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Robert L. Douglas

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Nassau Community College and Adjunct Faculty Association of Nassau Community College

Abstract

In the matter of the fact-finding between Nassau Community College, employer, and the Adjunct Faculty Association of Nassau Community College, union. PERB case no. M2010-152. Before: Robert L. Douglas, fact finder.

Keywords

New York State, PERB, fact finding

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Impasse

-between-

Nassau Community College

Case No. M2010-152

-and-

Adjunct Faculty Association of
Nassau Community College

FACT FINDER'S
REPORT AND RECOMMENDATIONS

Appearances: Ingerman Smith, LLP
 by John Gross, Esquire
 for the Employer

 Pryor Cashman, LLP
 by Richard M. Bethel, Esquire
 for the Union

Before: Robert L. Douglas
 Fact Finder

July 6, 2012

INTRODUCTION

On October 15, 2010, the State of New York Public Employment Relations Board appointed the Undersigned as the Fact Finder in

the impasse between the Nassau Community College (the Employer) and the Adjunct Faculty Association of Nassau Community College (the Union), which represents approximately 3200 adjunct faculty and adjunct support staff who work for the Employer. The Fact Finder is responsible for inquiring into the causes and circumstances of the dispute and for developing recommendations to the parties for resolution of the dispute.

BACKGROUND

The Employer operates a community college that enrolls over 25,000 day and evening students and 15,000 continuing education students. The parties entered into a collective bargaining agreement for the period from October 1, 2005 to September 30, 2010. The parties met approximately three times to negotiate a successor agreement but failed to do so. The Employer declared an impasse and submitted a Declaration of Impasse, dated September 21, 2010, to the Public Employment Relations Board. In response to this declaration, the New York State Public Employment Relations Board appointed a mediator to assist the parties to resolve their differences. This effort was unsuccessful and led to the appointment of the Fact Finder. The dispute therefore proceeded to the present fact-finding proceeding.

The Fact Finder met with the parties at the offices of the Employer on November 19, 2010 to discuss various preliminary matters and held a formal Fact-Finding hearing on March 10, 2011. The representatives of the parties appeared and were afforded a

full opportunity to offer oral testimony, written documentation, evidence, and argument in support of their respective positions. A verbatim transcript was taken of the March 10, 2011 hearing, which occurred in private. As agreed by the parties during the fact-finding hearing, the representatives of the parties subsequently submitted post-hearing briefs.

The evidence presented throughout the fact-finding process revealed that compensation constitutes the most critical issue in the dispute. In developing the following discussion and accompanying recommendations, the Fact Finder has reviewed the relevant materials and arguments that the parties have presented concerning the entire dispute.

CONTENTIONS OF THE EMPLOYER

The Employer recognizes that the members of the bargaining unit perform a valuable service. The Employer relates that the employees possess important skills and expertise. The Employer confirms that the employees perform in an able and competent manner.

The Employer points out that Nassau Community College and the County of Nassau constitute a joint employer of the employees who work at Nassau Community College. Notwithstanding such joint employer status, the Employer clarifies that the Nassau Community College constitutes the bargaining agent for purposes of collective negotiations, however, the County of Nassau must ratify a proposed collective bargaining agreement.

The Employer asserts that the State of New York and the

County of Nassau have provided less financial resources for Nassau Community College and that such financial reductions preclude the Employer from having an ability to pay for increased compensation to the employees represented by the Union. The Employer explains that in 2010 the State of New York provided 25.1% of the revenue to the Employer; tuition generated 44.6% of the revenue to the Employer; and the County of Nassau provided 30.4% of the revenue to the Employer. Due to the financial condition of the County of Nassau, the Employer highlights that the Nassau County Interim Finance Authority assumed control of the finances of the County of Nassau on January 25, 2011. The Employer mentions that the County of Nassau has a substantial deficit that precludes the County of Nassau from contributing financial support to Nassau Community College to support wage increases for the adjunct faculty. The Employer claims that increasing tuition for the students who attend Nassau Community College lacks viability because of the current economic conditions that exist for students who attend schools of higher education.

The Employer reasons that a structural imbalance exists for the revenue that Nassau Community College requires to operate. The Employer comments that the increased expenses that exist for the Employer widen the budgetary gap that exists given the relative reduced revenue stream from the State of New York and the County of Nassau. The Employer adds that a reduction in support from the federal government further undermines the

financial condition of the Employer. The Employer portrays the 2% property tax cap as another complicating factor that precludes improving the compensation for the adjunct faculty. The Employer cites the dramatic increase in pension costs for the New York State Teachers' Retirement System, which adjunct faculty may join, as placing additional financial constraints on the Employer.

The Employer therefore proposes a multi-year wage freeze; the elimination of the "Excellence in Teaching Program"; and the possible elimination of certain expenditures for Union released time. The Employer rejects the Union's original demand for the adjunct faculty to have parity with the full-time faculty based on a goal of equal pay for equal work. The Employer calculates that such a proposal would require a 76.3% increase in the wages of the adjunct faculty and an additional \$21,000,000 during the 2011-2012 academic year. The Employer further calculates that the Union's modified parity proposal of a 10% wage increase for five years would actually constitute a 52% wage increase due to the compounding effect of successive wage increases. The Employer disputes the validity of the Union's goal of wage parity because the Employer differentiates between the roles of the full-time faculty and the adjunct faculty. The Employer understands that the full-time faculty have broader responsibilities than the adjunct faculty and that such responsibilities justify the different compensation that the two groups receive.

As to the comparability factor for determining compensation, the Employer tracks the compensation for adjunct faculty at various levels at community colleges throughout the State of New York and the compensation at various levels for the faculty at other colleges and universities on Long Island to support the Employer's position.

The Employer indicates that the "Excellence in Education" provision of the collective bargaining agreement provides additional compensation to certain adjunct faculty members. The Employer submits that such extra compensation creates additional financial pressure on the Employer.

The Employer dismisses certain other Union proposals to the extent that the Union still may be pursuing them in the bargaining process. In particular, the Employer strongly opposes the Union's effort to have adjunct faculty members vote for Department Chairs; to have adjunct department representatives approve course assignments; and to eliminate the current contractual provision in Article 10.7(a) to make certain administrative appointments without regard to seniority.

The Employer seeks the deletion of the provision that restricts adjunct faculty assignments to eight hours per semester and an annual eighteen hour cap so that the Employer will have greater flexibility to meet course scheduling needs; modify the provision that restricts adjunct faculty to teach two sections per semester to permit the adjunct faculty to teach up to eight contact hours per semester; modify the discipline procedure to

permit differentiated penalties for discipline in place of the sole option of termination; modify the jurisdictional provision of the collective bargaining agreement to enable the Employer to exercise greater discretion to operate the institution especially by offering certain courses through the community services budget in the Continuing Education Department; and modify the collective bargaining agreement to permit the Employer to provide the collective bargaining agreement on-line to bargaining unit members.

The Employer underscores that the most recent financial figures for the fiscal years 2009-2010, 2010-2011, and 2011-2012 reflect the downward trend in the financial resources available to the Employer to fund a successor collectively negotiated agreement due to the reductions in aid from the State of New York and aid from the County of Nassau. The Employer identifies that fringe benefits for the full-time faculty and for administrators decline on a percentage basis as the salaries increase so that the combined average for fringe benefits for such personnel is 33 percent rather than the 42 percent stated by the Union. The Employer describes that approximately 1000 individuals fall into 69 administrative titles to perform non-classroom functions. The Employer refutes the Union's characterization of the student body as being transient because the students actually participate in over 120 clubs and associations, many guest speakers attract large crowds on the campus, and students represent Nassau Community College in various national academic competitions.

The Employer elaborates that each academic department sets requirements for the particular academic department and treats full-time faculty members and adjunct faculty members in the same manner except to the extent that certain existing full-time faculty members and adjunct faculty members may be grandfathered when teaching qualifications change. The Employer therefore disagrees with the Union's contention that the Employer requires the members of the adjunct faculty to have more qualifications than the full-time faculty members.

The Employer challenges the credibility of the Union President's testimony concerning the representation that full-time faculty members in the English Department grade papers in their offices whereas the adjunct faculty members in the English Department grade papers in their homes. The Employer notes that the Union President last taught a course at Nassau Community College in 1985.

The Employer reiterates the importance and validity of the Employer's non-economic proposals. The Employer requests that the non-economic proposals be addressed in the Fact-Finding Report.

CONTENTIONS OF THE UNION

The Union views the Employer as trying to operate by paying the adjunct faculty as little as possible as reflected by the Employer's effort to institute a multi-year wage freeze for all of the adjunct faculty and to eliminate the Excellence in Education Increase contained in Section 6.8 of the collective

bargaining agreement, which provides for additional compensation for the adjunct faculty with 20 years of service. In contrast, the Union asserts that the Employer agreed to provide wage increases for the full-time faculty represented by the Nassau Community College Federation of Teachers of 1% wage for 2010-2011; 2.75% for 2011-2012; and 2.5% for 2012-2013 in addition to step increases and longevity of \$2000 for unit members with at least 25 years of service who no longer receive step increases. The Union calculates that a full-time full professor therefore may progress from a base salary of \$78,888 to \$115,018 at the highest step of the collective bargaining agreement for full-time professors.

The Union emphasizes that the adjuncts do not receive any step increases, any health insurance benefits, or any other fringe benefits.

The Union observes that the Employer's revenue sources have become inadequate. The Union recounts that the Employer therefore relies on adjunct faculty to teach 53% of the courses. The Union insists that the compensation for the adjunct faculty should reflect the increased importance of compensating the adjunct faculty at an appropriate level. The Union questions the ability of the Employer to continue compensating the full-time faculty at such a high level while attempting to freeze and to reduce the compensation of the adjunct faculty. The Union discerns that the Employer's approach to compensating the adjunct faculty has created recruitment problems for some of the academic

departments. The Union underscores that the classroom duties of the adjunct faculty and the full-time faculty are identical. As the Union's demands seek parity based on comparing the contact hours that the adjunct faculty and the full-time faculty work, the Union considers the additional responsibilities of the full-time faculty to be immaterial to the pending impasse. The Union notes that some adjunct faculty lack a full-time teaching position elsewhere and therefore the level of compensation from the Employer constitutes a priority for such bargaining unit members.

The Union questions certain financial data provided by the Employer while stressing that the \$27,800,000 base payroll for the adjunct faculty constitutes a relatively small proportion of the total budget of the Employer. The Union points out that \$31,644 presently constitutes the maximum annual earnings of an adjunct faculty member. The Union discerns that the Employer must re-evaluate the budget for the future so that the Employer will be able to survive in the future. As the adjunct faculty teach a majority of the courses, the Union strenuously opposes any effort by the Employer to place an inappropriate and disproportionate burden on the adjunct faculty in this regard. The Union criticizes the Employer's effort of presenting misleading cost calculations by exaggerating the relative cost impact of any wage increases to the adjunct faculty over five years and of disregarding the absence of any fringe benefits for the adjunct faculty.

The Union depicts the Employer's effort to expand the proposals from the Employer as a hindrance to the successful negotiation of a collective bargaining agreement. The Union urges that the scope of the issues be narrowed to facilitate reaching a successor collective bargaining agreement. The Union suggests that the parties refrain from addressing any non-economic issues so that the parties will have a greater likelihood of successfully resolving the economic issues to reach agreement. The Union comments that the Employer's non-economic proposals occurred on the eve of the fact-finding proceeding, would fundamentally alter the relationship between the parties, lack merit, and reflect bad faith bargaining from a statutory standpoint.

The Union reiterates that the Employer retains the ability to pay appropriate increases for the adjunct faculty. The Union highlights that the Employer has a budget of \$200,000,000 and therefore has the ability to compensate the adjunct faculty with appropriate wages increases. The Union declares that the Employer spends too much money on administration while failing to spend sufficient money for the adjunct faculty, who teach a majority of the courses. The Union objects to the Employer's personal criticism of the President of the Union. The Union bolsters the importance of the teaching responsibilities of the adjunct faculty by recounting that most students simply take courses and do not participate in extracurricular clubs.

The Union summarizes by comparing the maximum annual

earnings of an adjunct faculty member of \$31,644 without benefits to the maximum annual earnings of a full-time faculty member of \$118,181 with benefits during the 2011-2012 year. The Union specifies that this disparity lacks reasonableness and justifies an increase in compensation for the adjunct faculty in each year of a three-year collective bargaining agreement.

DISCUSSION

A careful review of the record indicates that the economic concerns of the parties reflect the current challenges, obstacles, and tensions in the collective bargaining process in the public sector. The record documents that significant financial pressures exist for the State of New York and the County of Nassau to exercise the utmost fiscal prudence regarding the level of expenditures that they undertake. At the local level, such substantial concerns reflect the determination that the affected taxpayers need to gain relief from the level of taxation that undermines the continued viability for many property owners and residents to continue to reside in the County of Nassau or to operate commercial entities in the County of Nassau. The credible structural financial impediments that currently exist, at least in the short term, overshadow the entire collective bargaining process due to the dependency of the joint Employer on receiving major funding from the State of New York and from the County of Nassau to operate. The well-documented and well-publicized ongoing deteriorating financial condition of the government of the County of Nassau dominates,

overshadows, and transcends the present negotiations even more so than the traditional significant difficulties that periodically occur in negotiating the collective bargaining agreement between Nassau Community College and the Union.

A major legitimate reason for increasing the cost for operating a community college, such as Nassau Community College, arises because pressures exist for employees, such as the Adjunct Faculty, to obtain suitable compensation that accurately reflects the value of their job performance and the increasing cost of living that the Adjunct Faculty--like other members of the workforce--experience. As a result, the collective bargaining agreement must achieve this delicate balance for the joint Employer (on behalf of the taxpayers) and the Union (on behalf of the members of the bargaining unit).

From a quantitative perspective, the record indicates that the Adjunct Faculty receive approximately 12.8% of the expenditures whereas the Adjunct Faculty teach approximately 53% of the course offerings. (Union Exhibit 1 and Union Exhibit 2.) This perceived quantitative disparity highlighted by the Union did not arise overnight as reflected in the widening gap in compensation between the Adjunct Faculty and the Full-time Faculty over the years. (Presentation by Union President Charles Loiacono, March 10, 2011 transcript at 128-31.) The Employer's heavy reliance on the Adjunct Faculty for the course offerings constitutes a longstanding and evolving approach to the Employer's exercise of managerial, operational, and policy

discretion within the context of the applicable collectively negotiated agreements. The fact-finding process lacks the statutory authority to change, to displace, or to supersede the structural model of Nassau Community College that the parties have adopted and fostered. At a minimum and perhaps with limited influence, the members of the bargaining unit have knowingly accepted, acknowledged, and/or acquiesced to the educational model of the Employer. The members of the bargaining unit also have benefitted from this arrangement to the extent that the members of the Adjunct Faculty have decided to pursue their professional interests and careers by teaching at Nassau Community College and to the extent that many members of the Full-time Faculty have an opportunity to supplement their earnings by also teaching courses on an adjunct basis. (Union Exhibit 2 at 2.) As a consequence, the members of the bargaining unit know or should know that the Nassau Community College model places a disproportionate responsibility on the Adjunct Faculty to teach over half of the course assignments.

As a further complicating factor, an ongoing tension exists between the compensation for the Adjunct Faculty in relation to the compensation for the Full-time Faculty. From the standpoint of the Adjunct Faculty, the Adjunct Faculty teach the same or similar courses as the Full-time Faculty teach. The Adjunct Faculty therefore view their dramatically lower compensation as being inherently unfair because the Full-time Faculty receive an overall compensation package--including health insurance and

other fringe benefits--that exceeds the level of compensation of the Adjunct Faculty.

Such a perception by the Adjunct Faculty, however, lacks ultimate validity due to the false premise that Adjunct Faculty in their role as adjuncts and Full-time Faculty constitute comparable positions. The record supports such an inevitable and reluctant conclusion because of the historic differences that exist between the wages, hours, conditions of employment, and responsibilities that have developed between the Adjunct Faculty and the Full-time Faculty over a lengthy period of time. No basis exists in the context of the present limited proceeding to reverse, to revise, or to replace this well-settled arrangement that arises between full-time faculty members and adjunct faculty members at many institutions of higher learning. The quantitative comparisons that exist in the record between the Adjunct Faculty and the Full-time Faculty therefore lack controlling relevance to the present proceeding in many respects.

The most recent, available comparative compensation information for the rates for adjunct faculty at community colleges throughout the State of New York indicates that the Adjunct Faculty at Nassau Community College have the highest per contact hour rate of pay. (Employer Exhibit 1 at Exhibit V.) Nevertheless, a comparison of the compensation of other adjunct educators confirms that a measured, moderate, and modest increase for the members of the bargaining unit theoretically could be supported at this juncture due to the heavy reliance by Nassau

Community College on the Adjunct Faculty to educate the students at Nassau Community College and the passage of time since the compilation of the comparative information. In addition, the documentary evidence contained in the record supports this conclusion because the Employer has provided increases to other employees while withholding any increases for the Adjunct Faculty. The financial realities of the present economic climate, however, preclude any realistic likelihood of such arguably defensible adjustments from occurring in the immediate future. Such adjustments could be provided in the final years of a lengthy collective bargaining agreement.

RECOMMENDATION

For all of these reasons and most unfortunately due to the present economic conditions, the collective bargaining agreement should provide for an extension of the terms of the expiring collective bargaining agreement without any change in the level of compensation for the members of the bargaining unit. The only method to provide for any changes would involve a very lengthy collective bargaining agreement that could include modest increases in the final years of such an agreement.

DURATION OF THE AGREEMENT

DISCUSSION

The prior collective bargaining agreement covered the period from October 1, 2005 to September 30, 2010. From a practical

standpoint the present impasse has lasted for almost two years without any tangible sign of the parties being able to resolve the impasse. Even if the parties succeed in using the present Fact Finding Report and Recommendations as a basis for a settlement of the impasse, under these circumstances a successor agreement should provide an opportunity for the parties to resolve their pending disagreements and provide a chance to renew their important relationship in a productive manner. The parties have established a pattern, to some extent, of having lengthy impasses followed by long-term collective bargaining agreements. This approach, however, creates periods of uncertainty and hostility followed by periods of lengthy retroactive collective bargaining agreements with limited stability. Such an historic approach undermines the ability of the parties to plan for the future, to gain in a timely manner the benefits of any negotiated improvements contained in the collective bargaining agreement, and to improve their ongoing and overall relationship. Nevertheless, the present economic realities overshadow these concerns.

From a practical standpoint, the new collective bargaining agreement should cover a minimum of two years and preferably extend to three or four years until the parties have a better picture of the financial conditions of the State of New York, the County of Nassau, and the College itself.

RECOMMENDATION

The new collective bargaining agreement should cover a

minimum of the two-year period from October 1, 2010 through September 30, 2012 and a maximum of the three-year period through September 30, 2013 or the four-year period through September 30, 2014. Ideally and in particular, the last two options will enable the parties to bring some stability to their past and present differences and to direct their efforts in a hopefully cooperative manner toward the future. Most importantly, a collective bargaining agreement for any of these periods will enable the Employer to develop a financial plan for the coming years with a firmer grasp of a strategy to fund the costs of the appropriate compensation for the members of the bargaining unit. The parties also would potentially benefit from a sustained joint effort to identify any cost savings and productivity improvements that the parties could use to help fund any future improvements in the terms of the collective bargaining agreement.

CONCLUSION

The Fact Finder believes that these concrete recommendations constitute an appropriate and equitable framework for resolving the longstanding impasse, which arises during an extraordinarily difficult economic and political environment. All items not discussed or specifically recommended are deemed to be dropped. These recommendations should be acceptable to the parties after undergoing a careful and realistic evaluation of the long term interests and needs of both parties in the present economic and political climate. In this way the parties can re-direct their energies and efforts to provide for the delivery of services to

the residents of the County of Nassau and the students who rely to such a large extent on the educational offerings of Nassau Community College and the delivery of such offerings by the Adjunct Faculty in the most efficient and cost effective manner during the coming years.

Robert L. Douglas
Fact Finder

DATED: July 6, 2012