

Can UC Senate Faculty Respect the UAW Picket Line?: Addressing the Manager/Supervisor Concerns

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Overview

UC Senate faculty have received confusing and vague guidance about our rights to respect the UAW picket line under California's Higher Education Employer-Employee Relations Act (HEERA). As tenured UC faculty with labor & employment law expertise, we aim to clarify key points about the HEERA, especially the specter that many Senate faculty might lack HEERA protections as "managers" or "supervisors"; other related topics are beyond our scope here. This is a general treatment and not legal advice for any individual or organization. Our overall conclusion is that **Senate faculty engaged primarily in research and teaching (including while department chair or the like), and not in full-time administrative roles, likely enjoy HEERA protection if they choose to respect the picket line by withholding their labor from the University.**

Broadly speaking, there appear to be three main sources of confusion or error regarding Senate faculty HEERA rights. The first involves conflating two different ways in which our institutional authority could be relevant to the strike. One way occurs when we act as an "agent" of the University. If a Senate member exercises institutional authority to interfere with TAs' or GSRs' rights to strike (or not), this may constitute an "unfair labor practice" (ULP) by the University, and the University is appropriately keen to instruct us how to avoid this. But being among those who could put the University on the hook for a ULP is quite different than a second way our authority might matter: by placing us in HEERA's special categories of "managerial" or "supervisory" employees. Such classification could limit our own HEERA rights, rights that generally do not involve exercising our institutional authority but do include things like walking a picket line or respecting it by withholding our own labor.

The second, related source of confusion is that "managerial employee" and "supervisory employee" have quite narrow, technical meanings under the HEERA. A Senate faculty member might well exercise institutional authority (including over TAs and GSRs) that in lay terms involves "supervision" or "management"—and indeed thereby act as the University's agent in the ULP context noted above—and yet not trigger the statutory "supervisory" or "managerial" employee classifications. A Senate faculty member retains full HEERA rights in this scenario.

Finally, the third area of confusion is that even genuine "supervisory employees" retain the most relevant HEERA rights, unlike "managerial employees" who lack any HEERA protections.

The following nine steps summarize our affirmative analysis. A more detailed explanation with citations follows this summary.

- 1) Under HEERA, **employees have a right to engage in collective action** to advance and protect our interests as employees.
- 2) Protected **collective action includes an individual employee choosing to withhold their own labor to respect a picket line** established by a union that represents other employees.
- 3) It is **unlawful for the University to interfere with or retaliate for protected activity**, but simply **withholding pay for work not performed is not considered retaliation**.
- 4) **HEERA explicitly treats Senate faculty as protected employees**. It takes care to harmonize that protected status with our distinctive academic responsibilities for teaching, research, and service, including faculty governance.
- 5) **HEERA excludes “managerial employees” from all protections**. Managers include a very small number of Senate members serving in full-time administrative roles, such as **Deans or Vice-Chancellors, but not rank-and-file Senate faculty devoted primarily to our academic work**. The mark of a HEERA “managerial employee” is responsibility for establishing University policy on nonacademic matters outside the scope of faculty governance.
- 6) **HEERA also establishes a distinct category of “supervisory employees.”** Supervisory status has its own criteria, and, **unlike managers, supervisors possess HEERA protections**.
- 7) HEERA’s text indicates that supervisors have the same basic rights to engage in collective action as other employees. Therefore, **even if some non-managerial Senate faculty are supervisory employees, they retain the right to respect the UAW picket line**. Supervisory status does trigger other legal disadvantages, but not ones implicated here.
- 8) Moreover, **Senate faculty engaged primarily in research and teaching are unlikely to be considered “supervisory employees” in the first place**. HEERA’s specific provisions about potential Senate faculty union representation are structurally incompatible with a supervisory/nonsupervisory subdivision. Moreover, most forms of ordinary-language “supervision” by Senate faculty do not establish HEERA “supervisory” status because they involve either supervising employees who have their own separate bargaining units (such as striking TAs and GSRs), exercising academic judgment in teaching or research rather than personnel decisions, or undertaking ministerial acts like certifying time sheets.
- 9) Irrespective of “supervisory” or “managerial” employee status, Senate faculty must not exercise our institutional authority in a way that interferes with the HEERA rights of other employees, including TAs and GSRs. **A faculty member must not retaliate against a TA or GSR for striking or not striking, but that duty does not extinguish the faculty member’s own, distinct right to respect the picket line or otherwise to show support (or not)**.

Detailed Analysis

- 1) Under HEERA, **employees have a right to engage in collective action** to advance and protect our interests as employees.

HEERA explicitly recognizes that “higher education employees” (“employees”) “have the right to form, join and participate in the activities of employee organizations” ([§ 3565](#)). This language in HEERA and similar California public sector labor laws has long been held to protect not only activity directly related to employee organizations (unions) but also the broader labor law category of “concerted activity” for “mutual aid and protection.” *See, e.g., Trustees of the California State University* (2017) [PERB Decision No. 2522-H](#).

- 2) Protected **collective action includes an individual employee choosing to withhold their own labor to respect a picket line** established by a union that represents other employees.

The right to engage in concerted activity includes the right to respect a picket line established by a union that represents other workers but not the individual employee who refuses to cross. Although this right extends to respecting a picket line established by workers of another employer, it is especially secure when the worker shares a common employer with the striking workers, as is the case for Senate faculty vis-à-vis the UAW unions striking against the UC. *See McPherson v. PERB* (1987) [189 Cal.App.3d 293](#), 308-09; *Trustees of the California State University* (2017) [PERB Decision No. 2522-H, pp. 16-17](#); *California Federation of Interpreters/The Newspaper Guild/Communication Workers of America, Local 39521* (2018) [PERB Decision No. 2609-I, p. 10](#). These protections are particularly strong when respecting a picket against the common employer’s unfair labor practices, the type at issue in the current strike. *See Limpert Bros.*, 276 NLRB 364, 120 LRRM 1263 (1985), *enforced*, 800 F.2d 1135 (3d Cir. 1986).

- 3) It is **unlawful for the University to interfere with or retaliate for protected activity**, but simply **withholding pay for work not performed is not considered retaliation**.

Like other public and private sector labor laws, HEERA prohibits employers from interfering with employees’ exercise of their HEERA rights or retaliating or discriminating against them for exercising those rights ([§ 3571\(a\)](#)). Employers may, however, withhold pay for work not performed. *See Rio Hondo Community College District* (1983) [PERB Decision No. 292](#), pp. 10–11.

- 4) **HEERA explicitly treats Senate faculty as protected employees**. It takes care to harmonize that protected status with our distinctive academic responsibilities for teaching, research, and service, including faculty governance.

As discussed further below, HEERA specifically contemplates that UC Academic Senate members may organize as employees for collective bargaining purposes ([§ 3579\(e\)](#)). However, for all UC employees, HEERA includes in the scope of potential representation “wages, hours of employment, and other terms and conditions of employment” but excludes various academic decisions, including “the content and supervision of courses, curricula, and research programs,” as well various personnel matters involving Senate members ([§ 3562\(q\)\(1\)](#)). This distinction takes on particular importance with respect to forms of supervision discussed below.

- 5) **HEERA excludes “managerial employees” from all protections.** Managers include a very small number of Senate members serving in full-time administrative roles, such as **Deans or Vice-Chancellors, but not rank-and-file Senate faculty devoted primarily to our academic work.** The mark of a HEERA “managerial employee” is responsibility for establishing University policy on nonacademic matters outside the scope of faculty governance.

HEERA excludes “managerial employees” from the definition of protected employees ([§ 3562\(e\)](#)). Accordingly, managerial employees have no HEERA rights to engage in concerted activity and be protected from retaliation, nor to choose union representation. Note, therefore, that classifying Senate faculty as managers would not only implicate our ability to show solidarity with the UAW in this strike, but it would also mean that those faculty members could face discipline for showing solidarity with any other UC unions, including AFT-represented lecturers and librarians, Teamsters Local 2010 representing clerical workers, and so on.

As it happens, though, the managerial exclusion has no bearing on Senate faculty outside of high-ranking administrative positions. To be a managerial employee requires both “formulating” and “administering” “policies and programs.” *Grossmont-Cuyamaca Community College District Administrators’ Association* (2008) [PERB Decision No. 1958](#) (*Grossmont-Cuyamaca*). Faculty involvement in “decisions with respect to courses, curriculum, personnel, and other matters of educational policy” does not count toward managerial status ([§ 3562\(k\)](#)). This represents an important difference from private sector labor law, where the Supreme Court has interpreted the National Labor Relations Act to exclude faculty as managerial on account of their academic governance role. See *NLRB v. Yeshiva University*, [444 U.S. 672](#) (1980).

HEERA specifically contemplates that department chairs and similar academic directors do not become managers by virtue of administrative responsibilities exercised on behalf of unit faculty ([§ 3562\(k\)](#)). Managerial status “should be interpreted narrowly” and requires “discretionary authority to develop or modify institutional goals and priorities.” *Grossmont-Cuyamaca, supra*, p.10 (citing (*Sacramento City Unified School District* (2005) [PERB Decision No. 1773](#)). For instance, in the most (but imperfectly) analogous case, managerial status was applied to community college Vice Chancellors and administrative deans, but not academic deans. *Id.* In contrast, disputes over the employee status of department chairs center, at most, on their potential status as supervisors but do not contemplate classification as managers. See *Hartnell Community College District* (1979) [PERB Decision No.81](#); *Unit Determination for Employees of the California State University and Colleges* (1981) [PERB Decision No. 173-H](#).

- 6) **HEERA also establishes a distinct category of “supervisory employees.”** Supervisory status has its own criteria, and, **unlike managers, supervisors possess HEERA protections.**

Unlike managers, supervisors are **not** excluded from HEERA’s definition of protected employees ([§ 3562\(e\)](#)). Instead, a separate article of HEERA ([§§ 3580-3581.7](#)) stands apart from the rest of the statute and specifies a parallel set of protections for, and restrictions on, supervisory employees. This marks an important distinction from private sector labor law, where the National Labor Relations Act entirely excludes supervisors ([NLRA § 2\(3\)](#)).

- 7) HEERA’s text indicates that supervisors have the same basic rights to engage in collective action as other employees. Therefore, **even if some non-managerial Senate faculty are supervisory employees, they retain the right to respect the UAW picket line.** Supervisory status does trigger other legal disadvantages, but not ones implicated here.

HEERA states that “[s]upervisory employees shall have the right to form, join, and participate in the activities of employee organizations” ([§ 3581.1](#)), word for word the same as protections for HEERA employees generally (cf. [§ 3565](#)), except for the substitution of “supervisory.” Similarly, HEERA forbids employers to “interfere with, intimidate, restrain, coerce, or discriminate against supervisory employees because of their exercise of their rights under this article” ([§ 3581.6](#)), again closely tracking, with the insertion of “supervisory,” the prohibitions on retaliation or other interference with HEERA employee rights generally ([§ 3571\(a\)](#)). Therefore, supervisors enjoy the same protections for concerted activity, including the right to respect a picket line, as nonsupervisory employees. As noted above in point (2) with regard to nonsupervisory employees, these protections apply to respecting a picket line established by a union representing entirely different categories of employees, including those of other employers. The underlying shared interest is particularly strong in the context of a strike like the UAW’s here, a strike called to protest the common employer’s unfair labor practices and anti-union conduct, rather than one focused simply on obtaining favorable contract terms.

With respect to concerted activity, the only substantial statutory difference between supervisory and nonsupervisory employees is that the separate HEERA article governing supervisory employees neither duplicates nor cross-references HEERA’s provisions granting enforcement authority to the Public Employment Relations Board (PERB) ([§§ 3563-3563.5](#)). Under the State Employer-Employee Relations Act (SEERA), which at the time had provisions on supervisory employees identical to HEERA, PERB ruled that it lacks jurisdiction over violations of the rights of supervisors or unions representing them, concluding that “vindication of supervisors’ rights must be through another forum.” *State of California, Department of Forestry* (1980) [PERB Decision No. 119-S](#), p. 10. This explains the lack of subsequent PERB decisions addressing supervisory employees’ rights under HEERA or its sibling public sector labor statutes. “Presumably, the protected rights of supervisory employees under HEERA can be enforced through the courts,” though no reported cases have done so. 1 *California Public Sector Labor Relations* § 13.01(3)(b) (2022). Supervisory employee unions also have weaker rights during the bargaining process than do other HEERA employees. See Reginald Alleyne, *Instituting Collective Bargaining at California’s Universities and Colleges: The Outlines of HEERA*, [31 Hastings L.J. 563](#), 589 n. 113 (1980). These limitations do not change the main point here, that even if a Senate faculty member were classified as “supervisory,” they would retain their HEERA rights to engage in concerted activity like respecting a picket line.

- 8) Moreover, **Senate faculty engaged primarily in research and teaching are unlikely to be considered “supervisory employees” in the first place.** HEERA’s specific provisions about potential Senate faculty union representation are structurally incompatible with a supervisory/nonsupervisory subdivision. Moreover, most forms of ordinary-language “supervision” by Senate faculty do not establish HEERA “supervisory” status because they involve either supervising employees who have their own separate bargaining units (such as striking TAs and GSRs), exercising academic judgment in teaching or research rather than personnel decisions, or undertaking ministerial acts like certifying time sheets.

Under the HEERA, the primary function of a “supervisory” classification is not to strip supervisory employees of labor rights but instead to avoid the conflicts that could arise if supervisory employees participated in the bargaining units of workers they supervise. Thus, HEERA bars supervisory employees from participating in grievances, negotiations, or contract ratification votes involving nonsupervisory employees ([§ 3580.5](#)). Most cases about supervisory employee status focus on separating professionally similar employees into distinct supervisory and nonsupervisory units (e.g. *Regents of the University of California* (2018) [PERB Decision No. 2578-H](#); *Trustees of the California State University* (2014) [PERB Decision No. 2384-H](#)).

HEERA’s general approach to supervisory employees cannot apply to UC Senate faculty because of other provisions specific to Senate faculty. HEERA provides separately that “the only appropriate representation units including” UC Senate faculty are either a single systemwide unit or a single divisional unit ([§ 3579\(e\)\(1\)](#)). This structure directly guarantees that Senate faculty cannot be comingled with a unit of any non-Senate employees with regard to whom they might have some supervisory duties. Moreover, excluding any Senate faculty from the Senate unit on account of supervisory status would create an internal contradiction within HEERA: supervisory employees have the right to form their own bargaining unit ([§ 3581.1](#)), yet there can be no more than one unit representing Senate faculty within any division ([§ 3579\(e\)\(1\)](#)). Following similar reasoning, PERB rejected classifying classroom teachers as supervisors based on their supervision of teachers’ aides because to do so would simultaneously exclude them from the single classroom teachers’ unit and force them into the single supervisors’ unit alongside the principals who supervised them. PERB concluded that “the Legislature could not have intended these bizarre results.” *Redlands Unified School District* (1982) [PERB Decision No. 235](#), p. 14 (adopting the hearing officer’s analysis as its own).

To be sure, HEERA does not require that any Senate bargaining unit include all Senate members, but that proviso makes structural sense only with regard to high-ranking administrators, like Chancellors or Deans; these Senate membership are entirely excluded from HEERA protections as managerial employees. Indeed, this interpretation is consistent with our understanding of the long-established practices at UC Santa Cruz, where Senate faculty are exclusively represented by the Santa Cruz Faculty Association. Notably, when that bargaining unit formed, the PERB order establishing it defined its membership simply as “all employees” in the unit consisting of “members of the Academic Senate of the University of California Santa Cruz,” without any suggestion of supervisory/nonsupervisory distinctions. *Regents of the University of California* (March 9, 1981) Case No. SF-PC-1041, Certification of a Representative.

Not only is supervisory status for non-managerial Senate faculty structurally inconsistent with HEERA's Senate-specific provisions, but, independently, rank-and-file Senate faculty are unlikely to meet the HEERA's general definition of "supervisory employee." In this context, "supervision" is used in a narrow and somewhat counterintuitively technical way, in three senses.

First, for the purpose of establishing "supervisory employee" status, the only relevant forms of "supervision" are those oriented toward the terms & conditions of employment within the scope of bargaining. See *Regents of the University of California* (2018) [PERB Decision No. 2578-H](#) (*UC Regents*). HEERA explicitly excludes from that scope the "content and supervision of courses, curricula, and research programs" ([§ 3562\(q\)\(1\)\(c\)](#)). Therefore, Senate faculty supervision of teaching and research duties performed by ASEs and GSRs does not count toward "supervisory" status.

Second, because the focus of supervisory status is separation from a bargaining unit of occupationally similar nonsupervisory employees, even supervision of personnel-related matters is given little weight when the employees supervised would be in another unit regardless. For instance, in a HEERA case involving UCLA "lead" Early Care & Education teachers, PERB held that their supervisory status turned on the existence (found lacking) of a supervisory relationship to other teachers. PERB rejected the relevance of lead teachers' supervisory relationship (including hiring) to student workers in the classroom because "'supervising' non-bargaining unit members does not qualify as a supervisory function for exclusion from the bargaining unit." *UC Regents, supra*, p. 38. Similarly, in a case involving department chairs, PERB discounted chairs' acknowledged role in hiring and firing nonacademic staff employees, instead focusing on their personnel authority with respect to faculty. *Trustees of the California State University* (2014) [PERB Decision No. 2384-H](#). That authority vis-à-vis faculty, in turn, HEERA specifically excludes from the "supervisory" calculus insofar as it is mediated by faculty governance and exercised at the department chair level or equivalent ([§ 3580.3](#)). Under this reasoning, neither Senate faculty supervision—even with regard to personnel matters—of GSRs, ASEs, postdocs, and other academic employees, nor of nonacademic staff, provides the basis for a "supervisory employee" designation.

Finally, "supervisory employee" employee status does not follow automatically from exercising some otherwise relevant supervisory duties. Classroom teachers' supervision of teachers' aides has been found not to trigger supervisory status when it arises "incidentally to the performance of their own professional duties" rather than "essentially as an agent of the employer." *Redlands Unified School District* (1982) [PERB Decision No. 235](#), p. 10 (adopting hearing officer decision under EERA). With regard to hiring and firing authority, for instance, PERB discounted such authority as merely "consistent with their professional and statutory responsibility for [] instruction" and with giving "teachers some voice in selecting the most competent and compatible aide available." *Id.* at p. 12. This reasoning strongly implies that Senate faculty who exercise supervisory authority pursuant to their academic responsibilities as instructors of record or principal investigators are not thereby "supervisory employees." And even for genuinely supervisory responsibilities, these do not trigger supervisory status if the bulk of employee's time is devoted to "performance of regular professional duties" rather than supervision. *Id.* at 18.

Additionally, some ways in which Senate faculty are involved in personnel matters may not meet HEERA's standard requiring "independent judgment" to count toward supervisory status ([§ 3580.3](#)). To take just one example prominent in discussions of Senate faculty status, signing a time sheet to verify the factual matter of hours worked would not involve the "discretionary authority" characteristic of supervisory status. *UC Regents, supra*, p. 31. Other personnel involvement may not contribute to supervisory status if it is tightly constrained by University rules or is merely a report or recommendation toward a decision over which others can and do exercise independent judgment in making a final decision. *Id.*

- 9) Irrespective of "supervisory" or "managerial" employee status, Senate faculty must not exercise our institutional authority in a way that interferes with the HEERA rights of other employees, including TAs and GSRs. **A faculty member must not retaliate against a TA or GSR for striking or not striking, but that duty does not extinguish the faculty member's own, distinct right to respect the picket line or otherwise to show support (or not).**

As discussed above, Senate faculty may exercise supervisory authority in the lay sense without becoming "supervisory employees" in HEERA's technical sense. This still gives Senate faculty power over other employees, power invested in faculty by the University. Misuse of this authority to interfere with other employees' (including UAW unit members') exercise of their HEERA rights may constitute an unfair labor practice (ULP) by the University. The critical question is whether the interference comes from someone "acting as an agent" of the employer ([§ 3562\(g\)](#)). Although supervisors generally are agents, not all agents are supervisors. Under identical language in the National Labor Relations Act, an employer may be responsible for ULPs committed by nonsupervisory employees when they act as employer agents with regard to the conduct at issue. *See Facchina Constr. Co., Inc. & Carpenters Reg'l Council Baltimore & Vicinity a/w United Bhd. of Carpenters & Joiners of Am.*, 343 NLRB 886, 886 (2004). Accordingly, it is appropriate for the University to identify Senate faculty who possess such authority and to direct us not to commit ULPs using that authority. But having supervisory authority in this sense is distinct from being classified as a "supervisory employee" for the purpose of limiting our own HEERA rights, including the right to respect a picket line by withholding our own labor or to otherwise demonstrate support for striking colleagues. Much of the confusion around Senate faculty "supervisory" status results from conflating these two distinct concepts, though some line-drawing may need to occur in edge cases.

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This analysis has been prepared under the urgency of the strike. Some applications of general principle to the specific circumstances of Senate faculty, let alone to this strike, have not been tested in a legal forum, and so some uncertainty inevitably remains. Nonetheless, we conclude that **Senate faculty engaged primarily in research and teaching (including while department chair or the like), and not in full-time administrative roles, likely enjoy HEERA protection if they choose to respect the picket line by withholding their labor from the University.** We welcome feedback identifying any errors or omissions.