Arbitration Decisions

Labor Arbitration Decision, Univ. of Cal. San Diego, 2021 BL 506785, 2021 BNA LA 424

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November 8, 2021

OPINION AND AWARD

IN ARBITRATION PROCEEDINGS

PURSUANT TO A

COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between

University of California San Diego, Employer

and

Teamsters Local 2010, Union

Confidential Records Analyst Positions
Grievance Number 20-1937K

November 8, 2021

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BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Bargaining units - Contract rights and duties ►100.20 ►24.57 ►100.0235 ►100.0738 ►100.0765 [Show Topic Path]
Arbitrator Paul D. Roose ruled that the University of California San Diego violated its CBA with the Teamsters when it unilaterally designated two records analyst II employees as confidential who hadn't been so identified in a 2019 list and were thereby incorporated into the unit by the parties' 2020 settlement of a PERB accretion petition. UCSD violated the CBA provision requiring that it notify the union at least 30 days prior to reclassifying bargaining unit employees as excluded from the unit; whether the employees at issue are confidential employees wasn't properly before the arbitrator and must be decided by PERB. One employee no longer employed by the university is excluded from the remedy, and the other must be provided all pay and benefits she would've received if she had been incorporated

into the unit when other RA IIs were accreted into the unit. The union's request for reimbursement for union dues is denied as no evidence was submitted regarding whether dues would have been required, when and in what amount.

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PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was mutually selected as the arbitrator from a list of arbitrators contained in the collective bargaining agreement (CBA). The matter was heard on August 17, 2021, on the Zoom videoconferencing platform.

The University is claiming that the grievance is not arbitrable because of untimely filing. The parties have agreed to present their arguments about both arbitrability and the merits of the grievance in a single hearing.

The parties stipulated that the arbitrator retains jurisdiction over the implementation of the remedy if the arbitrator grants a remedy.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. The parties concluded their presentation by written briefs. The briefs were received by the arbitrator on October 20, 2021, and the matter was submitted for decision.

ISSUE

The parties stipulated to the statement of the issue, as follows:

1. Is grievance number 20-1937K arbitrable?
2. If yes, did the University violate Article 2E of the CBA with respect to Shannon Munemura, Jade Laidlaw, and Edgar Alminar?
3. If the University violated Article 2E, what is the appropriate remedy?

University of California And Teamsters Local 2010 AGREEMENT April 19, 2017 - March 31, 2022

ARTICLE 2

...

C. RECOGNITION

1. Pursuant to and in conformity with the certifications issued by the Public Employment Relations Board (PERB) of the State of California in case number SF-HR-12, the University recognizes Teamsters Local 2010 as the sole and exclusive representative for the purposes of collective bargaining with respect to wages, hours, and terms and conditions of employment for all employees, excluding employees designated as managerial, supervisory and/or confidential by the University as of November 21, 1997 and all student employees whose employment is contingent upon their status as students, in the following described bargaining unit:

A. Unit #12 — Clerical and Allied Services (SF-HR-12)

E. RECLASSIFICATION FROM UNIT TO NON-UNIT POSITIONS

In the event the University determines that a position or title should be reclassified or designated for exclusion from the unit, or the University intends to replace a major portion of a bargaining unit position with a position in a classification outside of the unit, the University shall notify Teamsters Local 2010 in writing at least thirty (30) calendar days prior**[*2]** to the proposed implementation. If Teamsters Local 2010**[*2]** determines to challenge the University's proposed action, it shall notify the University in writing within thirty (30) calendar days from the date on which the University's notice was mailed, and the proposed effective date will be extended by thirty (30) calendar days. During such an extension, the parties will meet and discuss the University's proposed action. If the parties are unable to reach agreement regarding the University's proposed action, the University may commence PERB unit modification procedures, as outlined under PERB regulations. Until the bargaining unit assignment is either agreed to by the parties or finally resolved through the PERB unit modification procedures, (1) the affected position(s) or title(s) shall remain in the unit and shall remain covered by all provisions of this agreement, (2) the University may, in compliance with Article 45 — Wages, Section A.6.d., Order of Increases and Section 7., Other Increases, of this Agreement, increase compensation for the affected position(s) or title(s), and (3) the duties associated with the proposed reclassification may be assigned to the affected employee(s).

ARTICLE 7 — GRIEVANCE PROCEDURE

A. GENERAL CONDITIONS

1. A grievance is a written complaint by an individual employee, a group of employees, or Teamsters Local 2010 that the University has violated a specific provision of this Agreement...

F. GRIEVANCE PROCEDURE — FORMAL REVIEW

1. **Step 1:**
a. All grievances (individual, group, or union) must be filed either by U.S. mail or hand delivery, and received by the Labor Relations Office at the campus/hospital/Laboratory which employs the grievant(s) within 30 calendar days after the date on which the employee or Teamsters Local 2010 knew or could be expected to know of the event or action giving rise to the grievance.
b. Grievances receive after the filing deadline will be processed solely for the purposes of determining whether the grievance was untimely...

FACTS

The Union Took Steps to Accrete the Records Analyst II (RA II) Classification into the Systemwide Bargaining Unit: On August 8, 2018, the Union filed a petition with PERB to accrete the RA IIs and the RA IIIs into the Union-represented CX bargaining unit.

Melissa Munio is the chief of staff for the Union. She testified that, in May 2019, the Union received from the University a spreadsheet of RA IIs. She stated that the document was in

response to a Union request for information about unrepresented groups of employees. She testified as follows:

> ...this is another response to a request for information that the union receives specific to a large audience[1] of unrepresented titles as part of classification work, and in the list before you is the university's reporting, [*3] as of May 2019, all of those workers that were then in the records analyst 2 title.

The[*3] spreadsheet included 28 employee names and their work locations. Five of those employees were identified as San Diego campus employees. Four others worked at the San Diego Medical Center. The remaining nineteen were at UC Davis, UC Davis Medical Center, UC Merced and the Office of the President (UCOP).

Of the five UC San Diego campus employees, three were later identified by the University as confidential. They are Edgar Alminar, Jade Laidlaw, and Shannon Munemura.[2]

A column in the spreadsheet was headed "Empl Rel Confid Code." Both Union and Employer witnesses confirmed that this column denotes whether the employee is designated as confidential. Each employee was marked "N" for No or "Y" for Yes under this heading. Two employees — Mr. Alminar from UC San Diego and Ms. Angela Hom from UCOP — were marked "Y" for Yes in the confidential column. The remaining 26, including Ms. Laidlaw and Ms. Munemura, were marked "N" for No in this column.

Ms. Munio testified that, during the accretion discussions, the University never claimed that any of the RA II positions were confidential and should be excluded.

The University Initially Resisted the Accretion, But the Parties Settled the Matter in January 2020: According to a Settlement Agreement entered into the record in this proceeding, the Union filed a Unit Modification Petition with the CA Public Employment Relations Board (PERB) on August 8, 2018, to accrete the RA IIS and RA IIIs into the bargaining unit. The University denied the petition on September 17, 2018.

The matter was scheduled for a hearing on January 8 - 10, 2020. The parties reached an agreement to settle the matter during those hearing dates. The University agreed to accrete the RA II group but not the RA III group. The Agreement was signed on January 23, 2020. The RA IIs were to be accreted 45 days from when the agreement was signed.

As part of the settlement, the parties agreed that four RA IIs at UC San Diego would be evaluated by a "desk audit" to determine whether they were properly classified. Those four do not include the employees later deemed "confidential."

The audit was conducted and determined that the four employees were properly classified as RA IIs, so they were accreted into the bargaining unit.

Item four of the settlement agreement was the following:

> Between now and when the Records Analyst IIs are accreted into the bargaining unit as set forth in 1 above, the University agrees not to reclassify Records Analyst IIs into Records Analyst IIIs or any other classification outside of the CX bargaining unit. Subsequent reclassifications of Records Analyst IIs into other classifications will follow the requirements of the collective bargaining agreement, including Article 2.E, between the University and Teamsters Local 2010.

After the Settlement, the University Notified the Union that Three RA IIs Would be Excluded from the Bargaining Unit Due to Their[*4] Being Confidential Employees: The University provided the Union[*4] with a current list of RA IIs (title code 4713) on January 30, 2020, a week after the settlement agreement was signed. The spreadsheet included 26 employees. It included the three UCSD employees later claimed by the University as "confidential." It also included Ms. Hom from UCOP.

The spreadsheet, unlike the one provided in 2019, included no designation of confidential status and made no distinction between confidential and non-confidential employees.

Ms. Hom was not included in the bargaining unit accretion and the Union did not object to her exclusion.

After the accretion decision, the Union bargained with the Employer about such issues as to what step on the bargained pay scale the accreted employee would be assigned. During

that bargaining, the Employer informed[3] the Union that it would not be accreting the three UCSD employees due to their confidential status.[4]

The Employer introduced exhibits purporting to be online job descriptions for the RA II positions in the policy and records administration department at UC San Diego. These named the individuals in question, classified them as "All others, confidential," and characterized their duties as "highly confidential." However, no evidence was in the record that the Employer had provided these job descriptions to the Union prior to the PERB settlement on January 23, 2020.

To summarize the somewhat complex timeline and fact pattern in this matter, the arbitrator has created the following timeline chart.

TIMELINE	**Date**	**Event**
	8/8/2018	Union Files Unit Modification Petition with PERB to Accrete the RA IIs
	9/17/2018	University Rejects the Unit Modification Petition and the Matter is set for Hearing in January 2020
	5/2019	RA II List Provided by UCOP to Union — "Confidential" Column Designates Alminar (UCSD) and Hom (UCOP Employee) as Confidential, Laidlaw (UCSD) and Munemura (UCSD) as Not Confidential
	1/8/2020 - 1/10/2020	PERB Hearing Dates on Unit Modification Petition — Parties Settle
	1/23/2020	PERB Settlement Agreement on Records Analyst IIs Signed
	1/30/2020	Records Analyst II List (Including Alminar, Laidlaw, and Munemura) Provided by UCOP to Union — No Confidential Designation Column
	2/11/2020	University Notified Union that the Three Positions at UCSD Would be Excluded from the Bargaining Unit
	9/4/2020	Union filed a ULP with PERB About the Exclusion of the Positions
	11/5/2020	Union Filed Grievance About Exclusion of the Three Positions, Based on the Occurrence Date October 23, 2020, of a Renewed Information Request
	12/9/2020	University Responded to Grievance, Denying on Merits and Challenging Arbitrability on Grounds of "Procedural Ineligibility"

TIMELINE	Date	Event
	2/2/2021	University Denied Grievance at Step Two, With No Additional Clarification About the Arbitrability Claim
	3/10/2021	University Denied Grievance at Step Three, Clarifying that Its Procedural Objection is Based on Confidential Employees Being Outside the Scope[*5] of the CBA, Not Based on Timely[*5] Grievance Filing
	4/12/2021	PERB Filed a Complaint About the Exclusion of the Three Positions and the University's Failure to Meet and Confer
	4/16/2021	Response from UCOP to Union About Appeal to Arbitration, Notifying Union that the University Will "Insist On a Separate Arbitration Hearing to Decide the Issue of Timeliness and/or Arbitrability of the Subject Matter"

The Union Objected to the Exclusion of the Three UCSD Employees and Filed a Grievance: The Union requested information about the three excluded employees, including their job descriptions and sample work products. The University provided the job descriptions, but not the sample work products.

On November 5, 2020, the Union filed a grievance at step one. The grievance alleged as follows:

> On October 23, 2020, the Union submitted a renewed Information Request to obtain documentation supporting a proposed confidential designation for three Records Analyst 2s that were accreted into the Teamsters Local 2010 CX unit. To date, the requested information has not been provided. Procedures for the reclassification from unit to non-unit positions are outlined in Article 2E of the Teamster CBA. A unilateral change of status is an Article 2E violation. Bargaining unit members impacted by this action include, but are not limited to: Alminar, Edgar; Laidlaw, Jade; Munemura, Shannon.

Under "Remedy Proposed," the Union asked:

> UCSD shall cease and desist actions intended to unilaterally change the status of RA2s accreted into the bargaining unit; all reclassifications will follow established procedures outlined in Article 2E of the Teamsters CBA and any other applicable resolutions.

The University denied the grievance at step one and step two. It wrote:

> The University reviewed all RA2 positions in title code 4713 after learning that the RA2 positions were to be accreted as part of the signed Settlement Agreement between the University and the Union. The University discovered that the three RA2 positions in Policy and Records Administration are designated confidential and concluded these positions were not to be accreted as confidential employees and are not represented by a bargaining unit.
>
> The University acknowledges that two of the three RA2 were not coded correctly in the Payroll Personnel System (PPS) and did not have the confidential designation entered into PPS. Edgar Alminar's position was correctly coded in PPS with the confidential designation. However, the

> confidential designation for all three positions in PRA was correctly input into the Master Job Description in the JD Online Application System, which is another internal database utilized by the University...

The step one decision questioned the arbitrability of the grievance, as follows:

> Given that confidential employees are excluded from representation by a bargaining unit, these positions would not fall under the provisions of the Agreement. Should the Union appeal this[*6] matter to arbitration, the University intends to challenge[*6] the arbitrability of the case for procedural ineligibility, and will insist on a bifurcated hearing prior to and separate from the hearing on the merits.

The step two and step three responses reiterated the same management positions on the grievance. The Union appealed the grievance to arbitration. It is that grievance that is now before the arbitrator.[5]

UNION'S POSITION

The Union argues that the confidential status of the three employees in question is not at issue in this grievance. "The Arbitrator has no authority to determine the confidential status as the parties have negotiated for that determination to be made by PERB. The Union has not presented evidence or argument on the issue of the confidential status of these employees because it is not within the scope of this grievance," the Union writes in its brief.

The Union contends that the matter should be presumed arbitrable. "UCSD asserts 'arbitrability' but fails to identify in the record any basis for its arbitrability claim. UCSD also failed to present any evidence at hearing to support an arbitrability claim. UCSD's opening statement is devoid of any argument that the grievance is not arbitrable," the Union's brief asserts.

Moreover, the Union contends that the University's claim of non-arbitrability has no grounding in the contract. The "substantive arbitrability claim makes no sense as disputes over the University's failure to comply with Article 2E are unquestionably arbitrable and UCSD does not assert otherwise," the Union writes.

The Union argues that the three employees in questions were accreted into the unit along with all the others. If the University wants to remove them and place them in confidential status, it must follow the strictures of Article 2E. It did not do so, the Union argues.

The Union concludes its brief by urging the Arbitrator "to find that UCSD violated Article 2E and order that the three RAII's be returned to the bargaining unit, made whole for any lost wage increases, and that UCSD make the Union whole for lost dues, and an order that UCSD comply with Article 2E if it seeks to remove these positions from the unit. Without an order for lost Union dues, the University's harm to the Union goes unremedied. This is particularly untenable given UCSD's bad faith in seeking to deprive the Union of the bargain that was struck."

EMPLOYER'S POSITION

The Employer contends that the grievance is not arbitrable, on procedural and substantive grounds. On procedure, the grievance was not timely filed. To be timely, the grievance would have to have been filed within thirty days of March 8, 2020. It was not filed until November 5, 2020. The purported event used by the Union to establish a new event date, an information request, is a separate issue and not the subject of the grievance.

Substantively, the University argues that the grievance is non-arbitrable since the employees in question are confidential[*7] employees and the CBA does not apply to them. The arbitrator does not have[*7] jurisdiction over this matter, the Employer theorizes.

On the merits, the University contends that the CBA language is clear and Article 2E does not apply to unrepresented positions. "Article 2E only applies to represented positions which the University is seeking to reclassify, exclude from the CX unit, or replace with a non-CX position. In other words, Article 2E only applies where the University determines that a position currently within the CX unit should be excluded," the University writes in its brief.

The proper resolution for accreting positions is a unit modification petition, the University asserts. "If Teamsters disagrees with the University's designation of the three RA 2's as confidential, and desires to add the positions to the CX unit, it may file a petition for modification of the CX unit with the Public Employment Relations Board," the Employer's brief argues.

The Employer acknowledges that a "coding error" was made on an employee list and thereby a mistake was made in communicating to the Union that two of the three employees were not confidential. However, these employees' duties were confidential, as reflected in their Master Job Description.

The University concludes by noting that the grievance is not arbitrable and there is no evidence of a violation of the CBA by the University. The University requests that the grievance be denied in full.

DISCUSSION

The Employer Failed to Properly Raise the Timeliness Issue at Earlier Steps of the Grievance Procedure, So the Grievance is Considered Timely Filed: The undersigned arbitrator adopts the consensus view of the arbitrator community that a claim of untimely filing must be raised by the employer at the earliest feasible step of the grievance procedure and continuously raised thereafter. The significance of this requirement is a practical one — the union must be placed on notice early in the process that the employer considers the grievance untimely. The union must be afforded the opportunity to rebut the untimeliness contention or, in some instances, withdraw the grievance and choose another course of action.

The record in this matter is clear that the Employer's untimeliness claim was not made until arbitration. A careful reading of the University grievance responses shows that, while lack of arbitrability for other reasons was raised, the filing date of the grievance was not an issue. Accordingly, the grievance is procedurally arbitrable.

The Employer's other claim of non-arbitrability is that the three employees are not covered under the CBA and thereby not the proper subject of a grievance. This arbitrability claim is inextricably wrapped up in the merits of the grievance. If the Employer's claim about the three employees' status holds up, then the matter will indeed have been found non-arbitrable. To the extent that the claim is[*8] not consistent with the factual record, the matter will have been found arbitrable and the arbitrator will fully weigh the merits of the case.

The Issue of Whether[*8] the Three UCSD Employees are Confidential Employees is Not Properly Before the Arbitrator: The parties, despite their differences in how they view this grievance, both appear to agree that PERB, not the arbitrator, resolves disputes over the confidential nature of employees under HEERA. This approach makes sense. The arbitrator was not made privy to the undoubtedly expansive body of case law on confidential employees under California public sector labor relations statutes.

The definition of a grievance as a violation of "a specific provision of this agreement" reinforces this view that it is not the role of the arbitrator to decide on a violation of HEERA. As the parties have stipulated in their issue statement, the substantive issue is whether the University violated Article 2E of the CBA.

As noted in an earlier footnote, the extensive testimony proffered by the Employer on job duties is, in the final analysis, irrelevant to these proceedings. It was not summarized or quoted. It will not be weighed.

The Sole Substantive Issue Before the Arbitrator is Whether the University Properly Notified the Union Before the Accretion that Certain RA IIs Were Confidential Employees: An analysis of the grievance begins with a look at the title of Article 2E. It refers to "reclassification from unit to non-unit positions." The University does not believe this provision applies in the instant case. The UCSD positions were, from its point of view, never in the bargaining unit. Since they were never in the unit, the University asserts that it does not have to go through the 2E procedures to exclude them.

The Union, on the other hand, believes that the three employees were in the bargaining unit. By virtue of being on an RA II list provided by the Employer, they were unit members by default. The Union's point of view is that the Employer must follow the 2E procedures if it wants to exclude the employees from the unit.

The key issue boils down to this: what did the Employer communicate to the union about the RA II group prior to the agreement to accrete them into the bargaining unit? From the

neutral arbitrator's vantage point, the most specific communication was the May 2019 list provided by UCOP to the Union. That was the only time during this process that a list was created and provided that classified employees as "confidential" or "not confidential."

For opposite reasons, neither party in this dispute was willing to rely on the 2019 list as determinative. This places the neutral arbitrator in the less-than-ideal position of reaching a determination that neither party was willing to support at the hearing.

The Employer's rejection of the significance of the document is based on its argument that the designation of RA IIs Munemura and Laidlaw as not confidential on that May 2019 list was a[*9] clerical or "coding" error. Yet this claim about an "error" was not backed up by any documentation or testimony about who made the error, how it was made, and why it was made. It[*9] does not explain how the Office of the President, presumably sophisticated in matters pertaining to the designation of employees as confidential, could have passed this supposedly erroneous list to the Union without correction or further explanation.

The record also does not reveal when the University discovered the "error," when it communicated that discovery to the Union, and how it explained that to the Union. From the factual record of this hearing, the explanation could have been a coding error. The explanation could also have been that the two employees in question — Munemura and Laidlaw — were considered non-confidential in 2019 and re-designated as confidential in 2020.

The Employer's effort to negate this "error" by producing job descriptions of the three employees falls short. The record was devoid of any showing that contemporaneous 2019 documentation existed that conflicted with the "erroneous" spreadsheet. Most important, no evidence existed that the Employer provided to the Union any job descriptions of the three employees prior to the settlement agreement.

The Union also downplays the importance of the May 2019 list. Chief of staff Munio characterized it as resulting from a routine Union request for information about RA IIs and other unrepresented classifications. While this may have been the case, the context is important to assess how the Union might have viewed this document. This document was provided to the Union after it had already filed for accretion of the RA II group. Dates for a formal PERB hearing on the matter in January 2020 had already been set.

Common sense dictates that the Union would have carefully scrutinized the list of RA IIs when it received the list, and taken note that two listed employees — Ms. Hom and Mr. Alminar — were classified as confidential. The undersigned arbitrator concludes that the Union was aware, or should have been aware, that the University considered two of the RA IIs to be confidential employees not eligible for accretion.

The Union argues that the May 2019 document was superseded by the January 2020 list. That later document, however, had no column designating confidential or non-confidential. It did not contradict the earlier list — it just provided less detail. The list was accurate — it was a list of RA IIs, both confidential and non-confidential.

The Union's argument that the January 2020 list is the one that should be relied on to establish the accretion is belied by the Union's own actions. UCOP employee Hom was on that second list, yet the Union agreed to exclude her from the unit based on her confidential employee status. It was not in the record why the Union agreed to exclude Ms. Hom. But by doing[*10] so, it acknowledged that the list was not the sole basis on which employees were to be accreted.

The Employer designated two employees as "confidential" prior to the January 2020 settlement agreement — Mr. Alminar from UCSD and Ms. Hom from UCOP. As such, they[*10] were never in the bargaining unit. The Union may file with PERB, argue that Mr. Alminar (and/or Ms. Hom if the Union has changed its view of her status) is not confidential, and attempt to get him incorporated into the unit.

The preponderance of the evidence is that Ms. Munemura and Ms. Laidlaw were incorporated into the bargaining unit by the settlement agreement of January 2020. The University should have included them in the bargaining over step placement and designated them as members of the CX bargaining unit when the other RA IIs were so designated. The University, also, is free to go through the process and attempt to have the positions declared confidential.

The University violated Article 2E of the CBA with respect to Shannon Munemura and Jade Laidlaw, but not Edgar Alminar.

One of the Impacted Employees, Ms. Laidlaw, is No Longer Employed by the University and is Thereby Excluded from the Remedy: Unrebutted testimony at the hearing was that Ms. Laidlaw ceased working at the University in June 2021. One could postulate that she should still be included in any back pay remedy ordered in this matter, until the date she left employment. However, it is the view of the undersigned that this would not be a just and appropriate component of a remedial order. Nothing in the record indicated that Ms. Laidlaw willingly participated in the grievance filing or sought inclusion in the bargaining unit. Neither did Ms. Munemura, for that matter, but there are other valid reasons to include Ms. Munemura in the remedy.

Ms. Munemura is Entitled to All Pay and Benefits She Would Have Enjoyed Had She Been a Member of the Bargaining Unit from the Date All Other RA IIs Were Accreted to the Unit: As noted above, nothing in the record indicated that Ms. Munemura initiated or supported the grievance in this matter. Indeed, her testimony strongly supported the contention that her duties are appropriately classified as confidential. If the University continues to believe that to be the case, it is entitled to pursue reclassification of Ms. Munemura's position using the procedures in Article 2E.

In the meantime, Ms. Munemura must be placed in the CX bargaining unit. The parties must engage in the same bargaining about her pay they deployed for the other accreted employees. To the extent that she would have received pay increases in 2020 and 2021 that she did not receive as an unrepresented employee, her pay must be adjusted accordingly. She must be made whole by receiving any back pay or benefits she would have received had she been accreted into the bargaining unit at the same time as the other employees in the spring of 2020.

This is an appropriate remedy for Ms. Munemura. While she did not initiate or support the grievance, back[*11] pay and a raise may partially compensate her for an outcome she did not seek. And the payment of back pay by the University for the contract violation may help deter future such violations.

The Union Did Not Meet Its Burden that It Lost Union Dues[*11] Because of the Contract Violation: The Union in its closing brief asked for reimbursement of lost union dues. This request is understandable since, from the Union's perspective, it lost potential revenue due to the contract breach. In some circumstances, the undersigned arbitrator would be willing to include payment to a union as part of a make whole remedy.

However, in the instant case, the Union has laid an insufficient foundation for the dues claim. Nothing in the record indicated whether the employee(s) would have been required to pay dues and, if so, when and in what amount. The Union has not proven the loss of dues because of the CBA violation. The request for reimbursement of union dues is denied.

AWARD

1. Grievance number 20-1937K is arbitrable.
2. The University violated Article 2E of the CBA with respect to Shannon Munemura and Jade Laidlaw but not Edgar Alminar.
3. The Employer shall accrete Ms. Munemura into the bargaining unit and compensate her for all pay and benefits she would have received had she been accreted into the bargaining unit on the same date that the other RA IIs were accreted into the unit.
4. The Union's request to be reimbursed for lost union dues is denied.
5. The arbitrator retains jurisdiction over the implementation of the remedy.

Paul D. Roose, Arbitrator
Date: November 8, 2021

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fn 1 The certified transcript in this hearing had the word "audience" here. It could have been another word that was distorted by the Zoom platform. In any case, the meaning is clear from context, regardless of whether it was "audience" or some other word.

fn 2 Mr. Alminar and Ms. Laidlaw did not testify at the hearing.

fn 3 If the Union was so informed in writing, it was not in the arbitration hearing record.

fn 4 The Employer introduced extensive documentation and testimony at the arbitration hearing on the question of whether the three employees were in fact confidential as defined in HEERA. One of the three employees, Ms. Munemura, testified about the confidential nature

of her duties, as did her supervisor Paula Johnson. However, in closing brief, the Employer does not summarize this testimony nor ask the arbitrator to reach a determination on the confidential nature of the positions. Accordingly, this testimony will not be recited in this fact section. The arbitrator's view of his role in the determination of confidentiality is covered in the discussion section of this opinion and award.

fn 5 The Employer dropped its insistence on having a bifurcated hearing on arbitrability and merits. The matter was heard on both issues in a single day.