

1 *BEFORE R. DOUGLAS COLLINS*
2 *IN ARBITRATION PURSUANT TO ARTICLE 10 OF THE*
3 *PARTIES' COLLECTIVE BARGAINING AGREEMENT*
4

5 In the Matter of a Dispute

6 - between -

7 *ACADEMIC PROFESSIONALS OF*
8 *CALIFORNIA*

9 - and -

10 *CALIFORNIA STATE UNIVERSITY.*

ARBITRATOR'S

OPINION & AWARD

11 Concerning the use of leave during emergency
12 campus closures. Case No. R04-2007-356.

13 *APPEARANCES*

14 *For the Union:*

15 *EDWARD R. PURCELL*

16 Business Manager

17 Academic Professionals of California

18 472 North Burton Way

19 Palm Springs, California 92262

(760) 325-9366

For the University:

BRIAN J. HURST

Senior Manager, Collective Bargaining

California State University

401 Golden Shore, 4th Floor

Long Beach, CA 90802-4210

(562) 951-4406

20 *PROCEDURAL HISTORY*

21 This arbitration arises under the Collective Bargaining Agreement ("Agreement") between
22 *ACADEMIC PROFESSIONALS OF CALIFORNIA* ("Union" or "APC") and the *CALIFORNIA*
23 *STATE UNIVERSITY* ("University or CSU"). The parties jointly have appointed me as the
24 impartial Permanent Arbitrator for all grievances in accordance with Article 10 of the Agreement,
25 which provides that my Award is final and binding upon both parties.

26 There was no evidentiary hearing in this matter. Rather, the parties agreed to submit this
27 dispute to me for resolution based on a stipulation of facts, joint exhibits, and written briefs. Each
28 party submitted a post-hearing brief, which I received on February 27, 2009. In addition, each party
submitted a reply brief, which I received on or before March 13, 2009, completing the record herein.

1 *ISSUE*

2 In their Stipulation, Agreed Facts and Documents, the parties agreed that the issues to be
3 decided in this arbitration are as follows:

- 4 1. Did the University violate the Collective Bargaining Agreement when it required
5 certain Unit 4 employees at the San Marcos, San Diego, and San Bernardino
6 campuses to utilize paid personal leaves during the period of Monday,
7 October 22, 2007, through Friday, October 26, 2007, when said campuses were
8 closed due to the threat of wildfires? Did the University violate the Agreement
9 between the parties?
10 2. If so, what shall the remedy be as it pertains to the individual employees at the
11 California State University's campuses at San Marcos, San Diego, and San
12 Bernardino who were actually harmed? Furthermore, must APC identify all of
13 these individuals in order to award a non-speculative remedy?

14 *RELEVANT PROVISIONS OF THE AGREEMENT*

15 Effective November 8, 2005, through June 30, 2008.

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17 ARTICLE 2
18 DEFINITIONS

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20 2.12 Hours Worked – the term “hours worked” as used in this Agreement refers to all time that an
21 employee is required to be on duty, or on the Employer’s premises, or at a prescribed workplace for
22 the Employer, and all times during which the employee is suffered or permitted to work for the
23 Employer.

24 ...

25 2.23 Workday – The term “workday” as used in this Agreement refers to the hours an employee is
26 scheduled for work on any one (1) calendar day.

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28 ARTICLE 3
EFFECT OF AGREEMENT

3.1 This Agreement constitutes the entire Agreement of the Trustees and the Union, arrived at as a
result of meeting and conferring. The terms and conditions may be altered, changed, added to,
deleted from, or modified only through the voluntary and mutual consent of the parties in an
expressed written amendment to the Agreement. This Agreement supersedes all previous
Agreements, understandings, policies, and prior practices related to matters included within this
Agreement.

3.2 The parties acknowledge that, during the negotiations which resulted in this Agreement, each had
the unlimited right and opportunity to offer proposals with respect to any subject or matter not
removed by law from the area of collective bargaining, and that the understandings and agreements

1 arrived at by the parties after the exercise of that right and opportunity are set forth in this
2 Agreement. Except as provided for in this Agreement, the Employer and the Union, for the life of
3 this Agreement, voluntarily and unqualifiedly waive the right, and each agrees that the other shall
4 not be obligated, to bargain collectively with respect to any subject or matter referred to or covered
5 by this Agreement, or with respect to any subject or matter not specifically referred to or covered in
6 this Agreement, even though such subjects or matters may not have been within the knowledge of
7 or contemplation of either or both of the parties at the time that they negotiated or signed this
8 Agreement.

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ARTICLE 6
MANAGEMENT RIGHTS

6.1 The CSU retains and reserves unto itself, without limitation, whether exercised or not, all powers, rights, authorities, duties and responsibilities which have not been specifically abridged, delegated or modified by this Agreement.

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ARTICLE 10
GRIEVANCE PROCEDURE

Definitions

10.1 Grievance – The term “grievance” as used in this Article refers to a written allegation by a grievant that there has been a violation, misapplication, or misinterpretation of a specific term of this Agreement.

Grievant – The term “grievant” as used in this Article refers to a:

...

The term “grievant” as used in this Article may refer to the Union when alleging a grievance on behalf of itself, or on behalf of a unit member or group of unit members. The Union shall not grieve on behalf of unit members who do not wish to pursue individual grievances. Whether filing on behalf of itself, a member, or a group of members, there shall be no financial remedy of any kind or any retroactive remedy in cases where the Union fails to identify by the pre-arbitration conference (10.5.E) the unit member(s) who have been directly wronged by a violation of a specific term of this Agreement.

...

10.3 A. The formal grievance shall state clearly and concisely on a grievance form, an example of which appears as Appendix E:

1. the specific term of the Agreement alleged to have been violated;
2. a detailed description of the specific grounds of the grievance, including names, dates, places, and times necessary for reasonably understanding;
3. the remedy sought;
4. the name, classification, address, telephone number, and signature of the grievant;
5. the name, address, and telephone number of the representative, if any; and
6. the date of submission at each level.

...

- 1 10.4 A. A designated individual in the Office of the Chancellor shall make every effort to hold a meeting
2 with the grievant and/or a designated representative of the grievant at the Office of the
3 Chancellor within twenty-one (21) days of the Level II filing. The parties may conduct this
4 meeting by telephone conference call in the event they are unable to conduct the meeting in
5 person. If the parties are not available to meet within 21 days, this period may be extended by
6 mutual agreement, pursuant to provision 10.12. The designated individual in the Office of the
7 Chancellor shall respond to the grievant in writing, with a copy to the indicated representative,
8 if any, no later than twenty-one (21) days after the Level II meeting, forty-two (42) days after
9 the Level II filing, or twenty-one (21) days after the end of any extension.
- 10 B. No amendments and/or modifications to the grievance shall be made by the grievant after the
11 Level II filing date.
- 12 C. The parties shall present at Level II all issues and evidence related to the grievance. No
13 additional issues and evidence may be presented by the parties after Level II.

10.5 Level III – Arbitration

- 11 F. The Labor Arbitration Rules of the American Arbitration Association shall apply at Level III,
12 except when the specific language of this Agreement is in conflict, in which case the specific
13 language of the Agreement shall apply.
- 14 G. It shall be the function of the arbitrator to rule on the specific grievance. The arbitrator shall be
15 subject to the following limitations:
- 16 1. The arbitrator's awards shall be based solely upon the evidence and arguments appropriately
17 presented in the hearing and upon any post-hearing briefs.
 - 18 2. The arbitrator shall have no power to alter, add to, detract from, or amend the provisions of
19 this Agreement. The arbitrator shall be without power to make any recommendation which
20 requires the commission of an act prohibited by law, or which is violative of the specific
21 terms and conditions of this Agreement.
 - 22 3. The arbitrator shall not consider any issue not raised by the parties at Level II of this
23 Agreement.
 - 24 4. The arbitrator shall not make an award which will supersede the substance of the President's
25 professional judgment. The arbitrator shall not make awards concerning the amount, or
26 granting or denial of performance pay, nor shall he/she have authority to order monetary
27 relief in any grievance concerning the performance pay program.
 - 28 5. The award of the arbitrator may or may not include back pay provided, however, that any
back pay award shall not be in excess of twenty-four (24) months salary less the difference
of any compensation including unemployment benefits that the employee received. Under
no circumstances may interest be included in an award.
 6. Except as provided in Article 4, the standard of review for the arbitrator is whether the CSU
violated a specific term of the Agreement.

1 7. The arbitrator's decision on the merits shall be in writing and shall set forth his/her findings,
2 reasonings, and conclusions on the issues submitted.

3 8. A final decision or award of the arbitrator shall be made within thirty (30) calendar days of
4 the close of the hearing or submission of post-hearing briefs.

5 H. The arbitrator's award shall be final and binding upon both parties.

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7 **ARTICLE 19**
8 **SICK LEAVE**

9 ...

10 19.8 Under no circumstances may an employee be granted sick leave for days during which the employee
11 is laid off, or on a leave of absence without pay, or during periods when the campus or department
12 is closed and the employee is not required to work.

13 ...

14 **Absences Chargeable to Sick Leave**

15 19.10 The use of sick leave may be authorized by the President only when an employee is absent because
16 of:

- 17 1. illness or injury;
- 18 2. exposure to contagious disease;
- 19 3. dental, eye, or other physical or medical examinations or treatments by licensed practitioners;
- 20 4. illness or injury in the immediate family;
- 21 5. death of a person in the immediate family; and/or
- 22 6. childbirth or disability related to pregnancy.

23 ...

24 **ARTICLE 25**
25 **HOLIDAYS**

26 ...

27 25.6 When possible, the CSU shall give sixty (60) days notice of any campus closure.

28 25.7 An employee shall be permitted to use accrued vacation or CTO or may be permitted to work a
sufficient number of extra hours in advance at the appropriate rate of compensation if the President
closes the campus and there is an insufficient number of holidays scheduled to be observed during
the closure.

25.8 Should an employee, because of length of service, have insufficient vacation or CTO accrued to cover
the scheduled days of closure, where possible, he/she shall be provided sufficient work to prevent any
loss of pay or benefits. Such work shall be compensated at the appropriate rate and shall be
performed prior to the scheduled day(s) of closure, unless an appropriate administrator deems it
necessary to assign an employee to work during the scheduled day(s) of closure.

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1 ARTICLE 26

2 VACATION

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3 26.8 Vacations shall be scheduled and taken only as authorized by the appropriate administrator. If a
4 conflict in vacation requests arises, the appropriate administrator may give consideration to the
5 employee(s) having the longest length of service at the campus provided that operational needs are
6 met.

7 26.9 Requests for scheduling vacation shall be submitted in writing to the appropriate administrator at
8 least thirty (30) days in advance. When authorized to do so by the appropriate administrator, an
9 employee may take vacation without submitting such a request. When a request is submitted in
10 writing, the appropriate administrator shall respond in writing, either approving or denying the
11 request. Failure to respond shall constitute a denial of the request.

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10 ARTICLE 28

11 HOURS OF WORK

12 28.1 Academic year employees shall be available for assignment on each academic workday as specified
13 on the campus academic calendar.

14 28.2 Ten (10) and eleven (11) month employees shall be available for assignment on all workdays within
15 the assigned ten (10) or eleven (11) months, respectively.

16 28.3 Twelve (12) month employees shall be available for assignment on all workdays within the assigned
17 twelve (12) months.

18 28.4 For those employees assigned a five (5) day workweek, the workday shall normally consist of eight
19 (8) hours. The workweek for such employees shall normally be Monday through Friday, inclusive.

20 28.5 For those employees assigned a four (4) day workweek, the workday shall normally consist of ten (10)
21 hours.

...

22 28.22 Requests for scheduling CTO shall be submitted to the appropriate administrator at least seven (7)
23 days in advance. CTO shall be scheduled and taken only as authorized by the appropriate
24 administrator. When authorized to do so by the appropriate administrator, an employee may take
25 CTO without submitting such a request.

...

26 28.26 Exempt Employees

27 The intent of this section 28.26 is to comply with the requirements of the Fair Labor Standards Act.

- 28 1. For full-time employees in classifications listed in Appendix C, the workweek shall be a
minimum average of forty (40) hours per week during any six (6) consecutive pay periods. This
provision shall apply pro rata to less than full-time employees. Authorized work may include
performance of specialized professional services, participation in committee assignments and
participation in approved professional activities. Work in excess of the minimum average
workweek is not compensable in cash or CTO, and shall not be deemed overtime.

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3. Employees who have absences of less than a full day shall receive a full day's salary and shall neither have their salary docked nor be required to use sick leave or vacation for such absences of less than a full day.

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STIPULATED FACTS

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In lieu of an evidentiary hearing, the parties stipulated to the following statement of agreed facts relevant to this matter:

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- In October of 2007, three California State University campuses were completely closed down for emergency purposes in order to protect the health and safety of employees and students from the wildfires threatening these campuses.
 - The shuttered campuses were the San Marcos, San Diego and San Bernardino campuses.
 - Each of these three campuses was fully closed on Monday, October 22, 2007 through Friday, October 26, 2007.
 - No partial day campus closures were made before, during or after this time period.
 - No altered work days or work schedules were implemented at any time.
 - No other campuses within the CSU system were affected.
 - Both exempt and non-exempt Unit 4 employees were affected.
 - Then-Interim Vice Chancellor, Gail Brooks issued an HR Coded Memo identified as HR 2007-15, dated October 23, 2007 to the campus Presidents.
 - APC was e-mailed a copy of HR 2007-15 at 4:53 PM on October 23, 2007, but was not consulted in advance of this date about the content or implementation of HR 2007-15.
 - No APC employee was allowed to work on an affected campus during the October 22 – October 26, 2007 emergency campus closures.
 - It is unknown if any Unit 4 employees were asked to work at home during the fire closures or if any individuals did so of their own volition.
 - Two (2) APC employees were charged paid leave at the San Marcos campus, they are:
 - R. Cusumano, non-exempt, 8 hours vacation requested on ____, paid for 10/22/07.
 - D. San Miguel, exempt, 32 hours vacation requested on 7/3/07, paid for 10/23/07 – 10/26/07.

- 1 ● Eleven (11) APC employees were charged paid leave at the San Diego State
2 University campus, they are:
- 3 ○ N. Aguilar, non-exempt, 20 hours sick requested on ____, paid for 10/22,
4 10/24 & 10/25/2007.
 - 5 ○ V. Farris, exempt, 8 hours personal holiday requested on ____, paid for
6 10/26/07.
 - 7 ○ L. Firmacion, exempt, 32 hours vacation requested on 9/13/2007, paid for
8 10/23/2007 – 10/26/2007.
 - 9 ○ J. Hasson, exempt, 8 hours personal holiday requested on 10/4/2007, paid for
10 10/22/07.
 - 11 ○ K. Humble, non-exempt, 8 hours vacation requested on 8/6/07, paid for
12 10/22/2007.
 - 13 ○ L. Pinkelman, exempt, 8 hours vacation requested on 8/15/07, paid for
14 10/22/07.
 - 15 ○ J. Porras, exempt, 104 hours sick requested on ____, paid for 10/12, 10/15 –
16 10/19, 10/22 – 10/26, 10/29 – 10/30/2007.
 - 17 ○ D. Rivera, non-exempt, 5 hours sick & 8 hours vacation requested on ____,
18 paid for 10/24 & 10/25/2007.
 - 19 ○ B. Romero, non-exempt, .5 hours vacation & 8 hours sick requested on ____,
20 paid for 10/22 & 10/25/2007.
 - 21 ○ P. Salazar, exempt, 8 hours sick called in on 10/22/07, paid for 10/22/2007.
 - 22 ○ M. Sanchez, exempt, 8 hours vacation requested on 9/13/07, paid for
23 10/22/2007.
- 24 ● Thirteen (13) APC employees were charged paid leave at the San Bernardino
25 campus, they are:
- 26 ○ F. Hernandez, non-exempt, 9 hours sick requested on N/A, paid for
27 10/22/2007.
 - 28 ○ E. Morris, non-exempt, 8 hours sick called in on 10/22/07, paid for
10/22/2007.
 - E. Osborne, exempt, 16 hours vacation requested on 7/31/07, paid for 10/26
& 10/29/2007.
 - J. Bauer, non-exempt, 16 hours vacation requested on 8/1/2007, paid for 10/26
& 10/29/2007.

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- L. Chaffee, exempt, 16 hours vacation requested on ____, paid for 10/26 & 10/29/2007.
- F. Wong, exempt, 8 hours vacation requested on ____, paid for 10/26/2007.
- H. English, exempt, 16 hours vacation requested on ____, paid for 10/25 & 10/26/2007.
- D. Byrd, non-exempt, 3 hours CTO requested on 10/3/07, paid for 10/23/2007.
- L. Macias, non-exempt, 8 hours sick requested on 10/22/07, paid for 10/22/2007.
- N. Cusino, non-exempt, 8 hours vacation requested on 10/8/07, paid for 10/22/2007.
- P. Sotelo, exempt, 8 hours vacation requested on 1/9/07, paid for 10/22/2007.
- D. Demeritte, non-exempt, 8 hours vacation requested on ____, paid for 10/23/2007.
- A. Arriaga, non-exempt, 8 hours sick requested on ____, paid for 10/22/2007.
- None of the above campus-specific information was provided when APC filed their grievance in 2007.
- None of the above campus-specific information was submitted by APC during or prior to the Level II meeting.
- No individual grievants have identified themselves by filing grievances of their own, or by signing the immediate grievance, as someone claiming they were directly harmed by the closures at any time.
- Former APC President, Charles Goetzl, was not scheduled to work at any of the three campuses during the week of emergency campus closures, and therefore was not harmed by the emergency closures.
- APC requested information on January 14, 2009 via e-mail to gain understanding of what campuses had been affected, the number of employees affected, the names of employees paid leave from their time banks, job classification of those employees, the nature of leave charged to each individual, for what dates that leave was charged, etc.
- The CSU represents that all information & documents forwarded on to APC on or before February 4, 2009 that pertain to their January 14, 2009 information request associated with this grievance is the sum of information & documents available concerning Unit 4 employee leave records for employees charged leave

1 during the October 2007 emergency campus closures. As of February 11, 2009,
2 CSU expects no additional documents pertaining to this grievance becoming
3 available from the three campuses.

- 4 ● The Governor has authorized “holiday informal time off” in numerous years prior
5 to 2008.
- 6 ● For multiple years now, the CSU has distributed to the campuses letters such as
7 HR 2008-22 regarding the Governor’s authorization of “holiday informal time
8 off.”

9 *ADDITIONAL RELEVANT FACTS*

10 On or about October 23, 2007, Interim Vice Chancellor for Human Resources Gail Brooks
11 issued the following “Coded HR Letter,” designated HR 2007-15, under the subject heading
12 “Administrative Leave – Fall 2007 Fire Season”:

13 Certain Southern California campuses are suffering varying degrees of disruption as
14 a result of current fires, and some employees may be displaced from their homes. To
15 assure consistency in the treatment of faculty and staff, the following guidelines are
16 provided in accounting for time during this period of disruption:

17 A. Campus closed to all or selected faculty and staff:

- 18 1. Administrative leave should be granted to all employees who were both
19 scheduled to work and were denied access to the campus during the period(s)
20 of closure.
- 21 2. During periods of full or partial campus closure, employees who have already
22 scheduled sick leave, vacation, personal holiday or CTO will still be charged
23 for that time, unless in conflict with a collective bargaining agreement. Please
24 refer to the following sections of the identified labor contracts for further
25 guidance on sick leave reporting during a campus closure: CFA – Article
26 24.8; APC – Article 19.8; CSUEU– Article 15.12; SETC – Article 23.14;
27 UAPD – Article 14.11; and UAW – Article 20.9.
- 28 3. Employees who would have been absent on any day of closure because they
were in non-pay status should not be granted administrative leave. Examples
would be an employee under a disciplinary suspension or an employee in
non-pay status because he/she has been AWOL.

B. Campus opens:

1. Employees who elected not to report to work during this fire period must use
accrued vacation, personal holiday, CTO, or be placed on a leave of absence
without pay, as appropriate.

1 C. Campus partially open:

- 2 1. If the President deems it safe to partially open the campus, please be advised
3 that emergency pay provisions of a collective bargaining agreement are only
4 available to those employees working in a campus area subject to closure.

5 D. Employees whose homes were destroyed or severely damaged by fire:

- 6 1. An employee who could not report to work because his/her home was
7 destroyed or severely damaged by fire shall be granted three consecutive days
8 of administrative leave, inclusive of any administrative leave granted as a
9 result of a full or partial campus closure. If an impacted employee needs
10 additional time, administrators are encouraged to work with the employee to
11 schedule vacation, as needed.

12 E. Employees directed to leave their homes due to mandatory evacuations:

- 13 1. For those employees who were directed to leave their homes due to a
14 mandatory evacuation and could not report to work due to issues related to
15 that evacuation, administrators are encouraged to work with the employees
16 to schedule vacation, as needed. This time is inclusive of any administrative
17 leave granted as a result of a full or partial campus closure.

18 These actions are consistent with our existing collective bargaining agreements and
19 university policy. To the extent possible, please endeavor to keep local officials of
20 employee organizations informed of events and plans.

21 On November 13, 2007, Charles Goetzl, who at the time was the elected statewide president
22 of the Union, filed the instant grievance to protest the University's actions taken pursuant to HR
23 2007-15. Therein, Goetzl named APC as the grievant and described the grounds of the grievance
24 as follows:

25 CSU Technical Letter OR 2007-15, issued on October 23, 2007, inappropriately
26 directs that some Unit 4 employees be charged various kinds of personal leave for
27 dates on which specific CSU campuses were closed due to fires while other Unit 4
28 employees be provided paid administrative leave for the same dates.

Goetzl alleged in the grievance that the University thereby violated the following provisions
of the Agreement: Article 3 (Effect of Agreement), Article 19 (Sick Leave), Article 20 (Leaves of
Absence with Pay), Article 25 (Holidays), Article 26 (Vacation), and Article 28 (Hours of Work).

To remedy the asserted violations of the Agreement, Goetzl proposed the following in the
grievance:

1 Identify all Unit 4 employees who were charged any kind of personal leave to the
2 dates in question, and return those employees all leave credits so charged. Provide
3 assurance to APC that no such leave will be charged in the event of similar campus
closures in the future.

4 On or about September 30, 2007, Senior Manager of Collective Bargaining Brian Hurst
5 submitted the University's Level II response to the grievance. Contending that "individuals who had
6 already requested, were approved for, and were scheduled to use vacation, personal holiday or CTO
7 time for October 22 through October 26, 2007, were properly charged for that time," Hurst
8 concluded that there had been no violation of Articles 3, 20, 25, 26, or 28 of the Agreement.
9 Although he conceded that there would be value in discussing the application of Article 19 in such
10 situations, Hurst did not agree that it had been violated as alleged in the grievance.

11 On or about October 13, 2007, the Union advised the University that it was submitting the
12 grievance to final and binding arbitration.

13 *OPINION*

14 Having carefully reviewed and weighed all the stipulated facts and documentary evidence
15 presented by the parties, and after considering each argument raised in their briefs, it is my
16 conclusion that the University violated the Agreement when it required certain Unit 4 employees
17 at the San Marcos, San Diego, and San Bernardino campuses to utilize paid personal leaves during
18 the period of Monday, October 22, 2007, through Friday, October 26, 2007, when said campuses
19 were closed due to the threat of wildfires. Under the terms of the Agreement, leaves of absence are
20 to be used when an employee is unavailable for work due to illness, vacation, or for other reasons.
21 Here, there was no work for the affected employees because the University closed the campuses in
22 question, and consequently there was no valid basis for charging time against their leave balances.
23 The University's contention that it was nevertheless appropriate to do so because the leaves had
24 previously been approved ignores this fundamental fact, and it is therefore not persuasive.

25 *Procedural Issues.* The University suggests that the instant grievance should be denied because
26 no individual employee filed a grievance regarding the use of leave during the campus closures in
27 question, and because the Union did not provide certain information at the Level II grievance
28 meeting. Neither contention is persuasive.

1 Section 10.1 of the Agreement provides that the Union may be the grievant when it alleges
2 a grievance on behalf of itself, or on behalf of a unit member or group of unit members. That was
3 obviously the case here. Moreover, because APC filed the grievance and sought a remedy for all
4 affected bargaining unit employees, it was unnecessary for any affected employee to submit an
5 individual grievance alleging the same violation or seeking the same remedy.

6 The University correctly points out that the Union's grievance did not specifically identify
7 those employees who were required to use accumulated leave during the campus closures, nor did
8 it include other information about those employees, such as their classifications, the dates of their
9 absences, the nature of their leaves, and so forth. However, in my judgment it would be
10 unreasonable to interpret the Agreement as requiring that level of detail, particularly where, as here,
11 the information was clearly within the University's knowledge and control. Indeed, the University
12 provided the specific information to the Union upon request prior to submitting its Level-II
13 response. It is thus clear that the Union's failure to include that data in the grievance as initially filed
14 in no way deprived the University of a meaningful opportunity to resolve the matter through the
15 grievance procedure. The despite was fully explored and understood by both parties well before it
16 was submitted to arbitration.

17 It is also clear that the grievance conformed with the requirements of §10.3(A) of the
18 Agreement. In the formal grievance as initially filed, Goetzl specified the articles alleged to have
19 been violated, and clearly described the grounds of grievance, including sufficient facts "necessary
20 for reasonably understanding" the grievance, the remedy sought, and other required information.
21 There is simply no indication that the University failed to understand the grievance.

22 Finally, §10.4(C) of the Agreement provides that all issues and evidence related to the
23 grievance shall be presented at Level II, and that no additional issues and evidence may be presented
24 by the parties after Level II. Similarly, §10.5(G)(3) provides that the arbitrator shall not consider
25 any issue not raised by the parties at Level II. It is clear, however, that the issues addressed here and
26 the controlling evidence were known to both parties prior to Level III.

27 *Merits of the Grievance.* In the final analysis, this is a relatively simple matter that boils down
28 to the contractual purpose of leave and to fundamental fairness. It is clear beyond dispute that leaves

1 of absence are intended to allow an employee to miss work under certain specified circumstances,
2 such as illness or approved vacation, without a concomitant loss of pay, benefits, seniority, or
3 employment. It is fundamental that where an employee enjoys a contractual entitlement to leave,
4 that leave may be reduced only when the employee is absent from work. It follows that where the
5 work is canceled by the employer, there is no reasonable basis for reducing the employee's
6 contractual entitlement to leave. The University's contention that the affected employees' leave
7 balances were properly reduced simply because the employees were not available to report for work
8 is not persuasive where, as here, the workday was canceled by the University and consequently there
9 was no work to which the employees could report.

10 This interpretation is consistent with §19.8 of the Agreement, which provides that an
11 employee may not be granted sick leave "during periods when the campus or department is closed
12 and the employee is not required to work." Although other leave provisions of the Agreement are
13 ambiguous to the extent that they do not include such language, similar restrictions are necessarily
14 inferred as it would be unreasonable to require the use of leave when the workday has been canceled
15 and the employee is therefore not required to work.

16 A basic principle of contract interpretation is the avoidance of unreasonable results. As
17 explained by one authority, "When one interpretation of an ambiguous contract would lead to harsh,
18 absurd, or nonsensical results, while an alternative interpretation, equally plausible, would lead to
19 reasonable results, the latter interpretation will be used."¹ In my judgment, it would be entirely
20 unreasonable to require employees to utilize leave for periods they are neither required nor expected
21 to work.

22 It is irrelevant that the leaves in question were approved prior to the closures of the
23 campuses. Once the University or a campus determined that employees were not to report for work
24 on a given date, any approved leaves for that date were no longer valid and should have been
25 canceled or modified. Again, since the employees were neither required nor expected to work, there
26 was no longer a proper basis for reducing their leave balances.

27 ¹ Committee on ADR in Labor and Employment Law, Section of Labor and Employment Law, American
28 Bar Association, Alan Miles Ruben, editor-in-chief, *How Arbitration Works*, Elkouri and Elkouri, Sixth Edition
(Washington, D.C.: BNA Books, 2003) 470 – 471.

1 Moreover, the implied covenant of good faith and fair dealing is an inherent part of any
2 contract. As I noted in my opinion in a previous arbitration involving these parties, that principle
3 serves to prevent a party from engaging in conduct that is destructive of the contractual rights of
4 another party.² This principle is explained by Hill and Sinicropi: “[I]n every contract there is an
5 implied covenant that neither party shall do anything which will have the effect of destroying or
6 injuring the right of the other party to receive the fruits of the agreement.”³ In my judgment, by
7 requiring certain employees to utilize leaves of absence during periods in which they were not
8 required to work, while at the same time granting paid administrative leave to other similarly
9 situated bargaining unit employees, the University violated this basic principle.

10 The University contends that the granting of paid administrative leave is not mandated by
11 the Agreement, and that it would have been within its rights to have placed all affected employees
12 on unpaid administrative leave for the duration of the emergency closures of the campuses. If it had
13 done so, then there arguably would have been a valid reason to permit employees—at their
14 option—to utilize leave in order to avoid any loss of earnings. But instead the University told all
15 bargaining unit employees at the affected campuses that they could stay home and granted them
16 paid administrative leave, except for those employees who had already been authorized leave for
17 other reasons. That constituted impermissible disparate treatment based on the flimsy excuse that
18 because the paperwork had been approved, the employees were unavailable for nonexistent work.

19 As the Union has pointed out, this holding is entirely consistent with my decision in another
20 case involving APC and CSU’s San Marcos campus. In that matter the campus reduced the workday
21 from eight to seven hours, but nevertheless continued to charge employees eight hours of leave on
22 days they were absent. As argued persuasively by APC, the primary distinction between that case
23 and the instant dispute is that here the affected employees’ workday was reduced to zero. In finding
24 that the University had violated the Agreement by the manner in which it charged employees for
25 sick leave and vacation, I held as follows:

26 ² *In the Matter of the Arbitration Between Academic Professionals of California & California State University*
27 *(Scheduling of Arbitration Hearings, Grievance No. 4-01-008)*, Collins, February 4, 2002.

28 ³ Marvin F. Hill, Jr., and Anthony V. Sinicropi, *Management Rights* (Washington, D.C.: The Bureau of
National Affairs, Inc., 1986) 128-129.

1 The crux of this case is the University's unilateral decision to reduce the workday for
2 affected Unit employees from the usual eight hours to only seven on the days in
3 question. Since those employees were scheduled to work only seven hours on those
4 days, it follows that any such employee who was not at work due to illness or
5 vacation on any of those days missed only seven hours of work. Consequently, the
6 University's deduction of eight hours from those employees' sick leave or vacation
7 banks was unjustified and in violation of either Article 19 or Article 26.

8 This finding also applies to FLSA-exempt employees. As specified in HR 93-17,
9 "Exempt employees who have an absence of less than a full day should receive a full
10 day's salary and should not have their salary 'docked' or 'adjusted' for less than a full
11 day nor should they be charged leave for less than a full day." The employees in
12 question here were undeniably absent for a full day; that is, it is undisputed that they
13 did not work any time on the days blasting was scheduled because they were on
14 vacation or sick leave for the entire day. But it is also undisputed that the workday
15 consisted of only seven hours on those days. Nothing in the Agreement, nothing in
16 HR 93-17, and nothing in law entitled the University to deduct more time from
17 those exempt employees' leave banks than they were absent from work. Moreover,
18 it is irrelevant that Section 28.4 of the Agreement defines the workday as "normally"
19 consisting of eight hours as these clearly were not "normal" days. Rather, the
20 University had restructured days on which construction blasting was scheduled to
21 consist of only seven hours for employees in the affected area. Having done so, it had
22 no valid basis for deducting more than seven hours of leave from such employees
23 who were absent those days. By doing so, CSUSM violated the principles embodied
24 in Article 25 and Article 26.⁴

25 The same reasoning applies here. Accordingly, for the above reasons and based on the record
26 as a whole, I find that the University violated the Agreement when it required certain Unit 4
27 employees at the San Marcos, San Diego, and San Bernardino campuses to utilize paid personal
28 leaves during the period of Monday, October 22, 2007, through Friday, October 26, 2007, when
said campuses were closed due to the threat of wildfires; the University did violate the Agreement
between the parties.

Remedy for Contract Violations. The remedy in this matter is self-evident: the individual
employees at the California State University's campuses at San Marcos, San Diego, and San
Bernardino who were actually harmed, specifically each of those employees identified in the parties'

⁴ *In the Matter of the Arbitration Between Academic Professionals of California & California State University San Marcos (Leave During Construction Blasting, Grievance No. 4-03-011)*, Collins, July 13, 2004.

1 stipulation of facts, shall have their leave balances credited by the University for any time deducted
2 from said balances during the period of the campus closures, specifically Monday, October 22, 2007,
3 through and including Friday, October 27, 2007. Furthermore, APC is not required to identify any
4 affected individuals other than those named in the parties' stipulation of facts in order to be awarded
5 a non-speculative remedy.

6 However, I do not agree with APC that a cease-and-desist order is necessary or appropriate
7 in this case. This Opinion & Award is final and binding on the parties; it constitutes the definitive
8 interpretation of the contractual provisions in dispute, and it will be followed and enforced in all
9 future cases involving these parties until and unless they mutually agree to some different
10 understanding. Moreover, the Union is free to advise its members of this decision so that they may
11 be aware of how the Agreement is to be applied in the future. A cease-and-desist order would
12 accomplish nothing more.

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AWARD

For the above reasons, and based on the record as a whole, I find and award as follows:

1. The University violated the Collective Bargaining Agreement when it required certain Unit 4 employees at the San Marcos, San Diego, and San Bernardino campuses to utilize paid personal leaves during the period of Monday, October 22, 2007, through Friday, October 26, 2007, when said campuses were closed due to the threat of wildfires; the University did violate the Agreement between the parties.
2. To remedy said violation of the Agreement, the individual employees at the California State University's campuses at San Marcos, San Diego, and San Bernardino who were actually harmed, specifically each of those employees identified in the parties' stipulation of facts, shall have their leave balances credited by the University for any time deducted from said balances during the period of the campus closures, specifically Monday, October 22, 2007, through and including Friday, October 27, 2007; furthermore, APC is not required to identify any affected individuals other than those named in the parties' stipulation of facts in order to be awarded a non-speculative remedy.
3. The arbitrator shall retain jurisdiction over this matter for the sole and limited purpose of resolving any disputes that may arise between the parties concerning the interpretation or application of this Award.

It is so ordered.



R. DOUGLAS COLLINS
Arbitrator

Dated: June 19, 2009

Hermosa Beach, California