STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

EASTERN MICHIGAN UNIVERSITY,
Public Employer,

Case No. R98 D-55

-and-

EASTERN MICHIGAN LECTURERS ORGANIZING CONGRESS, AMERICAN FEDERATION OF TEACHERS (AFT), AFL-CIO,
Petitioner-Labor Organization.
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APPEARANCES:

Dykema Gossett PLLC, by James P. Greene, Esq., and Jeffrey N. Silveri, Esq., for the Public Employer

Mark H. Cousens, Esq., for the Labor Organization

DECISION AND DIRECTION OF ELECTION

Pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, MSA 17.455(12), this matter was heard at Detroit, Michigan, on October 20, November 23, 1998, and February 10, 1999, before James P. Kurtz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission, after a notice of hearing issued on May 4, 1998. Based upon the record and the briefs filed by the parties on or before June 2, 1999, this Commission issues the following decision under Sections 12 and 13 of PERA:

Petition and Background Matters:

This is the third attempt by an affiliate of the American Federation of Teachers (AFT), to represent a bargaining unit of lecturers employed by the Public Employer, Eastern Michigan University (EMU). In both of the earlier cases, we held that the lecturers were not regular part-time employees, that their employment was casual and temporary in nature, and that it would be impossible for them to form a stable unit for purposes of collective bargaining. The first petition was filed in 1971 by the Eastern Michigan University Federation of Teachers Organizing Committee, Case No. R71 A-2. This case resulted in a ruling by the Court of Appeals in *Eastern Mich Univ v EMU Professors*, 46 Mich App 534 (1973), *rev'g* 1972 MERC Lab Op 118 and 876, which excluded lecturers from the bargaining unit of regular full-time faculty.

The second petition for an election was filed in 1993 by the Michigan Federation of Teachers

and School Related Personnel, AFT, AFL-CIO, Case No. R93 L-221, and concluded with the Commission's decision reported at 1997 MERC Lab Op 312. This latter decision was based upon a stipulation of both the issue and the facts by the parties. The decision sets forth the history, background, and other factual matters relating to the organization of the Employer's faculty and the employment of lecturers. These facts and background matters which are applicable to this case have not changed and therefore will not be repeated here.

The petition for an election in this case was filed under the name of Eastern Michigan Lecturers Organizing Congress, American Federation of Teachers, on April 28, 1998. The petition sought an unrepresented residual group of approximately 90 EMU lecturers described as "full-time lecturers with instructional and related duties, including full-time lecturers in the University library system." The Petitioner amended the claimed bargaining unit description by letter received on February 5, 1999, to include all persons employed by the University as full-time lecturers or as lecturers with a 100% appointment with instructional and related duties, including full-time lecturers in the library system. This amendment increased the estimated number of employees in the claimed unit from 90 to 104 lecturers. The reason for the amendment, as explained by Petitioner, is that the number of credit hours required for full-time employment varies among the University's 33 academic departments and other divisions, ranging from 12 to 15 credit hours. Furthermore, the full-time status of a lecturer is often based on the amount of responsibility and work required by the appointment in addition to, or in lieu of, classroom hours. The 100% designation is used to award benefits to those lecturers performing work responsibilities outside the classroom, such as lecturers teaching individual students in the music department, playing in the University's string quartet, acting as research scientists, or administering a special program. Thus, the 100% designation takes into account the nonclassroom responsibilities of the lecturers, similar to the additional responsibilities undertaken by tenure track faculty in higher education.

On October 20, 1998, the Employer filed a motion to dismiss the election petition, with a brief in support thereof, on the ground that it is barred by the doctrine of res judicata. This motion was not ruled on prior to the hearing and was renewed in the Employer's post-hearing brief, along with the doctrines of collateral estoppel and stare decisis. As in the prior cases, the Employer objected to any organization of its lecturers due to their alleged casual and temporary status, and contended at the hearing that the Union's current definition of the unit, raising the number of credit hours but limiting the semesters taught to one, rendered the proposed unit even more unstable than the broader unit of approximately 400 lecturers sought in the 1993 case. The Employer advanced no alternative unit description or eligibility formula in opposition to the Union's proposed definition of the bargaining unit.

As noted in the previous case, the regular teaching or tenure track faculty of the University, composed of professors, associate and assistant professors, instructors, and librarians with faculty rank, is represented for purposes of collective bargaining by the Eastern Michigan Chapter, American Association of University Professors (AAUP). The contract between the University and the AAUP has a provision limiting the appointment of lecturers to a cumulative total of 400% of a full-time teaching load. The contract provides that this cap may be waived with the agreement of two-thirds

of the represented faculty in an affected department. According to the record, the cap has never been enforced, nor has there ever been a grievance pertaining it. We reject, in any event, the contention that a limitation in a third party's contract may affect one way or the other the right of unrepresented employees to collective bargaining under PERA.

The parties disagreed as to whether lecturers in the continuing education division of the University shared a community of interest with lecturers employed in its 33 academic departments. The continuing education division is a self-supporting administrative unit of the University, separate from the academic departments that are supported by its general fund. Since there are no full-time lecturers employed in continuing education, we will not rule on this issue. We note, however, that we normally include similar instructional employees in K-12 systems with the regular teaching employees. See *Saginaw Twp Comm. Schools*, 1998 MERC Lab Op 479, 486-489. The University's other arguments in opposition to a unit in this case are discussed below.

The Claimed Bargaining Unit:

Petitioner seeks a bargaining unit variously described in the record as all lecturers employed by Eastern Michigan University with full-time or 100% appointments performing instructional and related duties, including lecturers in the library system. We construe the full-time or 100% appointment in this proposed definition of the unit to be the point at which a lecturer would become eligible for unit inclusion. Thereafter, the lecturer would remain a member of the bargaining unit until the employment relationship is terminated. Such a unit of lecturers would be an unrepresented residual or fringe group of instructional employees of the University, who are not included in the existing instructional bargaining unit represented by the AAUP. Residual units are not in the usual case appropriate standing alone, but that fact does not preclude the employees involved from coverage under collective bargaining statutes such as PERA. See *MEA v Alpena Comm College*, 457 Mich 300, 303-306 (1998), *aff'g* 1994 MERC Lab Op 955; *Schoolcraft College*, 1986 MERC Lab Op 888, 892-893.

The issue separating the parties is whether a stable, discernible group of lecturers can be defined for collective bargaining purposes under PERA, despite the findings in the previous two cases that the overall complement of lecturers are casual and temporary in their employment status with the University. These previous cases attempted to define the eligibility of lecturers on the basis of a minimum number of hours taught for two or more semesters. The problem encountered with these definitions was that they made it difficult to find a steady and ongoing work force of lecturers out of the large and fluctuating group of lecturers employed by the University. Petitioner, however, still maintains in this case that there is such a stable and identifiable group of lecturers whose employment history is such that they can constitute a unit in which a collective bargaining relationship could be maintained and administered without the constant turnover anticipated in the previous cases. The definition of the proposed unit in this case is based on the proposition that there is a group of lecturers employed by the University who are repeatedly hired and rehired, semester after semester, year after year, and who depend upon the University for much of their livelihood. These lecturers, according to the Union, may be distinguished from the large number of lecturers who occasionally and sporadically teach a course due to unusual demand or the unavailability of regular faculty.

The data presented by the Employer relative to the employment of lecturers covered the six-year period from the Summer of 1992 semester to the Spring of 1998. The most important semesters from the standpoint of regular employment are the Fall and Winter, which make up the normal or regular school year for most students, teachers, and lecturers. These two semesters also determine whether lecturers with full or 100% appointments may participate in the health care and pension programs of the University. During the six-year period involved, the University employed a total of more than 1650 lecturers, with an average of about 72 lecturers for each of the four semesters in a year. Our 1997 decision used a four-year period, during which time the University employed 1022 lecturers at its main campus. The large number of lecturers is necessary due to the limitations on the number of tenured faculty that the University can or will hire, and by the fluctuation in student demand for courses. To overcome the previous findings of casual and temporary status, Petitioner in the instant case has devised a formula for determining unit eligibility based upon the Employer's data of lecturers employed during the above six-year period of regular semesters, using as the end of that period what was, at that time, the most recent regular semester data available: the Winter 1998 semester running from January to April.

The Union analysis found that 104 lecturers received full-time or 100% appointments during the Winter 1998 semester. The amount of time these 104 lecturers had taught during the Fall and Winter semesters of the previous six years was then compiled. This data revealed that 94 of the 104 lecturers had full-time appointments during the preceding Fall semester, and 63 were employed for at least three consecutive semesters, excluding Spring and Summer. Twelve of the 104 lecturers worked full time or more for the entire six years, and a total of 28 worked full or part time for six straight years. Only two lecturers, who had not taught during the previous 11 semesters that were surveyed, were given full-time appointments for the first time during the Winter 1998 semester. A majority of the proposed bargaining unit, 59 lecturers or 57% of the 104 eligible employees, worked between six and 11 semesters either on a part-time or full-time basis. Except for the two newly-appointed full-time equivalents, all of the remaining lecturers worked from two to five semesters on a full or part-time basis. The record establishes that there are lecturers who have taught full-time for more than 10 years, and others who have taught either full or part-time for close to 20 years.

Conclusion as to Residual Unit:

An analysis of the foregoing data reveals that lecturers receiving the equivalent of a full-time appointment have "a reasonable expectation of continued employment from year to year." *Lutheran Social Services of Mich*, 1992 MERC Lab Op 325, 337-338. The data establishes that a lecturer receiving a full-time appointment not only has a reasonable expectancy of recall for the next regular semester, but also may reasonably expect continued employment on a full or part-time basis thereafter. Thus, using appointment on a full-time basis as the criterion for entrance into the unit, or for unit eligibility purposes, the Union has defined a group of lecturers that have a stable and continuing interest in their positions at the University, similar to employees in seasonal bargaining units. See *Livonia Public Schools*, 1990 MERC Lab Op 16, 20; *Michigan Technological Univ*, 1990 MERC Lab Op 312, 315-316. Those receiving 100% or full-time appointments certainly have more than a casual or temporary interest in their wages, hours, and working conditions, in view of their full-

time employment with, and dependence upon, the University. The turnover in this proposed unit is not excessive, and the group defined by the Union is a relatively stable group of lecturers for whom, we find, collective bargaining is possible.

Therefore, we conclude that a full-time appointment as a lecturer will serve as the basis for eligibility in a residual instructional unit of lecturers, and will move the lecturer out of the larger group of casual and temporary lecturers. Similar to normal bargaining units, inclusion in the unit would continue until the employment relationship is terminated by either the University or the employee, whether or not future appointments are full or part-time. Using this formula as the basis for unit inclusion, we do not find the unit to be unstable as contended by the University. The fact that lecturers are subject to non-reappointment whenever their current appointment ends merely puts them in the same position as all at will employees. However, the employment data establishes that a majority of the lecturers who reach full-time status continue to be reappointed on a full or part-time basis year after year. Only two additional lecturers were added to the proposed unit in the Winter 1998 term used by the Union as its basis for eligibility, and it can be assumed on the basis of the Employer's data that this relatively minor change in unit composition will be reflected in the succeeding Fall 1998 and Winter and Fall 1999 semesters which have occurred during the pendency of this petition.[1]

The Employer argues that this formula is arbitrary and leaves out lecturers teaching less than full-time or with less than 100% appointments. There are probably a number of potential formulas that could apply to a case like this, but we are dealing only with the one placed before us in this record. The modification that once achieving full-time status a lecturer remains in the unit during employment with the University, whether on a full or part-time basis, similar to any other bargaining unit, provides the stability that the Employer seeks and prevents a lecturer from "floating into and out of the unit" which the Employer fears. At the same time, this formula should make the unit relatively easy to identify and administer, since the record indicates that there should not be a great degree of fluctuation in the unit from year to year. Our decision herein will give lecturers who have been employed for many years, some close to 20 years, and who have a continuing interest in their employment relationship, the benefits of collective bargaining, as required by PERA, if they choose to be represented by a bargaining agent. Thus, no other rationale for unit inclusion has been advanced in this case which would provide the stability the University desires, and we decline to speculate on one on our own motion.

Res Judicata Issue:

The Employer contends that this petition is an attempt by Petitioner to retry our 1997 decision, and since there is no change in the facts, we should dismiss this petition by applying the doctrine of res judicata. Petitioner responds that the various preclusion doctrines, such as res judicata, cannot be applied to the instant case, contending that neither the petitioning party nor the

[1] We will add these three most recent regular school year semesters to the eligibility formula, in order to include any lecturers recently attaining full-time or 100% appointments.

issue to be determined are the same as in the 1997 decision. The petitioning parties in both cases were nominally different, but in fact were both affiliates of the American Federation of Teachers (AFT), and are "substantially identical" parties. See *Senior Accountants Ass'n v City of Detroit,* 399 Mich 449, 458, n 3 (1976). However, we agree that it is normally inappropriate to apply the doctrine of res judicata to a representation proceeding such as this case, barring a showing that the identical factual and legal determination is being relitigated in the subsequent proceeding.

Representation proceedings are nonadversary, information gathering procedures, as distinguished from contested, adjudicatory unfair labor practice cases conducted under Chapter 4 of the Administrative Procedures Act, MCL 24.275, MSA 3.560(175). See *Lake County and Sheriff,* 1999 MERC Lab Op 107, 112. As noted in the Supreme Court's decision in *Senior Accountants, supra*, preclusion doctrines such as res judicata and collateral estoppel apply to administrative decisions which are adjudicatory in nature. These doctrines are not designed to apply to bargaining unit determinations that rely on the specific facts presented at a particular time, and on the statute and policies applied by the particular administrative agency. Bargaining units tend to change and evolve over time as the employer's work complement and operations change. In addition, our 1997 determination involving the lecturers involved a stipulated issue that is not the same as the issue being decided in this case. 1997 MERC Lab Op at 316.

The two Commission cases relied upon by the University, *Michigan State Univ,* 1977 MERC Lab Op 382, 385-389, and 1976 MERC Lab Op 566, 568-569, were unfair labor practice decisions wherein the charging parties were attempting to relitigate and overturn a prior unit finding in *Mich State Univ (Public Safety Dep't),* 1974 MERC Lab Op 722, *aff'd* 61 Mich App 542 (1975). These decisions are not applicable in a situation such as this where we must rule in a representation case on an eligibility formula for the determination of a residual bargaining unit different from that decided in our previous rulings. Therefore, we conclude that our prior representation case rulings regarding the Employer's lecturers are not res judicata and do not preclude the ordering of an election herein.

Bargaining Unit and Election Order:

Based upon the above, we conclude that a question of representation exists herein under Section 12 of PERA, and that the following employees constitute a residual instructional unit appropriate for the purposes of collective bargaining under Section 13 of PERA:

> All lecturers employed by Eastern Michigan University who have received full-time or 100% appointments, excluding supervisors and all other employees.

Eligible to vote in the election will be those lecturers who received full-time or 100% appointments beginning with the Winter 1998 semester, which was the semester closest to the date of the filing of this petition, following the usual policy of the Commission for determining eligibility to vote, or lecturers receiving such appointments in the subsequent Fall 1998, Winter 1999, or Fall 1999 semesters. With this modification in our usual direction of election, which is attached hereto, the aforesaid employees will vote whether or not they wish to be represented for purposes of collective

bargaining by Eastern Michigan Lecturers Organizing Congress, American Federation of Teachers (AFT).[2]

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated: _____

[2] Commissioner Swift did not participate in this decision.