumvented UAFT in negotiating directly with the Narang faculty members.

The order in ACCFT v. University of Alaska, Decision & Order 204 (August 20,
1996), required the University to restore those terms and conditions of the UAFT CBA that
had been negotiated away in the unlawful direct dealing with the faculty members and
ordered that any future negotiations concerning those faculty members be conducted between
the University and UAFT. Decision & Order 204, Order ¶4.

This order was issued just weeks after the Agency certified United Academics as
collective bargaining representative of faculty at the University, but excluding “[a]ll
employees who are recognized by the University of Alaska as represented by the Alaska
Community Colleges’ Federation of Teachers, Local 2402 (sic) ....”12. Significantly, if, 
while the Narang unfair labor practice case was being adjudicated, the Agency had
determined that all faculty members teaching upper division courses, whether their

12 The description that followed was identical to the language of the then current UAFT collective bargaining
agreement that is now found in Art. 9.1, but it did not reference UAFT CBA Art. 5.1.

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workloads were bipartite or tripartite, belonged in the newly certified United Academics bargaining unit, that order would have been very different. It would have limited the remedy to restoring the UAFT CBA conditions up to July 2, 1996, when it issued United Academic’s certification. This it did not do because bipartite faculty belonged in UAFT’s bargaining unit, whether or not they taught upper division courses.

Just a few weeks before the Agency issued Decision & Order 204, it had issued the United Academics certification, which followed a hearing about the scope of the United Academics bargaining unit as distinct from the UAFT unit, and following an election held in the United Academics unit. In that proceeding, the Agency determined that “[d]espite the reorganization combining the faculty of the community colleges and of the four-year universities, the faculty of the proposed United Academics’ unit ha[d] maintained a distinct community of interest from the former community college faculty represented by the ACCFT.” United Academics v. University of Alaska, Decision and Order 202 (April 29, 1996) at ¶8. The University contended in that proceeding that there was a community of interest between all faculty that precluded certification of two separate bargaining units. The Agency disagreed, concluding that “these faculty have maintained different missions and identity and these differences continue despite University reorganization.” Id. at ¶ 15.

In particular, the Agency found: “The principal difference was described under the findings addressing community of interest -- the mission and teaching work of the two groups [and that t]he presence or absence of a research requirement is a key difference between the two faculty groups.” Id. at ¶ 26. Research as the third component in the tripartite workload distinguished the bargaining unit sought by United Academics from the UAFT unit whose members had a bipartite workload (no research component). The “faculty employees in United Academics’ proposed unit have a stronger research focus in their work. Research generally is not required of ACCFT bargaining unit members, who have a stronger

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focus on teaching and community service. *Id.* at ¶ 13. In contradistinction, the UAFT “teachers are oriented to teaching and service to the community.” *Id.* at ¶ 14. “These differences in the workload of the two faculty groups are significant and have a substantial impact on how the faculty view themselves and their community of interest.” *Id.* at ¶ 13. “Since consolidation, the ACCFT bargaining unit members continue to teach a bipartite workload.” *Id.* at ¶ 27. “The faculty in the proposed United Academics’ unit work a tripartite workload. The third component after teaching and service is the research requirement. Research is a very important responsibility of the tripartite faculty.” *Id.* at ¶ 28. Noting that Arbitrator Bornstein had earlier found, “[c]ritical to determining community of interest was the difference in the workload of the two groups of faculty,” *Id.* at ¶ 34, the Agency concluded that “the community of interest of the faculty groups has not changed since the arbitrator’s decision in 1990.” *Id.*, at Conclusion of Law. #7.

Consistent with the key difference between UAFT and United Academic bargaining units, the bi/tripartite distinction, the UAFT/UA collective bargaining agreements have carried forward the language of Art. 1.2 and 5.1 of the 1992 CBA after certification of United Academics. Article 5.1 of all their agreements recognizes that UAFT bargaining unit members may teach upper division courses upon written agreement and supplements Art 1.2.

Although the language of Article 5.1 was modified in the 1997 CBA, that change reflected the clear understanding that UAFT faculty could teach upper division courses and remain in the UAFT bargaining unit. Prior to 1997, Article 5.1 stated:

**5.1 Professional Assignment A. Workload:** The professional assignment of Faculty Members shall be consistent with the procedures and practices in place on the campus of their principal assignment as of the date of this agreement. The assignment of an upper division course or courses which would otherwise exclude a Faculty Member from the bargaining unit is permitted without exclusion from the bargaining unit, provided that the Faculty Member and

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13 ALRA clearly relied on the bipartite/tripartite distinction as the dividing line between UAFT and the UnAc unit, when it noted that “A key difference is that research is not required for ACCFT bargaining unit members but it remains an important factor in evaluating the performance of the nonbargaining unit faculty.” *Id.*, ¶ 16.

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appropriate University administrator agree to the assignment and such agreement is reduced to writing.

The 1997 CBA, negotiated subsequent to the Narang grievance and ALRA’s decision in the related Narang unfair labor practice proceeding, retained Art. 5.1 in a modified form. Article 5.1 in that contract, and all subsequent contracts, provides:

The assignment of an upper division course or courses is permitted, provided that the Faculty Member and appropriate University administrator agree to the assignment and such agreement is reduced to writing (Appendix C). See, Ex. 515, 509, 507-508.

The elimination of language in the former Art 5.1, referencing disqualification from the bargaining unit arising from teaching upper division courses, reflects the clear understanding following the Narang grievance, and following Decision and Order 202, that faculty with bipartite workloads properly belong in the UAFT bargaining unit regardless of whether they teach upper division courses. Therefore, the language that erroneously implied that teaching upper division courses could cause removal from the bargaining unit was removed from Article 5.1, so that the article correctly expressed the parties’ understanding and commitment to each other. Again, UAFT faculty members continued to be assigned upper division courses after 1997 and continued to remain in the UAFT bargaining unit.

THE DISPUTE CONCERNING TEACHING UPPER DIVISION

In 2003 and 2004, the longstanding understanding that the UAFT bargaining unit included faculty on main campuses with bipartite workloads teaching predominately lower division courses started to unravel. UAFT began seeing evidence that the University, which had previously assigned courses according to department needs and qualifications of faculty members, had begun restricting qualified UAFT-represented faculty members from teaching courses that their departments desired them to teach. UAFT protested this change. In 2003, UAFT filed a grievance alleging that the University had removed faculty member Dan Henry from the bargaining unit on the ground that he was teaching upper division courses. The University’s resistance to following its previous practice of allowing departments to assign
work according to departmental needs and resources regardless of bargaining unit membership arose from the pressure United Academics was bringing to bear to obtain all of the upper division coursework for its members. Therefore, the Henry grievance became a part of an overall, but unsuccessful, effort by the parties to sort out their differences about the bargaining unit definitions. In the end, UAFT did not pursue that grievance to conclusion because the parties were unable to resolve their differences and by the time they reached arbitration, Henry had left his employment.

Again in 2004, UAFT objected when the University denied a UAFT faculty member permission to teach an upper division course that he had taught for many years and was scheduled to teach that summer. After discussion, the University approved teaching the course and did not claim that the faculty member had to be removed from the unit, although it stated it did so as a “one-time approval, not intended to set any precedent.”

In August 2004, the University threatened to send a letter to UAFT faculty members who had regularly taught upper division courses telling them that in future they would be forced to choose between teaching upper division classes and their UAFT membership. The University took this new position, despite admitting in the cover letter enclosing the draft letter to faculty its past practice of assigning upper division courses to UAFT members as recognized under Art. 5.1. *Id.* Again UAFT protested and stated it would take legal action if the letter was sent. The University then pulled back from sending the letter.

In September 2004, there were at least 192 UAFT faculty teaching upper division courses in the academic years 2002-2004. The two unions and the University continued to be unable to resolve their dispute, and although the University had not taken any action to

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14 The attempt by United Academics to persuade the University to assign faculty members whose principal assignment is an extended site has a long history, of which this incident is only one. A more recent and successful example of preventing UAFT faculty at extended sites from teaching upper division courses will be presented at hearing in the example of Carol Klamer. However, the longstanding and continuing practice of UAFT bipartite faculty at extended sites teaching upper division courses will be well documented at trial, as will those faculty members’ community of interest with the other bipartite faculty on the main campuses.

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remove faculty from the UAFT bargaining unit, in 2006 UAFT again warned the University that any unilateral action by it was unlawful.

Thereafter, during negotiations for a successor collective bargaining agreement, the University proposed removing Art 5.1 from the agreement, contending that it violated the provisions of the United Academics contract. The University failed in that bargaining objective, and Art. 5.1 remains in the contract.¹⁵

In October 2007, faced again with the threat of unilateral action by the University, UAFT filed unfair labor practice charges which have been placed in abeyance pending this proceeding.

After filing the unfair labor practice charges, UAFT sought information from the University to assess the extent of the unlawful actions of the University in denying its members their historic work. Although the University was slow in producing the documentation, UAFT did receive enough information to document a policy of refusing to assign upper division courses to UAFT bargaining unit members on the main campuses. UAFT also discovered other failures by the University to place newly hired faculty members in the UAFT bargaining unit.

At the time UAFT provided evidence to the agency concerning these violations, its efforts to obtain further documents from the University and the review of the documents was continuing. However, it prepared a chart summarizing the information known at that time concerning faculty that should be in the UAFT bargaining unit, but who have not been recognized as such by the University. That chart and the documents it summarizes

¹⁵ At the time this agreement was reached in January 2008, the parties understood that the outcome of pending unfair labor practice complaints filed by UAFT might affect their agreement and agreed that neither party “waives their respective contentions before ALRA.” See, Ex. 503. During negotiations for the current CBA, the parties made a similar agreement. See, Ex. 506. While the University may believe these agreements shield it from the effect of agreeing to carry forward Art. 5.1, that is not the case. That provision which reflects the parties’ consistent practice over nearly two decades of assigning upper division courses to UAFT bargaining unit remains in the current contract.

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demonstrate that, beginning in academic year 06-07, and possibly earlier, the University began to assign to the United Academic bargaining unit bipartite new hires it would normally have placed in UAFT.

In some instances in making these assignments the University ensured that the new hires’ workload included an upper division class and assigned them to United Academics on that erroneous basis. However, even under the new definition of UAFT’s bargaining unit shared by United Academics and the University, there is no justification of the placement in the United Academics bargaining unit of many bipartite faculty members on main campuses who teach only lower division courses.

The attempt to unilaterally sever bipartite faculty teaching a mix of upper and lower division classes from the UAFT bargaining unit contradicts the reality that those faculty share a community of interest with all bipartite faculty, a fact that the University now concedes. See, Motion to Dismiss. While the University would like to see a merger of the two bargaining units, that is “outside the scope of [this] unit clarification proceeding.” Northwest Arctic Education Association, Decision and Order 162, citing Mac Towing, Inc., 262 N.L.R.B. No. 168, 110 L.R.R.M.(BNA) 1537 (1982).

**DISPARITY OF INTEREST BETWEEN BIPARTITE AND TRIPARTITE FACULTY**

The two bargaining units at issue here include over 1500 faculty members teaching in more than a dozen locations and in many different departments and fields. However, the common interests of those faculty who predominately teach and perform community or university service as distinguished from the common interests of those faculty who perform research in addition to service and a lighter teaching load will become apparent at hearing. Witnesses will testify concerning the connection of a tripartite/bipartite workload to

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16 The University contends it has a management right to assign upper division courses or not. However, that argument fails because the University does not have the management right to alter the scope of the bargaining unit, or to deny the contractual right to the opportunity to teach upper division courses through an unfettered discretion that would make the opportunity right nugatory. See, Bonnell/Tredegar Industries Inc. v. NLRB, 46 F.3d 359 (4th Cir. 1995).
differences in background and professional requirements, job performance requirements, reporting requirements, compensation, supervision, promotion and tenure tracks, and many other working conditions. UAFT will introduce documentary evidence demonstrating that the University itself makes the primary distinction among faculty along a bipartite/tripartite divide that affects every aspect of a faculty member’s working conditions no matter the location or department within which she or he works. Moreover, the evidence will show that the bipartite/tripartite distinction is a stable one, with very little or no cross-over among faculty.

This natural boundary is the boundary recognized by the Agency in Decision 202, and by Arbitrator Bornstein in his trilogy of arbitration decisions. The evolution of the University system has only made this division more prominent, and has only increased the impracticability and divisiveness of the attempted but never accomplished “exclusively lower division” boundary.

DATED this 1st day of April, 2010.

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I certify that on this 1st day of April, 2010, I caused the original and four copies of UAFT’s Hearing Brief to be delivered by legal messenger to:

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