

STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 10-UDA-01
Issued: April 23, 2010

MAINE COMMUNITY COLLEGE SYSTEM,)	
)	
Appellant,)	
)	
and)	DECISION AND ORDER ON
)	UNIT DETERMINATION
MAINE STATE EMPLOYEES ASSOCIATION,)	APPEAL
SEIU Local 1989,)	
)	
Appellee.)	

This unit determination appeal was filed by the Maine Community College System on March 10, 2010, pursuant to 26 M.R.S.A. §1028(2) and Chapter 11, §30 of the Rules and Procedures of the Maine Labor Relations Board (Board). The Unit Determination Report which is the subject of this appeal was issued by the Board's Hearing Examiner on February 23, 2010, pursuant to §1024-A of the University of Maine System Labor Relations Act. 26 M.R.S.A. §1021 et seq. The Maine Community College System (MCCS or Employer) objects to the Hearing Examiner's conclusion that the bargaining unit petitioned for by the Maine State Employees Association (MSEA), consisting of "all adjunct faculty members employed by the Maine Community College System who teach credit courses" was an appropriate bargaining unit within the meaning of 26 M.R.S.A. §1024-A. On appeal, the MCCS raises essentially the same arguments that were made to the Hearing Examiner, that is, that adjunct faculty are not "regular employees" covered by the Act, and that the creation of an additional bargaining unit is not permitted by the Act in this case.

Throughout this proceeding, Linda D. McGill, Esq., and Lori Londis Dwyer, Esq., represented the Maine Community College

System while Roberta de Araujo, Esq., and Alison Mann, Esq., represented the Maine State Employees Association. The Board met on March 19, 2010, to hear argument on this appeal and the related appeal of the Election Order. On April 1, 2010, the Board met to deliberate both of these matters. The Board denied the appeal of the Election Order on April 8, 2010.

JURISDICTION

The Maine Community College System is an aggrieved party within the meaning of 26 M.R.S.A. §1028(2). The Maine State Employees Association is a bargaining agent within the meaning of 26 M.R.S.A. §1022(1-B). The jurisdiction of the Maine Labor Relations Board to hear this appeal and to render a decision lies in 26 M.R.S.A. §1028(2).

DISCUSSION

I. Introduction

The standard of review this Board uses to evaluate a hearing examiner's findings of facts and conclusions of law is that they will be overturned if they are "unlawful, unreasonable, or lacking in any rational factual basis." Maine Maritime Academy and MSEA, No. 03-UCA-01 (May 15, 2003), at 2, citing City of Bath and Council 74, AFSCME, No. 81-A-01 (Dec. 15, 1980), at 6; Penobscot Valley Hospital and Maine Fed. of Nurses and Health Care Prof'ls, AFT, No. 85-A-01 (Feb. 6, 1985), at 2; Topsham and Local S/89 District Lodge #4, IAMAW, No. 02-UCA-01 (Aug. 29, 2002). The questions presented in this appeal are primarily matters of statutory interpretation.

The two legal issues presented in this case are both matters of first impression. The first issue is whether adjunct faculty are "regular employees" within the meaning of §1022(8) of the

Act. If so, the second issue to be addressed is whether the Hearing Examiner's decision to create an additional unit was consistent with the intent of §1024-A. Neither of these questions have been addressed by the Board before, nor is there any comparable language in the other collective bargaining statutes this Board administers and enforces. Thus, our review of the case must start with our own legal interpretation of the statute. As the administrative agency responsible for the enforcement of the Act, we must independently determine the meaning of the statute and its application in light of the factual findings of the Hearing Examiner.

II. The Definition of "Regular Employee" in §1022(8).

The statutory protections and rights established by the University of Maine System Labor Relations Act extend to the employees of various public sector higher education institutions in Maine. Subsection 11 of the definitions section of the Act provides, in full:

11. "University, academy or community college employee" means any regular employee of the University of Maine System, the Maine Maritime Academy or the Maine Community College System performing services within a campus or unit, except any person:

A. Appointed to office pursuant to law;

B. Appointed by the Board of Trustees as a vice-president, dean, director or member of the chancellor's, superintendent's or Maine Community College System executive director's immediate staff; or

C. Whose duties necessarily imply a confidential relationship with respect to matters subject to collective bargaining as between such person and the university, the academy or the Maine Community College System.

26 M.R.S.A. §1022, sub-§11. In turn, sub-§8 of the definitions section states:

8. "Regular employee" means any professional or classified employee who occupies a position that exists on a continual basis.

26 M.R.S.A. §1022, sub-§8. The construction of the University Act is unique in that the definition of employee, with its exclusions, only applies to those individuals already determined to be "regular employees." The other collective bargaining statutes do not include anything comparable to sub-§8.

This definition of "regular employee" found in sub-§8 has not changed since the University Act was enacted in 1976. P.L. 1975, c. 603. At that time, the Act's protection was limited to employees of the University of Maine System. The Legislature extended the Act's protections to employees of other higher education institutions on two occasions since then, each time amending §1022(11) to add the reference to the institutional employer, but never changing the definition of "regular employee" found in §1022(8). See P.L. 1975, c. 671, (extending the Act to include the Maine Maritime Academy); P.L. 1977, c. 581 (extending the Act to include employees of the state schools of nursing and the vocational technical institutes¹). The definition has also remained constant through a number of organizational changes, such as when the technical institutes became technical colleges, P.L. 1989, c. 443, and when the Maine Technical College System became the Maine Community College System, P.L. 2003, ch. 20 §002. Although the present dispute is limited to adjunct faculty at the M CCS, the definition of regular employee is central to

¹The vocational technical institutes were a part of the Maine Department of Education until 1985 when the Vocational-Technical Institute System was created.

determining whether an individual is provided the benefits and protections of the Act whether they are employed by the University System, Maine Maritime Academy or the Maine Community College System.

It is noteworthy that unlike all of the other public sector collective bargaining statutes in Maine, the University Act does not contain an exclusion from the definition of employee for any person who is a "temporary, seasonal, or on-call employee." Compare §1024(11) to 26 M.R.S.A. §962(6)(G)(Act covering municipal and county employees), 26 M.R.S.A. §979A(6)(F)(Act covering state employees), and 26 M.R.S.A. §1282(5)(F)(Act covering judicial employees). This exclusion, which has been part of the other three Acts since their enactment, has never been part of the University Act. The University Act is also the only one of the four collective bargaining acts enforced by this Board that does not exclude employees with less than six months of employment.² See §962(6)(F), §979A(6)(E), and §1282(5)(G).

In examining the statutory language of any "employee who occupies a position that exists on a continual basis", we conclude that the requirement of "existing on a continual basis" applies to the position, and not to the employee who occupies that position. This is a reasonable interpretation of the language from a grammatical perspective, as the restrictive clause following "that" defines the word "position", not the employee.

Our conclusion that the focus must be on the position and not the employee is consistent with the use of the term

²The University Act did contain this exclusion from its enactment in 1976 until 2003, when the exclusion was repealed. There is no argument or legislative history that this repeal had anything to do with adjunct faculty.

"position" elsewhere in Maine's collective bargaining statutes. Bargaining units are made up of positions, not employees. Section §1024-A of the University Act establishes the statutory framework for bargaining units. Subsection 4 states:

4. In the event of a dispute over **the assignment of jobs or positions to a unit**, the executive director shall examine the community of interest, including work tasks among other factors, and make an assignment to the appropriate statutory bargaining unit set forth in subsection 1, 2 or 3.

26 M.R.S.A. §1024-A, sub-§4 (emphasis added).

Similarly, this statutory directive to consider the positions rather than the employee holding the position is stated explicitly in Maine's other three collective bargaining statutes in the sections authorizing the executive director to determine the composition of the bargaining unit. For example, the relevant section in the Municipal Public Employees Labor Relations Act starts:

1. In the event of a dispute between the public employer and an employee or employees as to the appropriateness of a unit for purposes of collective bargaining or between the public employer and an employee or employees **as to whether a supervisory or other position is included in the bargaining unit**, the executive director or his designee shall make the determination, except that anyone excepted from the definition of public employee under section 962 may not be included in a bargaining unit. . . .

26 M.R.S.A. §966(1)(emphasis added). Identical language is found in the statute covering state employees at 26 M.R.S.A. §979-E(1), and in the statute covering judicial employees at 26 M.R.S.A. §1286(1). These same sections direct the executive director to consider the "principal functions of the position" when deciding whether a "supervisory position" should be included in a unit

with subordinate employees.³

This emphasis on the position or job when creating bargaining units is distinct from the analysis that necessarily occurs when the question is whether a person is excluded from the definition of employee by the specific terms of the statute. Within the University Act, §1024-A(11) contains three exclusions that require a focus on the individual. With respect to the Maine Community College System, the definition of employee is "any person" (A) "Appointed to office pursuant to law", (B) "Appointed by the Board of Trustees... as [the MCCS] executive director's immediate staff" or, (C) "Whose duties necessarily imply a confidential relationship with respect to ... collective bargaining" 26 M.R.S.A. §1024-A(11)(C). This same construction for exclusions from the definition of employee is found in Maine's other collective bargaining statutes.

These basic principles of unit composition are readily apparent in practice. For example, if a bargaining unit contains the position of secretary, all employees who occupy the position of secretary are included in the bargaining unit. An individual employee would only be excluded by a specific statutory exclusion or by virtue of a limitation in the definition of the bargaining unit.⁴ Even when the position of "secretary" is included in the unit, a particular secretary may be excluded as a confidential employee because that secretary's duties "necessarily imply a confidential relationship" with respect to collective bargaining matters. See, e.g., 26 M.R.S.A. §1022(11)(C).

³See also the provisions for voluntary recognition at §1025(1), §967(1), §979-F(1), and §1286(1). A request for recognition must state the "grouping of jobs or positions which constitute the unit claimed to be appropriate."

⁴Sometimes bargaining units are organized along departmental lines.

We emphasize this point because we think the Employer and the Hearing Examiner incorrectly focused on the situations of the employees and the patterns of their employment while trying to interpret the definition of "regular employee". The Hearing Examiner considered evidence of the adjuncts' actual continuity of employment from semester to semester as a basis for her conclusion that they were regular employees. The Employer argues both that the "position" of adjunct faculty does not exist and that adjuncts do not "occupy a position on a continual basis". Memorandum of Appeal, at 5. As we noted above, the focus should be on the position and not the circumstances and experiences of the individuals occupying that position.

The Employer argues that adjunct faculty do not occupy a "position" because they are paid out of a salary pool and there is no "discrete and identifiable slot" or "position" to be budgeted, funded, or tracked. Memorandum of Appeal, at pp. 5-6. The Employer points to no legal authority or evidence in the record that the use of the term "position" in §1022(8) refers to an identifiable budgetary slot or defined post. We agree with the Hearing Examiner that the Employer's argument is without merit.

The Employer also argues that the contingent and fluctuating nature of adjunct employment means that the position does not exist on a continual basis. To quote from the Employers Memorandum of Appeal,

The record evidence is clear that at least some adjunct positions are temporary and do not exist on a continual basis by any measure. Some individuals teach a single adjunct course for a single semester and never work at MCCS again. ... Some teach more than one semester over a span of time, but their employment is interrupted-sometimes for a period of years-or episodic,... [S]ome

adjuncts do teach one or more classes fairly regularly over the course of numerous semesters.

Memorandum of Appeal, at 3 (citations to record omitted). When the Employer argues that because "some adjunct positions are temporary" those positions "do not exist on a continual basis by any measure", the Employer is confusing the word "position" with the teaching assignment of the individual employee. The position at issue is Adjunct Faculty Member, not "Instructor of Early American History, Plymouth Rock to 1789" or "Instructor of Introductory Sociology". Whether a particular adjunct faculty is employed from semester to semester or whether a particular course is offered from semester to semester has nothing to do with whether the position of "adjunct faculty member" exists on a continual basis--it merely reflects the needs of the college and the number of individuals who are employed and in the bargaining unit during any given semester.

To summarize, given our analysis of the use of the word "position" throughout the Act, its meaning in §1022(8) refers to a job or position without reference to its occupants. We agree with the Hearing Examiner's rejection of the Employer's argument on the meaning of "position", but disagree with her conclusion that the term position "means nothing more specific or unusual than 'employment,' 'work'" or a 'job'". Instead, we must analyze the totality of circumstances in each case.

We also agree with the Hearing Examiner's conclusion that adjunct faculty members occupy "a position that exists on a continual basis", but our analysis differs from that of the Hearing Examiner. In making her conclusion, the Hearing Examiner stated,

. . . The Union has made a very strong case that adjuncts as a class of employees or as a pool of employees exist on a continual basis in the Community College System; their use is too large and consistent

to conclude otherwise. The fact that the position of adjunct truly exists on a continual basis within the System may be sufficient, without more, to support a conclusion that they are "regular employees" within the meaning of § 1022(8). . . .

Report at 17. The Hearing Examiner went on to consider the continuity of the employment of individual adjuncts as an additional basis for concluding that the adjuncts occupy a "position that exists on a continual basis." Report at 17-19. We consider the use of wording "class of employees" or "pool of employees" above, like the analysis of individual employees' continuity of employment, to be problematic because it has the wrong focus.

Upon review, we find that the Hearing Examiner's factual finding that "the position of adjunct truly exists on a continual basis with the System" is supported by substantial evidence in the record. The record supports the Hearing Examiner's conclusion that the M CCS offers courses every semester that are taught by adjunct faculty, and that they are a large and indispensable part of the teaching faculty. Of the 1650 M CCS employees, about 340 are regular faculty members and 750-800 are adjunct faculty. Enrollment has nearly doubled since 2002, but there has not been a corresponding increase in regular faculty members. There is ample evidence to support the finding that on average, 40 to 45 percent of all course sections across the system in the Fall of 2009 were taught by adjuncts. At Southern Maine Community College, which offers twice the number of courses as any other college, the percent of courses taught by adjuncts since 2007 ranges from 48% to 57%. The regular faculty have a "right of first refusal" to teach any course for which they are qualified before that course is offered to an adjunct. Thus, there is not a defined group of courses for the adjunct to teach and another set of courses for regular faculty to teach, although

the adjuncts are used heavily in teaching general education courses such as English and math. What particular courses or sections will be available for adjuncts to teach depend on enrollment figures and department needs. The terms of the contract of employment signed by the adjunct reflect the assignment to teach a particular course or section, but sections are cancelled if enrollment is too low. We conclude that these facts demonstrate that the position of adjunct faculty exists independent of a specific course offering.

The Hearing Examiner's factual findings on the continual existence of the adjunct faculty position at the various system campuses is supported by substantial evidence in the record. The Legislature's choice of using the word "continual" in sub§-8 at the same time that it chose not to mandate an exclusion for temporary, seasonal and on-call employees, in our opinion supports our conclusion that the Legislature did not want to exclude employees who are employed on something other than a continuous, year-round basis.

We hold that the Hearing Examiner's factual findings are supported by the substantial evidence in the record and that her conclusion that adjunct faculty members are "regular employees" under §1022(8) is correct. We hold that the adjunct faculty employees do, in fact, "occupy a position that exists on a continual basis" and consequently are covered employees protected by the University Act.

III. Section 1024-A and Creating an Additional Bargaining Unit.

The Employer contends that even if the adjunct faculty members are "regular employees" and therefore covered by the Act, §1024-A precludes the Board from creating a new bargaining unit in this case. Section 1024-A, sub-§§1, 2, and 3 structure

bargaining units based on occupational groups for the University System, the Maine Maritime Academy, and the community colleges. Subsection 3 states:

3. Community colleges. It is the express legislative intent to foster meaningful collective bargaining for employees of the community colleges. Therefore, in accordance with this policy, the bargaining units shall be structured with one unit in each of the following occupational groups:

- A. Faculty and instructors;
- B. Administrative staff;
- C. Supervisory;
- D. Support services;
- E. Institutional services; and
- F. Police.

26 M.R.S.A. §1024-A, sub-§3.

Subsection 5 addresses the possibility of creating additional bargaining units.

5. Additional bargaining units. Notwithstanding subsection 1, 2 or 3, the Legislature recognizes that additional or modified university system-wide units, academy units or community college units may be appropriate in the future. The employer or employee organizations may petition the executive director for the establishment of additional or modified university system-wide units, academy units or community college units. **The executive director or a designee shall determine the appropriateness of those petitions, taking into consideration the community of interest and the declared legislative intent to avoid fragmentation whenever possible and to insure employees the fullest freedom in exercising the rights guaranteed by this chapter.** The executive director or a designee conducting unit determination proceedings may administer oaths and require by subpoena the attendance and testimony of witnesses, the production of books, records and other evidence relative or pertinent to the issues represented to them.

26 M.R.S.A. §1024-A, sub-§5 (emphasis added).

The question of the circumstances under which the Board may create an additional or modified bargaining unit under §1024-A, sub-§5 is a matter of first impression. We note at the outset that, contrary to the assertions of the Employer, there is no outright ban on creating an additional unit simply because the word "instructor" is in one of the statutorily-established units. If that were the case, the introductory clause in sub-§5 authorizing the creation of additional or modified bargaining units would use more restrictive language than the broad allowance of "Notwithstanding subsection 1, 2 or 3." Similarly, experience has shown that even though the statute specifies occupational groups in each particular unit, the statute does not preclude a specified occupational group from becoming part of another unit. As the Hearing Examiner pointed out, the MCCS "police" (security) unit was never organized as a separate unit but has always been part of the support services bargaining unit. Report at 23.

The Employer argues that the Hearing Examiner's decision was improper because she was "heavily influenced by the immediate lack of options for [the adjuncts] to be represented." Memorandum of Appeal, at 9.⁵ The Employer misconstrues the Hearing Examiner's decision. The Hearing Examiner's discussion related to the lack of options available to her in responding to the petition, not any lack of options for the employees. The Hearing Examiner simply stated that she must address the petition as presented, and not try to fashion an alternative.⁶ The petition

⁵We also note that the Employer's assertion that new or changed circumstances are required for the creation a new bargaining unit is without merit. That requirement only applies in unit clarification petitions under 26 M.R.S.A. §1024-A(7).

⁶The parties did not argue or present evidence in the record for an alternative. We express no opinion on the authority of the Hearing Examiner to explore or fashion an alternative in an appropriate case.

for unit determination was supported by a sufficient showing of interest by the adjunct faculty members who expressed a desire to be represented by MSEA. The existing unit of regular faculty is represented by the Maine Education Association which has not expressed an interest in representing the adjuncts and did not intervene in the unit determination proceeding. There was nothing improper about the Hearing Examiner's recitation of the facts.

The Hearing Examiner was correct to note that the plain language of the Act includes the Legislature's explicit recognition that additional bargaining units "may be appropriate in the future". We agree with the Hearing Examiner that the facts of the case justify her decision creating the unit. In reaching her conclusion, the Hearing Examiner assessed the three factors that must be considered in determining the appropriateness of an additional or modified unit under sub-§ 5: the community of interest, the legislative intent to avoid fragmentation, and the legislative intent to insure employees the fullest freedom in exercising their rights. 26 M.R.S.A. §1024-A (5).

The Hearing Examiner noted in a separate section of her decision that the Employer did not dispute that the adjunct faculty as a group share a community of interest. Report at 19. Nonetheless, the Hearing Examiner examined the factors required in any analysis of the community of interest, and concluded that the adjuncts clearly do share a community of interest with each other and are an appropriate unit based on those factors. Report at 19-20. The Hearing Examiner referred to that conclusion as part of her analysis of the three factors identified in §1024-A (5). Report at 23.

The Employer argues that the Hearing Examiner should have concluded that the adjunct faculty share a community of interest

with the regular faculty because the nature of their classroom teaching responsibilities is the same. The Employer contends that this community-of-interest examination is required as one of the three factors identified in sub-§ 5. We recognize that some minimal level of review of community of interest with respect to existing units must take place to ensure that the proposed unit is not, as the Employer argues, "duplicative".

We have reviewed the Hearing Examiner's factual findings as presented in the Unit Determination Report. We conclude that there are very significant differences between adjunct faculty and regular faculty with respect to their terms and conditions of employment, their employment status from semester to semester, and their involvement with college governance. Given these substantial differences, the fact that their classroom teaching responsibilities are the same is not very compelling. While some of the differences are attributable to collective bargaining, the differences we find most significant are those that lead to differing and potentially opposing priorities for collective bargaining.⁷ Thus, there is substantial evidence in the record to support our conclusion that there is no community of interest issue that justifies denial of the pending petition.

We hold that the significant differences in interests between the proposed unit of adjuncts and the existing unit of regular faculty means that there is no fragmentation.⁸ Fragment-

⁷We note the large increase in the number of courses taught by adjunct faculty since the M CCS starting offering associate degrees, which may create a real or perceived conflict of interest between the two groups of employees.

⁸If the Employer were correct that the unit is "duplicative", which we expressly conclude it is not, then two units would constitute "fragmentation" thereby diluting the collective voice of the employees. The concepts of finding a community of interest and avoiding fragmentation are both directly related to the concept of

ation occurs when a class or group of employees with the same interests is fragmented into separate groups. UPIU and MSAD #33, No. 77-A-01 at 2 (Dec. 14, 1976), affirming No. 77-UD-06 (separate unit for CETA employees creates fragmentation which would deprive employees of the fullest freedom in exercising their rights); Teamsters and State Institutional Services Unit and AFSCME and MSEA, No. 84-A-02 at 4 (April 2, 1984), affirming 83-UD-25 (severing a corrections unit out of a larger unit would create excessive fragmentation among the State employee bargaining units). There is no fragmentation occurring in this case. We also agree with the Hearing Examiner that creation of a system-wide unit of adjunct faculty precludes fragmentation of that large group of employees. Report at 24.

The Hearing Examiner addressed the declared legislative intent to insure employees the fullest freedom in exercising their rights under the Act by considering 1) the adjuncts desire to be in a separate unit, 2) the adjuncts interest in being represented by MSEA and not the Maine Education Association, the bargaining agent for the faculty unit. We agree that these factors are important in determining the appropriateness of the unit because, as the Hearing Examiner pointed out, the Act protects the right of employees to join labor organizations "of their own choosing". For all of the foregoing reasons, we conclude that the creation of the adjunct faculty bargaining unit was permissible under §1024-A of the Act.

insuring employees the fullest freedom in exercising rights under the Act. For a full discussion of this see Lewiston Firefighters Ass'n, Local 785, IAFF v. City of Lewiston, 354 A.2d 154, 160 (Me. 1976) ("The institutional purpose of the bargaining unit . . . is to strengthen the bargaining position of the employees as a group.")

ORDER

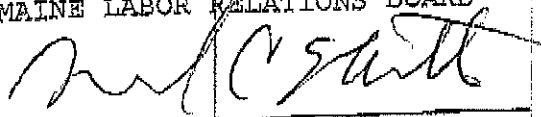
On the basis of the foregoing discussion and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by the provisions of 26 M.R.S.A. § 1028(2), it is ORDERED:

1. That the appeal of the Maine Community College System filed on March 10, 2010, is DENIED and that the Hearing Examiner's Decision of February 23, 2010, establishing that the petitioned for unit is appropriate is hereby AFFIRMED for the reasons set forth herein.

2. That the ballot count scheduled to occur on Monday, May 3, 2010 will proceed as scheduled.

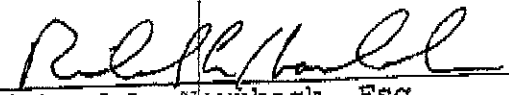
Dated at Augusta, Maine, this 23rd day of April, 2010.

MAINE LABOR RELATIONS BOARD

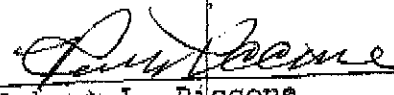


David C. Elliott, Esq.
Chair

The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant to 26 M.R.S.A. §1029(7) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.



Richard L. Hornbeck, Esq.
Employer Representative



Robert L. Piccone
Employee Representative