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ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

January 30, 2020

Maria Harper-Marinick, Chancellor
Leslie Kyman Cooper, General Counsel
c/o Lynne C. Adams
Osborn Maledon, P.A.
2929 N. Central Ave.
Phoenix, AZ 85012

Re: Opinion Request No. R19-021; Opinion No. I20-001

Pursuant to A.R.S. § 15-1448(H), and after receipt and review of the enclosed opinion to the Chancellor and General Counsel of the Maricopa County Community College District (the "Opinion"), the Attorney General hereby concurs in the analysis section, which is set forth on pages 6-11, as well as the ultimate conclusions reached based on that analysis: (1) the Faculty Association is an "elected employee representative organization" for purposes of A.R.S. § 15-1444(A)(7); (2) the eligibility of Faculty Association members for reassigned load hours and the opportunity to provide input on working conditions and governance constitute "more favorable terms and conditions of employment" for purposes of A.R.S. § 15-1444(A)(7); and (3) provision of these "more favorable terms and conditions" violates A.R.S. § 15-1444(A)(7).

Without analysis, the Opinion accepts as undisputed that the activities in question are being performed "for the District's benefit," and thus are not prohibited by § 15-1444(A)(7)'s prohibition of "compensat[ing] an employee for work performed on behalf of an elected employee representative group." Opinion at 4. To the extent that the Opinion expresses any legal opinion on this underlying assumption in its analysis or conclusions, the Attorney General declines to review that aspect of the Opinion.

A handwritten signature in blue ink that reads "Mark Brnovich". The signature is fluid and cursive, with a long horizontal flourish at the end.

MARK BRNOVICH
Attorney General

Enclosure

CC: Hon. Kathy Hoffman, Superintendent of Public Instruction



A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

MEMORANDUM

TO: Maria Harper-Marinick, Chancellor
Leslie Kyman Cooper, General Counsel

FROM: Lynne C. Adams

DATE: December 2, 2019

RE: Analysis of HB2750/A.R.S. § 15-1444(A)(7)

General Counsel Leslie Kyman Cooper requested an opinion regarding the appropriate implementation of the portion of A.R.S. § 15-1444(A)(7) that was added last legislative session by HB2750 (codified at Laws 2019, ch. 266, § 1). In particular, I understand that Maricopa County Community College District (the “District”) and the Maricopa Community Colleges Faculty Association (the “Faculty Association”) disagree about the provision of the law that prohibits community college districts from providing more favorable terms and conditions of employment to any employee because that individual belongs to an elected employee representative organization. My analysis of that issue is provided below.

Ms. Cooper has also requested that I transmit a copy of this opinion to the Arizona Attorney General for review pursuant to A.R.S. § 15-1448(H).¹ The Attorney General will have 60 days to concur, revise to decline to review the opinion, although we are requesting expedited review to the extent possible.

¹ The Attorney General has confirmed in the K-12 context that the term “county attorney” in A.R.S. § 15-253(B) (which authorizes the submission of opinions prepared on behalf of school districts to the Attorney General for review) includes elected county attorneys as well as attorneys who represent school districts with the consent of the county attorney. Ariz. Att’y Gen. Op. I88-052, at 2 (Substitute Op.) (June 15, 1988). Thus, the District may submit this opinion to the Attorney General for review although it was not prepared by the Maricopa County Attorney.

Factual Background

Language Added to A.R.S. § 15-1444(A)(7)

HB2750 was introduced near the end of the last legislative session as a budget reconciliation bill (or BRB) for higher education for the 2019-20 fiscal year.² BRBs are bills that include substantive changes to the law that are related to budget appropriations contained in other bills.

Among other provisions and statutory changes, HB2750 added the following language (in **bold**) to A.R.S. § 15-1444(A)(7):

A. Except as otherwise provided, the district board shall:

....

7. Determine the salaries of persons it appoints and employs. **A district may not compensate an employee for work performed on behalf of an elected employee representative group and may not provide more favorable terms and conditions of employment to any employee because that individual belongs to an elected employee representative organization.**

Laws 2019, ch. 266, § 1. Thus, the new statutory provision contains two prohibitions for community college districts: 1) they may not pay employees for work that they perform on behalf of an “elected employee representative group,” and 2) they may not provide “more favorable terms and conditions of employment” to any employee because they belong to such a group.

The Faculty Association, the Faculty Executive Council and the Adjunct Faculty Association

The Faculty Association represents the District’s residential faculty members (full-time faculty) in interactions with the District regarding shared governance, academic freedom and professional standards issues. It also engages in efforts to influence state legislation. *See* Maricopa Community Colleges Faculty Association Constitution (the “Faculty Association Constitution”), art. II, available at <http://www.mccfa.org/Resources/Documents/RFP-Docs/FEC%20Constitution%20approved%207-22-2014.pdf>. As of December 2, 2019, the Faculty Association indicated that 72% of the District’s residential faculty are Faculty Association members. *See* Maricopa Community Colleges Faculty Association website homepage, at <http://www.mccfa.org/>. To join the Faculty Association, residential faculty members, retired faculty members and other eligible individuals must pay annual dues. *See id.* at “Join Us” tab; Faculty Association Constitution, art. IV.

The Faculty Executive Council (“FEC”) is the executive body of the Faculty Association. It is comprised of the ten college Faculty Senate Presidents and additional members, the number

² HB2750 was the House of Representative’s version of the higher education BRB. SB1552 was the Senate’s version, which was replaced by HB2750.

of which depends on the Faculty Association membership at each college in the District. *See* “Faculty Executive Council,” at <http://www.mccfa.org/FEC>. Only active members of the Faculty Association are eligible to serve as members of the FEC, and the FEC members are elected by the members of the Faculty Association, not by the residential faculty as a whole. *See* Faculty Association Constitution, art. V. The Faculty Association President, Past President and President Elect are selected from the FEC members. *See id.*, art. VI.³

The FEC has established several standing committees that perform the work of the Faculty Association and the FEC, including the Faculty Professional Growth Committee (the “FPG”), which in turn has created a Policy Review Committee (the “FPG Policy Review Committee”). *See id.* art. IX. Only active members of the Faculty Association are eligible to serve on those committees, and the FPG Policy Review Committee membership consists of FEC members or individuals selected by the FEC. *Id.*; “FPG Committees and Representative Job Description” (“FPG Description”) (attached as Ex. 2).

The District and the Faculty Association have agreed upon a set of Residential Faculty Policies, which the District Governing Board has adopted. *See* Maricopa Community Colleges Residential Faculty Policies, 2017-2018, available at <http://mccfa.org/resources/Pictures/Approved%20RFP%202017-18.pdf> (the “Policies”).⁴ Those Policies include many powers, privileges and roles for the Faculty Association, the Faculty Association President, the FEC, and the Faculty Senate Presidents. Among those are the following:

- “Sufficient time” to present “Faculty views” to the District Governing Board at all regular Board meetings. Policies, sec. 2.8.
- A role in the interpretation of the District’s personnel policies. *Id.*, sec. 2.9.
- The right to participate in the District’s budget development process, including access to all budget development materials. *Id.*, sec. 2.10.
- The ability to recommend faculty members to serve on screening and interviewing committees for District and college administrative personnel. *Id.*, sec. 2.11.3.
- Eligibility for annual load hour reassignments to perform work on behalf of the District and the colleges. *Id.*, sec. 2.12.
- The right to appoint one member of a hearing committee to hear the charges against faculty members who are recommended for dismissal and the right to

³ Counsel for the Faculty Association has indicated that the Association is “moving away from the practice of selecting college Senate Presidents only from Faculty Association members and by vote of only Faculty Association members,” but it is not clear whether that move has occurred, and the Faculty Association’s Constitution has apparently not yet been amended to reflect this change. *See* Aug. 13, 2019 Letter to Leslie Cooper from James Barton (attached as Ex. 1). The arguments made by Mr. Barton in that letter regarding the proper interpretation of Section 15-1444(A)(7) are noted and addressed later in this memorandum.

⁴ The Policies adopted as of July 1, 2017 are still in effect, although the District and Faculty Association are currently working to prepare new policies.

representation on an appeal committee for residential faculty members who believe they were inappropriately laid off. *Id.*, secs. 3.12.4 & 3.15.7.1.

The District and the Faculty Association entered into a settlement agreement on June 13, 2019 that affirms that certain members of the Faculty Association will be compensated for performing the activities that are listed in Section 2.12.2 of the Policies and are described as “beneficial to achieving the district’s vision, mission, and values.” *See* June 13, 2019 Settlement Agreement, § 2.12.1 (listing representative activities for which certain faculty members will be granted annual load hour reassignments). At the District level, the Faculty Association President, Past President and President Elect are the only individuals who are eligible for load hour reassignments to perform the activities listed in Section 2.12.1.⁵ At the college level, the FEC Faculty Senate Presidents are eligible for load hour reassignments. *Id.* The FPG Policy Review Committee members are also eligible for load hour reassignments for their work on that committee. *Id.*, sec. 2.12.2.

The Policies authorize the FGP to oversee the implementation of the policies regarding residential faculty salary, sabbatical and leave policies. *See generally id.*, App. A. The FPG “has developed a set of policies and procedures that relate to advancement and reimbursement” for all residential faculty. *Id.*, sec. A.1.1. The FPG also makes determinations regarding interpretations of those policies. *Id.*, A.1.3. The FPG and the FPG Policy Review Committee annually review those policies, and the FEC annually approves them. *Id.*, sec. A.1.4. The FPG Policy Review Committee may also “monitor[] and revis[e] existing policy” related to these areas and recommend changes to be made to the Policies during the meet and confer process with the District. FPG Description at 2 (Ex. 2).

The Adjunct Faculty Association represents all of the District’s part-time instructional faculty. There are no additional membership criteria, such as the payment of dues. *See* “About AFA,” at <https://myafa.org/about-afa>. Instead, the Adjunct Faculty Association accepts donations to fulfill its educational and communication goals. *Id.* Because all adjunct faculty are “members” of the Adjunct Faculty Association, any adjunct faculty member may serve on the Association’s Executive Committee. The Policies do not grant any powers or privileges for the Adjunct Faculty Association or the members of its Executive Committee.

Areas of Agreement Regarding the Implementation of Section 15-1444(A)(7)

The District and the Faculty Association agree that the activities listed in Section 2.12.1 of the Policies are for the District’s benefit. Therefore, Section 15-1444(A)(7) does not prohibit any Faculty Association member from performing those activities, as was confirmed in the parties’ recent settlement agreement. In other words, even assuming that the Faculty Association is an “elected employee representative organization” (something the Faculty Association does not believe is true), the District and the Faculty Association agree that members of the Faculty

⁵ Load hour reassignments refers to the practice of allowing the substitution of faculty teaching hours for hours spent performing duties other than teaching class. *See* Policies, sec. 5.3 (establishing faculty load hours per fiscal year and the processes for calculating load hours).

Association performing the tasks listed in Section 2.12.1 are performing work that benefits the District.

The District and the Faculty Association also agree that the individuals who were elected by the residential faculty members and by the adjunct faculty members to engage with the District in the Faculty Administration Collaboration Team (known as FACT) to agree upon the provisions of new faculty policies are not only performing work that is for the District's benefit, but that those FACT members were selected by all residential faculty members and by all adjunct faculty members, without regard to their membership in the Faculty Association or the Adjunct Faculty Association (although all adjunct faculty are members of the Association).

The District has no concerns about the manner in which the Adjunct Faculty Association selects its Executive Committee. As indicated above, all adjunct faculty members may vote for the officers who will represent their Association in interactions with the District.⁶

Finally, the District and the Faculty Association agree that governance groups that are created by the District to help fulfill the District's mission are not impacted by Section 15-1444(A)(7).

Areas of Disagreement Regarding the Implementation of Section 15-1444(A)(7)

The District and the Faculty Association disagree about the portion of A.R.S. § 15-1444(A)(7) that prohibits the District from providing "more favorable terms and conditions of employment" to any employee because they belong to an "elected employee representative organization."⁷ Because they disagree about the meaning of the terms "elected employee representative organization" and "more favorable terms and conditions of employment," they disagree about the Faculty Association's role in electing or selecting individuals:

- who are eligible for load hour reassignments to perform the activities envisioned by Section 2.12.1 of the Policies;
- who can exercise the powers and privileges that are reserved in the Policies for the Faculty Association, the Faculty Association President, the FEC or the Faculty Senate Presidents;
- to serve on the FPG or the FPG Policy Review Committee; and
- to serve as Faculty Senate Presidents and the Faculty Association President.

In other words, the District and the Faculty Association disagree about whether Faculty Association members' eligibility for load hour reassignments and their ability to provide input to the District on issues and policies and the governance of the District are prohibited by Section 15-1444(A)(7).

⁶ Moreover, as explained above, members of the Adjunct Faculty Association and its Executive Committee are not eligible for load hour reassignments to perform work on behalf of the District or granted additional District governance rights.

⁷ These disagreements and the Faculty Association's position are set forth in Mr. Barton's August 13, 2019 letter (Ex. 1).

Analysis

To determine how the District must implement A.R.S. § 15-1444(A)(7), it is necessary to first determine the meaning of the phrases “elected employee representative organization,” “terms and conditions of employment,” and “more favorable.” Only then will it be clear whether the new statutory language implicates any of the District’s and Faculty Association’s current practices and agreements.

In interpreting the meaning of a statute, its plain language is the determinative factor. *E.g.*, *Janson on Behalf of Janson v. Christensen*, 808 P.2d 1222, 1223 (Ariz. 1991) (noting that the “best and most reliable index of a statute’s meaning is its language”); *see also State v. Reynolds*, 823 P.2d 681, 682 (Ariz. 1992) (stating that courts must “look primarily to the language of the statute itself and give effect to the statutory terms in accordance with their commonly accepted meanings . . . ‘unless the legislature has offered its own definition of the words or it appears from the context that a special meaning was intended’” (citations omitted)). References to dictionaries may be used to determine the meaning of statutory language. *See, e.g.*, *DBT Yuma, L.L.C. v. Yuma Cty. Airport Auth.*, 361 P.3d 379, 381 (Ariz. 2015). All of this is in keeping with the directive of the Arizona Legislature that “[w]ords and phrases shall be construed according to the common and approved use of the language.” A.R.S. § 1-213.

The meaning of words used in a statute also depends on “the context in which they are used.” *DBT Yuma, L.L.C.*, 361 P.3d at 381. In determining that context, it is appropriate to consider the “effects and consequences” of an interpretation, “as well as the spirit and purpose of the law.” *State v. Garza Rodriguez*, 791 P.2d 633, 638 (Ariz. 1990). Finally, interpretations that render a provision insignificant or superfluous or would lead to “absurd results” must be avoided. *E.g.*, *State v. Deddens*, 542 P.2d 1124, 1128 (Ariz. 1975); *Ariz. State Hosp. v. Klein*, 296 P.3d 1003, 1007 (Ariz. Ct. App. 2013). Against this backdrop of statutory interpretation principles, I examine the meaning of the disputed phrases in the A.R.S. § 15-1444(A)(7).

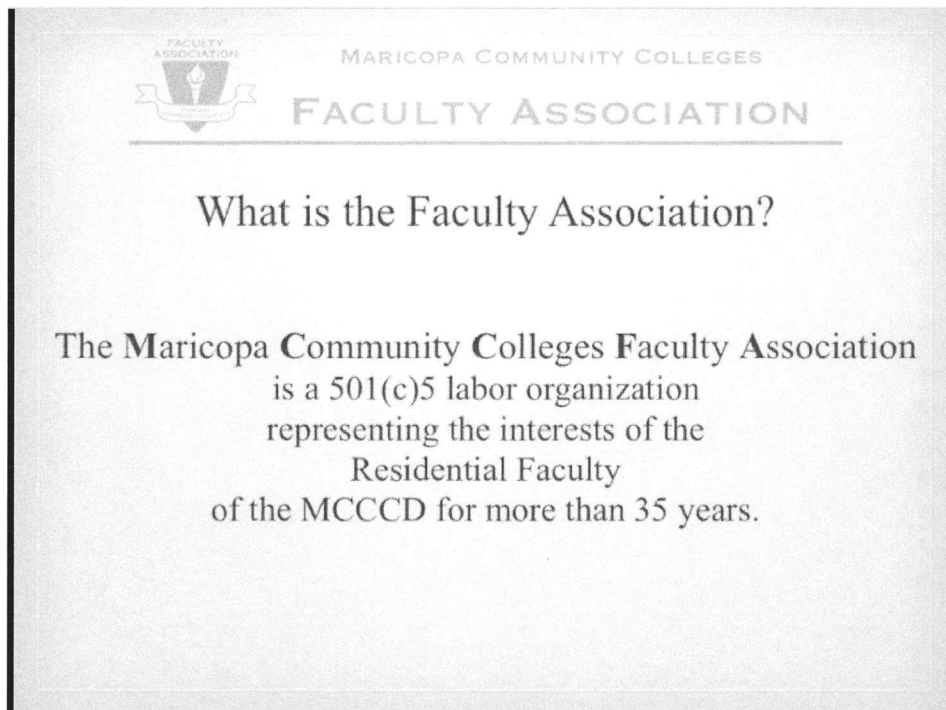
I. The meaning of the phrase “elected employee representative organization.”

The phrase “elected employee representative organization” is not defined by the statute or included in HB2750, nor is it found in any other Arizona statute. Therefore, the meaning of the phrase must be determined using its plain language, while also considering the spirit and purpose of the law and avoiding any interpretation that would lead to an absurd result.

The term “employee representative organization” (or a similar arrangement of those same words) commonly refers to an entity that represents the interests of a defined group of employees in dealings with an employer. *See Cheatham v. DiCiccio*, 379 P.3d 211, 215 (Ariz. 2016) (analyzing a City of Phoenix contract with the Phoenix Law Enforcement Association under which police officers were paid for time spent on behalf of their “authorized representative,” which was characterized as the “authorized employee organization”); *State of Nevada Employees’ Ass’n, Inc. v. Bryan*, 916 F.2d 1384 (9th Cir. 1990) (holding that the Nevada State Employees Association was a “recognized representative” organization of state employees for purposes of the Fair Labor Standards Act despite the fact that state law prohibited collective bargaining); *Sidorova v. East Lyme Bd. of Educ.*, 122 A.3d 656 (Conn. Ct. App. 2015) (noting in

analysis of claims filed by a teacher that Connecticut’s Teacher Tenure Act refers to agreements between the school board and the “employees’ representative organization”); *Calif. Sch. Emp. Ass’n v. Sequoia Union High Sch. Dist.*, 272 Cal App. 2d 98, 100-02 (Cal. Ct. App. 1969) (using the term “employee representative organization” to refer to the association that represented classified public school employees that were employed by the defendant school district).

The Faculty Association itself indicates in an online presentation that it is a “labor organization” that represents “the interests of the Residential Faculty” of the District. Here is a slide from that presentation:



“What is the Faculty Association?” available at <https://vimeo.com/104373611>. The video narrator states that “for more than 35 years, the Faculty Association has been the sole recognized *representative organization* for faculty” employed by the District. *Id.*, at 00.19-00.28 (emphasis added). In other words, the Faculty Association is clearly an “employee representative organization.”

The word “elected” must also have some meaning – it cannot be superfluous – but it cannot have an absurd meaning. The word “elected” in this phrase could logically mean one of two things, but only one reflects the spirit and context of the legislation. That more germane interpretation indicates that the Faculty Association falls within the ambit of the new statutory language.

The first meaning of “elected” in this context is an organization that is “chosen” or “selected” by the residential faculty to represent them in their discussions and negotiations with the District about working conditions. *See Merriam-Webster Dictionary* (defining “elect” in this sense as “carefully selected” or “chosen”), available at <https://www.merriam->

[webster.com/dictionary/elected](https://www.merriam-webster.com/dictionary/elected). The Faculty Association has clearly been chosen by the residential faculty for this purpose. As the Faculty Association recognizes, it is the “sole” organization that represents the interests of the District’s residential faculty. *See* “What is the Faculty Association?” at 00.19-00.28. Thus, it is the organization that the residential faculty have elected to represent them.

That interpretation also reflects the context and spirit of the legislation. The new statutory language, taken as a whole, was apparently intended to prohibit community colleges from paying employees for performing “union” and similar organization activities or from otherwise receiving special treatment by virtue of their membership in an organization that represents some group of employees in their interactions with the community college. The Arizona Legislature has previously prohibited K-12 school districts from compensating employees for “professional association activities.” A.R.S. § 15-504. This portion of HB2750 appears to be the community college correlative of the K-12 prohibition.⁸ Interpreting the word “elected” to mean the employee representative organization that the residential faculty have chosen to represent them in their communications and relationship with the District regarding their working conditions reflects the spirit of the legislation.

The second potential meaning is that individuals in the representative organization are selected by a vote to join the employee representative organization. *See* Merriam-Webster Dictionary (also defining “elect” as selecting “by vote for an office, position or membership”), available at <https://www.merriam-webster.com/dictionary/elected>. This interpretation has been suggested by the Faculty Association, which asserts that it is not an “elected employee representative organization” because although it represents District employees, residential faculty are not elected to the Association, but instead voluntarily join it. *See* Aug. 13, 2019 Letter at 2-3 (Ex. 1). That interpretation, however, would be illogical and absurd given the context of the word “elected.”

The phrase “employee representative organization” indicates that the entity at issue is a separate organization from the community college, as opposed to a committee or other group within a community college. Individuals may choose to join employee representative organizations – the practical equivalent of unions – but are not generally (or perhaps ever) “elected” to membership. An “election” requirement for individual membership in a representative organization, as opposed to a leadership position within the organization, would be at odds with how such representative organizations form and operate. For that reason, this potential interpretation must be rejected in favor of the previous interpretation, which employs both a plain meaning of the word “elected” and respects the spirit of the statute as a whole.⁹

⁸ There is no legislative history regarding this provision of HB2750.

⁹ There is one other potential meaning of the phrase “elected employee representative organization,” which must be rejected because it would lead to an absurd and illogical result. This interpretation, which the Faculty Association mentioned in an October 3, 2019 email to Ms. Cooper, is an organization that represents “elected employees.” But as the Faculty Association recognizes, such an interpretation would be absurd because the phrase “elected employees” is internally contradictory; Arizona community college employees are hired, not elected. *See* A.R.S. § 15-1444(A)(6) & (7) (authorizing community college governing boards to “appoint and

The Faculty Association is an “elected employee representative organization,” as that phrase is appropriately interpreted in A.R.S. § 15-1444(A)(7).

II. The meaning of the phrase “more favorable terms and conditions of employment.”

A. Analysis of “terms and conditions of employment.”

The Faculty Association has asserted that voting for Faculty Senate Presidents who will be FEC members is not a term or condition of employment, and because being allowed to vote for Faculty Senate Presidents is not a term or condition of employment, Section 15-1444(A)(7) is inapplicable to the Faculty Association’s current operations. *See* Aug. 13, 2019 Letter at 2 (Ex. 1). That position regarding the scope of the statutory provision is too narrow.

A “term or condition of employment” is generally recognized to be any benefit or circumstance with respect to an employee’s employment, including wages, hours and working conditions. *See, e.g., Cheatham*, 379 P.3d at 216; *see also* Merriam-Webster Dictionary (defining “conditions” in this sense as the “attendant circumstances”), available at <https://www.merriam-webster.com/dictionary/condition>. The phrase is also used in the National Labor Relations Act, 29 U.S.C. § 158(d), in the definition of “collective bargaining,” which is defined as discussions between employers and “the representative of the employee” “with respect to wages, hours and other terms and conditions of employment.” The Arizona Supreme Court therefore noted in *Cheatham* that federal courts have recognized that “employer payments for time spent by employees during working hours on certain union activities, are a mandatory subject of collective bargaining because such payments relate to the employees’ ‘wages, hours and other terms and conditions of employment.’” 379 P.3d at 216 (emphasis added; citations omitted).

In other words, although the Faculty Association may be correct that the right to vote for a Senate President is not in and of itself a term and condition of employment, the right to be eligible for load hour reassignments and to provide input on District policies and decisions are terms and conditions of employment of the District’s residential faculty.¹⁰ Those rights, which are included in the Policies, supplement the other terms of the District’s employment of those employees. *See Leikvold v. Valley View Cmty. Hosp.*, 688 P.2d 170, 174 (Ariz. 1984), *superseded on other grounds by statute*, A.R.S. § 23-1501, *et seq.* (recognizing that provisions of an employee manual may refine the terms of employment). They are the “terms and conditions of employment” that are the crux of the appropriate analysis of Section 15-1444(A)(7), not merely the right to vote for the Faculty Senate Presidents, who in turn are members of the FEC.

employ” administration, faculty and staff and to set salaries for the individuals it “appoints and employs”).

¹⁰ Indeed, the Faculty Association has indicated that it believes that “terms and conditions of employment” are “concrete benefits that impact a class of workers.” Aug. 13, 2019 Letter at 2 (Ex. 1).

B. Analysis of “more favorable.”

Although the rights discussed above in the “Factual Background” section of this memorandum are “terms and conditions of employment” for which only members of the Faculty Association are eligible, those terms and conditions of employment must also be “more favorable” than those offered to residential faculty members who are not members of the Faculty Association to be subject to the prohibition in Section 15-1444(A)(7).

In a letter to another community college district regarding the new statutory provision, the Arizona Education Association asserted that although some members of that community college’s employee association were afforded additional powers or rights by virtue of their membership in the association, those “rights” modified the employees’ scope of work and duties, rather than improved them. In other words, the AEA contended that such additional powers are not necessarily “more favorable terms and conditions of employment,” but are simply *different* “terms and conditions.” See June 28, 2019 Letter to Seth Shippee from Jarrett Haskovec at 1-3 (attached as Ex. 3).

But as the AEA itself recognizes, overlaying such a value judgment on a statutory prohibition would be “unworkable in application.” *Id.* at 3. And statutes must be interpreted in a way that would not render any part of the statute “void, superfluous, contradictory or insignificant.” *Cemex Const. Materials South, L.L.C. v. Falcone Bros. & Assocs., Inc.*, 349 P.3d 210, 215 (Ariz. Ct. App. 2015). Thus, we cannot ignore the term “more favorable” because it may imply a value judgment, and instead it must be assigned its plain meaning.

The word “favorable” has several meanings, but as it is used in Section 15-1444(A)(7), it has a meaning that is synonymous with “advantageous,” “good,” and “beneficial,” among other words. See Merriam-Webster Thesaurus, providing synonyms for “favorable” at <https://www.merriam-webster.com/thesaurus/favorable>. Although determining whether terms and conditions of employment offered to members of the Faculty Association are more favorable than those terms and conditions that are offered to other employees involves some value judgment, it is not a value judgment that cannot be made. For example, contracts often include a “most favored nation” clause that provides one party to a contract with the right to the same terms and conditions as other parties that contract with the same entity. The inability to determine whether terms and conditions are “more favorable” in one contract than another has not been a stumbling block to the enforcement of those provisions. See, e.g., *In re Eschelon Telecom of Arizona, Inc. Against Qwest Corp.*, 2004 WL 3417305 (Ariz. Corp. Comm’n April 21, 2004) (determining that a telecommunications company was entitled to a refund based on a “most favored nations” provision of the Telecommunications Act of 1996); cf. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 898 P.2d 964, 965 (Ariz. 1995) (noting that a “most favored nations” clause in a lease agreement entitled the lessor to receive the same terms as another tenant regarding lease rental rates and other lease terms). Of course, there may be some outliers who might not think that one term is better than another, but as a society, we typically understand when one term or right is “more favorable” than another. It is that collective sense of a beneficial advantage that must be applied to the phrase “more favorable terms and conditions of employment” in order to avoid rendering the term “more favorable” void or superfluous.

Although members of the Faculty Association are not entitled to additional compensation from the District as the result of their membership, they are afforded the *opportunity* to provide input to the District on a host of issues and policies that are directly related to their working conditions and the governance of the District. In addition, they are eligible for reassigned load hours to perform work that is different from the classroom instructional work that other residential faculty members must perform. It is the opportunity for Faculty Association members to do different work and to provide input about important issues related to working conditions and shared governance that is clearly “more favorable” than what is offered to residential faculty who are not members of the Faculty Association. It is beyond question that the right to be eligible for different opportunities is “more favorable” than a circumstance in which we have fewer, more constrained options. It is therefore clear that the ability to do different work and to shape policies and the interpretation of policies that directly impact the benefits, wages and other working conditions of residential faculty members, as well as the governance of the District, is a “more favorable” term and condition of employment than is available to residential faculty who are not members of the Faculty Association.

III. The application of the statutory language to the District’s current policies and practices.

In light of the interpretation of the key statutory terms, the Faculty Association is an “elected employee representative organization.” The Faculty Association members’ eligibility for reassigned load hours and their opportunity to provide input to the District on their working conditions and the District’s governance are “more favorable terms and conditions of employment” than are available to the residential faculty members who are not members of the Faculty Association. Thus, the provisions of the current Policies that establish and implement these rights and privileges violate the terms of A.R.S. § 15-1444(A)(7).

If the District and the Faculty Association desire to continue to allow members of the residential faculty to be eligible under the Policies to exchange their teaching load hours for other duties; to provide input into the development of and interpretation of the District’s personnel policies, decisions and interpretations; to participate in the District’s budget development (which includes decisions regarding wages); and to have a role in shared governance, the District and the Faculty Association must revise the provisions of the Policies that restrict those rights and privileges to members of the Faculty Association, the Faculty Association President and/or the FEC. In the alternative, the Faculty Association must expand the eligibility for those more favorable working conditions to the entire residential faculty. How the District and the Faculty Association might best accomplish that is beyond the scope of this opinion, but the parties, working together, can certainly determine an appropriate way forward, as have other community colleges and their faculty associations.

/lca

EXHIBIT 1

August 13, 2019

Via Email

Maricopa Community Colleges
Office of General Counsel
Attn: Leslie Cooper
2411 W. 14th St.
Tempe, AZ 85281-6942

leslie.cooper@domail.maricopa.edu

Re: Changes in Faculty Senate Officer Selection Process

Dear Ms. Cooper:

Our firm represents the Maricopa Community Colleges Faculty Association (“MCCFA”) and writes you today in response to concerns surrounding the Legislature’s enacting House Bill 2750. We hope that MCCFA can serve as a clearing house for understanding the bill’s impact on the Faculty Senates to ensure consistency across the colleges. To that end, we would like to explain the steps being taken to alter the Faculty Senate officer selection process, but why that change is neither prompted nor required by HB 2750.

Background

In response to the March 2019 AAUP Investigative Report, the college Senates are moving away from the practice of selecting Presidents only from Faculty Association members and by vote of only Faculty Association members. Best practices support distinguishing the work of Faculty Senates—roughly focused on ensuring academic freedom and maintaining the institution’s integrity—from employee associations—roughly focused on terms and conditions of employment. This change was afoot prior to the last-minute introduction of the HB 2750 section that concerns us today.

HB 2750, approved by the Governor on May 31, 2019 and effective August 27, 2019, was amended late in the legislative session to provide the following attempted limitations on the powers and duties of the governing board: A District may not compensate an employee for work performed on behalf of an elected employee representative organization and may not provide more favorable terms and conditions of employment to any employee because that individual belongs to an elected employee representative organization. Laws 2019, Ch. 266, § 1 (H.B. 2750).

MCCFA contacted your office when it learned of this bill, which seemed targeted at our on-going settlement negotiations and you assured us that MCCCDC was not behind the amendment. Furthermore, within days of its introduction, MCCFA settled its lawsuit with MCCCDC affirming in part that “reassign time [is] for the purposes set forth in in Section 2.12 of the 2017-2018 RFP,” and “recommending the extension of the current RFP until June 30, 2020.” The RFP contains reassign time for faculty senate officers.

Close Reading of HB 2750

Based on the outcome of the settlement negotiations, MCCFA presumes that the District is interested in moving forward with operations as outlined by the RFP until the new process is developed through FACT. We understand that there may be concern that prior to August 27, 2019 all officers of the Faculty Senates must be selected by a vote of all faculty members in order to qualify for reassign time. This is not the case because (1) voting for Faculty Senate President is *not* a term or condition of employment, and (2) the Faculty Association is not “an elected employee representative organization.” Thus, the District should feel confident in moving forward in the spirit of the negotiated settlement and the recently extended RFP.

Voting for Senate President is not a term or condition of employment. The phrase “term and condition of employment” is used in the employment law context exclusively when concerning mandatory terms of negotiation. Its use in HB 2750 is peculiar and makes the statute vague.

Turning to the law that consider the phrase, we see that “terms and conditions of employment” are concrete benefits that impact a class of workers. They are not highly speculative or insubstantial potential outcomes; thus, excluding retirees from a health plan—although potentially impacting active workers—was not a term or condition of employment. *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 180, 92 S. Ct. 383, 398, 30 L. Ed. 2d 341 (1971); *N.L.R.B. v. Electro Vector, Inc.*, 539 F.2d 35, 37 (9th Cir. 1976) (a bonus that was discretionary was not a term or condition of employment).

We all agree that the first clause of HB 2750 does not apply to reassign time because “reassign time [is] for the purposes set forth in in Section 2.12 of the 2017-2018 RFP.” Thus, the only way HB 2750 impacts who votes for Senate President is if such voting amounts to a term and condition of employment. It does not. *N. L. R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349–50 (1958) (a ballot clause that merely called for an advisory vote of the employees was not a term or condition of employment).

Undefined term that cannot apply to MCCFA. Furthermore, membership in MCCFA is not membership in “an elected employee representative organization.” One is *not* elected to MCCFA. One merely voluntarily joins the group. HB 2750 only applies to special terms or conditions of employment based on membership in “an elected employee representative

organization.” Since MCCFA is not such a group, the restriction does not apply to MCCFA membership.

Of course, this is the product of the amendment transferring concepts from release time for public unions, to reassign time for employee associations. They simply are not the same. “Elected employee representative organization” is not defined. Nonetheless, it plainly cannot refer to an organization to which one is not elected.

MCCFA looks forward to continue working productively with the Administration and the Adjunct Faculty Association to develop a comprehensive employment contract with terms and conditions of employment for all members of the District. To the extent that process sheds light on the operations of Faculty Senates, we welcome it. We hope this letter alleviates any lingering concerns about the impact of HB 2750 on the operations of Faculty Senates at MCCC.

Sincerely,

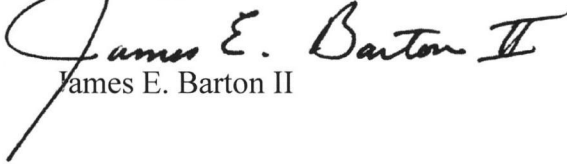
James E. Barton II

EXHIBIT 2

FPG

Committees and Representative Job Description

The Faculty Professional Growth (FPG) Committee is a [Governing Board](#) approved District Committee which consists of the:

- Provost or designee, one Dean of Instruction
- One college Vice President of Academic Affairs
- Two faculty representatives from each college, appointed by the Faculty Senate President.
- The District Faculty Association President or designee will serve ex-officio as a non-voting member. (§RFP 1.2 Definitions)

See the [FPG contacts area](#) for current members and representatives.

The FPG Committee is divided into two subcommittees. There is a representative from each college on each committee.

The **Advancements/Sabbatical Committee** reviews and signs applications for sabbatical leaves, academic and non-academic advancement requests. These requests include credit hours and clock hours used for horizontal advancement on the salary schedule. This committee also evaluates sabbatical proposals. Representatives on this committee also provide sabbatical proposal support through workshops, materials, and individual assistance.

The **Fees/Travel/Projects Committee** reviews and approves applications that request funds for conference registration fees and related travel expenses. This committee is also responsible for the administration of summer projects.

All representatives of each of the two subcommittees are required to attend District FPG Committee meetings so that they may evaluate applications, allocate funds, and discuss policies/guidelines related to professional growth. Meetings are held on the 1st and 3rd Tuesdays of the month during the Academic year. (See the FPG calendar for dates). The FPG Committee at all times attempts to make determinations in an open and unbiased manner--free from conflict of interest. Accordingly, Department/Division Chairs who are members of the FPG Committee should abstain from decisions that affect professional growth applications of faculty members in their respective departments/divisions. Likewise, faculty members who are on the FPG Committee should abstain from decisions that affect professional growth applications of their respective chairpersons. Other potential conflicts of interest must be treated in a similar manner. (§ RFP A.2.4)

FPG Committee Responsibilities:

- Review applications prior to meeting and come prepared to discuss them.
- Come ready to discuss common issues at the full FPG meeting.
- Come ready to discuss issues that are applicable to your subcommittee.
- Attend all regularly scheduled meetings of the FPG Committee held at the District Office on the first and third Tuesday of each month during the academic year.
- Read the committee minutes for accuracy and be prepared to note changes.
- Review and evaluate sub-committee specific proposals (sabbaticals and summer projects).
- Evaluate the budgetary impact of decisions and work with sub-committees to develop maximum limits/funding for faculty.
- Assist with interpreting FPG policies.
- Work with the Policy Review Committee (PRC) on any concerns regarding inconsistencies or necessary changes to policy language.
- Respond to requests by PRC regarding revision to FPG policies.
- Advocate for faculty members regarding qualifying FPG opportunities.

FPG Sub-committee Chair Responsibilities:

- Act as co-chair of joint meetings of the two FPG sub-committees.
- Fulfill duty of college representative for their respective sub-committee.
- Provide leadership for the sub-committee meetings.
- Inform sub-committee representatives of pertinent information and issues, advising them of changes, dates, and needs.
- Stay current with FPG issues.
- Field questions from sub-committee members.
- Facilitate sub-committee meetings.
- Review appropriate sub-committee applications that come to the District for completeness and accuracy.
- Approve/co-sign all completed and accurate FPG applications.
- Evaluate the budgetary impact of decisions and work with sub-committees to develop recommendations for proposed funding for annual budget and annual individual limits.
- Ensure website reflects accurate and up-to-date information and collaborate with appropriate personnel to update website as needed.
- Coordinate and collaborate with MCLI and other appropriate personnel.
- Collaborate with FPG Administrative Assistant.
- Provide access to training for new subcommittee members.
- Provide a process for approving applications during summer. (Compensation may be available)
- Work with college faculty senate presidents to discuss issues relating to FPG sub-committee member's participation and performance.
- Attend FPG PRC meetings or appoint a designee.
- Attend one FEC meeting in the fall at the invitation of FEC.
- Communicate or meet with appropriate Associate Vice Chancellor for Academic Affairs and Provost about sub-committee issues.
- Provide annual report to the FPG Policy Review Committee, Associate Vice Chancellor for Academic Affairs, and the Provost.

FPG College Representative Responsibilities:

- The role of the professional growth representatives is to promote and facilitate professional growth opportunities for the faculty of their college

- Obtain a working knowledge of the FPG information in the Residential Faculty Policies Appendix A as well as Administrative Regulation 1.15
- Work with your college fiscal agents, college administration, and other personnel as appropriate to process applications.
- Assist faculty in finding FPG information and completing FPG forms.
- Return calls or emails from your college faculty in a timely manner.
- Track all date-sensitive FPG correspondence and paperwork.
- Review all applications for completeness and accuracy, returning forms for revising if necessary.
- Keep faculty on your college informed of FPG Committee decisions.
- Host a minimum of one FPG workshop or equivalent per semester at your college.
- Advocate for your faculty members regarding qualifying FPG opportunities.
- If applicable, chair the college travel committee.
- Report to College Faculty Senate, a minimum of once per semester.
- Inform faculty of summer application and approval process.

Remuneration:

Per Residential Faculty Policies 2.12.2 each of the Faculty Professional Growth Committee representatives shall be awarded reassigned time according to the following scale:

Number of RFP Faculty at College	Reassigned Time Per Year
20-125	3 hours
126-199	4.5 hours
200-270	6 hours
Over 270	9 hours

Subcommittee Chairs receive an additional 3 load or release hours/academic year.

Policy Review Committee

Purpose: The committee will serve as the policy writing and review body for the Faculty Professional Growth (FPG) Guidelines (§ FEC Bylaws Article V. Section E. 1.)

Responsibility: Faculty Executive Council (FEC) has charged the FPG Policy Review Committee with the following responsibilities:

- Monitoring and revising existing policy for the FPG Programs
- Recommending FPG changes for inclusion in the Meet and Confer process;
- Facilitating communication between FEC, the FPG Committee and the faculty regarding faculty professional growth; and
- Reviewing and monitoring the FPG budget expenditure and unexpended funds.
- Serving as the FPG appeals committee (SRFP 1.2)

Committee Structure: Members serve a one-year term.

- Each FPG Subcommittee Chair of designee
- Two members of the FEC Council, which will consist of the past president and president-elect
- One or two members of the faculty at large elected by FEC
- Chair of this committee is approved by FEC

It is strongly urged that a minimum of three members from the current committee continue for the coming year.

Committee Meetings: This committee meets as needed throughout the academic year.

Committee Process:

- The PRC will respond to issues raised by the FPG Committee and FEC regarding inconsistencies, difficulties and new issues as a result of changes
- The PRC will write or revise policy as needed.
- The PRC will refer the policy back to the FPG Committee or the Faculty at Large for feedback/input.
- Once revised, the committee will bring the policy to FEC for approval.

In group processes differing points of view provide much needed input in discussions of policy. This small group has the opportunity to be very productive while also working for the good of the faculty. Once the policies are drafted, debated and refined, all groups have opportunity for input.

- Committees and Job Description
- Frequently Asked Questions
- Professional Obligation and Eligibility
- Programs

EXHIBIT 3

June 28, 2019

Via Email to: rshippee@pima.edu

Seth Shippee, Esq.
Deputy General Counsel
Pima Community College

Dear Mr. Shippee:

I am writing to you on behalf of the Pima Community College Education Association (PCCEA) to address recent legislative changes concerning community college employees represented by employee representative organizations. More specifically, the purpose of my letter is to both offer some input on the application of HB 2750 in this context and to suggest some lawful options for continuing to allow Pima Community College (PCC) employees to engage in certain work on a paid basis. Put simply, much of the work PCCEA officers and members do while reassigned under the terms of the Faculty Personnel Policy Statement (the Policy) may properly be characterized as work performed for PCC's benefit and on its behalf. As such, PCC retains the authority to compensate employees for such work and to continue to offer PCCEA officers and members reassignment so that they may engage in this work, notwithstanding the passage of HB 2750.

On May 31, 2019, the Governor signed HB 2750 into law. While HB2750 includes a wide range of changes, the portion of the bill that is most relevant to PCCEA is the language added to A.R.S. § 15-1444(A)(7), as follows:

A. Except as otherwise provided, the district board shall:

7. Determine the salaries of persons it appoints and employs. **A DISTRICT MAY NOT COMPENSATE AN EMPLOYEE FOR WORK PERFORMED ON BEHALF OF AN ELECTED EMPLOYEE REPRESENTATIVE ORGANIZATION AND MAY NOT PROVIDE MORE FAVORABLE TERMS AND CONDITIONS OF EMPLOYMENT TO ANY EMPLOYEE BECAUSE THAT INDIVIDUAL BELONGS TO AN ELECTED EMPLOYEE REPRESENTATIVE ORGANIZATION.**

The amendment includes two separate prohibitions, each of which is underlined above. In the following discussion, I will examine these prohibitions in reverse order.

(1) The Prohibition on Providing Any Employee With “More Favorable Terms and Conditions of Employment Because That Individual” Is Associated With PCCEA

The second part of the amendment prohibits a community college district from providing “more favorable terms and conditions of employment to any employee *because that individual belongs to an elected employee representative organization.*” (Emphasis added). The simple response is that PCCEA members do not receive “more favorable terms and conditions of employment . . . because” of their membership or involvement in PCCEA. Almost without exception, the terms and conditions of employment for faculty are generally applicable and are set without reference to membership or participation in PCCEA. Under the Faculty Personnel Policy Statement, faculty receive particular terms and conditions by virtue of the fact that they are full-time, regular faculty members and thus considered “Faculty” under the Policy; their entitlement to these terms and conditions of employment emphatically does not depend on their PCCEA membership status. For example, faculty members receive a particular salary based on (1) their inclusion within the definition of “Faculty” under the Policy and (2) their salary placement in view of their step and grade.

The principal portion of the Faculty Personnel Policy Statement that pertains to PCCEA is Article XII, entitled “Faculty Representative Group (PCCEA) Rights.” As the title suggests, most of the rights contained therein are afforded to PCCEA as a group and not to any specific individual employee. For instance, the College agrees to provide PCCEA with bulletin board space at several campuses. None of these group-based rights is implicated here because the prohibition relates to “more favorable terms and conditions of employment” provided “*to any employee because that individual belongs to an elected employee representative organization,*” and not to rights afforded to the association itself. (Emphasis and underscore added).

In the few instances in which these “rights” are arguably afforded to individual PCCEA officers or members, it cannot be unequivocally said that these “rights” provide “more favorable” or better terms and conditions of employment to PCCEA members. Rather, these “rights” modify or expand the PCCEA officers’ or members’ scope of work and duties. In other words, PCCEA officers or members occasionally perform different, but not necessarily better, work duties compared with some other faculty. For example, under Article XII of the Policy, PCCEA officers or members may represent faculty members in the meet-and-confer process and in grievance processing and may be reassigned, within strict, group-wide limits, to do this work rather than exclusively carrying the normal instructional faculty workload. This representational work serves important employer interests, as the Policy recognizes in the Preamble. Specifically, it is done “to promote harmonious relations between the Faculty and the Board, and to permit input for the development of personnel policies directly and substantially related to wages, salaries, working conditions for Faculty in order to encourage an efficient and high level of educational service to the community, and to foster open and honest relations among the Faculty, Administration, and the general College community.” In addition, it may facilitate the resolution of grievances and other employer-employee disputes and overall improve communications, morale, and labor relations at the College.

In light of these realities, there can be no clear judgment that the conferral of these “rights” to PCCEA constitutes providing “more favorable” or better terms and conditions of employment to any employee. It is not the case that PCCEA officers or members receive better

pay or more unrestricted leave, for instance, than other employees by virtue of their association with PCCEA. Any suggestion that these “rights” confer “more favorable” or better terms and conditions of employment represents a mere value judgment – that is, a subjective assessment or opinion about the value and importance of this work. Such a subjective, value-laden standard would prove unworkable in application and cannot be what the legislature had in mind.

(2) The Prohibition on “Compenat[ing] an Employee for Work Performed on Behalf of” PCCEA

The first portion of this amendment is similar to an existing prohibition on compensating school district employees that has been in place for a decade: “School district employment contracts shall not include compensated days for professional association activities.” A.R.S. § 15-504. Since this law became effective in November 2009, neither courts nor the Arizona Attorney General have weighed in on what this language means and what it specifically prohibits. That being said, a number of school districts have continued to compensate employees who are associated with their local education associations for performing a range of work that is for the districts’ benefit. Such work includes meeting and working with employees, administrators, and other stakeholders for a variety of purposes, such as to provide input, to assist in resolving disputes, to maintain relationships, and to facilitate effective communications with these groups. This arrangement, sometimes known as the “ombudsperson/liaison” model, represents a recognition that much of the work performed by association officers and members redounds to the benefit of the district (and therefore is not compensation solely “for professional association activities”). Accordingly, the school district may properly pay for that part of an employee’s work that is performed for the employer in this capacity.

Included below in Appendix A are two examples of district-paid, “ombudsperson/liaison”-type arrangements that school districts have in place.

Please let me know if you have any questions. I’d be happy to discuss this further with you at your convenience.

Sincerely yours,

Jarrett J. Haskovec
AEA General Counsel

Appendix A:

Paradise Valley Unified School District:

Article I

B. GOVERNING BOARD

1. Recognition of Responsibilities and Rights of the Association

a. The Board recognizes that the responsibilities of the Association require a considerable amount of time and often constitute actions that are considered district business. The Board agrees to appoint the District Ombudsman/Liaison to be responsible for the tasks that are considered district business. . . .

C. PARADISE VALLEY EDUCATION ASSOCIATION

. . .

2. Release Days

Employees who desire to be released to perform Association business must use personal leave time as outlined in Bargaining Agreement IV.F.4.a, b, c, d.

3. President

The Association President will use personal release time as outlined in Bargaining Agreement IV.F.4.a, b, c, d for any Association business he/she elects to conduct during the professional day. . . .

Glendale Union High School District:

Release time-

- c. The President of the Association shall have available 20% of each semester of released time, non-accumulative at the District's expense, for the purpose of community relations and Association/District communications.