

VERMONT LABOR RELATIONS BOARD

VERMONT STATE COLLEGES	)	
FACULTY FEDERATION, UPV/AFT	)	
LOCAL 3180	)	
	)	DOCKET NO. 06-43
and	)	DOCKET NO. 07-28
	)	
VERMONT STATE COLLEGES	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 31, 2006, the Vermont State Colleges Faculty Federation, UPV/AFT Local 3180, AFL-CIO (“Federation”) filed a unit clarification petition (Docket No. 06-43) with the Vermont Labor Relations Board, requesting the amendments of the full-time and part-time faculty bargaining units represented by the Federation at the Vermont State Colleges. Specifically, the Federation requested that instructors who teach courses through the Northeast Kingdom School Development Center (“NEKSDC”) and the Castleton Center for Schools (“CCS”) be added to the bargaining units. On April 12, 2007, the Federation amended its petition to provide that teaching through the NEKSDC and the CCS should be regarded as bargaining unit work to the extent that the courses taught carry academic or continuing education credit from Lyndon State College or Castleton State College.

On October 19, 2007, the Federation filed another unit clarification petition (Docket No. 07-28). Therein, the Federation requested that certain courses taught through the Vermont Higher Education Collaborative (“VT HEC”) that carry credit at any of the Vermont State Colleges be considered bargaining unit work, and that any instructors who

taught such courses be added to the bargaining unit once they met the standards for entry into the unit.

The Labor Relations Board consolidated these cases for hearing, and conducted hearings on February 28, 2008, and March 27, 2008, in the Board hearing room in Montpelier before Richard Park, Acting Chairperson; Leonard Berliner and James Dunn. Attorney Richard Cassidy represented the Federation. Attorney Nicholas DiGiovanni, Jr., represented the Colleges. The Colleges and the Federation filed post-hearing briefs on May 23 and 27, 2008, respectively.

### FINDINGS OF FACT

#### **Northeast Kingdom School Development Center**

1. The Northeast Kingdom School Development Center (“NEKSDC”) exists through a collaboration between Lyndon State College (“Lyndon”) and the superintendents and nine supervisory unions of the Northeast Kingdom. Its purpose is to improve educational instruction in classrooms for area teachers by providing professional development for the teachers of the supervisory unions. The NEKSDC was created in January 2001. The resources of the collaborating supervisory unions are pooled through the Center to offer specific courses to area teachers to meet identified needs. The NEKSDC is governed by a Board of Directors comprised of the nine superintendents of each of the supervisory unions in the Northeast Kingdom along with the President of the College (Colleges NEK #2).

2. Lyndon State College and the NEKSDC Board of Directors entered into a Memorandum of Understanding on June 15, 2001, which provided:

This memorandum of understanding describes the formal relationship between the NEKSDC and LSC. It does not limit expansions in the relationship that may be mutually agreed upon in future.

Purpose. NEKSDC is a formal collaborative program between Lyndon State College and the superintendents and supervisory unions of the Northeast Kingdom for the purpose of improving the quality of in-service and pre-service teacher education (including allied professions, such as special education, early childhood education, secondary education, and paraeducation). This purpose is accomplished through formal programs, interchanges, and cooperative programs, supported financially and in-kind by the superintendents and supervisory unions of the Northeast Kingdom and Lyndon State College.

Services NEKSDC Provides to LSC. NEKSDC, through its programming and outreach efforts, provides opportunities for continuing professional education for LSC faculty and opportunities for participation by LSC students in appropriate programming. LSC faculty may participate in such programming free of charge. NEKSDC also provides opportunities for LSC faculty to offer programs under the aegis of NEKSDC in support of the purpose of the organization.

Public Association. In all public communication, the NEKSDC is identified as being located at Lyndon State College.

Services LSC Provides to NEKSDC:

Hosting the NEKSDC. Lyndon State College provides office space and basic office services (telephone, network connections) for the use of the principal staff of the NEKSDC and space for meetings. The space and services are provided as in-kind contribution to the NEKSDC. The location of the NEKSDC on campus may be changed by LSC with 60 days notice. The Board of Directors of NEKSDC must be consulted before such a change is implemented.

Credit for Educational Activities. Upon timely submission of appropriate information (course syllabi, faculty curriculum vitae), LSC will review for the award of credit proposed educational activities offered under the aegis of the NEKSDC. Where possible, LSC will award such credits to students satisfactorily completing such activities.

Fiscal Agency. Lyndon State College serves as the fiscal agent for the NEKSDC, providing necessary accounting and business office services to support the activities of the NEKSDC. The costs of any audit required by state or federal agencies is the responsibility of the Board of Directors. Lyndon State College will provide all records it maintains in support of NEKSDC as required.

Indirect Cost Recovery. Notwithstanding the in-kind contribution, and where reasonable and feasible, NEKSDC agrees to seek in any grant applications (not

including grants from the Vermont Department of Education) indirect cost recovery at a maximum of 5% for these operating expenses or other services (e.g., copy services) to assist in defraying the expenses incurred by the College.

(Federation Exhibit 1, Colleges Exhibit NEK 1)

3. NEKSDC is an Educational Service Agency (“ESA”). An ESA is an organization which provides various services to schools within a particular geographic area in Vermont in partnership with the Vermont Department of Education. NEKSDC is one of six ESA’s in Vermont. The State provides partial funding for the ESA’s (Federation Exhibit 4).

4. Mary Ann Bertolini has been Director of the NEKSDC since June 2006. Prior to becoming Director, Bertolini was Superintendent of the Essex-Caledonia Supervisory Union for the previous eight years. Bertolini has an office on the Lyndon campus. Linda Metzge, a faculty member at Lyndon, is NEKSDC Co-Director. Bertolini does most of the daily work of NEKSDC. Bertolini receives her pay and health insurance from Lyndon, and participates in Lyndon’s TIAA-CREF retirement plan. Much of Metzge’s work for NEKSDC involves the submission of NEKSDC courses to the Lyndon faculty committee for review and approval. Metzge receives three credits release time from her full-time faculty workload due to her involvement with the NEKSDC. The NEKSDC Director and Co-Director are appointed by Lyndon with the advice and consent of the NEKSDC Board of Directors. They are considered employees of Lyndon (Colleges Exhibit NEK Exhibit 2, Federation Exhibit 2).

5. Bertolini reports to the NEKSDC Board of Directors and Donna Dalton, Lyndon Dean of Academic and Student Affairs. The NEKSDC Board of Directors oversees the Center’s budget, oversees expenditures, and discusses coursework and other

training to be offered by the Center (Colleges Exhibit NEK Exhibit 2, Federation Exhibit 2).

6. The NEKSDC is the primary means of offering post-graduate courses and certificates to the teachers employed in the nine supervisory unions that it serves.

Superintendents and other supervisory union officials identify professional development needs for area teachers to Bertolini. Bertolini then matches the professional development needs with a course and instructor. The NEKSDC courses are specifically designed to meet the identified professional development needs of area teachers. Bertolini finds the instructors to teach the courses that are developed. In some cases, superintendents and curriculum coordinators in the area schools may inform Bertolini of specific instructors they have in mind to teach a specific course. In other cases, Bertolini may be aware of a suitable person to teach a course. In finding instructors for the courses, Bertolini does not interact with Dean Dalton or any department chairs at Lyndon (Federation Exhibit 6).

7. Bertolini requests instructors to submit a course syllabus and a curriculum vitae. Metzge takes this information and brings it to a council at Lyndon for review and approval of credits. This committee used to be called the Education Council. The Education Council had ten to twelve faculty members, including all members of the Education Department. The newly-established Graduate Council, which first met in May of 2007, now reviews NEKSDC courses for approval. The Council had not actually reviewed a NEKSDC course as of the hearing dates in these matters. The Graduate Council focuses on graduate programs and courses. Bertolini is on the Graduate Council. The Council also consists of the Lyndon Chair of Graduate Education and representatives

of Lyndon academic departments that offer graduate courses (Federation Exhibit 6, Colleges Exhibits NEK 4 - 6).

8. There was an occasion prior to Dean Dalton's hiring in November 2004 when a NEKSDC course was reviewed by the Curriculum Committee of the Faculty Assembly and the entire Faculty Assembly. In the Fall of 2007, Dean Dalton removed a proposed NEKSDC course from Curriculum Committee review because she disagreed that the course should be reviewed there. This action by Dean Dalton occurred subsequent to the filing of the unit clarification petition filed in this matter concerning the NEKSDC.

9. Once a NEKSDC course is approved, the Lyndon registrar gives the course an official course number. This is done so that students taking the course can have grades properly recorded. NEKSDC courses are not listed in the Lyndon course catalog. Bertolini then enters into a contract with the instructor on behalf of NEKSDC. This includes details on the location and times of the course and the compensation that will be paid the instructor (Colleges Exhibits NEK 7 – 37).

10. Bertolini negotiates the salary with the instructor. Such compensation usually has ranged between \$2,000 and \$3,200 per course for instructors. Dean Dalton is not involved in the setting of salaries for NEKSDC instructors. Instructors of NEKSDC courses are paid by a check from Lyndon (Colleges Exhibits NEK 7 – 37, Federation Exhibit 21).

11. Since the summer of 2002, existing part-time or full-time Lyndon faculty members have taught approximately 30 percent of NEKSDC courses. They are paid commensurate with what they would be paid for teaching a regular course at Lyndon.

They enter into a contract with NEKSDC that is separate from the contract they enter into with Lyndon concerning their regular course load. Their NEKSDC assignments do not affect their workloads for teaching regular courses at Lyndon (Colleges Exhibits NEK 3, 7 – 37).

12. Tuition for NEKSDC three-credit courses has remained at \$600 a course since the Center was founded. While teachers taking the courses are responsible for tuition payments, most of the time tuition is paid from the professional development funds of the teachers' school districts. \$400 of the \$600 tuition goes to Lyndon; the remaining \$200 goes to the NEKSDC.

13. Teachers in the supervisory unions take the approved NEKSDC courses as part of their individual action plans and/or to maintain their teaching licenses in Vermont. Most courses are three-credit courses in which the instructor has 45 contact hours with individuals taking the course. Many NEKSDC courses are run on a concentrated basis, lasting a week or so rather than spread through a number of weeks. Courses can be run at any time during the year and do not necessarily comport to the semester schedule for regular Lyndon courses (Colleges Exhibit NEK 3).

14. Bertolini establishes the schedule for NEKSDC courses. Neither Dean Dalton nor Lyndon academic departments play a role in the scheduling of NEKSDC courses.

15. The NEKSDC uses its own evaluation form for students to assess the course instructor and provide feedback on their professional development needs. Bertolini developed the current form in the summer of 2006. Lyndon does not retain the evaluation forms completed for NEKSDC courses. Lyndon uses a separate form for the

evaluation of full-time and part-time faculty. These completed forms are retained in Dean Dalton's office. Unlike her extensive evaluative role for full and part-time bargaining unit faculty, Dean Dalton does not participate in the evaluation of NEKSDC instructors and does not observe them in class. Lyndon academic department chairs evaluate part-time faculty at Lyndon. They are not involved in the evaluation and observation of NEKSDC instructors. Bertolini attends the first class of NEKSDC courses to ensure that course logistics are in place and registration requirements have been met (Colleges Exhibits NEK 38-39).

16. If there is a problem with the performance of a NEKSDC instructor, Bertolini has the responsibility to deal with it. She has the authority to terminate instructors.

17. The majority of NEKSDC courses are taught at the various schools around the Northeast Kingdom. The remaining NEKSDC courses are held on the Lyndon campus due to its central location. The instructors who teach NEKSDC courses do not have offices on the Lyndon campus. They are not eligible for membership in the College's Faculty Assembly. They do not have privileges on the campus such as library cards, discounts to events, or use of athletic facilities.

18. The NEKSDC is funded through tuition monies, \$1,600 annual membership fees from each participating supervisory union, and grants from the State Department of Education. Lyndon does not provide direct funding to the NEKSDC. It does provide office space to Bertolini, release time to Metzge, and acts as fiscal agent for the Center. Expenses incurred by the NEKSDC include payment to the instructors of NEKSDC courses which is routed through Lyndon as the fiscal agent; Bertolini's salary



and benefits; mailings of the Center; and expenses of NEKSDC meetings (Federation Exhibit 4).

19. The NEKSDC distributes a regular newsletter to the schools served by it. The newsletter advertises NEKSDC courses, workshops and training sessions. It also covers other professional development news. The newsletter does not advertise courses offered as part of the regular Lyndon curriculum (Colleges Exhibits NEK 40 – 54).

20. Courses at Lyndon may come into being as part of a new major or as a free standing course for which it is thought there is sufficient interest. A course can be offered by a department as a “special topics” course twice, after which it needs approval of the Curriculum Committee of the Faculty Assembly and the entire Faculty Assembly. Once approved by the Assembly, the course appears in the college catalog.

21. Undergraduate students at Lyndon cannot take NEKSDC courses. NEKSDC courses are not designed for graduate students at Lyndon. Students enrolled in Masters in Education degree programs at Lyndon do not take NEKSDC courses as part of their required courses. There have been occasions where individuals took NEKSDC courses, were later admitted to the Lyndon graduate program, and had credits from NEKSDC courses apply toward their degree. There have been limited occasions where Education graduate students at Lyndon have taken NEKSDC courses and have had credits for the courses apply toward their graduate degree. If a graduate student wishes to take a NEKSDC course, there have been occasions where they have not been allowed into the course because the class maximum size has been reached with area teachers. Teachers employed by the supervisory unions connected with NEKSDC have priority over Lyndon graduate students in NEKSDC course placements.

22. The Chair of Graduate Education at Lyndon reviews the NEKSDC course work to see if it is appropriate for credit toward a graduate degree. All NEKSDC courses have been approved for graduate credit at Lyndon. Lyndon graduate students are never required to take NEKSDC courses. The Chair also considers courses taken at other institutions to determine whether they should count towards a Lyndon graduate degree.

23. The typical Education graduate student at Lyndon is a certified teacher working in a Northeast Kingdom school. There also are graduate students who are uncertified teachers from private schools or persons not currently teaching. A small percentage of teachers taking NEKSDC courses matriculate as Lyndon graduate students. Many more teachers take NEKSDC courses for professional development purposes rather than for the purpose of applying it toward a graduate degree. There are a total of 23 graduate students spread throughout Lyndon's academic programs.

### **Castleton Center for Schools**

24. The Castleton Center for Schools ("CCS") was established in 2002. The Vermont State Colleges had been encouraging its member institutions prior to this to engage in more workforce development. Castleton State College decided to direct its efforts to professional development of teachers in area schools. In the past, Castleton State College's involvement in professional development of teachers had been through the on-campus graduate programs in education that it offered. Graduate program admissions declined substantially in the 1990's. Principals and superintendents became interested in having more targeted and extensive school improvement programs for teachers that offered academic credit. Castleton State College also wanted to strengthen the connection between the college and area schools. The CCS was created in 2002 to

meet these ends. The CCS primarily supports courses that individual school districts wish to run for their teachers to further their professional development and to meet the recertification and licensing requirements under state law.

25. Peter Mello has been Director of the CCS since it was established in 2002. He is an employee of Castleton State College. Prior to July 2007, Mello reported to the Dean of Academic Affairs at the College. Since then, he has reported to the College Dean of Education. Mello's office is on the Castleton campus. Mello spends the majority of his time in the field meeting with principals to identify their needs. The Center has two other employees, Assistant Director and Staff Office Assistant.

26. The primary activity engaged in by the CCS is supporting courses that school districts wish to run for their teachers. The school districts typically contact the CCS with a particular course they would like to offer their teachers. The school districts know the instructor they would like to teach the course approximately 95 percent of the time. Mello helps school districts find an instructor in the rare cases where they do not have someone in mind. Mello may check to see if any Castleton State College faculty members are interested, or he may consult his database to suggest to the school districts other individuals to contact.

27. The CCS requires the schools to submit biographical information on the proposed instructor and a course syllabus. Castleton State College then reviews the proposed course to determine whether it will be certified for college credits. The CCS does an initial screening. Either Mello or the CCS Assistant Director ensures that the proposed instructor meets the minimum credentials to teach the course. They also ensure that the syllabus reflects the required number of contact hours between instructor and

student (i.e., 15 contact hours per credit). The CCS has determined that the instructor did not have the required credentials in less than six courses offered by school districts through CCS since 2002. As long as the proposed instructor meets the minimum qualifications for teaching the course, the determination whether to hire the instructor is made by the sponsoring school district.

28. Once the initial screening is done by CCS, the course and instructor materials are sent to the chairperson of the appropriate academic department on campus. This is usually the Education Department, but it also may be the Math Department or the English Department. The department chairperson either approves the course, or asks for more information or revisions. Once the chairperson has approved the course, it then goes to the Dean of Education for review and approval of the course for credits. The approval process normally takes about two weeks.

29. The instructors for the courses run through the CCS are often consultants, field practitioners and experts in the particular content area of the course. Occasionally, Castleton faculty members teach a course. Seven or eight Castleton faculty have taught courses out of approximately 100 individuals who have taught courses through the CCS since 2002. Castleton faculty who teach CCS courses generally do so separate from their Castleton workload. There was one occasion where Andrew Alexander, a Castleton full-time faculty member, taught a CCS course and the College approved the teaching of the course as counting toward the annual 24 credit workload of the faculty member.

30. In situations where the instructor for a course run through the CCS is not a Castleton faculty member, payment to the instructor for teaching a course comes directly from the sponsoring school district. On the limited occasions when Castleton faculty have

taught CCS courses, sometimes they have received payment directly from the sponsoring school district and other times payment has come from a grant received by Castleton State College. Castleton faculty members are compensated for CCS courses commensurate with the compensation they would receive under the full-time or part-time faculty contracts.

31. Negotiations over the salary to be paid an instructor for teaching a CCS course occur between the instructor and the sponsoring school district. Neither the CCS nor other Castleton State College officials are involved in the setting of salaries. The normal range of payment to an instructor for a three-credit course is \$3,000 to \$4,000. The instructor is paid by the sponsoring school district. Neither the CCS nor the College provide workers compensation insurance, unemployment compensation or any benefits to the instructors.

32. The instructors of courses offered through the CCS are not eligible for membership in the Faculty Assembly at the College. They do not have office space on the Castleton campus. They do not have privileges on the campus such as library cards, discounts to events, or use of athletic facilities.

33. Once a course has been approved, the CCS sends out confirmation letters to the sponsoring school district and course instructor. These letters outline the details and responsibilities associated with the course; such as where and when the course is meeting, when grades are due, class enrollment changes, and that the sponsoring school district is responsible for the instructor's compensation and all instructional expenses related to the course (Colleges Exhibits CCS 4 – 35, Federation Exhibits 22-23).

34. The College sets the tuition for the CCS courses. It is currently \$109 per credit, less than one-third of the regular Castleton tuition rate of \$347. The rate is lower because the sponsoring school district pays the compensation of the instructor, generally houses the course, absorbs infrastructure and overhead costs associated with the course, assumes the risks if the course is not popular, and does course marketing,. The tuition is the responsibility of the student but in almost all cases the sponsoring school district pays the tuition and sends it to the College.

35. Courses run through the CCS usually are offered on or near the property of the sponsoring school district. Courses can be held anytime during the year. They can run over an entire semester or year, or take place in a concentrated one or two week time frame. Scheduling of the courses supported by the CCS is generally done by the sponsoring school districts.

36. One of the three CCS employees attends the first class of all courses. They have registration forms for the students taking the course, complete the class roster and answer any questions of the students.

37. The CCS has developed its own evaluation form for students to complete at the end of a course run through the CCS. The form is different from the forms used to evaluate Castleton faculty. If there are negative comments made about an instructor on evaluation forms, Mello ensures that the forms are sent to the sponsoring school district and that the district is made aware of the problem. Neither the CCS nor other College officials observe the instructors in class. If there is a complaint made about an instructor, the complaint is sent to the sponsoring school district for action (Colleges Exhibits CCS 2, 3).

38. The Castleton Dean of Academic Affairs evaluates the performance of full-time and part-time faculty members represented by the Federation, and keeps personnel files on these faculty members in his office. The Dean plays no role in evaluating the performance of instructors who teach the courses supported by the CCS, and keeps no files on these instructors.

39. Courses supported by the CCS are not part of the College's graduate programs except that certain CCS courses can be taken as electives by graduate students in limited circumstances. CCS courses may be open to Castleton graduate students at the discretion of the sponsoring school district. The College's graduate admissions office decides whether credits granted for CCS courses are approved for credits toward a graduate degree. Castleton graduate students rarely take CCS courses.

40. There are other instances where the College awards credits to students for work that is not done through a course taught by a Castleton faculty member: a) courses taken that fall under agreements by Castleton and another academic institution to treat each other's courses as their courses for credit purposes; b) advanced placement courses and certain other courses taken by high school students; c) life experiences recognized by the Vermont State Colleges Office of External Programs; and d) certain education and training that took place in the military. There is a limit of 9 credits, including from CCS courses, that can be transferred into a Castleton graduate program.

41. The Southwest Curriculum Coordinators Collaborative is the ESA for southwest Vermont. Mello serves as the ESA coordinator for the southwest region. The CCS receives 20 percent of the ESA grant monies awarded by the State of Vermont in the region.

## **Vermont Higher Education Collaborative**

42. The Vermont Higher Education Collaborative for Education Workforce Development (“VT HEC”) was formed around 2000 as a collaborative effort of the State of Vermont Department of Education, University of Vermont and the Vermont State Colleges to help meet the goals of the Vermont Public Education Partnership (“VPEP”) and the requirements of IDEA, Act 117, and the Vermont Department of Education Strategic Plan. VPEP was created by the chief executive officers of the University of Vermont, Vermont State Colleges and the Vermont Department of Education to examine and address critical needs throughout the state. Act 117 was passed by the Vermont General Assembly. It charged the Vermont Department of Education to work with the colleges and universities throughout the state to address critical needs in education, particularly involving special needs children (Colleges Exhibit HEC 2, Federation Exhibit 18A).

43. The first critical need identified by VPEP was the serious shortage of special educators in the state and the increasing number of “waivers” being issued. Waivers were issued as a result of schools not being able to find a licensed special educator and asking the State Department of Education for a waiver to hire someone without a license. In response to this problem, VT HEC started work on developing strategies to increase the number of licensed special education teachers in the state.

44. The stated goals of VT HEC are to: a) form and maintain a partnership to develop and implement personnel preparation and support programs in critical need areas; b) prepare sufficient qualified personnel to address the needs of Vermont’s children and families including special educators and administrators, related service



providers, and early childhood educators; c) increase the retention of new and veteran special educators, administrators and related service employees; and d) increase the number of classroom teachers that have the knowledge and skills to address the needs of Vermont's diverse student population (Colleges Exhibit HEC 1).

45. The Vermont State Colleges acts as the fiscal agent for VT HEC. This includes the responsibility to pay instructors of VT HEC courses, pay program expenses, and process registrations and billings for VT HEC courses. In paying instructors, the Vermont State Colleges uses VT HEC funds, not Colleges monies.

46. There is a Steering Committee for VT HEC which includes representatives from the Vermont State Colleges, the University of Vermont and the State Department of Education. The Committee also includes Dennis Kane, VT HEC Director, and Patty Morgan, Coordinator of the Special Education Licensure Program (the largest program run by VT HEC). The steering committee sets the general direction for VT HEC, reviews the budget and addresses programming issues. The steering committee identified special education as the first area for VT HEC to address.

47. Kane oversees VT HEC's programs and its daily operations. Morgan coordinates the special education licensing program. They both are paid through grants awarded by the State Department of Education.

48. VT HEC receives revenues from three main sources: grants from the U.S. Department of Education, grants from the Vermont Department of Education, and tuition charged for VT HEC courses. The Vermont State Colleges does not contribute to the budget. Major VT HEC expenses are instructor salaries, curriculum development, materials and marketing.

49. The special education licensing program was the first program run by VT HEC and is still the largest. It is a 24 credit program that allows someone with a Bachelor's degree and a teacher's license in Vermont to be endorsed in special education. Cohorts of 10-15 students are formed in various geographic areas of the state based on the special education needs of area school districts. Students in a cohort take prescribed courses together until they reach 24 credits. It takes a typical cohort about two years to complete the program

50. The courses in the special education licensing program were developed by agreement of the higher education institutions in the state. A standard set of courses is developed that is moved around the state. The University of Vermont, Johnson State College, Lyndon State College and Castleton State College serve as the host institutions for the cohorts. The courses loosely conform to semester schedules at the host institutions, and are offered at times convenient to the teachers taking the courses. The VT HEC Steering Committee decides who will be the host institutions.

51. Tuition for VT HEC courses is currently \$700 for a three credit course. \$130 of the \$700 is provided to the host institution. The remainder of tuition monies goes to VT HEC.

52. The students who take VT HEC courses receive graduate credits from whoever is acting as the host institution. By agreement, these credits are automatically transferable from one VT HEC institution to another.

53. In addition to its special educator licensing program, VT HEC has developed several other programs for Vermont teachers over the years. These include programs in Autism, Language Based Learning Difficulties in Adolescents, Applied

Behavior Analysis, BEST (Building Effective Supports for Teaching Students with Emotional and Behavioral Challenges, TASS (Teaching All Secondary Students), and Early Childhood Education. Each program has a coordinator who answers student questions and other inquiries, recruits students and finds instructors (Colleges Exhibit HEC 1).

54. In selecting instructors, program coordinators seek to find an expert on the subject in the region where the course is being taught. In many cases, instructors are educators in primary and secondary schools. Faculty members of the Vermont State Colleges have constituted approximately five percent of the individuals teaching VT HEC courses. Compensation for teaching a course is a flat rate of \$3,800 for a three credit course. Instructors sign contracts with VT HEC (Colleges Exhibits HEC 6 – 15, Federation Exhibit 24).

55. VT HEC instructors who are not existing Vermont State Colleges faculty members do not have offices on State Colleges campuses. They do not participate in faculty governance at any of the State Colleges. They are not under the direction of the academic dean at any of these institutions.

56. VT HEC has developed its own evaluation forms for students of VT HEC courses to complete. These evaluation forms are different from those used to evaluate full-time and part-time faculty members of the State Colleges who are represented by the Federation. VT HEC evaluates the instructors of its courses (Colleges Exhibit HEC 5).

57. VT HEC courses are not generally open to Vermont State Colleges students. There have been rare occasions where State Colleges students have enrolled in such courses. Also, there was one occasion when some members of a VT HEC cohort

took a course at Lyndon State College that was a regular college course taught by a Lyndon full-time faculty member and taken by Lyndon students.

58. If an instructor of a VT HEC course does not do the work he or she contracted to perform, VT HEC is responsible for dealing with the matter.

### OPINION

There is a threshold issue in this case concerning whether the individuals whom the Federation is seeking to add to the existing faculty bargaining units - the instructors of courses offered through the Northeast Kingdom School Development Center (“NEKSDC”), the Castleton Center for Schools (“CCS”), and the Vermont Higher Education Collaborative (“VT HEC”) – are employees of the Colleges. The Colleges contend that the individuals are not employees of the Colleges. The Colleges assert that the real employers of the instructors of courses offered through the Castleton Center for Schools are individual school districts. Similarly, the Colleges contend that the employer of the instructors of Northeast Kingdom School Development Center is the NEKSDC Board of Directors which is essentially comprised of the area school superintendents who formed the NEKSDC. The employer of instructors of courses offered through VT HEC, the Colleges maintain, is VT HEC itself which has its own directors and employees who run the day to day operations of VT HEC programs without any involvement by the Colleges.

The Federation contends to the contrary that, when the “single employer” standards developed under the National Labor Relations Act are applied here, it is clear that the Colleges are the effective employer of the instructors. The Federation asserts that a contrary conclusion would allow the Colleges to do indirectly – by collaborating with

other entities – what the Labor Relations Board would not allow it to do directly: retain effective control of employees who are performing the work of the bargaining unit, while depriving such employees of the protection of collective bargaining agreements.

Alternatively, the Federation maintains that the Colleges and other involved entities are “joint employers” of employees for labor relations purposes. The Federation recognizes that some of the instructors in question may have employment relationships with entities other than the Colleges but that this does not mean that the Colleges is not their employer for labor relations purposes.

The “single employer” and “joint employer” concepts are distinct. NLRB v. Browning-Ferris Industries of Pennsylvania, 691 F.2d 1117, 1122 (3d Cir. 1982). Clinton’s Ditch Cooperative Co., Inc. v. NLRB, 778 F.2d 132, 137 (2<sup>nd</sup> Cir. 1985). A “single employer” relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a “single employer”. Id. A “single employer” situation is present when nominally separate entities are not what they appear to be, that in truth they are but divisions or departments of a single enterprise. Id. NLRB v. Deena Artware, Inc. 361 U.S. 398, 402 (1960). In general, “single employer” status is characterized as the absence of an “arm’s length relationship” found among nonintegrated entities. Browning-Ferris Industries, 691 F.2d at 1122. Mercy Hospital of Buffalo and Communications Workers of America, Local No. 1133, AFL-CIO, 336 NLRB 1282, 1283-84 (2001). Canned Foods, Inc., d/b/a Grass Valley Grocery Outlet and United Food and Commercial Workers Union, Local 588, 332 NLRB 1449 (2000).

The factors to examine to determine whether a “single employer” relationship exists are: 1) functional integration of operations; 2) centralized control of labor relations; 3) common management; and 4) common ownership. Radio & Television Broadcast Technicians Local Union 1264, International Brotherhood of Electrical Workers, AFL-CIO v. Broadcast Service of Mobil, Inc., 380 U.S. 255, 256 (1965). Mercy Hospital, supra. Canned Foods, supra. No single criterion is controlling, but the first three are more critical than common ownership or financial control. Canned Food, supra. The most important factor in deciding whether a single-employer relationship exists is centralized control of labor relations. Id. Mercy Hospital, supra.

In contrast, in a “joint employer” relationship, there is no single integrated enterprise. A conclusion that employers are “joint” assumes that they are separate legal entities but that they have chosen to jointly handle certain aspects of their employer-employee relationship. Browning-Ferris Industries, 691 F.2d at 1122. Clinton’s Ditch Cooperative, 778 F.2d at 137. In alleged “joint employer” situations, it is a matter of determining which of two employers, or whether both employers, control in the capacity of employer the labor relations of a given group of workers. Browning-Ferris Industries, 691 F.2d at 1122-23.

The determination whether an entity possesses sufficient control over the work of employees to qualify as a joint employer is essentially a factual issue. Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964). Among the factors to be considered in determining whether an employer is a “joint employer” are supervision of employees’ daily activities, authority to hire or fire or otherwise discipline employees, the promulgation of work rules and conditions of employment, and work assignments. G.

Hielman Brewing Co., Inc. v. NLRB, 879 F.2d 1526, 1531 (7<sup>th</sup> Cir. 1989). Clinton's Ditch Cooperative, 778 F.2d at 138-39.

We turn to applying these standards to the facts of this case.

### **Castleton Center for Schools**

The CCS primarily supports courses that individual school districts wish to run for their teachers to further their professional development and to meet the recertification and licensing requirements under state law. In applying the “single employer” standards discussed above to CCS, we conclude that the evidence does not support a conclusion that there is a single integrated employer comprised of Castleton State College and the school districts. Instead, the real employers of the instructors of CCS courses are the individual school districts.

There is no functional integration of operations, common management or common ownership with respect to Castleton State College and the school districts. The College and the school districts do not act in concert with each other in conducting their operations. The school districts determine their own curriculum needs for professional development of their teachers and find their own instructors. Only then do the school districts turn to the College to certify that the courses they wish to offer are credit-worthy. While the College facilitates through CCS the work of the schools in providing professional development for their teachers, the College does not orchestrate that effort. Also, CCS courses are not part of the College's graduate programs except that certain CCS courses can be taken as electives by graduate students in limited circumstances subject to the discretion of the sponsoring school district.

Further, the College has its own management headed by the President and deans independent of the school administrations headed by superintendents and principals. The College ultimately is governed by the Vermont State Colleges Board of Trustees, while the school districts have their own boards of school directors.

Most importantly, common control of labor relations does not exist with respect to the College and the school districts. The school districts mostly find their own instructors for CCS courses without assistance from the College. The College does not assess whether the instructor selected by the school district is the best person but accepts the school district's judgment in this regard. Although the College determines whether the instructor meets the minimum qualifications for teaching the course, only on rare occasions has the College determined that the proposed instructor has not met the minimum qualifications. Otherwise, the determination whether to hire the instructor is made by the sponsoring school district.

Neither the CCS nor other Castleton State College officials are involved in the setting of salaries for instructors of CCS courses. Negotiations over the salary to be paid an instructor for teaching a course occur between the instructor and the sponsoring school district. The instructor is paid by the sponsoring school district.

The instructors of CCS courses are not supervised by the College. Scheduling and location of courses is handled by the sponsoring school district. No one at the College directs the work of instructors. If there are negative comments made about an instructor on evaluation forms developed specifically for CCS courses, the CCS sends the forms to the sponsoring school district and the district is made aware of the problem. Neither the CCS nor other College officials do classroom observations of instructors. If there is a



complaint made about an instructor, the complaint is sent to the sponsoring school district for action.

This supervision of CCS instructors is much different than that of full-time and part-time faculty members at the College represented by the Federation. The Castleton Dean of Academic Affairs evaluates the performance of these full-time and part-time faculty members, and maintains personnel files on them. The Dean plays no role in evaluating the performance of instructors who teach the courses supported by the CCS, and keeps no files on these instructors.

In sum, the application of “single employer” standards results in our conclusion that no “single employer” relationship exists here where the separate entities of the College and the school districts are actually part of a single integrated enterprise employing CCS instructors. We next address whether the College is the “joint employer” of the instructors along with the school districts.

In determining whether the College possesses sufficient control over the work of the CCS instructors to qualify as a joint employer, we consider the factors of supervision of employees’ daily activities, authority to hire instructors, authority to fire or otherwise take action against instructors, and directing and assigning work to instructors. In each of these areas, the sponsoring school districts maintain significant control over the instructors. The College involvement in these areas is not close to the level necessary to make it a joint employer of the instructors. Thus, we conclude that the instructors of CCS courses are not employees of Castleton State College. The employers of the instructors are the individual school districts.

## **Vermont Higher Education Collaborative**

VT HEC is a collaborative effort of the Vermont Department of Education, the University of Vermont and the Vermont State Colleges. It offers a special educator licensing program and several other programs to address critical education needs in Vermont.

In applying the “single employer” standards to VT HEC, we conclude that there is not a single integrated enterprise comprised of the Vermont State Colleges and VT HEC. There is some functional integration of operations of functions, as well as some common management and ownership, with respect to the Vermont State Colleges and VT HEC. The Colleges are involved in the governance of VT HEC, and the VT HEC Steering Committee includes a Vermont State Colleges administrator. However, the degree of the Colleges’ involvement in these respects in VT HEC is similar to that of the other collaborating entities in VT HEC, the University of Vermont and the Vermont Department of Education.

Further, the Colleges are not actively involved in the daily operations of VT HEC. VT HEC has its own director and coordinators who run the daily operations of VT HEC’s programs without the involvement of the Colleges and independent of the Colleges’ operations.

The control of labor relations involving VT HEC instructors resides with the VT HEC director and coordinators separate from any involvement of Colleges administrators. The director and coordinators recruit and hire instructors for VT HEC courses. The instructors sign contracts with VT HEC, not the Colleges, and are compensated at a set rate.

Further, there is no involvement by State Colleges administrators in the supervision of VT HEC instructors. VT HEC has developed its own evaluation forms for students of VT HEC courses to complete. These evaluation forms are different from those used to evaluate full-time and part-time faculty members of the State Colleges who are represented by the Federation. VT HEC evaluates the instructors of its courses. If an instructor of a VT HEC course does not do the work he or she contracted to perform, VT HEC is responsible for dealing with the matter. These labor relations matters involving VT HEC instructors are handled independent from the control of labor relations exercised by Colleges administrators of full-time and part-time faculty members at the Colleges represented by the Federation.

In sum, the application of “single employer” standards results in our conclusion that no “single employer” relationship exists where the entities of the State Colleges and VT HEC are actually part of a single integrated enterprise employing VT HEC instructors. We next address whether the State Colleges is the “joint employer” of the instructors along with VT HEC.

In determining whether the State Colleges possesses sufficient control over the work of the VT HEC instructors to qualify as a joint employer, we consider the factors of supervision of employees’ daily activities, authority to hire instructors, authority to fire or otherwise take action against instructors, and directing and assigning work to instructors. In each of these areas, VT HEC maintains significant control over the instructors. The lack of control by the State Colleges in these areas makes it readily apparent that it is not a joint employer of the instructors. Thus, we conclude that the instructors of VT HEC

courses are not employees of the State Colleges. The employer of the instructors is VT HEC.

### **Northeast Kingdom School Development Center**

The NEKSDC is a collaboration between Lyndon State College and the superintendents and nine supervisory unions of the Northeast Kingdom. Its purpose is to improve educational instruction in classrooms for area teachers by providing professional development for the teachers of the supervisory unions. The resources of the collaborating supervisory unions are pooled through the Center to offer specific courses to area teachers to meet identified needs.

In applying “single employer” standards to NEKSDC, we conclude that Lyndon State College and NEKSDC are not part of a single integrated enterprise resulting in a “single employer” situation. There is some functional integration of operations between NEKSDC and the College since the NEKSDC is housed at the College and the NEKSDC Director and Co-Director are employees of the College. However, the governance of Lyndon and the NEKSDC is distinct. The NEKSDC has its own Board of Directors which, although it includes the College President, is otherwise comprised of the nine superintendents of each of the supervisory unions in the Northeast Kingdom. On the contrary, the College is governed by the Vermont State Colleges Board of Trustees.

Further, there is not a common management structure between NEKSDC and the College. The College daily operations are directed by the College President, deans and other management officials. On the other hand, the daily operations of the NEKSDC are handled by the NEKSDC Director.

The largely separate functional operations of the NEKSDC and the College is evident by examining the development of curriculum. The regular College curriculum is developed by faculty members and the College administration for a mostly undergraduate student body. In contrast, the courses offered through NEKSDC are developed and implemented by the NEKSDC and are specifically targeted to the ongoing professional development needs of current teachers in Northeast Kingdom schools.

Also, there is a lack of common ownership concerning the NEKSDC and the College. This is indicated by examining the NEKSDC's funding. Although the College houses the NEKSDC and is its fiscal agent, the College does not provide direct funding to the NEKSDC. The NEKSDC is funded through tuition mostly paid through by participating school districts, annual membership fees from each participating supervisory union, and grants from the State Department of Education. This funding covers the major expenses incurred by the NEKSDC of payment to the instructors of NEKSDC courses, the NEKSDC Director's salary and benefits; mailings of the Center; and expenses of meetings.

Also, a centralized control of labor relations does not exist with respect to the College and the NEKSDC. The College Dean of Academic and Student Affairs plays a central management role in the hiring, evaluating and retaining of full-time and part-time faculty at the College. This is not the case with respect to the instructors of NEKSDC courses. The NEKSDC Director is the primary official involved in the recruiting, hiring, evaluating, disciplining and retaining of instructors of NEKSDC courses.

In sum, the application of "single employer" standards results in our conclusion that no "single employer" relationship exists here where Lyndon State Colleges and the

NEKSDC are part of a single integrated enterprise employing instructors of NEKSDC courses. We next address whether the State Colleges is a “joint employer” of the instructors.

The determination whether “joint employer” status exists here is difficult. As discussed above, a conclusion that employers are “joint” assumes they are separate legal entities that have chosen to jointly handle certain aspects of their employer-employee relationship. The governance structure, source of funding and purpose of the NEKSDC indicate that it is a separate legal entity from the College. Nonetheless, the fact that the primary management official involved in the operations of the NEKSDC, its Director, is a College employee, as well as the NEKSDC Co-Director being employed by the College, raises the question whether the College possesses sufficient control over the work of NEKSDC instructors to qualify as a joint employer along with the NEKSDC.

The NEKSDC, through its participating supervisory unions, possesses significant control over the work of the instructors of NEKSDC courses to qualify as an employer of the instructors. The primary impetus behind the work of the NEKSDC comes from the area superintendents and supervisory unions who have pooled their resources through the NEKSDC to offer specific courses to area teachers to meet their professional development needs. The supervisory unions provide the bulk of NEKSDC funding through annual membership fees and tuition payments. The NEKSDC is governed by a Board of Directors mostly comprised of the superintendents of each of the supervisory unions. The Board of Directors oversees the Center’s budget, oversees expenditures, and discusses the coursework and other training to be offered by the Center. The NEKSDC

Director reports to the Board of Directors. These factors combine to indicate that the NEKSDC is an employer of the NEKSDC instructors.

However, the fact that the NEKSDC Director is a College employee, who reports to the Lyndon Dean of Academic Affairs as well as the NEKSDC Board of Directors, leads us to conclude that the College also possesses sufficient control over the work of NEKSDC instructors to qualify as a joint employer along with the NEKSDC. In making this determination, we consider the factors of supervision of instructors' daily activities, authority to hire instructors, authority to fire or otherwise take action against instructors, and directing and assigning work to instructors. In each of these areas, the NEKSDEC Director maintains significant control over the instructors. As detailed in the Findings of Fact, the NEKSDC Director has primary authority concerning the recruiting, hiring, evaluating, disciplining and retaining of instructors of NEKSDC courses. The exercise of such control by an employee of the College leads us to conclude that the College is a joint employer of the instructors of NEKSDC courses along with the NEKSDC. Our conclusion is reinforced by the additional fact that the NEKSDC Co-Director also is an employee of the College.

Given this joint employer relationship, we next need to decide whether it is appropriate to add such instructors to existing bargaining units of faculty members employed by the Colleges. The Colleges contend it is not appropriate. The State Employees Labor Relations Act provides that the Board shall decide "an appropriate unit for purposes of collective bargaining" in each case. 3 V.S.A. Section 927. In applying the provisions of the Act, we conclude that an appropriate unit would not result by including such instructors in the existing bargaining units.

If we added NEKSDC instructors to existing Colleges faculty bargaining units, this would require the combination of employees solely employed by one employer with employees who are jointly employed by that employer and another entity. This would inappropriately require the bulk of bargaining unit employees, the full-time and part-time faculty of the Colleges, being subject to negotiations and administration not only with their employer, the Colleges, but also with supervisory unions with whom they have no employment relationship. At the same time, the Colleges would be inappropriately required to combine in negotiations and administration with supervisory unions over terms and conditions of employment for the bulk of bargaining unit employees solely employed by the Colleges and concerning whom the supervisory unions have no interest.

In sum, we conclude that the instructors of courses offered through the Castleton Center for Schools and the Vermont Higher Education Collaborative are not employees of the Colleges. We further conclude that Lyndon State College is a joint employer of instructors of the Northeast Kingdom School Development Center, but that it is not appropriate to add such instructors to existing bargaining units of faculty members of the Colleges. As a result, we dismiss the unit clarification petitions filed in this matter to add such instructors to the bargaining units of faculty members employed by the Colleges.



ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the unit clarification petitions filed by the Vermont State Colleges Faculty Federation, UPV/AFT Local 3180 in Docket Nos. 06-43 and 07-28 are dismissed.

Dated this 7th day of October, 2008, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Acting Chairperson

/s/ Leonard J. Berliner

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Leonard J. Berliner

/s/ James J. Dunn

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James J. Dunn