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Legal Issues in Higher Education - Handout: Cayuga Community College PERB Decision and Order

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49 PERB ¶ 3007, 49 Off. Dec. of N. Y. Pub. Employee Rel. Bd. ¶ 3007, 2016 WL 7911936

New York Public Employment Relations Board

In the Matter of **CAYUGA** COMMUNITY **COLLEGE** PART-TIME FACULTY ASSOCIATION, Petitioner, and
CAYUGA COMMUNITY **COLLEGE** and COUNTY OF CAYUGA, Employer, and **CAYUGA** COMMUNITY
COLLEGE FACULTY ASSOCIATION, Intervenor.

Case No. C-6254

AGATA, DEMARCO, HITE

January 25, 2016

Related Index Numbers

15.1221 Educational Employees, Professionals, Professors, College Instructors
33.21 Standards for Unit Determination, Appropriate Unit
33.323 Criteria, Unit Size, Fragmentation or Proliferation
33.34 Criteria, Community of Interest
34.34 Employee Categories, Part-Time Employees
48 PERB 4003

Appearances:

TRUDY RUDNICK, LABOR RELATIONS SPECIALIST AND ORGANIZER, for Petitioner
COLIN M. LEONARD, of counsel, for Employer, BOND, SCHOENECK & KING
SUSAN M. DECARLO, LABOR RELATIONS SPECIALIST, for Intervenor

Judge / Administrative Officer

AGATA
DEMARCO
HITE

Case Summary

PERB affirmed an ALJ's determination that the appropriate placement for petitioned-for adjunct faculty at a county community college was in a separate bargaining unit rather than in the existing unit of full-time faculty [see 48 PERB ¶ 4003 (2015)]. The college contended the adjunct faculty shared a strong community of interest with the full-time faculty and attempted to distinguish the instant dispute from the Board's ruling in *Board of Higher Education*, 2 PERB ¶ 3056 (1969). However, PERB rejected that assertion, concluding the ALJ did not err in finding the adjunct and full-time faculty played fundamentally different institutional roles, which created a conflict of interest that precluded placing the adjunct faculty in the same bargaining unit as the full-time faculty. Record evidence showed members of the faculty unit determined every aspect of the job of adjunct faculty, including whether an adjunct teaches a course, the syllabus and textbooks used for the course and whether to remove an adjunct. Additionally, the conflict of interest created by the disparities in salaries and benefits available to adjunct faculty when compared to full-time faculty militated in favor of the placement of the adjunct faculty in a separate bargaining unit. Moreover, the PERB noted that the petitioned-for 200 adjunct faculty were sufficiently large enough to "create a viable and coherent unit of employees with a genuine community of interest and absent conflict."

Full Text

Board Decision and Order

This case comes to us on exceptions by **Cayuga** Community **College** and the County of Cayuga (collectively, the College) to a decision of an Administrative Law Judge (ALJ) defining an appropriate bargaining unit and ordering the College to produce a list of the employees within the bargaining unit as defined.¹ The ALJ found, over the College's objection, that adjunct faculty at the College were most appropriately placed in a separate appropriate bargaining unit from the full-time faculty.

Exceptions

The College excepts to the ALJ's decision on multiple grounds. First, the College excepts to the ALJ's finding that the full-time faculty and the adjunct faculty do not share a strong community of interests, and to not weighing facts supporting the existence of a community of interests, such as the same core duties, educational qualifications, supervision, and advancement on the pay scale.² Second, the College contends that the ALJ erroneously found "significant conflicts" existed between full-time faculty and adjunct faculty, and in relying on the predicates supporting that finding.³ Third, the College excepts to the ALJ's failure to accord significant weight to its claim of administrative convenience.⁴

In addition to these primary exceptions, the College raises several of a subsidiary nature. The College excepts to the ALJ's reliance on a specified decision, and her not considering others in which the Board found that part-time and full-time employees are appropriately placed in a single unit.⁵ Likewise, the College contends that the ALJ should have addressed the fact that many other colleges have both full-time and adjunct faculty in a combined unit.⁶ The College asserts that the ALJ should have found that if a conflict does exist the New York State United Teachers (NYSUT) should not represent both groups.⁷ Finally, the ALJ erred, the College argues, by not finding the petition subject to the contract bar rule.⁸

Facts

The currently represented employees at the College fall into four units: (1) the full-time faculty represented by the Cayuga Community College Faculty Association ("Faculty Association"); (2) administrative professional staff; (3) clerical staff; and (4) maintenance and custodial staff.⁹

The current contract between the Board of Trustees of the College and the Faculty Association (Contract) includes, among its definitions, the "Negotiating Unit," defined as:

The negotiating unit shall consist of faculty members (instructional and non-instructional) who are full-time professional staff employees holding academic rank and shall exclude administrators excepting those serving as division chairs as provided under Section 13 below.¹⁰

Section 13 defines a "Division Chair" as "a teaching faculty member temporarily assigned to administrative duties" under the Contract.¹¹

The Faculty Association has approximately 66 members, including division chairs.¹² By contrast, the unit petitioned for by the Cayuga Community College Part-Time Faculty Association consists of approximately 193 adjunct faculty members (each of whom can teach up to 12 credits per semester), nine coaches and nine members of the administrative professional staff.¹³

For the 2013-2014 academic year, the minimum full-time faculty starting salaries were \$54,0241 for an Instructor; \$60,874 for an Assistant Professor; \$67,351 for an Associate Professor; and \$80,016 for a Professor.¹⁴ For these salaries, a member of the full-time faculty is required to carry a full teaching load of no more than 17 credit hours per semester or 30 per year, and no less than 80% of that load.¹⁵

In addition to their salaries, full-time faculty members may teach additional courses, known as "overload" courses, and be compensated at a per credit hour rate ranging, in academic year 2013-2014, between \$ 966 per credit hour (for an Instructor) to \$1,301 (for a full professor) set forth in the Contract.¹⁶ Adjunct faculty are offered courses on a take-it-or-leave-it basis only after the full-time faculty have selected the "overload" courses they want to teach.¹⁷

Full-time faculty members receive, and are eligible to receive, among other benefits: paid sick and personal leave time, paid sabbatical leave after six years of service with the College, longevity increases, faculty development funds, special service work, and promotional stipends. In addition, they are eligible to receive the Faculty Award for Excellence, an enhancement of their base pay. Full-time faculty also receive health and dental insurance, and have the option of an early retirement

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incentive. Fulltime faculty may participate in the Employee Retirement System, the Teacher Retirement System, or a TIAA-CREF retirement option.¹⁸

Adjunct faculty are compensated on a per credit hour basis, at a rate equivalent to the rate paid to full-time faculty for teaching an “overload” course. Adjunct faculty receive no other paid benefits or leave time. They are not eligible for health or dental insurance coverage.¹⁹ Adjuncts are not required to be available to students for office hours, as are full-time faculty, nor are they required to attend division meetings.²⁰ Adjunct faculty may teach at other schools, or have other full-time employment elsewhere or at the College.²¹

According to Steven Keeler, Division Chair of the English, Humanities and Telecommunications Division, “we don’t consider adjuncts to be members of the division in terms of attending division meetings, and they have no vote at the division meetings” if they do attend.²² Keeler further testified that full-time faculty participate in curriculum and course development, but that adjunct faculty have no role in governing the college.²³ Keeler explained that, since the 1990s, the Faculty Association had rejected the notion of representing the adjunct faculty, due to a perceived conflict of interest between them; he explained that “the objection always centered around the idea that the adjuncts would take away the full-time faculty courses.”²⁴

All college staff, including adjunct faculty, receive a tuition waiver for family members attending the College. Adjuncts may participate in the State and Local Employees’ Retirement System or the Teachers’ Retirement System. Adjuncts who are former full-time faculty or administrators, or who are currently employed as full time administrative professionals, may participate in the TIAA-CREF retirement option.

The four division chairs of the College assign courses to both full-time faculty members and to adjunct faculty. Division chairs are also responsible for hiring and firing adjunct faculty, either directly or through a designee. Full-time faculty members may avail themselves of just cause disciplinary process that culminates in binding arbitration; adjunct faculty members have no such protection.²⁵ Full-time faculty members must be hired pursuant to a contractually agreed process that includes a recommendation by a search committee to the appropriate vice president and then to the College president, and finally ends with the approval of the Board of Trustees.²⁶

Discussion

The unit placement petition here “presents an initial uniting situation because it seeks representation rights for unrepresented employees.”²⁷ In such cases, the Board must determine the most appropriate unit because “[t]he statutory grant of authority to this Board to resolve disputes concerning representation status mandates this Board to define appropriate units and does not restrict its power simply to the approval or disapproval of units sought by the party or parties to the proceeding.”²⁸ In making such a determination, the Board has long applied “the community of interest and administrative convenience standards set forth in § 207.1 of the Act, with the community of interest given predominant consideration.”²⁹

As we have recently reaffirmed:

Under this standard, the Board has consistently held that, among the factors to be considered in determining whether a community of interest exists are similarities in terms and conditions of employment, shared duties and responsibilities, qualifications, common work location, common supervision, and an actual or potential conflict of interest between the members of the proposed unit.³⁰

Additionally, the Board has, where proposed placement in a pre-existing unit is at issue, looked to the parties’ contractual recognition clause in determining whether the unrepresented employees were properly encompassed in the proposed unit.³¹ Finally, where relevant, the Board has looked to the bargaining history of the parties and to the extent of supervisory authority of the unrepresented employees over the represented employees in determining the existence of a conflict of interest.³²

The instant case bears several indicia of conflict of interest. First, as correctly found by the ALJ, we find that the fundamentally different institutional roles played by the full-time faculty and the adjunct faculty are sufficient to create a

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conflict of interest precluding placing the adjunct faculty in the same bargaining unit as the full-time faculty.

In *Board of Higher Education of the City of New York*, the Board found that adjunct faculty and permanent faculty (that is, tenured faculty and tenure-track faculty) should be in different bargaining units.³³ The Board found it to be “significant” in that matter that “ the non-tenured faculty almost matches the faculty-rank-status personnel in numbers.”³⁴ The Board explained the diverging interests of the two groups:

[A]s the nontenured instructional staff comprises a large number of persons who hold other positions from which they receive substantial fringe benefits and to which they owe their primary professional loyalty, their interests and ambitions relative to the City University are different from those of faculty-rank-status personnel.

The faculty-rank-status personnel are the heart of the university. It might be compromising to their independence and to the very stability of the university for nontenured instructional personnel, in numbers almost equal to that of faculty-rank-status personnel, to be included in the unit of faculty-rank-status personnel.

We believe that the differences between faculty-rank-status employees and nonannual lecturers-whether they teach more or less than six hours a week-are of sufficient magnitude to preclude their being placed in the same negotiating unit. Faculty-rank-status personnel are all permanent staff in that they are tenured or hold positions leading to tenure. Nonannual lecturers, on the other hand, are appointed and reappointed for only one semester at a time. Faculty-rank-status employees receive many and various fringe benefits, the cost and value of which are considerable. Nonannual lecturers, on the other hand, do not receive these fringe benefits.

Faculty-rank-status personnel exercise important responsibilities regarding the operation of the university by their service on departmental committees. Nonannual lecturers, on the other hand, rarely serve on departmental committees. Faculty-rank-status personnel have their primary personal commitment to the City University; nonannual lecturers, on the other hand, are likely to be fulltime high school teachers working at the university at night, or businessmen, accountants, lawyers, or graduate students whose primary professional commitments are elsewhere.³⁵

The decision in *Board of Higher Education* closely matches the facts here. Indeed, the conflict is starker and sharper in this case, as adding the adjunct faculty to the full-time faculty’s bargaining unit would effectively drown out the voice of the fulltime faculty, who would, at a stroke, be outnumbered by a more than three-to-one ratio. We note also that the approximately 200 adjunct faculty members petitioned for are sufficient to create a viable and coherent unit of employees with a genuine community of interest and absent conflict.

The College asserts that *Board of Higher Education* “was wrongly decided and has not stood the test of time,”³⁶ relying on *Warren County*³⁷ and *County of Genesee*.³⁸ As a threshold matter, these decisions were rendered not by the Board, but by the then-Acting Director of Representation and Employee Practices, and therefore are “not binding on the Board and ha[ve] no precedential value.”³⁹

Moreover, far from being inconsistent with *Board of Higher Education*, the cases relied upon by the College are applications of its fact-specific analysis to differing factual scenarios. Thus, in *Warren County*, the Director had found that academic and non-academic staff had a “community of interest” as they “ serve[d] together on faculty governance committees,” worked closely and in consultation together with overlapping duties, and desired to be part of the same unit.⁴⁰ Under the specific factual circumstances of that case, the Director found that the employer’s claim of potential conflict did not suffice to warrant separating the titles into two units. Likewise, *County of Genesee* also involved a different constellation of facts than that involved here, in that the administrators at issue had faculty status, participated in college governance, and enjoyed similar benefits and work conditions to the academic faculty as well as having overlapping job functions. In both cases, the Director found the factual distinctions between the case before him and *Board of Higher Education* made all the difference. Without reviewing those director’s decisions on the merits, we reject the College’s claim that, as a matter of precedent, *Board of Higher Education* “is out of step with modern PERB policy and should be disregarded.”⁴¹

Moreover, the bargaining history of the parties supports separate representation of adjunct faculty. The fact that neither group wishes to be jointly represented with the other, while not dispositive, is salient, as is the fact that the Faculty Association has since the 1990s rejected the opportunity to organize and represent adjunct faculty because of a felt conflict between the two

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groups. Likewise, the fact that the College and the Faculty Association have stipulated in their collectively bargained Contract that the unit to be represented by the Faculty Association is limited to full-time academic staff is germane and supports our conclusion that adjuncts, while entitled to representation, are not properly placed in the Faculty Association.

This is particularly the case since the College deploys against the fundamental alteration of the bargaining unit, the conflict delineated in our most directly applicable precedent, and the expressed wishes of both the full-time and the adjunct faculty only a conclusory, non-specific claim of administrative convenience. That claim is undermined by the fact that the College has, in a series of collectively bargained agreements, the latest of which remains in effect through August 31, 2016, expressly agreed upon a definition of the “negotiating unit” represented by the Faculty Association. While the parties’ agreements are not binding on us, the addition of the adjunct faculty members to the Faculty Association would either require an abrogation of this provision of the parties’ collectively bargained agreement or would require separate negotiations by the Faculty Association on behalf of adjunct faculty, thereby eliminating the very administrative convenience upon which the College relies.

Because we affirm the ALJ’s finding as to the appropriate bargaining unit and, more specifically, her finding that conflict between the interests of full-time faculty and adjunct faculty warrant a separate unit, we need not address the College’s exception based on the contract bar rule. Nor do we find persuasive the College’s contention that the Part-Time Faculty Association should be deemed an inappropriate placement because it is affiliated with NYSUT. The College asserts that the “reality is that this is a single, NYSUT organization, with both the Faculty Association and the Part-Time Faculty Association ‘represented’ out of the same office.”⁴² We have long rejected the notion that placement of two units within locals affiliated with the same parent union, without anything more, perpetuates the conflict between the two units.⁴³ As the only specific allegation is that the two locals are represented herein by advocates in the same office building, we decline to find any conflict in having two locals affiliated with NYSUT represent separate bargaining units employed by the College.

Accordingly, we affirm the ALJ’s decision and find that a separate unit, defined to include all adjunct faculty, and to exclude all other employees, is most appropriate.

Cases Cited

- [48 PERB 4003]
- 31 PERB 3070
- 1 PERB 399.85
- 42 PERB 3009
- 14 PERB 3051
- 33 PERB 3035
- 36 PERB 3038
- 45 PERB 3020
- 48 PERB 3025
- 45 PERB 3020
- 42 PERB 3030
- 42 PERB 3009
- 39 PERB 3024
- 12 PERB 3068
- 11 PERB 3075
- 12 PERB 3068
- 47 PERB 3001
- 42 PERB 3030
- 2 PERB 3056
- 7 PERB 4032
- 7 PERB 4044
- 48 PERB 3023
- 7 PERB 4032
- 9 PERB 3022

Footnotes

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1 48 PERB ¶4003 (2015).

2 Exception Nos. 1, 10, 11,12, 13, 14, 15, 16, 17.

3 Exception Nos. 3, 5, 6, 7, 8, 9.

4 Exception No. 2.

5 Exception Nos. 4 and 19.

6 Exception No. 18.

7 Exception No. 20.

8 Exception No. 21.

9 Stipulation of Facts, Joint Ex 1 at ¶5.

10 2011-2016 Contract, Joint Ex 3, Art I, §11. The 2004-2011 Contract contains an identical definition of the negotiating unit. Joint Ex 2, Art. I, § 11. The 1970-1972 Contract between Auburn Community College (the College' s original name) and the Auburn Community College Faculty Association, provides that the terms “ *Faculty Member*, or *Instructional Staff* or *Academic Staff* shall mean a member of the negotiating unit, which consists of all full time professional staff employees who hold faculty rank.”Joint Ex 4, Art. I, §1.6 (emphasis in original).

11 *Id.*, §13. The 2004-2011 Contract contains an identical definition of Division Chair. Joint Ex 2, Art. I, § 13. The definition of “ Department Chairman” similarly limits the position to full-time staff, requiring as the sole qualification “ the rank of Associate Professor or above.” Joint Ex 4, Art. IX, § 6.2.

12 Joint Ex 1, ¶14.

13 *Id.*; *see also* Tr, vol. 2, at p. 15.

14 Joint Ex 1, ¶17. The rates for 2015-2016 academic year are, respectively, \$56,538; \$63,988; \$70,032; and \$83,068. Joint Ex 3, Art. XV, § 1.

15 Joint Ex 3, Art. XIV §§ 1.1. 2.2.

16 Joint Ex 1, ¶6; Joint Ex 3, Art. XV, § 4. In 2015-20916, overload rates range between \$995-1339.

17 Tr, vol 1 at 96-97.

18 Joint Ex 1, ¶¶ 18, 11; Joint Ex 3, Art. XVI.

19 Joint Ex 1, ¶12.

20 Joint Ex 1, ¶13; Tr, vol 1, at pp. 31-32 (Sevik); 97-98 (Keeler).

21 *See, e.g.*, Tr, vol 1, at p. 20 (Adjunct lecturer Gregory Sevik also teaches at LeMoyne College); Joint Ex 1, ¶11 (“Certain adjuncts participate in TIAA CREF based on being a member through employment at another institution”); Tr, vol 1, at p. 101 (College administrator taught a telecommunications course as an adjunct).

22 Tr, vol 1, at pp. 97-98 (Keeler).

23 Tr, vol 1 p. at 98.

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- 24 Tr, vol 1, p. at 77.
- 25 Joint Ex 3, Art. VI; Tr, at pp. 108-109.
- 26 Joint Ex 3, Art. X.
- 27 *Clinton Comm College*, 31 PERB ¶3070, 3155 (1998).
- 28 *Id.*, quoting *State of New York*, 1 PERB ¶399.85, 3231 (1969).
- 29 *St. Paul Boulevard Fire Dist*, 42 PERB ¶3009, 3027 (2009), citing *Board of Educ of the City Sch Dist of the City of Buffalo*, 14 PERB ¶3051 (1981); *City of Rye*, 33 PERB ¶3035 (2000); *NYCTA*, 36 PERB ¶3038 (2003); see also *Niagara Frontier Transp Auth*, 45 PERB ¶3020, 3050 (2012).
- 30 *County of Franklin*, 48 PERB ¶3025, ____ (2015) (quotation and editing marks omitted), quoting *Niagara Frontier Transportation Auth*, 45 PERB ¶3020, at 3050 (2012); citing *Sachem Cent Sch Dist*, 42 PERB ¶3030 (2009); *St. Paul Boulevard Professional Firefighters Assn*, 42 PERB ¶3009; *Monroe #1 BOCES*, 39 PERB ¶3024 (2006); *Somers Cent Sch Dist*, 12 PERB ¶3068 (1979); *East Ramapo Cent Sch Dist*, 11 PERB ¶3075 (1978); *Somers Cent Sch Dist*, 12 PERB ¶3068 (1979).
- 31 *County of Monroe*, 47 PERB ¶3001, 3003 (2014).
- 32 *Sachem Cent Sch Dist*, 42 PERB ¶3030, at 3112 (bargaining history showed unrepresented employees who had at one time been placed within unit had functioned harmoniously in bargaining with rest of unit); *County of Monroe*, 47 PERB ¶3001, at 3003 (nurse managers, though entitled to representation, not properly placed in a unit with their subordinates when they have a supervisory role in hiring, discharge, promotion or grievance administration enabling them to significantly affect the terms and conditions of employment of those whom they supervise).
- 33 2 PERB ¶3056 (1969).
- 34 *Id.* at 3469.
- 35 *Id.* at 3469-3470.
- 36 Brief in Support of Exceptions, at 16.
- 37 7 PERB ¶4032 (1974).
- 38 7 PERB ¶4044 (1974).
- 39 *County of Nassau*, 48 PERB ¶3023, n. 89 (2015).
- 40 7 PERB ¶4032, at 4044-4045.
- 41 Brief in Support of Exceptions, at 17.
- 42 Brief in Support of Exceptions, at 19.
- 43 See *City of Binghamton*, 9 PERB ¶3022 (1976).