

Faculty Rights 101: Layoff & Non-Reappointment

Last Revised June 4, 2009

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I. Layoff.

A. Definition.

1. General Rule: Involuntary Separation or Reduction in Time Base.

"A layoff shall refer to an **involuntary separation or reduction in time base** pursuant to this Article." [Article 38.40]

2. Exceptions: Reduction in Time-Base and Non-Reappointment of Lecturers.

a. Reduction in Time Base of Part-Time Faculty.

"The **partial or complete reduction in time base of a part-time faculty unit employee** may be accomplished pursuant to provision 12.5 and does not require the layoff of the employee pursuant to this Article." [Article 38.47]

"An appointment for a **less than full-time** temporary employee may be on a conditional basis. . . . The conditions established at the time of appointment may relate to enrollment and budget considerations. If a class is canceled **prior to the third class meeting**, the temporary employee shall be paid for class hours taught. If a class is canceled **after the third class meeting**, the temporary employee shall either be paid for the remaining portion of the class assignment or provided an alternate work assignment. [Article 12.5]

"**Full-time** temporary employees, except Coaching Faculty Unit Employees, shall not be appointed on a conditional basis." [Article 12.6]

b. Non-Reappointment of Temporary Employee.

"Non-reappointment of a temporary faculty unit employee or non-retention of a probationary faculty unit employee shall not constitute layoff." [Article 38.12]

B. Decision to Lay Off.

1. Administration Determines Necessity for Layoff . . .

"The necessity for layoff of faculty unit employees shall be determined by the Employer on the basis of whether there exists, on a particular campus, a lack of work or lack of funds, or a programmatic change." [Article 38.1]

2. . . . But Must Meet and Confer with CFA About Bargaining Unit Impact (e.g., Effect on Workload) and Consult About Alternatives.

"When the CSU determines that there may be a need for implementation of any layoff procedures outlined in this Article, the CSU shall notify CFA. The CSU agrees to immediately **meet and confer** with the CFA on the bargaining unit impact." [Article 38.3]

Within seven (7) days of notification to CFA of a potential layoff, CFA may request to **consult** pursuant to HEERA on alternatives to layoff. Such consultation session(s) shall take place within thirty (30) days of the request. [Article 38.5.]

C. Order of Lay Off.

- "a. first, less than full-time temporary faculty unit employees who do not hold a three-year (or longer) appointment [**no seniority**];
- b. next, full-time temporary faculty unit employees who do not hold a three-year (or longer) appointment [**no seniority**];
- c. next, less than full-time temporary faculty unit employees who hold a three-year (or longer) appointment [**no seniority**];
- d. next, full-time temporary faculty unit employees who hold a three-year (or longer) appointment [**no seniority**];
- e. next, faculty in the Faculty Early Retirement Program [**no seniority**];
- f. next, probationary faculty unit employees [**no seniority**];
- g. last, tenured faculty unit employees [by **reverse order of seniority** determined by hire date into TT or T position (Articles 38.16, 38.24)]." [Article 38.11]

D. Notice of Lay Off.

1. Lack of Funds or Lack of Work.

- "a. A **temporary faculty unit employee** who is to be laid off shall receive notice of layoff from the President no later than **forty-five (45) days** prior to the effective date of layoff.
- b. A **tenured faculty unit employee participating in FERP** who is to be laid off shall receive notice of layoff from the President no later than **sixty (60) days** prior to the effective date of layoff.
- c. A **probationary faculty unit employee** who is to be laid off shall receive notice of layoff from the President no later than **ninety (90) days** prior to the effective date of layoff.
- d. A **tenured faculty unit employee** who is to be laid off shall receive notice of layoff from the President no later than **one hundred and eighty (180) days** prior to the effective date of layoff." [Article 38.21]

2. Programmatic Change.

- "a. A **temporary faculty unit employee** who is to be laid off shall receive notice of layoff from the President no later than **sixty (60) days** prior to the effective date of layoff.
- b. A **tenured faculty unit employee participating in FERP** who is to be laid off shall receive notice of layoff from the President no later than **ninety (90) days** prior to the effective date of layoff.
- c. A **probationary faculty unit employee** who is to be laid off shall receive notice of layoff from the President no later than **one hundred twenty (120) days** prior to the effective date of layoff.
- d. A **tenured faculty unit employee** who is to be laid off shall receive notice of layoff from the President no later than **one (1) year** prior to the effective date of layoff." [Article 38.22]

E. Order of Recall.

1. Tenure-track and tenured faculty on recall list are recalled in reverse order of being laid off.

- a. TT stay on recall list for number of years equal to time spent in probationary status **up to five (5) years**.
- b. T stay on recall years for **five (5) years**. [Articles 38.33 and 38.34]

2. **Lecturers are given preference for work under Articles 12.29 and 12.30 and careful consideration under Article 12.7.**
 - a. **Three-year lecturers** are placed on a departmental reemployment list and have **preference for** available temporary **work** over one-year and semester/quarter lecturers, other three-year lecturers who had their entitlements met, and new hires for **three (3) years**. [Articles 38.48, 12.29]
 - b. **One-year lecturers** have **preference for** available temporary **work** over semester/quarter lecturers, other lecturers who had their entitlements met, and new hires for the **remainder of the academic year**. [Article 12.29(b)]
 - c. **Semester/quarter lecturers** have **careful consideration** rights over lecturers who had their entitlements met and new hires for the **remainder of the academic year**. [*id.*]
 - d. **One-year and semester/quarter lecturers** have **careful consideration** rights over lecturers who had their entitlements met and new hires for the **next academic year**. [*id.*]

F. Administrators Cannot Teach During Layoff.

"No administrators may perform teaching duties in a department in which faculty unit employees are in layoff status who have not waived recall rights." [Article 38.41]

II. Non-Reappointment & Reduction/Non-Fulfillment of Lecturer Time-Base Entitlement.

A. Semester and Quarter Lecturers Do Not Have an Expectation of Reappointment.

"The official notification to a temporary employee shall also indicate that appointments automatically expire at the end of the period stated and do not establish consideration for subsequent appointments or any further appointment rights. No other notice shall be provided." [Article 12.4]

B. Three-Year Lecturers Have an Expectation of Reappointment.

"Temporary faculty (excluding coaches) holding three-year appointments shall have the expectation of appointment to subsequent three-year appointments except in instances of documented unsatisfactory performance or serious conduct problems." [Article 12.13]

C. All Lecturers Have Preference for Available Temporary Work (for Some Time).

"12.29 In the event that the department determines that a need exists to assign new or additional work to temporary faculty unit employees after the assignment needs of

tenured and probationary faculty (including FERP and PRTB faculty) have been satisfied, and after any work to be taught by administrators, teaching associates and other student employees, or volunteer faculty, have been assigned, the work shall first be offered to **qualified** temporary faculty in the department, who have performed satisfactorily, in the following order:

a. Assignment Order At the Beginning of the Academic Year

1. First offer work to 3-year full-time appointees pursuant to provisions 12.12 and 12.13 of the Agreement;
2. Next, offer work to other continuing multi-year (not 3-year under provisions 12.12 and 12.13) full-time appointees;
3. Next, offer work to three-year, part-time appointees pursuant to provisions 12.12 and 12.13 up to their time base entitlement;
4. Next, offer work to individuals whose names appear on the list for the department established pursuant to Article 38.48 up to the time base entitlement of their most recent three-year appointment;
5. Next, offer work to continuing multi-year (not three-year under provisions 12.12 and 12.13) part-time appointees up to their time base entitlement;
6. Next, offer work to Visiting Faculty [up to 125 systemwide; *see* Article 12.34];
7. Next, pursuant to provision 12.7 give **careful consideration** [up to their time-base entitlements] to all part-time and full-time temporary faculty with no multi-year appointments who were employed in academic year prior to the year for which they are being considered. Temporary faculty in this group may be appointed in any order
8. Next, assign any remaining temporary work to temporary employees as "new or additional" work in the following order:
 - i. First, offer work to three-year, part-time appointees up to and including a 1.0 time base;
 - ii. Next, offer work to all other part-time temporary faculty offered appointments pursuant to paragraphs 5 and 7 above up to and including a 1.0 time base; and
 - iii. **Last, offer work to any other qualified candidate.**

b. Assignment Order During The Academic Year

1. First offer work to 3-year full-time appointees pursuant to provisions 12.12 and 12.13 of the Agreement;
2. Next, offer work to other continuing multi-year (not 3-year under provisions 12.12 and 12.13) full-time appointees;
3. Next, offer work to three-year, part-time appointees pursuant to provisions 12.12 and 12.13 up to their time base entitlement;
4. Next, offer work to individuals whose names appear on the list for the department established pursuant to Article 38.48, up to the time base entitlement of their most recent three-year appointment;
5. **Next, offer work to continuing one-year and multi-year (not Three-year under provisions 12.12 and 12.13) part-time appointees up to their time base entitlement;**
6. Next, offer work to Visiting Faculty subject [up to 125 systemwide; *see* Article 12.34];
7. Next, pursuant to provision 12.7 give **careful consideration**[up to their time-base entitlements] to all part-time and full-time temporary faculty with no one-year or multi-year appointments who were employed during the current or immediate past academic year. Temporary faculty in this group may be appointed in any order. . . .
8. Next, assign any remaining temporary work to temporary employees as "new or additional" work in the following order:
 - i. First, offer work to three-year, part-time appointees up to and including a 1.0 time base;
 - ii. Next, offer work to all other part-time temporary faculty offered appointments pursuant to paragraphs 5 and 7 above up to and including a 1.0 time base; and
 - iii. **Last, offer work to any other qualified candidate.**

D. All Lecturers Have the Right to Careful Consideration (for Some Time).

1. What Is Careful Consideration?

"Each department or equivalent unit shall maintain a list of temporary employees who have been evaluated by the department or equivalent unit. If such an employee applies for

a position in that department or equivalent unit or applicant pool for that department or equivalent unit, the faculty unit employee's previous periodic evaluations and his/her application shall receive careful consideration." [Article 12.7]

- a. Department must properly evaluate lecturer.
 - i. Evaluation criteria made available to lecturer no later than 14 days after first day of instruction of the academic term.
 - ii. No change in evaluation criteria and procedure once evaluation process has begun.
 - iii. Evaluated at least once during each one-year or three-year appointment. [Articles 15.23-15.26]

But: Scholz (D'Orazio, 2009) [denied] [umpire case]

"I recognize that Scholz received no evaluation for 2004-2005, contrary to the evaluation requirements in Article 15. However, the absence of this evaluation does not offset the weight of the evaluations that are in Scholz's PAF. The failure to evaluate Scholz in 2004-2005 occurred over two years before the assignments that gave rise to this grievance, there is no evidence that the failure to evaluate was challenged by a grievance or otherwise, and it appears from the record that Scholz did not teach in Fall 2004."

- b. Decision-makers must use only PAF and sign PAF log.
 - i. "Only the official Personal [Action] File ["PAF"] may be used as the basis of personnel actions. [Article 11.1; *see also* Article 11.9]
 - ii. "The custodian shall log all instances of access to a [PAF], including access to the file by administrators" [Article 11.15]
 - iii. Esposito (Angelo, 2008) [denied] [umpire case].

"The Selection Committee members did not sign the PAF form when reviewing the file, apparently thinking it would be signed on their behalf by the Department Chair. The Committee also reviewed material not contained in the PAF – something referred to as the 'shadow file' – and both actions were flagrant violations of the careful consideration process."

- c. PAF must contain all and only appropriate materials.
 - i. All prior evaluations.
 - ii. No unsigned student complaints. [Articles 11.2, 15.7]
 - iii. Right to be provided with copy of any material to be placed in PAF five (5) days prior to such placement; right to submit rebuttal and have it placed in PAF. [Articles 11.2-6]
- d. Decision must have "some reasonable support in the record" and cannot be "arbitrary and capricious."
 - i. CFA must first present evidence that lecturer was (better) qualified to teach course.
 - ii. CSU must then provide specific and detailed evidence that lecturer was not (better) qualified.
 - iii. CSU's decision as to whether lecturer was (better) qualified, although owed appropriate deference, must have some reasonable support in the record and cannot be arbitrary and capricious.

See: Levinson (Angelo, 2009) [sustained] [umpire case]

In terms of the proof requirements of this type of case, the Union should first demonstrate there were classes available for the Grievant to teach and then present evidence as to why the Grievant was qualified to teach the courses. The University must then show that there were no classes available or that the Grievant was not qualified to

teach the classes. The Grievant is responsible for providing specificity and detail as to qualifications, and the University must provide specificity and detail as to the bona fides of its decision, necessarily including a substantive response to the Grievant's claims. In assessing the evidence, the arbitrator should provide appropriate deference to the University but must also ensure the decision is responsive to the Grievant's claims and has some reasonable support in the record.

As noted above the University is entitled to deference as to its decisions on qualifications. That deference is lost when a decision is made that cannot be logically supported and fails to address the actual qualifications of the employee. I must conclude the decision was arbitrary and capricious based on the evidence in this case.

- iv. Note: Although Levinson was a "careful consideration" case addressing the question whether the grievant was **better qualified** to teach a course, the same standards also apply to "preference for work" cases addressing the question whether the grievant was merely **qualified** to teach a course.

2. How Long Does Right to Careful Consideration Survive Non-Reappointment?

- a. Sarf (Winograd, 1992): Break in service of one semester not enough to extinguish careful consideration rights.
- b. Esposito (Angelo, 2008): Break in service of two years "far too long a period to allow [grievant] to retain careful consideration rights."

E. Some Lecturers Have the Right to an Appointment of a Certain Duration and with a Certain Time Base Entitlement.

1. One-Year Appointments.

"Following two (2) semesters or three (3) quarters [including Summer term] of consecutive employment within an academic year, a **part-time** temporary employee offered appointment to a similar assignment in the same department . . . at the same campus shall receive a one (1) year appointment." [Article 12.3.]

- a. No entitlement for full-time temporary employee.
- b. No entitlement unless offered "similar assignment."
- c. Time-base entitlement calculated according to Appendix F.

2. Three-year Appointments.

- a. Initial Appointment.

After six (6) consecutive years of having worked at least one (1) semester or two (2) quarters in the same department on the same campus, "an initial three-year appointment shall be issued **except** in cases of documented unsatisfactory performance or serious conduct problems." [Article 12.12.]

- b. Subsequent Appointments.

"Temporary faculty . . . holding three-year appointments shall have the expectation of appointment to subsequent three-year appointments, except in instances of documented unsatisfactory performance or serious conduct problems." [Article 12.13.]

"If at the end of a three-year appointment, no work exists in the department to support the subsequent appointment of the lecturer or if the time base of the lecturer was zero during the third year of her/his appointment, s/he shall be placed on a departmental [reemployment] list pursuant to Article 38.48." [Article 12.12(h)]

- i. No entitlement if "documented unsatisfactory performance." *See Smith* (D'Orazio, 2009) [sustained] [umpire case]

"[T]he University argues, the term "unsatisfactory performance" is not defined in the CBA and, therefore, the Department has the management right to determine when work is unsatisfactory as long as the procedures and policies set forth by the University have been followed. . . . Nothing in section 12.13 expressly cedes to the employer the right to determine what is or is not satisfactory performance. In fact, the plain meaning of the language suggests the opposite; that is, the exception to the expectation of reappointment must be "documented" unsatisfactory performance, thus requiring the University to produce evidence to document its decision."

- ii. No entitlement if no work available.
- iii. Time-base entitlement calculated according to Appendix F.

B. Time Base Entitlement.

1. General Rule.

First two consecutive terms taught in last academic year before one-year or three-year appointment, beginning with the Fall term, establish time base entitlement in subsequent one-year or three-year appointment. [Appendix F]

"In the event there is no work available to satisfy the time base entitlement during any academic term of a three-year appointment, the temporary faculty employee shall continue to maintain this contractual entitlement for the duration of the three-year appointment." [Article 12.12(f)]

2. Exception for Three-Year Appointments.

"In the event there is insufficient work to support the reappointment at the previous time base, the time base of his/her successor three-year appointment may be reduced to reflect available work for which the temporary faculty member is qualified." [Article 12.13]

3. Appendix F.

Semester Campus Rule: Must work 2 consecutive terms in prior academic year and only first 2 consecutive terms count in establishing entitlement. Fall is first term of the year.

Semester Campus Example:

Academic Year #1 Work Assignment				Academic Year #2 1-year entitlement if appointed in Fall?		Does AY #1 Service Count Toward 6 Years required under 12.12?	
	Fall	Spring	Summer				
1	9	6		1	1 year for 15 WTUs	1	yes
2	9	6	3	2	1 year for 15 WTUs	2	yes
3		6	3	3	1 year for 9 WTUs	3	yes
4	9			4	no 1-year entitlement	4	yes
5		6		5	no 1-year entitlement	5	yes
6			3	6	no 1-year entitlement	6	no

Quarter Campus Rule: Must work 3 consecutive terms in prior academic year and only first 3 consecutive terms count in establishing entitlement. Fall is first term of the year.

Quarter Campus Example:

Academic Year #1 Work Assignment					Academic Year #2 1-year entitlement if appointed in Fall?		Does AY #1 Service Count Toward 6 Years required under 12.12?	
	Fall	Winter	Spring	Summer				
1	9	3	6		1	1 year for 18 WTUs	1	yes
2	9	3	6	3	2	1 year for 18 WTUs	2	yes
3		3	6	3	3	1 year for 12 WTUs	3	yes
4	9	3			4	no 1-year entitlement	4	yes
5		3	6		5	no 1-year entitlement	5	yes
6			6	3	6	no 1-year entitlement	6	yes
7	9				7	no 1-year entitlement	7	no
8				3	8	no 1-year entitlement	8	no

III. Effect of Layoff, Non-Reappointment, or Reduction in Time Base.

A. Please Visit the CFA Website for the Following Resources:

1. "Grievance Filing Guide" at

http://www.calfac.org/allpdf/Representation/CFA%20Grievance%20Filing%20Guide-June_2008_Update.pdf

2. "Lecturers' Handbook" at

http://www.calfac.org/allpdf/lecturers/lecturershandbook_Sept2008.pdf

3. "Lecturer Nuts and Bolts Powerpoint" at

http://www.calfac.org/allpdf/lecturers/nutsandbolts_Apr28_2009.ppt

B. Layoff, Non-Reappointment, and Reduction in Time Base Entitle Faculty Unit Employee to (Partial) Unemployment.

1. For all claims, see

http://www.edd.ca.gov/Unemployment/FAQ_-_Eligibility.htm

2. For partial claims, see

http://www.edd.ca.gov/Unemployment/FAQ_-_Partial_Claims.htm

C. Layoff, Non-Reappointment, and Reduction in Time Base to Less Than 0.4 Entitle Faculty Unit Employee to COBRA.

1. Employee pays 102% of premium for up to 18 months.

2. See http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.html.

D. Layoff and Non-Reappointment, but Not Reduction in Time Base to Less Than 0.4, Entitle Faculty Unit Employee to COBRA Subsidy.

1. Employee gets 65% premium reduction for up to 9 months.

2. See <http://www.dol.gov/ebsa/COBRA.html>.

3. Technical Letter HR/Benefits 2009-02.

Please note: Lecturers appointed with contractual entitlement rights pursuant to Article 12 of the R03 Collective Bargaining Agreement (CBA), including individuals with continuing multi-term appointments and individuals with 3-year contract entitlements, who are separated at the end of a benefits eligible term of employment due to lack of work/funds, would be deemed eligible for COBRA and the COBRA Subsidy as an involuntary termination.