VERMONT LABOR RELATIONS BOARD

VERMONT STATE COLLEGES FACULTY FEDERATION, AFT LOCAL 3180	)	
	)	DOCKET NO. 17-60
and	)	
	)	
VERMONT STATE COLLEGES	)	

AMENDED FINDINGS OF FACT, OPINION AND ORDER[1]

Statement of Case

On December 26, 2017, the Vermont State Colleges Faculty Federation, AFT Local 3180 §("Federation") filed a Petition for Election of Collective Bargaining Representative seeking to add part-time faculty employed in the Distance Learning program at Johnson State College to the bargaining unit of part-time faculty at the campus-based colleges in the Vermont State Colleges system. The Vermont State Colleges ("Employer") filed a response to the petition on January 22, 2018, raising questions of unit determination. On February 20, 2018, the Federation filed an Amended Petition for Election of Collective Bargaining Representative. The Federation petitioned for the addition of following individuals to the part-time faculty bargaining unit:

> Faculty employed by the Vermont State Colleges in the Distance Learning program at Johnson State College who meet the following requirements: 1) employed for at least three semesters, or who currently are in the their third teaching semester, 2) teach at least six credit hours per academic year for the Vermont State Colleges excluding Community College of Vermont, of which at least three are for the Distance Learning program, 3) notwithstanding the first two requirements, faculty who have not taught during one academic year, past or present, are included in the bargaining unit provided they otherwise teach as least six credit hours per academic year for the Vermont State Colleges, excluding Community College of Vermont, of which at least three are for the

[1] The Labor Relations Board issued Findings of Fact, Opinion and Order in this matter on May 15, 2018. The Federation filed a Motion for Reconsideration and New Hearing on June 14, 2018. The Employer filed an Opposition to Petitioner's Motion for Reconsideration and New Hearing on June 29, 2018. Upon review and consideration of the motion and opposition to it, the Board granted the motion for reconsideration in part and denied it in part on August 22, 2018, and retracted the Findings of Fact, Opinion and order issued on May 15, 2018, and substituted in its place Amended Findings of Fact, Opinion and Order. The Board issues these second amended Findings of Fact, Opinion and Order pursuant to 3 V.S.A. §924(c), which provides: "Until the transcript of the record in a case is filed in a court under this chapter, the Board at any time upon reasonable notice and in such manner as it considers proper may modify or set aside wholly or partially a finding made or order issued by it."

> Distance Learning program and have been employed for at least three semesters, or who are currently in their third teaching semester; and 4) are not otherwise employed by the Colleges in a full-time position as a manager or administrator. Also excluded from the unit are all other employees who are otherwise covered by a collective bargaining agreement with the Vermont State Colleges, with the exception of those employees represented by the Part-Time Faculty Federation inclusive of Community College of Vermont.

There are 44 distance learning faculty who currently meet this definition. The Employer contends that the proposed inclusion of distance learning faculty in the existing part-time faculty bargaining unit is inappropriate because they do not share a sufficient community of interests with them to be included in the same bargaining unit. The Employer requests instead that the Board approve a separate unit for the distance learning faculty.

The Labor Relations Board conducted a hearing on this unit determination question on March 9, 2018, in the Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Chairperson and Edward Clark, Jr. Board Member Alan Willard was not present at the hearing but has reviewed the entire record and participated in the decision as the third member of the panel pursuant to 3 V.S.A. § 921(a)(3). Attorney Patrick Bryant of Pyle, Rome, Ehrenberg represented the Federation. Attorney Joseph McConnell of Morgan, Brown & Joy and Sophie Zdatny, Employer General Counsel, represented the Employer. The Federation and the Employer filed post-hearing briefs on March 28 and 30, respectively.

FINDINGS OF FACT

1. The Vermont State Colleges ("VSC") is a nonprofit institution of higher education. VSC is overseen by a fifteen-member Board of Trustees, which appoints a Chancellor for VSC and Presidents for each of the member colleges of VSC.

2. VSC currently is made up of the Chancellor's Office and five colleges – Castleton University, Johnson State College, Lyndon State College, Vermont Technical College, and Community College of Vermont.

3. Johnson State College and Lyndon State College are transitioning from being two separate colleges within the VSC system to becoming a single institution, Northern Vermont University. Johnson and Lyndon remain two separate institutions for the 2017-2018 academic year but are overseen by a single senior administrative structure. Elaine Collins currently serves as the President of both Johnson and Lyndon. Nolan Atkins serves as the Provost (or Chief Academic Officer) of both institutions. Beginning in the 2018-2019 academic year, Johnson and Lyndon will become fully integrated and will be renamed Northern Vermont University (Employer Exhibit 8).

4. Six represented bargaining units presently exist in the Vermont State Colleges: 1) full-time faculty and ranked librarians of the Colleges represented by the Federation; 2) non-faculty employees of the Colleges; excluding supervisory, confidential and professional employees; represented by the Vermont State Employees' Association; 3) part-time faculty of the campus-based colleges represented by the Federation; 4) supervisory employees of the campus-based colleges represented by the Federation; 5) professional, administrative and technical employees of the campus-based colleges represented by the Federation; and 6) instructors employed by the Community College of Vermont who meet certain requirements represented by the Federation; excluded from the CCV unit are all employees who are otherwise covered by a collective bargaining agreement with the Vermont State Colleges, with the exception of those employees represented by the Part-Time Faculty Federation..

5. The bargaining unit of part-time faculty of the campus-based colleges represented by the Federation consists of the part-time faculty who meet the following requirements: 1) employed for at least three semesters, or who currently are in their third teaching semester, 2) teach at least six credit hours per academic year, 3) notwithstanding the first two requirements, part-time faculty who have not taught during one academic year, past or present, are included in the bargaining unit provided they otherwise teach at least six credit hours per academic year and have been employed for at least three semesters, or who are currently in their third teaching semester; and 4) are not otherwise employed as College presidents, deans, business managers, division chairpersons, academic division directors, and all non-faculty employees (Employer Exhibit 1, Federation Exhibit 2 – Article 1, Appendix C).

6. The Johnson Provost administers the part-time faculty bargaining unit collective bargaining agreement for Johnson State College and Lyndon State College.

7. Johnson State College maintains a "Distance Learning" program. Distance Learning is comprised of the External Degree Program ("EDP") and JSC Online.

8. The EDP was established in 1978. It is designed to provide a degree completion program for students who have previously obtained college credits from one or more institutions but have not yet obtained a degree. EDP administrators review and accept these credits and design a program that permits these students, who are often older, to move towards obtaining a degree. In order to enroll in EDP, students must have gained at least 60 credits, approximately one-half of the credits necessary to graduate. EDP students may take courses on campus, but not a large number of EDP students do so. The EDP first offered online courses to Johnson students in 1998 and began offering online degree programs in 2010 (Federation Exhibit 3, p. 51, 54).

9. EDP faculty and students may be involved in three types of courses: a) hybrid courses in which a majority of instruction is delivered in a structured alternative delivery format including, but not limited to, the Internet and/or other off-campus formats and a minority of instruction is provided through in-person meetings; b) online courses in which instruction is delivered entirely on-line; and c) weekend courses in which instruction is delivered through four all-day face to face classes with supplemental online materials. Johnson hybrid courses include courses in Outdoor Education and Teacher Education (Employer Exhibit 2, Federation Exhibit 1, p. 7).

10. JSC Online was established in the fall of 2016. It provides 100% online course instruction for students who choose to engage in a non-campus-based degree program and obtain all their courses through Distance Learning.

11. Johnson State College offers 25 bachelor's programs, three master's programs, three associate degree programs, 25 minors and three certificates (Federation Exhibit 3, p.44).

12. The Distance Learning programs at Johnson offer degrees in five areas of academic study – Professional Studies, Interdisciplinary Studies, Psychology, Business, and Wellness & Alternative Medicine. The academic content of Distance Learning programs and courses has been determined primarily by Johnson academic departments and the Johnson curriculum committee (Federation Exhibits 3, p.54-55; 28, p.6-7).

13. Degrees in each of these areas, except Professional Studies, are available to campus-based Johnson students. Requirements are identical for the degrees available to both Distance Learning and campus-based students.

14. Bobbi Jo Carter, Associate Dean of Distance Education at Johnson, has been the director of the Distance Learning program since the Fall of 2016. Carter has a Master's degree

and also holds a Ph.D. in Organizational Management. Prior to coming to Johnson, she had extensive experience in distance learning elsewhere in the country. Unlike the heads of other academic programs at Johnson who report to the Provost, who in turn reports to the Johnson President, she reports directly to the President (Employer Exhibit 8).

15. When Carter was hired, she was told to treat the Distance Learning program as a business and that it was her responsibility to increase the number of Distance Learning students and revenues. She was given a goal of having one thousand distance learning students within five years and ultimately to have two thousand such students. There are many online education programs in the country, and Johnson competes with these programs for distance learning students. Online distance learning is a growing and profitable field of higher education.

16. The Distance Learning program is staffed by Associate Dean Carter, two part-time EDP Students Advisors, a Staff Assistant and a part-time Coordinator of Online Learning Services (Employer Exhibit 8).

17. One of Associate Dean Carter's first missions was to identify, review and develop clear policies for distance learning faculty. She produced a Distance Learning Policies and Procedures Handbook that contains the various policies and procedures with which faculty teaching in Distance Learning are required to comply (Employer Exhibit 2, Federation Exhibit 1).

18. Campus-based enrollment at Johnson was two percent lower in the Fall 2017 semester than it was in the Fall 2015 semester. It was two percent lower in the Spring 2017 semester than it was during the Spring 2015 semester. EDP enrollment has been dropping over the last several years, but Distance Learning generally has been able to maintain its total student

population through the significant growth of JSC Online in the past two academic years (Employer Exhibit 11, Federation Exhibit 6).

19. In the Fall 2014 semester, 1.2% of Distance Learning students came from outside Vermont. By the Fall 2017 semester, the percentage increased to 13.2%. Out of state EDP students have averaged less than 2% of total EDP students over the past two years. Out-of-state student enrollment in JSC Online has increased from 50% in the Fall of 2016 to 57% in the Fall of 2017. Non-Vermont students have constituted approximately 25% of the campus-based students during this period (Employer Exhibit 12, Federation Exhibit 7).

20. In the Spring 2018 semester, there were 763 on-campus students enrolled at Johnson State College. 9 percent of them are part-time. There were 431 Distance Learning students enrolled this semester, 70 percent of whom are part-time. 313 of the Distance Learning students are in the EDP program; 118 are JSC Online students. Distance Learning students made up almost 35 percent of total student enrollment at Johnson for the Fall 2017 semester. On a full-time equivalent basis, Distance Learning students made up approximately 26 percent of the student enrollment for the Fall 2017 semester (Employer Exhibits 10, 11; Federation Exhibits 4, 6).

21. The experience for distance learning students differs significantly from the experience for students for traditional on-campus courses. The distance learning students do not: reside on campus, engage in varsity athletics or have access to campus athletic facilities, participate in campus based-clubs and organizations, or participate in extra-curricular activities available to traditional, campus-based students. Students enrolled in distance learning programs have the following support services available to them that also are accessible to campus-based

students: academic advising, financial aid, library, tutoring, disability services and the bookstore (Employer Exhibit 2, Federation Exhibit 1, p. 26).

22. The experience for faculty teaching in Distance Learning differs significantly from that experienced by faculty for traditional on-campus courses. Distance learning faculty most often are not present on campus. If teaching a 100% online course, distance learning faculty are required to present their instruction through the online learning platform known as “Moodle”. They are required to obtain the technical skills necessary to design courses and provide instruction for online delivery of courses. They must follow prescribed methods for designing and organizing courses, developing syllabi and communicating with students. Unlike campus-based faculty who need to be available for specific time slots on campus for class and office hours, distance learning faculty instead are expected to be available over the course of a week to respond to messages from students within 48 hours. They also are expected to review, evaluate and return student assignments within a week (Employer Exhibits 2 through 6).

23. Carter initiated a voluntary training program for distance learning faculty to provide the fundamentals of technology for teaching the distance learning courses. The program is approximately three hours long.

24. Faculty teaching campus-based courses in the VSC system have the ability to use the online Moodle platform. Approximately 50 percent of these faculty use Moodle, and they generally do so in a more limited manner than distance learning faculty.

25. All VSC campus-based colleges and the Community College of Vermont offer a variety of non-traditional schedules and methods for education. They all offer classes on the weekends, in the evenings, online and hybrid. Online is a growing means to deliver higher education instruction (Federation Exhibit 9).

26. Distance learning faculty are not provided office space on the Johnson campus. Members of the existing part-time faculty unit are designated office space upon request pursuant to the collective bargaining agreement which covers them. They are entitled to an office or office area with available storage and/or shelving, and reasonable access to a telephone and desk which they may use for preparation and consultation with students or colleagues (Employer Exhibit 1, Federation Exhibit 2, Article XXVII).

27. Distance learning courses are available to all EDP, JSC Online and campus-based students, although EDP and JSC Online students are given priority in registering for these courses. Enrollment in distance learning courses is often a mix of distance learning and campus-based students. 69 percent of the total distance learning sections of courses offered from Fall 2014 through Summer 2017 included campus-based students. Campus-based students constituted 17 percent of the enrollees in the distance learning courses (Federation Exhibit 10).

28. Johnson campus-based courses are available to EDP students . 22 percent of the total campus-based sections of courses offered from Fall 2014 through Summer 2017 included distance learning students. Distance learning students constituted 3 percent of the enrollees in the campus-based courses (Federation Exhibit 10).

29. In planning the scheduling of Distance Learning courses, Carter attempts to avoid conflicts with academic departments offering campus-based courses with respect to scheduling the same course as both online and campus-based. This is to avoid too many campus-based students selecting a distance learning course, leaving too few students taking the same campus-based course (Federation Exhibit 27).

30. The academic periods for distance learning and campus-based courses overlap. Distance learning courses that are 14 weeks long occur within the 15-week period for campus-

based courses. Accelerated distance learning courses, 7 weeks in length, occur within the existing 14-week distance learning semester and within the existing 15- week campus-based semester.

31. EDP students pay tuition at standard in-state and out-of-state rates based on their residency status. JSC Online students living outside Vermont receive a scholarship that effectively lowers tuition to the in-state rate for online courses they take from Johnson. The in-state rate does not apply to any face-to-face Johnson course or to any non-Johnson course (Employer Exhibit 2, Federation Exhibit 1, p. 27).

32. Distance learning courses are asynchronous, meaning that students can view them at any time within a window of time. Johnston State College recently received a grant that will enable it to add synchronous courses which, like face to face courses on campus, require students to participate in courses at a scheduled time (Employer Exhibit 7).

33. Members of the existing part-time faculty bargaining unit are hired through their respective academic department and academic dean. The respective department chair and academic dean evaluates performance of members of the part-time faculty bargaining unit (Employer Exhibit 1, Federation Exhibit 2, Articles XV and XVIII).

34. Distance learning faculty are hired directly by Associate Dean Carter. She forwards the credentials of potential new hires to the respective department chairs to ensure that prospective hires have the qualifications to meet the standards required to teach in the applicable academic area. The ultimate decision to select an individual to teach a particular distance learning course is made by Associate Dean Carter. The responsibility to evaluate Distance Learning faculty resides with Associate Dean Carter. She has conducted few such evaluations between the time she was hired in the Fall of 2016 and the hearing in this matter.

35. Classroom observations supplemented with student feedback are the main inputs into evaluations of part-time faculty teaching campus-based courses. Classroom observations are not, and cannot be, part of the evaluation of distance learning instructors.

36. Associate Dean Carter implemented more stringent hiring credentials for distance learning faculty than exist for existing members of the part-time faculty bargaining unit. She requires them to have a minimum of a Master's degree in the field from a regionally-accredited institution and 18 graduate credits in a discipline directly related to the course being taught. The minimum degree requirements for existing members of the part-time unit is a Master's degree or equivalent experience in the applicable field of study. The reason Carter implemented the higher standard for distance learning faculty is that the JSC Online program may be partnering with other higher education institutions whose regional accrediting agencies may have higher minimum requirements for instructors, and to compete with colleges offering online courses who may have higher minimum requirements for instructors. This 18 credit requirement reduces the pool of Vermont residents who are available to teach distance learning courses.

37. The Johnson Distance Learning program is partnering to provide joint and cross-enrolled courses with Sinte Gleska University, which is located in Mission, South Dakota, and is under a separate regional accrediting body. The Johnson Distance Learning program is accredited by the New England Association of Schools and Colleges Commission on Institutions of Higher Education ("NEASC"). NEASC does not require distance learning faculty to have more than a Master's degree in the applicable field of study (Employer Exhibits 7, 14, 15, 16, 17, 18).

38. Associate Dean Carter has capped the number of credit hours a distance learning faculty member can teach as nine credits with the Vermont State Colleges system and a total of

21 credits of any courses at any educational institution. These caps reduce the pool of available Vermont faculty to teach distance learning courses and increase the reliance on non-Vermont faculty (Employer Exhibit 2, p.20).

39. In the 2014-2015 and 2015-2016 academic years, and in the Fall of 2016, the percentage of distance learning faculty who lived outside of Vermont ranged between 12 and 13 percent. In the Spring 2017, Fall 2017 and Spring 2018 semesters, the percentage of distance learning faculty who live out of state increased to 19 percent, 26 percent and 34 percent, respectively (Employer Exhibit 19, Federation Exhibit 18).

40. Approximately 90 percent of the members of the existing part-time faculty bargaining unit live in Vermont.

41. The VSC Board of Trustees approves the budget for VSC which includes individual budgets for each college. The Johnson State College President recommends a budget for approval by the VSC Chancellor and the Board of Trustees.

42. The Johnson Distance Learning program maintains a budget that is separate from the college academic budget that is overseen by the Provost. Unlike the campus-based program, the Distance Learning program budget is dynamic insofar as it may increase or decrease depending on enrollments. The Johnson President retains the authority to make changes to the Distance Learning program budget.

43. Members of the part-time faculty bargaining unit are paid from the budget overseen by the Provost; distance learning faculty are paid from the budget which Associate Dean Carter oversees. During the last three completed fiscal years, revenues significantly exceeded expenses for the Distance Learning program, whereas expenses consistently exceeded revenues for the campus-based academic programs. The Johnson and Lyndon administration

expects the Distance Learning program to grow and remain profitable so that it bolsters the overall financial health of Northern Vermont University (Employer Exhibit 9).

44. Associate Dean Carter generally compensates Vermont-based distance learning faculty at the same per credit rate paid to members of the part-time faculty bargaining unit. She has developed a pay scale to compensate non-Vermont based faculty at lower, nationally-based rates based on the market conditions for faculty in the specific subject area.

45. Full-time faculty teach some courses in the Distance Learning program. They are paid for such courses at a different overload rate set forth in the full-time faculty collective bargaining agreement. An exception is that full-time faculty may receive specific permission to have a distance learning course count toward the normal, full-time workload for exceptional circumstances. There were instances prior to 2017 in which EDP courses taught by full-time faculty were counted toward the faculty member's full-time teaching workload (Federation Exhibits 22, 23, 23a).

MAJORITY OPINION

The issue before us is whether to grant the petition filed by the Federation to add part-time faculty employed in the Distance Learning program at Johnson State College to the bargaining unit of part-time faculty at the campus-based colleges in the Vermont State Colleges system. The Employer contends that the proposed inclusion of distance learning faculty in the existing part-time faculty bargaining unit is inappropriate because they do not share a sufficient community of interests with them to be included in the same bargaining unit. The Employer requests instead that the Board approve a separate unit for the distance learning faculty.

The relevant statutory provisions in appropriate unit cases under the State Employees Labor Relations Act ("SELRA"), 3 V.S.A. § 901 *et seq.*, are:

> *Section 902(3)* - "Collective bargaining unit" means the employees of an employer, being either all of the employees, the members of a department or agency or such other unit or units as the board may determine are most appropriate to best represent the interest of employees.
>
> *Section 927* - (a) The board shall decide the unit appropriate for the purpose of collective bargaining in each case and those employees to be included therein, in order to assure the employees the fullest freedom in exercising the rights guaranteed by this chapter.
>
> (b) In determining whether a unit is appropriate under subsection (a) of this section, the extent to which the employees have organized is not controlling.
>
> (c) The board may decline recognition to any group of employees as a collective bargaining unit if, upon investigation and hearing, it is satisfied that the employees will not constitute an appropriate unit for purposes of collective bargaining or if recognition will result in over-fragmentation of state employee collective bargaining units .
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> *Section 941* - . . . (f) In determining the appropriateness of a collective bargaining unit the board shall take into consideration but not be limited to the following criteria:
>
> (1) The authority of governmental officials at the unit level to take positive action on matters subject to negotiation.
>
> (2) The similarity or divergence of the interests, needs, and general conditions of employment of the employees to be represented. The board may, in its discretion, require that a separate vote be taken among any particular class or type of employees within a proposed unit to determine specifically if the class or type wishes to be included.
>
> (3) Whether over-fragmentation of units among state employees will result from certification to a degree which is likely to produce an adverse effect on effective representation of state employees generally, or upon the efficient operation of state government.

This language demonstrates a clear legislative intent to allow employees freedom in selecting the composition of the unit which will best represent their interests as long as the unit is appropriate and will not result in over-fragmentation of units. Petition of VSEA re: Separate Bargaining Unit for Community Correctional Center Employees, 5 VLRB 82, 92 (1982); *Affirmed*, 143 Vt. 636 (1983). Petition of VSEA (re: Sworn Law Enforcement Officers), 32 VLRB 1, 14 (2012). The unit need not be the most appropriate unit, only an appropriate unit. Id.

143 Vt. at 642-43, 646; 32 VLRB at 14. In analyzing this case, we examine considerations of community of interest, over-fragmentation, and whether officials at the unit level have the authority to take action on matters subject to negotiations. Petition of VSEA (re: Sworn Law Enforcement Officers), 32 VLRB at 15.

The Board has considered the following factors relevant in determining whether a community of interests exists among employees: differences and similarities in method of compensation, hours of work, employment benefits, supervision, qualifications, training, job functions, and job sites; and whether employees have frequent contact with each other and have an integration of work functions. Petition of VSEA (re: Bargaining unit for Department of Corrections), 13 VLRB 287, 304-305 (1990). Petition of VSEA (re: Sworn Law Enforcement Officers), 32 VLRB at 15. A group of employees must at least be a readily identifiable and homogenous group apart from other employees to support a determination that a community of interests exists among them. AFSCME and Town of Middlebury, 6 VLRB 227, 231 (1983). Petition of VSEA (re: Sworn Law Enforcement Officers), 32 VLRB at 14.

In considering the appropriateness of the addition to the bargaining unit proposed by the Federation, we analyze separately two distinct groups of part-time faculty who teach distance learning courses: those who teach on-line courses exclusively, and those who teach both online courses and campus-based courses. We first address the part-time faculty who teach on-line courses exclusively.

We conclude that the part-time faculty employed in the Johnson Distance Learning program who teach on-line courses exclusively share a greater community of interests among themselves than with the existing members of the bargaining unit of part-time faculty at the campus-based colleges in the Vermont State Colleges system. First, the students served by these

distance learning faculty are substantially different than those taught by part-time faculty bargaining unit members. The distance learning students largely are spread out in locations far removed from the Johnson campus for their online instruction from these distance learning faculty. In the Spring 2018 semester, the distance learning students were substantially part-time (70 percent) as opposed to the vast majority (91 percent) of on-campus students being full-time. Distance learning students are generally older and employed. In the case of the EDP students, they must have already accumulated 60 credits, approximately half of a baccalaureate program before admittance and participation.

The existing members of the part-time faculty bargaining unit on the other hand primarily teach classes to traditional campus-based students who are in the classroom and just beginning their higher education experience. This results in fundamentally different job sites and job demands among the two groups of faculty members and a set of learners with very different experiences and needs. On-campus part-time faculty have set times for student consultation whereas distance learning faculty have no specific schedule but rather performance standards for their availability to students and the speed of student interactions.

Second, the courses taught by the distance learning faculty who teach on-line courses exclusively are designed and presented in a substantially different manner than the campus-based courses taught by the members of the part-time faculty bargaining unit. These distance learning faculty teaching a 100% online course provide instruction solely through the Moodle learning platform. Faculty teaching campus-based courses often do not use Moodle and do so voluntarily. Distance learning faculty exclusively teaching on-line courses interact with and respond to students in a substantially different manner than the face to face interactions part-time faculty

have with students in traditional classroom settings. These differences highlight how the job functions of the two groups of faculty members differ.

Third, the distance learning faculty exclusively teaching on-line courses and the campus-based part-time faculty are hired and supervised separately. The Associate Dean of the distance learning program is responsible for the selection, retention, supervision and evaluation of the distance learning faculty. The campus-based part-time faculty are hired and supervised by their respective academic departments under the direction of the Provost's office.

Fourth, there are different considerations with respect to compensation. The data suggests that distance learning will grow and that soon the majority of faculty will be non-Vermont based. Although Vermont-based distance learning faculty are paid at the same credit rate as the members of the part-time faculty unit, the increasing number of distance faculty living out of state results in geographic pay differentials being an issue with respect to distance learning faculty but not for members of the part-time faculty unit.

Even more distinguishing, the campus-based faculty are paid in the traditional manner of all instructors getting the same rate based on their years of experience. The labor markets within which the Employer recruits, hires, and compensates are very different and result in different interests for campus-based and distance-learning faculty in negotiating appropriate compensation and benefits. In this unique situation, we are forced to look afresh at the factor of compensation in determining community of interests in the world as it now exists.

Fifth, there is no evident interaction between distance learning faculty exclusively teaching on-line courses and campus-based part-time faculty due to their work locations. These distance learning faculty are not based on campus, and their distribution across the country

likely will increase over time, while members of the part-time faculty unit are primarily campus-based.

While the Board and Court decision in Grievance of Verderber and the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO, 23 VLRB 277 (2000), *Affirmed, 173 Vt. 612 (2002),* is not directly applicable to this case since it involved a contract interpretation question rather than a unit determination matter, it is worth noting for contextual and historical purposes that the Board and the Court ruled that External Degree Program assignments were not part-time faculty bargaining unit work.

In determining whether an adequate community of interests exists between the part-time campus-based faculty and the distance learning faculty who teach on-line courses exclusively, it is important to look at the broad picture of what is happening in higher education. The Distance Learning program and the faculty teaching in the program are part of a development that is in large part either disrupting or displacing the current campus-based model. Many of the competitors of the Distance Learning program have no affiliation with campus-based services. In this context, the interests of the part-time campus-based faculty and the distance learning faculty exclusively teaching on-line courses differ. Placing both groups in the same bargaining unit would make it difficult for them to be represented effectively and difficult to negotiate with them as a single entity. This is a unique situation which significantly differs from any past unit determination cases considered by this Board. It is hard to imagine it being replicated in any future unit determination case.

In sum, there are student differences, courses designed and implemented in a substantially different manner, separate hiring and supervision, different compensation considerations, and no evident interaction among the distance learning faculty exclusively

teaching on-line courses and the members of the part-time faculty unit. They do not share a sufficient community of interests to include them in the same bargaining unit.

We reach a different conclusion when we consider the part-time faculty who teach both on-line courses and campus-based courses. This includes part-time faculty who teach hybrid courses with both on-line and in-person components. These faculty share a greater community of interests with the existing members of the bargaining unit of part-time faculty at the campus-based colleges than do the part-time faculty who teach on-line courses exclusively. The mix of students whom part-time faculty teaching both on-line and campus-based courses serve include campus-based students in the classroom. This provides them in part with similar interactions with students as the existing members of the part-time faculty bargaining unit.

The part-time faculty who teach both on-line and campus-based courses also are involved in part in courses designed and presented in the same manner as courses taught by faculty in the existing part-time faculty bargaining unit in that there are face to face interactions with students in traditional classroom settings. Further, when teaching campus-based courses, these faculty, like existing members of the part-time faculty unit, may be hired and supervised by their respective academic departments under the direction of the Provost's office. The considerations with respect to compensation would be similar for these faculty as existing members of the part-time unit when they are teaching courses on the same four campuses of the State Colleges system.

It is significant as well that part-time faculty teaching both on-line courses and campus-based courses have a greater potential for interaction with existing members of the part-time faculty unit than do faculty exclusively teaching on-line courses. This is due to their work locations in part on the same campuses where members of the part-time unit teach.

In sum, part-time faculty teaching both on-line and campus-based courses have the following characteristics which differ from the faculty teaching on-line courses exclusively: greater potential for interaction with existing members of the part-time faculty bargaining unit, face to face interaction at times with students in a classroom setting, teaching courses at times designed and implemented in the same manner as those taught by existing part-time faculty bargaining unit members, and hiring and supervision at times by academic departments like existing part-time faculty unit members when they teach campus-based courses. These characteristics provide a sufficient community of interests making it appropriate to include part-time faculty teaching both on-line and campus-based courses in the same bargaining unit as part-time faculty in the existing bargaining unit.

Our conclusion in this regard is reinforced by a review of National Labor Relations Board election results . In 16 of 30 elections examined between 2012 and the present involving part-time faculty in higher education, faculty teaching "only" on-line courses, or "exclusively" on-line courses, are clearly excluded from the bargaining unit. In the remaining 14 cases, faculty teaching "only" or "exclusively" on-line courses clearly are included in the bargaining unit in some of the cases, and is not clear in some of the cases whether they are excluded or included.[2]

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[2] The American University, NLRB Case Number 05-RC-070027 (2012). Trustees of Tufts College, NLRB Case Number 01-RC-109106 (2013). Lesley University, NLRB Case Number 01-RC-118179 (2014). Burlington College, NLRB Case Number 01-RC-138050 (2014). Champlain College, NLRB Case Number 01-RC-138052 (2014). Saint Michael's College, NLRB Case Number 01-RC-138466 (2014). The Washington University d/b/a Washington University in Saint Louis, NLRB Case Number 14-RC-141308 (2015). Boston University, NLRB Case Number 01-RC-139754 (2015). Barnard College, NLRB Case Number 02-RC-154022 (2015). Brandeis University, NLRB Case Number 01-RC-163352 (2015). Loyola University of Chicago, NLRB Case Number 13-RC-164618 (2016). University of Southern California, NLRB Case Number 31-RC-164864 (2016). Duke University, NLRB Case Number 10-RC-169472 (2016). Loyola University of Chicago, NLRB Case Number 13-RC-168082 (2016). Boston University, NLRB Case Number 01-RC-171016 (2016). Holy Names University, NLRB Case Number 32-RC-170352 (2016). Saint Louis University, NLRB Case Number 14-RC-173981 (2016). Notre Dame de Namur University, NLRB Case Number 20-RC-172076 (2016). McDaniel College, NLRB Case Number 05-RC-175386 (2016). Saint Martin's University, NLRB Case Number 19-RC-173933 (2016). Minneapolis College of Art and Design, NLRB Case Number 18-RC-182546 (2016). Marist College, NLRB Case Number 03-RC-127374 (2016). Augsburg College, NLRB Case Number 18-RC-186094 (2016). The University of Hartford, NLRB Case Number 01-RC-187989 (2016). Arcadia University, NLRB Case Number 04-RC-194273

This indicates a recognition nationally both that excluding faculty teaching on-line courses exclusively from bargaining units of other part-time faculty, and including part-time faculty who teach both on-line and campus-based courses in such units, is within accepted norms.

The community of interests criterion must be considered together with whether over-fragmentation of units will result to a degree which is likely to produce an adverse effect on the effective representation of other employees or upon the efficient operation of the employer. Teamsters Local 597 and University of Vermont, 19 VLRB 64, 79; *Affirmed*, 167 Vt. 564 (1997. Board policy generally favors broader units to guard against the potential problems which may arise given a multiplicity of units – Balkanization, whipsaw bargaining and institutional complications of dealing with a multiplicity of units. Id., 19 VLRB at 81. Petition of VSEA (re: Sworn Law Enforcement Officers, 32 VLRB at 16.

In balancing these considerations against the community of interests criterion, we conclude that placing part-time faculty who exclusively teach on-line courses in a separate bargaining unit from part-time faculty in the existing bargaining unit and those who teach both on-line and campus-based courses will not result in over-fragmentation of units likely to produce an adverse effect on either the effective representation of other employees or upon the efficient operation of the Employer. This case is a rare exception where the inclusion of distance learning faculty exclusively teaching on-line courses in a larger unit would likely lead to consequences placing significant burdens on the Union and the Employer.

(2017). Northwestern University, NLRB Case Number 13-RC-177943 (2017). Washington University in Saint Louis, NLRB Case Number 14-RC-196901 (2017). St. Catherine University, NLRB Case Number 18-RC-199024 (2017). Fordham University, NLRB Case Number 02-RC-207806 (2017). Nazareth College of Rochester, NLRB Case Number 03-RC-218093 (2018).

If distance learning faculty exclusively teaching on-line courses are not included in the part-time faculty bargaining unit, concerns regarding whipsaw bargaining would be diminished because the bargaining unit of distance learning faculty exclusively teaching on-line courses, the amended part-time faculty unit including part-time faculty teaching both on-line and campus-based courses, and Community College of Vermont's faculty all would be represented by the same union. Also, we do not envision that the effective representation of the separate groups of faculty members would be adversely affected by the separate bargaining units. A separate bargaining unit for distance learning faculty exclusively teaching on-line courses will enable the Employer to retain the entrepreneurial nature and necessary flexibility of the Distance Learning program's online model to respond nimbly to developments in the competitive online education marketplace.

We disagree with the dissenting opinion that previous decisions of the Labor Relations Board under the State Employees Labor Relations Act provide strong guidance against segregating distance learning faculty exclusively teaching on-line courses from the existing members of the part-time faculty bargaining unit. Our colleague cites: 1) the 2001 appropriate unit decision in which the Board dismissed a petition filed by Vermont State Employees' Association ("VSEA") to remove Agency of Transportation highway and maintenance employees from the Non-Management Unit represented by VSEA and organize them into a separate bargaining unit; 2) the 2012 decision dismissing a petition filed by VSEA to remove sworn law enforcement officers of the Vermont Department of Fish & Wildlife, the Vermont Department of Liquor Control, and the Vermont Department of Motor Vehicles from the Non-Management Unit represented by VSEA and place them in a separate bargaining unit; and 3) the 2012 decision that a union-proposed unit of administrative support and clerical employees of the

University of Vermont was not an appropriate unit, and dismissed the union's election petition to represent these employees.

There were many differentiating factors in those three cases which are not present in the case before us. Among the significant differentiating factors in those cases were: a) there was a symmetry of reporting with other workers; b) the same budget-building, administration and funding approval existed; c) virtually all employees were Vermont residents; d) the employer was a significant influencer in the compensation and benefits in the labor market within which they operate; and e) the majority of these cases involved proposed disruption of long-established bargaining units by removing some employees from these units.

Also, in those cases, the employer contended that fragmentation would create inefficiencies. In contrast, here the Employer is contending that keeping the groups separate would create efficiencies. This is not to infer that we do not need to balance the rights of employees to choose, the potential power the employees have with a larger unit, and the effective representation of employees, but we give deference to the employer concerning the efficiency of operations factor.

Our dissenting colleague also cites the 1991 decision of the Board approving the appropriateness of the existing part-time faculty bargaining unit in which the Board rejected the Colleges proposal for a more restricted unit on the grounds that over-fragmentation of units could result if the Colleges' proposed unit definition is accepted but would not result under the broader unit proposed by the Federation. Our decision here does not reverse the 1991 decision but rather recognizes some changed circumstances that did not exist then. The decision was made well before anyone could envision how we now both work and learn. The Internet became widely available in 1994. Google was founded in 1998 and Facebook in 2004. The I-phone was

introduced in 2007. It is understandable that the Board would not foresee higher education and higher education degrees being granted with no face to face contact.

The decision also was made prior to the parties mutually agreeing that Community College of Vermont instructors who were both part-time and statewide constituted an appropriate separate bargaining unit. The decision also was made prior to anyone envisioning a Vermont public service such as JSC Online being provided in a large and growing part by employees who are not Vermont residents to clients who are not Vermont residents.

The 1991 decision still stands . If you were an employee as defined by the 1991 decision, and a faculty member, you were either in the full-time unit or the part-time unit. This issue is not before us.

We are concerned as much as the dissenting member about creating precedents that encourage petitions proposing fragmented units. However, no prior unit determination cases have had even a vaguely similar fact set to the one before us. The majority cannot envision another case coming before us where a group of workers for a Vermont public sector employer are largely based out of state. Thus, we see this ruling having limited application in future unit determination cases.

Finally, we consider under SELRA which officials have the authority to take positive action on matters of negotiations pursuant to 3 V.S.A. § 941 (f)(1). We consider this statutory criterion along with 3 V.S.A. §§ 902(7) and 905(a). §902(7) states in pertinent part: "Employer means the . . . Vermont State Colleges, represented by the Chancellor or the Chancellor's designee". §905(a) provides that "(t)he provost, or a person or persons designated by the provost, for Vermont State Colleges . . . shall act as the employer representatives in collective bargaining negotiations and administration". In construing these sections to operate

harmoniously and given that the State Colleges system as a whole lacks a Provost, we presume the Vermont General Assembly intended to name the Chancellor or the Chancellor's designee to act as the employer representative in collective bargaining negotiations and administration.

The Chancellor for good reasons has established a system wherein the Associate Dean who directs the Distance Learning program does not report through the Johnson State/Lyndon State College Provost but reports directly to the Johnson President. The Distance Learning program compared to the other academic programs at Johnson has different goals, different budgeting and fiscal management processes, different students, sometimes different accrediting bodies and oversight, and different competition among the other differences mentioned above. The desire to have the Distance Learning program possess more agility, and not report through the more traditional campus-based academic structure, is reasonable and perhaps necessary for its success. This was decided long before there was a union petition for expansion of the existing part-time faculty bargaining unit. These distinguishing characteristics of the Distance Learning Program make it evident that the authority to take positive action on at least some matters subject to negotiations exists at the Distance Learning program level.

Finally, we would like to respond to the dissenting opinion's view that our decision invites a "cyber sweatshop". The terms and conditions of employment of many of the State, State Colleges and University of Vermont bargaining units strongly influence the labor marketplace. In terms of the State Police and Corrections Units, they are geographically distinct and virtually define the labor marketplace for their job roles. On the other hand, the distance learning labor marketplace is global, totally mobile and highly transparent.. If the Employer underpays the market rates for such positions, the Distance Learning program will fail. If the Employer overpays the market rates, the Distance Learning program also will fail. Our decision is simply a

recognition that The Employer has less influence on the rates of compensation for distance learning faculty than it does for the existing part-time faculty bargaining unit.

In sum, the petition by the Federation to add part-time faculty employed in the Distance Learning program at Johnson State College to the bargaining unit of part-time faculty at the campus-based colleges in the Vermont State Colleges system does not result in an appropriate bargaining unit to the extent it proposes inclusion of part-time faculty exclusively teaching on-line courses in such a unit. Instead, a separate unit of distance learning faculty exclusively teaching on-line courses is an appropriate unit, and an appropriate unit also results if part-time faculty teaching both on-line and campus based courses are added to the existing part-time faculty unit.

Our decision herein results in bargaining unit configurations different than proposed by either the Federation or the Employer. We have considered whether our conclusions should result in dismissal of the petition filed by the Federation or whether we should proceed to conduct elections consistent with the bargaining units we have deemed appropriate. We conclude upon reflection that the best course is to dismiss the petition.

In so deciding, we recognize that the Federation is now faced with proceeding to election with unit configurations significantly different than it envisioned when it filed the petition. If we order that elections be held in which employees vote on whether they wish to be organized into the bargaining units we have deemed appropriate, and whether they wish to be represented by the Federation, the Federation would be compelled to participate in an election in which employees would be voting directly whether they wish to be included in bargaining units opposed by the Federation. This reality under the two question voting procedure for State Employees Labor

Relations Act elections also increases the potential for employee confusion as they vote on the bargaining unit and union representation questions on the ballot.

These circumstances result in our decision to dismiss the election petition and not hold elections. The Federation and the Colleges will then be able to contest on appeal to the Vermont Supreme Court this unit determination decision of the Board majority. If the Court reverses the Board majority in entirety by approving the bargaining unit proposed by the Federation, the Board then would conduct a unit determination and representation election among employees consistent with the Court decision and Federation's proposed unit.

If the Court fully affirms the Board majority decision, or if an appeal of the Board decision does not occur, the dismissal of the election petition will stand, The Federation then would be able to decide whether it wishes to refile the petition consistent with the Board majority decision. The processing of the refiled petition should be able to proceed expeditiously since Board guidance, and as applicable Court direction, on appropriate unit questions would have been provided. If an appeal is taken and the Court affirms the Board decision in part and reverses it in part, proceedings will occur consistent with the direction of the Court.

We regret that dismissal of the petition will cause delay in exercise of the rights of employees to decide whether they desire to be represented by an exclusive bargaining representative. Nonetheless, we conclude that dismissal of the election petition is the prudent course upon full consideration of the circumstances of this case in the context of the two question election procedure under the State Employees Act.

The determination to dismiss the election petition is consistent with a previous election petition involving part-time faculty of the Colleges. The Federation filed a petition in March of 1986 to add certain part-time faculty of the Colleges to the existing bargaining unit of full-time

faculty and ranked librarians of the Colleges represented by the Federation. The Board issued a decision on January 22, 1987, concluding that addition of certain part-time faculty to the existing full-time bargaining unit was appropriate. Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO and Vermont State Colleges, 10 VLRB 39. The Colleges appealed the Board decision to the Vermont Supreme Court. In a May 12, 1989 decision, the Court reversed the Board decision insofar as it ordered the inclusion of the adjunct faculty in the same bargaining unit with full-time faculty members. 152 Vt. 363. Subsequent to the Court decision, there was not an election in which part-time faculty voted on whether they wished to be organized into their own bargaining unit. Instead, the petition was dismissed. The Federation subsequently – in January 1991 - filed a separate petition to represent the part-time faculty in their own bargaining unit.

Here, the Board is proceeding likewise in not conducting an election upon deciding to not approve a Federation-proposed petition to add certain faculty to an existing faculty unit. Instead, in line with what occurred in the earlier case, the Federation ultimately is able to decide whether it wishes to refile a petition consistent with the Board majority decision.

Our decision to so proceed should in no way be construed as reflecting on our views on the soundness of our holding on the appropriate unit questions raised in this matter. We adhere as strongly to our views on the appropriate unit questions as when the Board issued an amended decision on August 22, 2018.

/s/ Richard W. Park

Richard. W. Park, Chairperson

/s/ Alan Willard

Alan Willard

DISSENTING OPINION

There is nothing in the amended Majority Opinion which alters the views expressed in my original dissenting opinion. I respectfully disagree with the conclusion of my colleagues that the proposed inclusion of distance learning faculty in the existing part-time faculty bargaining unit by the Federation is inappropriate. In so concluding, the majority in my view has misapplied the pertinent statutory provisions and has mostly ignored the extensive body of case law precedents.

The language of the State Employees Labor Relations Act relating to the appropriateness of bargaining units demonstrates a clear legislative intent to allow employees freedom in selecting the composition of the unit which will best represent their interests as long as the unit is appropriate and will not result in over-fragmentation of units. Petition of VSEA re: Separate Bargaining Unit for Community Correctional Center Employees, 5 VLRB 82, 92 (1982); *Affirmed*, 143 Vt. 636 (1983). Petition of VSEA (re: Sworn Law Enforcement Officers), 32 VLRB 1, 14 (2012). The unit need not be the most appropriate unit, only an appropriate unit. Id. 143 Vt. at 642-43, 646; 32 VLRB at 14. In determining whether a proposed unit is appropriate, we examine considerations of community of interests, over-fragmentation, and whether officials at the unit level have the authority to take action on matters subject to negotiations. Petition of VSEA (re: Sworn Law Enforcement Officers), 32 VLRB at 15.

The Board has considered the following factors relevant in determining whether a community of interests exists among employees: differences and similarities in method of compensation, hours of work, employment benefits, supervision, qualifications, training, job functions, and job sites; and whether employees have frequent contact with each other and have

an integration of work functions. Petition of VSEA (re: Bargaining unit for Department of Corrections), 13 VLRB 287, 304-305 (1990). Petition of VSEA (re: Sworn Law Enforcement Officers), 32 VLRB at 15. A group of employees must at least be a readily identifiable and homogenous group apart from other employees to support a determination that a community of interests exists among them. AFSCME and Town of Middlebury, 6 VLRB 227, 231 (1983). Petition of VSEA (re: Sworn Law Enforcement Officers), 32 VLRB at 14.

A review of the pertinent factors indicates that a sufficient community of interests exists among the part-time faculty employed in the Distance Learning program at Johnson State College and the part-time faculty at the campus-based colleges in the Vermont State Colleges system to make it appropriate that they are in the same bargaining unit. They have the same method of compensation. They both are paid on a per credit rate based on the number of academic credits granted students in the courses that they teach.

The number of hours distance learning faculty and existing members of the part-time faculty bargaining unit work is dependent on the number of credits they teach, but presumably the amount of work per credit is similar. Also, although distance learning faculty teaching online courses have more flexibility on scheduling their hours of work than faculty in the existing part-time unit who teach classes on campus, it is not clear by the evidence that this results in significant differences in the hours of the day they spend working. It is significant in this regard that a large amount of work for both online and campus-based instructors occurs at the discretion of the individual faculty member: designing courses, reading course materials, preparing lectures, evaluating students, and communicating with students.

The employment benefits of distance learning faculty versus campus-based members of the existing part-time faculty bargaining unit inevitably will have some differences resulting

from the distance learning faculty not being on campus unlike campus-based faculty. Entitlement to office space is a primary example. Nonetheless, we have never required that a community of interests only exists when benefits are identical.

Also, the fact that the members of the existing part-time faculty unit may have more extensive benefits at present which are not enjoyed by distance learning faculty is not significant. It is not surprising that employees represented by a union have greater benefits than employees not represented by a union because they have specifically negotiated for these benefits. Nor is it surprising that non-union, non-Vermont distance learning faculty are paid at "lower nationally-based rates based on market conditions". One would suspect that some "internationally-based rates" might even be lower.

Distance learning faculty do not share common supervision with existing members of the part-time faculty bargaining unit. However, differences in supervisors has not stymied a community of interests existing within the existing part-time faculty bargaining unit. The respective department chair and dean at each of the colleges hire and evaluate performance of members of the part-time faculty bargaining unit. Thus, there are many different chains of supervision in the current unit. The fact that distance learning faculty have different supervision is not significant in light of these circumstances.

The qualifications of distance learning faculty and existing members of the part-time unit are similar since they both are required to have a Master's degree in the applicable field of study. I recognize that distance learning faculty also are required to have 18 graduate credits in a discipline directly related to the course being taught. This more refined requirement certainly does not defeat a community of interests among distance learning faculty and existing members of the part-time unit. There are many bargaining units in the Vermont public sector where

educational qualifications vary much more widely than the narrow difference existing here. The requirement simply reduces the pool of Vermont residents who are available to teach distance learning courses.

I conclude similarly with respect to training. The employees in the proposed unit are trained similarly given the extensive training necessary to obtain a Master's degree. The fact distance learning faculty devote a few hours to develop the necessary skills to teach online courses pales in comparison to the time both distance learning faculty and existing part-time unit members expend to obtain an advanced degree.

A review of job functions likewise supports a shared community of interests. Distance learning faculty and part-time faculty in the existing unit perform the same essential functions of preparing and delivering college-level instruction to undergraduate students in courses that count toward bachelor's degrees, and mentoring and evaluating students. Although courses taught by the distance learning faculty are designed and presented in a different manner than the campus-based courses taught by the existing members of the part-time unit, the essential job functions of instructing, mentoring and evaluating students does not differ.

The job sites of employees in the proposed unit differ to the extent that faculty teaching distance learning courses are not primarily on campus and existing members of the part-time unit largely teach campus-based courses. However, the effect of this factor is largely diminished by the variety of non-traditional schedules and methods for education offered at all VSC campus-based colleges and Community College of Vermont. They all offer classes on the weekend, in the evenings, online and hybrid.

The remaining factors of whether employees have frequent contact with each other, and whether they have an integration of work functions, do not substantially further the inquiry.

There was no evidence that distance learning faculty interact with each other more frequently than they do with other faculty members. Further, the evidence does not indicate that existing members of the part-time faculty unit interact with each other more than they do with distance learning faculty. The lack of evident interaction among all these faculty appears to result from the nature of contingent work in which they are all engaged. The same conclusion can be reached with respect to integration of work functions. There is a lack of evidence on integration of work functions for all the involved faculty.

On a more general level, distance learning faculty and existing members of the part-time faculty bargaining unit have similar interests in that they each have demonstrated a serious, sustained commitment to the teaching profession by their extended teaching service with the same employer. Vermont State Colleges Faculty Federation, Local 3180, AFL-CIO and Vermont State Colleges, 14 VLRB 52, 63 (1991). In sum, the proposed bargaining unit of distance learning faculty and existing members of the part-time faculty unit is an appropriate unit. It constitutes a readily identifiable and homogenous group apart from other employees to support a determination that a community of interests exists among them.

The community of interests criterion must be considered together with whether over-fragmentation of units will result to a degree which is likely to produce an adverse effect either on the effective representation of other employees or upon the efficient operation of the employer. Teamsters Local 597 and University of Vermont, 19 VLRB 64, 79; *Affirmed*, 167 Vt. 564 (1997. Board policy generally favors broader units to guard against the potential problems which may arise given a multiplicity of units – Balkanization, whipsaw bargaining and institutional complications of dealing with a multiplicity of units. Id., 19 VLRB at 81. Petition of VSEA (re: Sworn Law Enforcement Officers), 32 VLRB at 16.

Previous decisions of the Labor Relations Board under the State Employees Labor Relations Act provide strong guidance against segregating distance learning faculty from the existing members of the part-time faculty bargaining unit. In a 2001 appropriate unit decision, the Board dismissed a petition filed by Vermont State Employees' Association to remove Agency of Transportation highway and maintenance employees from the Non-Management Unit represented by VSEA and organize them into a separate bargaining unit. Petition of VSEA (Re: Agency of Transportation Highway and Maintenance Employees), 24 VLRB 37 (2001). In addressing over-fragmentation of unit considerations, the Board stated:

> The proposed unit, consisting of employees of a division of an agency of state government, is too small a grouping to be appropriate. The four existing units in state government are organized on no less than a department-wide basis. If we were to allow a divisional bargaining unit such as is proposed here, the precedent established would create the potential of setting into motion a significant expansion of bargaining units in state government and resulting complications of dealing with a multiplicity of units.. Id. at 48-49.

In 2012, the Board similarly dismissed a petition filed by VSEA to remove sworn law enforcement officers of the Vermont Department of Fish & Wildlife, the Vermont Department of Liquor Control, and the Vermont Department of Motor Vehicles from the Non-Management Unit represented by VSEA and place them in a separate bargaining unit. In considering the community of interests criterion together with the over-fragmentation of units consideration, the Board concluded that the proposed bargaining unit constituting just one percent of the state employees eligible to be represented by an employee organization would result in over-fragmentation of units to a degree which is likely to produce an adverse effect on the effective representation of other employees and upon the effective operation of the employer. The Board held that if the proposed bargaining unit was allowed, the precedent established would create the potential of setting into motion a significant expansion of bargaining units in state government

and resulting complications of dealing with a multiplicity of units. Petition of VSEA (Re: Sworn Law Enforcement Officers), supra.. The Board reaffirmed this ruling in a 2015 decision, dismissing a petition filed by the New England Police Benevolent Association to represent the same grouping of employees involved in the 2012 decision. Petition of New England Police Benevolent Association (Re: Sworn Law Enforcement Officers), 33 VLRB 246 (2015).

The Board further determined in 2012 that a union-proposed unit of approximately 380 administrative support and clerical employees of the University was not an appropriate unit, and dismissed the union's election petition to represent these employees. The Board concluded these employees did not share a distinct community of interests apart from other employees and that over-fragmentation of units would result if the proposed unit was approved. The Board concurred with the University that a unit of approximately 785 employees consisting of these employees, and technical and specialized employees of the University that are not supervisory or confidential employees, would be appropriate. University Staff Union/Vermont-NEA/NEA and United Staff and University of Vermont, 32 VLRB 121 (2012).

Finally, the Labor Relations Board decision in 1991 approving the appropriateness of the existing part-time faculty bargaining unit speaks directly to the over-fragmentation issue involving VSC part-time faculty. The Federation presented a petition in that case to represent all the adjunct faculty whom the Board had previously determined met the definition of "employee" within the meaning of the State Employees Labor Relations Act. The Colleges contended this was not an appropriate unit, and proposed a more restricted unit which would require adjunct faculty to meet the following requirements to be eligible to be a member of the bargaining unit: 1) to be teaching during the current semester, and 2) to have taught at least three credits per semester for three consecutive semesters or who are currently in their third consecutive semester

of teaching three or more credits. The Board stated as follows with respect to the over-fragmentation issue:

> In considering . . . whether overfragmentation of units will result, we conclude that overfragmentation of units could result if the Colleges' proposed unit definition is accepted, but will not result under the broader unit proposed by the Federation. . . . If the unit proposed by the Federation is accepted, and all adjunct faculty who are "employees" within the meaning of SELRA are included in the same bargaining unit, then the potential exists for just two faculty bargaining units in the Colleges: 1) a unit of full-time faculty, and 2) a unit of all adjunct faculty who are "employees" within the meaning of SELRA.
>
> If the unit proposed by the Colleges is accepted, then the potential exists for at least three faculty bargaining units: 1) a unit of full-time faculty, and 2) a unit of those adjunct faculty who, among other requirements, are teaching in the current semester, and have taught at least three credits per semester for three consecutive semesters or are currently in their third consecutive semester of teaching three or more credits, and 3) a unit or units of those remaining adjunct faculty who do not meet the requirements of #2 above but are "employees" within the meaning of SELRA.
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> The established policy of the Board that public rights are protected by larger units favors placing all eligible adjunct faculty in one bargaining unit. . . We conclude that, if the position of the Colleges is accepted and the potential for three or more faculty units exist, then overfragmentation of units may result to a degree which is likely to produce an adverse effect either on the effective operation of employees generally or upon the effective operation of the Colleges. 3 V.S.A. § 941(f)(3).
>
> In sum, we conclude that the placement of all adjunct faculty employed by the Colleges, who are "employees" within the meaning of SELRA, in one bargaining unit is appropriate. Vermont State Colleges Faculty Federation, Local 3180, AFL-CIO and Vermont State Colleges, 14 VLRB at 63 – 65.

The application of these precedents to the facts of this case compel a conclusion that placing distance faculty in their own bargaining unit will result in over-fragmentation of units among Vermont State Colleges employees which is likely to produce an adverse effect either on the effective representation of employees generally or upon the efficient operation of the State Colleges. The proposed unit, consisting of just 44 employees employed in one program of one college, constitutes too small a grouping of employees to be appropriate. The approval of the bargaining unit by the majority establishes the precedent of creating the potential of setting into

motion a significant expansion of bargaining units in the State Colleges and resulting complications of dealing with a multiplicity of units.

The established policy of the Board that public rights are protected by larger units favors placing all eligible part-time faculty in one bargaining unit. The broader unit is more likely to result in productive and stable labor relations because competing internal interests within a bargaining unit are weighed and ultimately are subordinate to the greater interest of the whole. It promotes effective representation of employees since employees with similar interests negotiate together. It promotes the efficient operation of the State Colleges since the terms and conditions of employment of contingent faculty are considered and determined in a comprehensive manner.

Two bargaining units to the contrary creates the potential of excessive competition among employees which may result in whipsaw bargaining. Although the potential for this may be lessened if they are represented by the same union, competition and instability with respect to benefits and compensation for online courses is a realistic threat given two bargaining units. Effective representation of employees generally and the efficient operation of the Colleges are better served by the placement of the involved faculty in the same bargaining unit.

In a concluding note on over-fragmentation considerations, a response is warranted to the following statement in the majority opinion: “A separate bargaining unit for distance learning faculty exclusively teaching on-line courses will enable the Employer to retain the entrepreneurial nature and necessary flexibility of the Distance Learning program’s online model to respond nimbly to developments in the competitive online education marketplace.” This justification for the majority decision goes well beyond the Board’s authority and expertise. It is more of an ideological embrace of a specific business model and an ill-defined one at that.

In any event, I fail to see how a separate bargaining unit will promote the entrepreneurial nature of the Distance Learning program while including distance learning faculty with other part-time faculty will inhibit the flexibility and nimbleness of the program. The existence of a union representing distance learning faculty will restrict flexibility to some extent whether such faculty are in their own unit or in a unit with other part-time faculty. The union representation of employees may even result in more (not fewer) Vermont residents teaching Distance Learning courses and prevent the creation of a cyber sweatshop in the service of a Vermont publicly supported college system.

Further, the terms and conditions of employment for distance learning faculty, should they decide to be represented by the Federation, will be determined mutually between the parties at the bargaining table. The parties can negotiate terms that respect the entrepreneurial nature of the Distance Learning program whether the distance learning faculty are in their own unit or in a combined unit. Given the revenue generating capacity of the Distance Learning program to subsidize other academic programs, it is in the interests of distance learning faculty and other part-time faculty to ensure the continuing success of the Distance Learning program.

The final consideration under SELRA is whether officials at the unit level have the authority to take positive action on matters of negotiations pursuant to 3 V.S.A. § 941 (f)(1). This statutory criterion is considered along with 3 V.S.A. §§ 902(7) and 905(a), which when construed together reflect the Vermont General Assembly intent to name the Chancellor or the Chancellor's designee to act as the employer representative in collective bargaining negotiations and administration.

The above statutory provisions indicate that the Associate Dean who directs the Distance Learning program would not have the authority to act on significant negotiable matters, such as

determining wages and benefits. She is levels removed from having the authority to take positive action on matters of negotiation. The potential problems inherent in having a bargaining unit at the lower level of a program at one of the colleges are reflected in the fact that there is at present no bargaining unit in the Vermont State Colleges system at a level less than a statewide institution. Given these realities along with over-fragmentation considerations, a separate bargaining unit for distance learning faculty would unduly complicate the negotiation process.

The 1991 Board decision on the part-time faculty bargaining unit warned against the result which has now been approved by the majority. The majority claims that its decision does not reverse the 1991 decision but rather recognizes some changed circumstances that did not exist then. I disagree: it does reverse the 1991 decision. The argument that a change in the delivery method of course content is somehow relevant is not supported by evidence, the State Employees Labor Relations Act or legal precedent. The established policy of the Board that public rights are protected by larger units favors placing all eligible part-time faculty in one bargaining unit.

The original majority decision inappropriately ignored this long-established policy, destabilizes a longstanding and consistent body of precedent, and invites an appeal. The changes in the amended majority decision do not redress the failure to seriously consider the pertinent statutory provisions and extensive precedents. If the majority decision stands, statutes, policies and decades of precedent will be rendered moot. This is no way to change the meaning of statutes, the development of policy or the development of Vermont legal precedents.

/s/ Edward W. Clark

Edward W. Clark, Jr.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the petition for election of collective bargaining representative filed by the Vermont State Colleges Faculty Federation, AFT Local 3180, seeking to add part-time faculty employed by the Distance Learning program at Johnson State College to the bargaining unit of part-time faculty at the campus-based colleges in the Vermont State Colleges system, is dismissed.

Dated this 30th day of October 2018, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard. W. Park, Chairperson

/s/ Alan Willard

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Alan Willard