

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**TOMPKINS CORTLAND COMMUNITY COLLEGE
ADJUNCT ASSOCIATION, NYSUT, NEA, AFT,
AFL-CIO,**

Petitioner,

- and -

**TOMPKINS CORTLAND COMMUNITY COLLEGE
and COUNTY OF TOMPKINS and COUNTY
OF CORTLAND,**

Employer,

- and -

**TOMPKINS CORTLAND COMMUNITY COLLEGE
FACULTY ASSOCIATION,**

Intervenor.

JULIE BERMAN, LABOR RELATIONS SPECIALIST, for Petitioner

HARRIS BEACH PLLC (MARK McCARTHY of counsel), for Employer

HEATHER CLEMENS SPONENBURG, for Intervenor

DECISION OF ADMINISTRATIVE LAW JUDGE

On or about December 12, 2014, the Tompkins Cortland Community College Adjunct Association, NYSUT, NEA, AFT, AFL-CIO (Adjunct Association) filed a petition seeking to represent a unit of unrepresented adjunct faculty employed by Tompkins Cortland Community College (College). The Tompkins Cortland Community College Faculty Association (Faculty Association), which represents a bargaining unit that includes the full-

RECEIVED

FEB 16 2017

NYSUT ONLY RECORDS
HYDROUSE C 1111

CASE NO. C-6307

time faculty at the College, intervened in support of the petition. The joint employer filed a response in which it asserted that the proposed unit was not appropriate.

A hearing was held in Syracuse on June 11 and June 12, 2015, at which all parties were represented. All parties submitted briefs thereafter.

FACTS

Currently, there are approximately 250¹ adjunct instructors (adjuncts) and tutors employed by the College, though not every adjunct teaches every semester. According to the College's 2014-2015 Teaching Manual,² the salary formula for adjunct instructors is "determined on a case-by-case basis after consideration of an individual's experience and credentials."³ Adjuncts are placed on one of five levels, each with a corresponding salary per credit hour. For example, adjuncts placed on Level 1, the lowest level, are paid \$870 per credit hour, while adjuncts placed on Level 5, the highest level, are paid \$1,135 per credit hour.⁴ According to the Teaching Manual, first-time faculty members are placed at the Level 1 rate. However, any adjunct who has, or had in the past, academic rank at another institution will be placed at the corresponding rate, with Level 1 equating to an Instructor, Level 2 equating to an Assistant Professor, Level 3 equating to an Associate Professor and Level 4 equating to a Professor.⁵ Additional experience or advanced degrees may permit an individual to be placed at a higher level. Generally, after six semesters of successful employment as an adjunct faculty member at the College, an individual is eligible to be moved to the next higher level.

¹ Administrative Law Judge (ALJ) Exs 1 and 3.

² Joint Ex 1.

³ *Id.*

⁴ Those rates were unchanged from the 2013-2014 school year. Joint Ex 2.

⁵ *Id.*

With respect to benefits, adjuncts do not receive health insurance paid by the College.⁶ Those with a minimum appointment of three months, earning at least \$2,000 annually, may enroll in the health, dental and vision plans offered by the College, but must pay 100 percent of the premium for individual or family coverage.⁷ Membership in one of the New York State retirement systems is optional.⁸ With some limitations, adjunct faculty members who have taught at least nine credit hours may receive a full tuition waiver for one credit-bearing course at the College, or up to three one-credit courses.⁹

A section of the Teaching Manual titled "Teaching Assignments for Adjunct Instructors," indicates as follows:

Scheduling for the following semester begins shortly after the current semester begins. Program Chairpersons are responsible to submit course offerings to the Dean of Instruction. Scheduling of adjunct teaching will begin once full-time faculty loads are determined. Contact your Program Chair regarding your availability and teaching preferences.¹⁰

In Article 8.9(k) of the current collectively negotiated agreement between the College and the Faculty Association,¹¹ the College agrees to inform Faculty Association members as soon as the decision to offer a course is final, "in order to give first preference for instruction according to Article 8.12."¹² Procedures regarding the instruction of overload courses by Faculty Association members are set forth in Article 8.12a. While that term is not defined

⁶ Tr No 1, at p. 64. The transcript of the second day of hearing begins with page one rather than continuing the page numbering, sequentially, from the conclusion of the first day of hearing. Thus, references to the transcripts herein will identify the transcripts as either "Tr No 1" – for the June 11, 2015 hearing – or "Tr No 2" – for the June 12, 2015 hearing.

⁷ Joint Ex 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Joint Ex 3.

¹² *Id.*

therein, Larry Chase, a professor who is president of the Faculty Association,¹³ testified that full-time faculty members are expected to teach a “base” load of 15 credits per semester, and that they are eligible to receive additional compensation, known as “overload,” for teaching additional classes, up to six credits, or providing other services.¹⁴ He explained that the agreement also allows members to “bank” overload time earned so that in the future the individual can take time off from teaching duties.¹⁵ Section 8.12a provides that in the event a member selects an overload course or section that does not open, or which becomes part of the employee’s full-time load, the Faculty Association unit member “shall be given preference for an adjunct assigned course/section for which the employee is qualified to teach.”¹⁶

For the 2015-2016 academic year, salaries for ten-month employees in the instructional ranks – i.e., Instructor, Assistant Professor, Associate Professor and Professor – range from a minimum of \$43,256 and a maximum of \$64,886 for Instructors, up to a minimum of \$69,359 and a maximum of \$104,039 for Professors. For twelve-month employees, the ranges are \$51,907 to \$77,861 for Instructors and \$83,232 to \$124,846 for Professors.¹⁷

Members of the Faculty Association’s bargaining unit contribute 20 percent of health insurance premiums for both individual and family coverage.¹⁸ Those who opt out of such health insurance are paid \$1,000 annually upon providing proof that they have coverage

¹³ Tr No 2, at p. 9.

¹⁴ Tr No 2, at p. 18.

¹⁵ Tr No 2, at pp. 18-19.

¹⁶ Joint Ex 4.

¹⁷ *Id.* For both ten and twelve-month employees, the salary ranges for Assistant and Associate Professors fall between the ranges for Instructors and Professors.

¹⁸ Joint Ex 4.

elsewhere.¹⁹ Faculty Association unit employees may receive dental insurance through a payroll deduction; the employee contributes the full cost of the premium.²⁰ Faculty Association unit employees are eligible to participate in an income protection plan for which the College pays the monthly premium. In addition, bargaining unit employees are eligible to participate in a group life insurance plan; the College contributes \$100 per year towards the plan, while those who obtain their own life insurance are reimbursed \$100 per year. Once a bargaining unit employee has been employed by the College for one year, tuition for College courses is waived, both for the employee and his/her spouse and children. Members of the full-time faculty are required to join a retirement system.²¹

The parties entered into the record four separate memoranda of agreement,²² all of which were signed by the presidents of the Faculty Association and the College in early May of 2015. In one such agreement, the Faculty Association and the College agreed that for the 2015-2016 academic year, "adjunct faculty members may carry a maximum teaching load of 11.25 CHE per semester."²³ In another, the Faculty Association and the College agreed to the compensation rate for overload teaching.

Robert Earle has taught at the College as an adjunct instructor for five semesters and has been employed as a tutor for two semesters. He has taught courses in English, sociology and environmental science. In the 2015 spring semester, Earle taught one course and tutored 12 hours per week; in the 2014 fall semester, he taught three courses and tutored three or four hours per week. Earle is a Level 2 adjunct, earning \$925 per credit

¹⁹ *Id.*

²⁰ *Id.*

²¹ Joint Ex 3.

²² Joint Exs 3-A through 3-D.

²³ Joint Ex 3-C. "CHE" is a credit-hour equivalent. Joint Ex 3.

hour taught. He testified that besides that compensation, he receives no benefits.²⁴

Regarding teaching assignments, Earle testified that he is “never confident” that he will be teaching a class until at least a week into the semester.²⁵ He explained that classes may be canceled due to low enrollment or he could be “bumped” from a class in the event that a full-time faculty member wishes to teach it.²⁶ Regarding his role as a tutor, Earle testified that he works 12 hours a week in the writing and research center, helping students research and write essays, primarily for their English composition courses.²⁷ Earle was unaware of any Faculty Association member performing tutoring duties.²⁸

Earle testified about the College Forum (Forum) and College governance.

Unapproved minutes from a February 8, 2013 meeting of the Forum, which Earle attended, were entered into evidence.²⁹ Earle explained that the Forum’s bylaws³⁰ do not define adjuncts as “staff,” and testified that at the February 8, 2013 meeting, there was a discussion about changing the Forum’s bylaws to allow adjuncts to serve as members of the Forum. The matter was voted on by members of the Forum, where adjuncts were unable to cast a vote.

Earle also testified that adjuncts are not required to attend faculty meetings, and that they are not compensated in the event that they do attend those meetings. Earle was asked about the College’s Fall, Spring and Winter Days, when classes are not held and instead, faculty members lead presentations and seminars. Earle was invited to participate

²⁴ Tr No 1, at p. 64.

²⁵ Tr No 1, at p. 25.

²⁶ *Id.*

²⁷ Tr No 1, at p. 97.

²⁸ Tr No 1, at p. 98.

²⁹ Petitioner’s Ex 3.

³⁰ Petitioner’s Ex 5.

in one of these events, but could not do so because of his teaching schedule at another institution. However, he assisted in the preparation of a PowerPoint presentation, but was not compensated for that work.³¹

Earle's supervisors in each department, who are responsible for scheduling classes, are in the Faculty Association's unit.³² Earle testified that his classes had been reviewed by full-time faculty members,³³ and that when he was initially hired to teach sociology, he had been interviewed by a faculty member.³⁴ He explained that in his experience, faculty members send adjuncts emails asking for availability and indicating which class sections are available.³⁵

On cross-examination, Earle was asked to identify areas in which there are conflicts of interest between adjuncts and faculty members. Earle identified overload pay. When asked how adjuncts and faculty members differ, Earle stated that adjuncts are "contract employees that are paid by class," while faculty members are on a tenure track.³⁶ Earle testified that adjuncts have nothing comparable to tenure, and that they do not achieve any sort of seniority that would guarantee them a class to teach each semester.³⁷ He also noted that faculty members are on campus more often, while adjuncts may teach just two or three days a week and not be present on campus otherwise due to other commitments.³⁸

³¹ Tr No 1, at pp. 57-58.

³² Tr No 1, at p. 27.

³³ Tr No 1, at p. 71.

³⁴ Tr No 1, at p. 76.

³⁵ Tr No 1, at p. 74.

³⁶ Tr No 1, at p. 89.

³⁷ Tr No 1, at p. 94.

³⁸ Tr No 1, at p. 88.

The Adjunct Association called Diane Williams to testify. Williams has been an adjunct at the College since 1991 or 1992. She has taught science courses, including biology, chemistry, anatomy and physiology. In the spring semester of 2015, she taught two courses, while in the fall of 2014 she taught three. She is paid at the rate of \$1,135 per credit hour. Williams is also a full-time teacher for the Homer Central School District, where she teaches chemistry.³⁹

Williams testified that she had taught Biology 1015 during summer sessions dating back to 1999. In the summer of 2014, it was canceled due to low enrollment. Then, in the summer of 2015, adjunct Renee Borgella was assigned to teach Biology 1015 by the department chair, who is a member of the College faculty.⁴⁰ Williams testified that she does not expect to teach the course in the summer in the future, opining that “once you’re out of that loop, you’re out of that loop.”⁴¹ Asked whether it is “accurate to say that you have absolutely no job security from one semester to the next,” Williams replied, “That’s pretty accurate.”⁴²

Williams testified that her performance was evaluated by the previous department chair “several times.”⁴³ On cross-examination, Williams confirmed that members of the full-time faculty receive paid sabbaticals, while adjuncts do not.⁴⁴ She testified that adjuncts do not act as student advisors.⁴⁵

³⁹ Tr No 1, at pp. 103-104.

⁴⁰ Tr No 1, at p. 107.

⁴¹ Tr No 1, at p. 119.

⁴² *Id.*

⁴³ Tr No 1, at p. 110.

⁴⁴ Tr No 1, at pp. 135-136.

⁴⁵ Tr No 1, at p. 122.

The Adjunct Association called Nancy Crane, an adjunct who has taught at the College dating back to 1993. Crane explained that if an insufficient number of students enroll in a course, it may be offered as an “independent study” instead. In that circumstance, she is paid \$157 per student per credit hour, which is what occurred with one of her classes in the summer of 2015.⁴⁶ Crane explained that she ended up being paid less than half her normal amount.⁴⁷

Crane testified that she could be bumped by a full-time faculty member from the two classes she was scheduled to teach in the upcoming fall semester.⁴⁸ She explained that the term “bumping” refers to a situation when an adjunct is offered a class, but a full-time member of the Faculty Association has one of their classes canceled and takes a class previously offered to an adjunct in order to maintain a full teaching load.⁴⁹ She also explained that the classes could be canceled due to low enrollment, and that this had happened to her “many times” in the past.⁵⁰ Crane testified about her efforts in 2011 at obtaining classes to teach; emails about the matter show that she was not assigned to teach a class in which she was interested.⁵¹ Like other witnesses, she explained that a member of the Faculty Association was responsible for determining adjunct assignments.

Crane testified that she has been a member of the State retirement system since 2005, and that she learned of her eligibility only after inquiring about it. According to Crane, her children would not receive free tuition at the College as a result of her position as an

⁴⁶ Tr No 1, at p. 142.

⁴⁷ *Id.*

⁴⁸ Tr No 1, at p. 147.

⁴⁹ Tr No 1, at p. 154.

⁵⁰ Tr No 1, at p. 148.

⁵¹ Petitioner’s Ex 11.

adjunct.⁵² Crane stated that one office at the College has been allotted for adjuncts, describing it as a large room with a number of cubicle-style desks and approximately six computers. She explained that it was not an ideal situation, because the room was loud, there was no privacy and there were not sufficient computers for all adjunct faculty to use.⁵³ Yet, Crane testified, she is required to hold office hours as part of the responsibility of teaching a class.

When asked about being included in a bargaining unit with the full-time faculty, Crane identified conflicts of interest, including the fact that the overload rate for full-time faculty, which is the rate paid to adjuncts, is "an extra" for full-time faculty, who as a result would be more concerned with their base salary rather than increasing the rate paid for overload coursework or to adjuncts.⁵⁴

Patrick Sewell was called by the Adjunct Association. He is an adjunct instructor at the College, where he began teaching in the fall of 2010. He testified that the chair of his department is a full-time faculty member who interviewed him, hired him and now assigns him classes. He currently is paid \$990 dollars per credit hour for courses he teaches. He further described the adjunct office, testifying that it contains a number of shared desks that are available on a first come, first served basis, as well as six computers that are difficult to access during certain times of the day. He testified that there are 32 cubbies available to over 200 adjuncts and just one phone. In contrast, he testified that full-time faculty members at the College have their own individual offices with computers and office

⁵² Tr No 1, at pp. 165-166.

⁵³ Tr No 1, at pp. 166-167.

⁵⁴ Tr No 1, at p. 172.

phones.⁵⁵ He also testified that full-time faculty members have secretarial assistance, while the adjuncts currently do not.

Sewell is invited to faculty meetings, but testified that he does not participate because adjuncts do not have a vote. Sewell explained that on Fall, Spring and Winter days, students do not have class but "it's sort of staff development day," with full-time faculty required to attend or use a personal day.⁵⁶ Adjuncts, in contrast, are not required to attend and are not paid in the event they do attend.

On cross-examination, Sewell estimated that between 10 and 15 adjunct instructors attended the last Fall/Spring/Winter day. He agreed that different adjunct instructors have different levels of involvement with the College community and that different full-time faculty members similarly have different levels of involvement with the College community. When asked about potential conflicts with the full-time faculty, Sewell testified that adjuncts feel that their department chairs, who are members of the Faculty Association and who are in effect their supervisors, make "really important decisions regarding us," which puts the adjuncts "into an awkward place."⁵⁷

The Adjunct Association called Gregg Weatherby, an adjunct who teaches in the English department. He testified that the department chair, a full-time faculty member, solicits the adjuncts each semester to determine what courses they would like to teach and whether they are available. Weatherby also explained that Dean Carl Penziul performs some supervisory functions as well. Weatherby was asked a series of questions about grade inflation in his department, and he explained that there is a "general assumption that

⁵⁵ Tr No 1, at pp. 206-207.

⁵⁶ Tr No 1, at pp. 220-221.

⁵⁷ Tr No 1, at p. 244.

if you award students higher grades you will stay off the radar...you will not have complaints going to Dean Penziul.”⁵⁸ He also testified that higher grades result in better course teacher evaluations, which “impact our employment.”⁵⁹ Weatherby explained that a “full load” for an adjunct in the spring and fall semesters – i.e., the maximum number of courses they can teach – is three.⁶⁰

Weatherby recounted that he was undergoing cancer treatment in the summer and fall of 2013 and notified the Dean that he would not be able to teach. When he was ready to return the following spring, he learned he was not scheduled to teach any courses. After an informal meeting and discussions with both Penziul and the department chair, Weatherby was given one course to teach.⁶¹ The following summer he asked for a full load of courses but again was only assigned one, even though he told the Dean that he was “financially strapped” from not working due to his illness.⁶² Weatherby testified that he does not have health insurance through his employment as an adjunct at the College, but does have coverage through his employment at SUNY Cortland, where Weatherby is also an adjunct, though he explained that they are called “contingents” there⁶³ and are in a mixed unit of both adjunct and full-time faculty.⁶⁴ Weatherby testified that conflicts arose out of that arrangement, and concluded that based on his experience at SUNY Cortland, he feels a combined unit at the College would be inappropriate.

⁵⁸ Tr No 2, at p. 116.

⁵⁹ *Id.*

⁶⁰ Tr No 2, at p. 119.

⁶¹ Tr No 2, at p. 121.

⁶² *Id.*

⁶³ Tr No 2, at p. 129.

⁶⁴ *Id.*

Larry Chase, who was called by the Faculty Association, described the full-time faculty bargaining unit as consisting of both teaching faculty and non-teaching faculty, which include counselors, librarians, coordinators and lab assistants.⁶⁵ He explained that members of his unit are paid a base salary over ten or 12 months. Currently, the unit includes 63 teaching faculty and 21 non-teaching faculty members. Chase testified that teaching faculty includes four ranks: Instructor, Assistant Professor, Associate Professor and Professor. Faculty members move through these ranks based on the amount of time spent in each position and an evaluation by the provost to determine whether the individual should be promoted. Full-time faculty members are eligible to get tenure, which is also known as a "continuing appointment."⁶⁶ Chase stated that adjunct faculty members, in contrast, do not get tenure.⁶⁷

Chase testified that full-time faculty members are required to prepare an annual report detailing efforts in which they have been involved in service to the College community. He explained that full-time faculty members are compensated for performance growth and are eligible to receive an excellence award after five years at the rank of Professor, and, thereafter, every five years. The monetary award is added to the employee's base salary.⁶⁸ According to Chase, adjuncts are not eligible for this award.

Chase testified that full-time faculty members are expected to teach a "base" load of 15 credits per semester, and that pursuant to their collectively negotiated agreement, they are eligible to receive additional compensation, known as "overload," for teaching up to six

⁶⁵ Tr No 2, at p. 13.

⁶⁶ Tr No 2, at p. 23.

⁶⁷ *Id.*

⁶⁸ Tr No 2, at p. 17.

additional credits of classes or providing other services.⁶⁹ He explained that the agreement also allows members to “bank” overload time earned so that in the future the individual can take time off from teaching duties.⁷⁰ Chase, who was a member of the negotiating team for the Faculty Association during the last round of negotiations, testified that the parties went to impasse, with the main issues being compensation and health insurance. He characterized the overload issue as “extremely” important and a priority to the full-time faculty.⁷¹

Like other witnesses, Chase affirmed that full-time faculty members have a contractual right to work overload assignments, as well as the right to “bump” adjuncts from teaching a class.⁷² He also affirmed that full-time faculty members could “bump” adjuncts in the event that a class assigned to a full-time faculty member was canceled and the full-time faculty member needed to fill his/her 15 credit hour course load. Chase confirmed that full-time faculty members are expected to attend Spring, Fall and Winter days, to participate in committees, and to advise students. Regarding student advisement, the maximum number of students that full-time faculty members advise is supposed to be 35, though Chase testified that some faculty members advise more than that, and as a result, receive additional compensation pursuant to a “complicated” formula set forth in the contract.⁷³ Chase testified that adjunct faculty members do not advise students, and that retention of this responsibility by full-time faculty members is a priority to the Faculty Association. Chase also testified that full-time faculty members may apply for sabbatical leave, while

⁶⁹ Tr No 2, at p. 18.

⁷⁰ Tr No 2, at pp. 18-19.

⁷¹ Tr No 2, at p. 19.

⁷² Tr No 2, at p. 20.

⁷³ Tr No 2, at p. 26.

adjuncts may not.⁷⁴ He explained that full-time faculty members earn sick leave and have access to a sick leave bank, while adjuncts do not.⁷⁵ Similarly, full-time faculty members earn paid leave time, receive bereavement leave and may join a fitness center on campus, while adjuncts do not have access to these benefits. Full-time faculty members may receive health insurance in retirement, while adjuncts do not.

Chase was asked about the “major concerns” of unit members regarding the possible addition of adjunct faculty members to the Faculty Association’s unit. He identified the goal of maintaining the benefits they have negotiated over the last 30 years and noted that increasing his membership from 84 to “perhaps 360 members” and attempting to negotiate for the same “piece of the pie” would be “very, very complicated.”⁷⁶ When asked why the inclusion of adjuncts in his unit would cause conflicts, Chase cited health insurance and the fact that adjuncts may move “in and out of employment at the College.”⁷⁷ Chase also distinguished the “level of participation in the College” between adjuncts and full-time faculty, though he did acknowledge that some adjuncts may be more involved in the College than some full-time faculty members.⁷⁸ Chase again identified the preservation of overload as a priority for full-time faculty members, and noted that a larger unit with a majority of adjuncts may lead to a different result in negotiations.⁷⁹

⁷⁴ Tr No 2, at pp. 29-30. On cross-examination, however, he testified that the College recently has made it clear that those requests will not be granted, due to financial reasons. Tr No 2, at p. 66. He also affirmed, on cross-examination, that the decision of whether to grant a request for sabbatical leave is not grievable. *Id.*

⁷⁵ Tr No 2, at p. 30.

⁷⁶ Tr No 2, at pp. 35-36.

⁷⁷ Tr No 2, at p. 50.

⁷⁸ Tr No 2, at pp. 48-51.

⁷⁹ Tr No 2, at pp. 56-57.

The College called Carl Penziul, the Dean of Instruction, to testify. Penziul has been employed by the College full-time since the summer of 2006, and, prior to that, was an adjunct instructor for approximately five years. Penziul described the College as very “decentralized,” with over 40 full-time faculty members assuming responsibility as department chairs, who are responsible for smaller areas within the curriculum.⁸⁰ Penziul creates a course schedule in consultation with the chairs, who work with him semester by semester to determine what courses will be on the schedule. He explained that with their recommendation and support, he would decide which adjunct faculty members would retain teaching positions and have sections assigned to them.⁸¹ Penziul testified that decisions on what courses to offer are “pretty much” enrollment driven, and that he also considers what courses students need to be able to graduate.⁸²

Penziul explained that the collective bargaining agreement with the Faculty Association requires full-time faculty members to maintain a 15-credit load of teaching each semester. Conflicts among faculty members regarding teaching assignments are addressed by seniority.⁸³ Regarding the assignment of courses to adjuncts, Penziul testified that he works with Sharon Dovi in the Human Resources office to provide them with a letter of reasonable assurance, but that courses may still be canceled or reassigned to a full-time faculty member who needs to teach a class to maintain a full course load.⁸⁴

Penziul testified that department chairs do not have the authority to fire adjuncts, but that they may bring to his attention deficiencies, and at that point Penziul would talk to the

⁸⁰ Tr No 1, at p. 253.

⁸¹ Tr No 1, at pp. 253-254.

⁸² Tr No 1, at p. 254.

⁸³ Tr No 1, at p. 255.

⁸⁴ Tr No 1, at p. 256.

adjunct faculty member. Penziul testified that he is ultimately responsible for the decision to terminate an adjunct's employment.

Penziul explained that there is a formal evaluation process for adjuncts and full-time faculty, with the same form used to evaluate both groups of employees.⁸⁵ First-time teaching faculty are observed in the classroom twice, by either the department chair or Penziul. The first observation is informal, while the second observation is more formal and is included in a personnel record no later than the 12th week of the first semester in which they teach. Penziul testified that there are not different standards of instruction for adjuncts and full-time faculty members.⁸⁶ Penziul was asked if there is a disciplinary process, "short of termination," for adjuncts. He responded that he "has not had to follow up" during his nine years at the College, but explained that he would make the decision regarding whether to terminate teaching privileges or suspend or revoke a teaching contract.⁸⁷

Sharon Dovi, the College's Human Resources Administrator, testified. Dovi oversees employment, personnel, benefits and labor relations for the College. She is also responsible for the hiring process of adjuncts. She explained that adjuncts have access to health insurance after they have been employed for a certain period of time, and that their contribution rate is 100 percent of the premium. Dovi testified that with respect to dental and vision insurance, adjuncts have the same access as other College employees, and are required to pay 100 percent of the premiums.⁸⁸ They may join a State retirement system, participate in the deferred compensation plan and receive a personal tuition waiver after

⁸⁵ Tr No 1, at p. 265.

⁸⁶ Tr No 1, at pp. 262-263.

⁸⁷ Tr No 1, at p. 264.

⁸⁸ Tr No 2, at pp. 156-157.

teaching nine credit hours. In contrast, a tuition waiver applies to dependents of full-time faculty members as well.⁸⁹ Both adjuncts and full-time faculty members have access to the College fitness center for \$80 per semester (\$65 for the summer), but full-time faculty members are eligible to be reimbursed for those expenses if they actively attend the fitness center.⁹⁰

Walter Poland, the College's Vice President for Global Initiatives and its chief negotiator for collective bargaining since 1982, testified that with respect to the Faculty Association, the focus at the bargaining table is on "dollars and cents."⁹¹ He explained that the College often meets with the Faculty Association "away from the table" to discuss other issues, including those that pertain to instruction and class selection.⁹² The results of those discussions are sometimes incorporated into the collective bargaining agreement.

Poland testified that the College would prefer that adjuncts be included in the Faculty Association because negotiations and discussions that involve instruction should include all who are involved in that instruction. Poland agreed that currently there is a "linkage" between the full-time faculty's overload rate and the amount paid per credit hour to adjuncts.⁹³ He further testified that overload rates are negotiated on an "off year basis" and agreed to by a memorandum of understanding.⁹⁴ In response to a question on items that may be "unique" to the adjuncts, Poland acknowledged that the adjuncts have a different concern over whether they are sure to be assigned coursework during a certain period,

⁸⁹ Tr No 2, at pp. 164-165.

⁹⁰ Tr No 2, at p. 164.

⁹¹ Tr No 2, at p. 173.

⁹² Tr No 2, at p. 174.

⁹³ Tr No 2, at p. 179.

⁹⁴ Tr No 2, at p. 181.

since the Faculty Association agreement contains set requirements about class load.⁹⁵ Asked whether the Faculty Association's priority during negotiations was base salary increases or an increase in the overload rate, Poland replied base salary.⁹⁶ He testified that the College has made the decision to apply the overload rate that it negotiates with the Faculty Association to the adjuncts as their per credit hour rate.⁹⁷

DISCUSSION

At issue here is whether the adjunct faculty should be placed in the unit represented by the Faculty Association, as the College argues, or placed in a separate unit, as both the Faculty Association and the Adjunct Association urge.

When determining the appropriateness of a bargaining unit, the most important criterion is the community of interest standard.⁹⁸ The factors to be considered include the similarity of terms and conditions of employment, shared duties and responsibilities, similar qualifications, common work location and supervision, and whether there is an actual or potential conflict of negotiating interests between the members of the proposed unit.⁹⁹ The employer's administrative convenience is also considered, as "[i]t is the policy of the Act to find appropriate the largest unit permitting for effective negotiations."¹⁰⁰

I find here that members of the adjunct faculty are appropriately placed in a bargaining unit separate from the full-time faculty. As set forth more fully below, the terms and conditions

⁹⁵ Tr No 2, at p. 185.

⁹⁶ Tr No 2, at p. 192.

⁹⁷ Tr No 2, at pp. 193-194.

⁹⁸ *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).

⁹⁹ *County of Franklin*, 48 PERB ¶¶ 3025, 3097. See also *St. Paul Blvd Fire Dist*, 42 PERB ¶¶ 3009 (2009).

¹⁰⁰ *Town of North Castle*, 19 PERB ¶¶ 4049, at 4071 (1986).

of employment for adjuncts are significantly different from those of the full-time faculty, conflicts exist between the adjuncts and full-time faculty that are likely to prevent effective negotiations, and, notwithstanding the two groups' shared duties and responsibilities pertaining to student instruction, the two groups have marked differences regarding their professional standing in the College community.

Regarding terms and conditions of employment, adjuncts are paid on a per-course basis, as well as for any tutoring they provide, earning significantly less than the salaried full-time faculty members.¹⁰¹ While certain adjuncts are eligible to receive health insurance through their employment at the College, they must pay the entire cost of the premiums. In contrast, members of the Faculty Association contribute 20 percent of the premiums. An adjunct's children and spouse are not eligible for free tuition, while the children and spouse of members of the Faculty Association are entitled to such a benefit. Members of the full-time faculty earn sick leave and may join a sick leave bank, while these options are not available to adjuncts. Members of the Faculty Association may have paid health insurance in retirement, while adjuncts do not. Case law makes it clear that separate units may be found to be appropriate when the record indicates a marked disparity or gross distinction between benefit levels.¹⁰² Such a disparity exists here.

Clearly there are occupational or professional similarities between full-time faculty and adjunct faculty. The College's teaching manual applies to both full-time and adjunct faculty

¹⁰¹ Based on the limit of 11.25 CHE credits per semester and the Level 5 rate of \$1135 per credit, adjuncts would earn a maximum of about \$12,768 per semester. In contrast, the lowest-paid ten-month instructors earn over \$43,250 per year, while the highest-paid twelve-month employees with the rank of Professor would earn over \$124,000.

¹⁰² See *North Syracuse Cent Sch Dist*, 15 PERB ¶ 4060, *aff'd* 15 PERB ¶ 3108 (1982), and the cases cited therein.

members, for instance, and with respect to instruction, testimony established that adjunct faculty and full-time faculty members are evaluated using the same form and have received comparable student evaluations. However, tenured faculty have a greater role in College governance, as demonstrated by the testimony surrounding the adjuncts' efforts at obtaining voting rights in the Forum. They also participate in hiring decisions and are actively involved in course scheduling. There are also differences in professional standing and involvement at the College. For instance, adjuncts are not permitted to become student advisors and are not expected to participate in certain College events; in contrast, members of the Faculty Association must attend Fall, Spring and Winter days or use a personal day to cover the absence. Adjuncts must share limited office space and resources at the College, while members of the Faculty Association have their own individual offices with computers and telephones, along with secretarial assistance that is not available to adjuncts.

Finally, teaching faculty members of the Faculty Association are eligible to receive tenure, or a "continuing appointment," while adjuncts do not get tenure. In *Board of Education of the City University of New York*, the Board held that occupational similarities alone do not require the amalgamation of part-time faculty into a unit of full-time, tenured faculty.¹⁰³ There, the Board determined that part-time lecturers should not be placed in the unit with full-time, tenured (and tenure-track) faculty, despite the occupational similarities between them, noting as follows:

All members of the instructional staff may teach the same subjects to the same students. All teachers grade, evaluate and are authorized to discipline students. They instruct in the same buildings, use the same classrooms and laboratories, and have the same privileges with regard to use of the dining room and other facilities.¹⁰⁴

¹⁰³ 2 PERB ¶¶ 3056, 3470 (1969).

¹⁰⁴ *Id.* at 3469.

Nonetheless, the Board pointed to the differences between tenured faculty and “nonannual” lecturers in terms of status (i.e., tenured vs. non-tenured), benefit levels, and committee service as significant factors in placing them in separate units.¹⁰⁵

Deriving from the numerous differences in terms and conditions of employment as set forth above, there are also conflicts and potential conflicts between the adjuncts and faculty members of the Faculty Association. Members of the Faculty Association have first choice over the courses available on an overload basis, and thus have a significant impact on the number and nature of courses left for adjuncts to teach. Moreover, when a class assigned to a unit faculty member is canceled, that faculty member may “bump” an adjunct out of a previously assigned class so that the full-time faculty member will continue to maintain a full load of courses. Members of the Faculty Association have a significant role in determining whether adjuncts are assigned courses, and thus whether they even work at all from semester to semester. This impact on job security makes the potential for conflicts clear. Placing the adjunct faculty into the unit of full-time faculty would thus result in a non-cohesive unit which would “serve neither the need of the employees to share a community of interest nor the administrative convenience of the employer.”¹⁰⁶

In sum, the differences between the terms and conditions of employment, and the potential conflicts of interest between the two groups, outweigh their shared instructional mission at the College and thus warrant the placement of adjunct faculty in a separate bargaining unit.¹⁰⁷

¹⁰⁵ *Id.* at 3470. See also *Cayuga Community College*, 49 PERB ¶ 3007 (2016).

¹⁰⁶ *Lawrence Union Free Sch Dist*, 13 PERB ¶ 3072, 3118 (1980).

¹⁰⁷ I am not persuaded by the College’s administrative convenience argument. In effect, the College argues that it would be inconvenient to negotiate separately with adjuncts and the Faculty Association over instructional issues. However, testimony established that the parties

Therefore, I find that a separate unit, as defined below, is most appropriate:

Included: All adjunct faculty.

Excluded: All other employees.

In light of the above, the Director of Public Employment Practices and Representation has determined that an election by secret mail ballot shall be held among the employees in the unit found to be appropriate who were employed on the payroll date immediately preceding the date of this decision unless the Part-Time Faculty Association submits to me, within ten days from the date of its receipt of this decision, evidence to satisfy § 201.9(g)(1) of PERB's Rules of Procedure for certification without an election. It is further ordered that the College shall submit to me, with a copy to the Adjunct Association, within 10 working days from the date of receipt of this decision, an alphabetized list of all employees within the unit found to be appropriate who were employed on the payroll date immediately preceding the date of this decision.

Dated at Albany, New York
this 8th day of February, 2017



Kenneth S. Carlson
Administrative Law Judge

have previously engaged in separate negotiations over instructional issues, and no specific evidence was offered in support of the administrative convenience argument. The record thus does not support the College's claim that its administrative convenience should predominate and require a single, combined unit of adjuncts and full-time faculty.

The following is an extract of PERB's Rules of Procedure, 4 N.Y.C.R.R. Parts 200-215. Any party filing exceptions or other papers with the Board should consult the Rules of Procedure to ensure compliance with all requirements.

Exceptions to Decision of Director; Exceptions to Administrative Law Judge's (ALJ) Decision and Recommended Order; Action by Board

(a) Within 15 working days after receipt of the decision of the Director or the decision and recommended order of the ALJ, a party may file with the Board an original and three copies of a statement in writing setting forth any exceptions thereto, and a separate original and three copies of a brief in support thereof, together with proof of service of copies of such exceptions and brief upon each party.

(b) The exceptions shall:

- (1) Set forth specifically the questions of procedure, fact, law or policy to which exceptions are taken;
- (2) Identify that part of the decision or order to which objection is made;
- (3) Designate by page citation the portions of the record relied upon; and
- (4) State the grounds for exceptions. An exception to a ruling, finding, conclusion or recommendation which is not specifically urged is waived.

Cross-Exceptions

Within seven working days after receipt of exceptions, any party may file an original and three copies of a response thereto, or cross-exceptions and a separate brief in support thereof, together with proof of service of copies of these documents upon each party to the proceeding. Within seven working days after receipt of cross-exceptions, any party may file an original and three copies of a response thereto, together with proof of service of a copy thereof upon each party to the proceeding.

Request for Extension of Time

A request for an extension of time within which to file exceptions and briefs shall be in writing, and filed with the Board at least three working days before the expiration of the required time for filing, provided that the Board may extend the time during which to request an extension of time because of extraordinary circumstances. A party requesting an extension of time shall notify all the parties to the proceeding of its request and shall indicate to the Board the position of each other party with regard to such request.

Objection to Certification Without Election

A written objection to the Director's determination that an employee organization should be certified without an election may be filed within five working days after receipt of the Director's determination. A party may file a response to the objection within five working days after its receipt of the objection. The objection and any response must be served on all parties.

Oral Argument Before the Board

If a party desires to argue orally before the Board, a written request with reasons therefore shall accompany the exceptions filed, the response thereto, or the cross-exceptions filed. The Board may grant such a request; it may also direct oral argument on its own motion.

Board Action

(a) Upon receipt of the case, the Board may adopt, modify or reverse the Director's or ALJ's decision or order.

(b) Unless a party files exceptions to the decision and recommended order of the Director or ALJ within 15 working days after receipt thereof, the decision and any accompanying order will be final, except that the Board may, on its own motion, decide to review any remedial action recommended within 20 working days after receipt by the parties of the decision and recommended order.

Party

The term "party", as used in PERB's Rules of Procedure, means any person, organization or public employer filing a charge, petition or application under the Act or these Rules; any person, organization or public employer named as a party in a charge, petition or application, filed under the Act or these Rules; or any other person, organization or public employer whose timely motion to intervene in a proceeding has been granted.

Working Days

The term "working days", as used in PERB's Rules of Procedure, shall not include a Saturday, Sunday or legal holiday.

Filing; Service

(a) The term "filing", as used in PERB's Rules of Procedure, shall mean delivery to the Board or an agent thereof, or the act of mailing to the Board, or deposit with an overnight delivery service for overnight delivery.

(b) The term "service", as used in PERB's Rules of Procedure, shall mean delivery to a party or the act of mailing to a party, or deposit with an overnight delivery service for overnight delivery.

NOTICE TO PARTIES

Judicial Appeal of Board Orders.

A party may appeal a final order of the Board by filing with the court and serving the necessary parties the pleadings and papers required by Article 78 of the New York Civil Practice Law and Rules (CPLR) and New York Civil Service Law (CSL) §213 within thirty days after service of the Board's order. The Board's "filing" and "service" definitions (above) do not govern the filing and service requirements of the CPLR or CSL, which are covered by the terms of those statutes. Failure to comply with a final order of this agency will result in an enforcement proceeding in New York Supreme Court pursuant to CSL §213.