

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer,

Case No. UC07 H-022

-and-

LECTURERS' EMPLOYEE ORGANIZATION, AFT MICHIGAN,
Labor Organization-Petitioner.

APPEARANCES:

David J. Masson, Esq., Assistant General Counsel, for the Employer

Mark H. Cousens, Esq., for Petitioner

**DECISION AND ORDER
ON PETITION FOR UNIT CLARIFICATION**

Pursuant to Section 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, this case was heard at Detroit, Michigan on February 5, 2008, by Julia C. Stern, Administrative Law Judge for the State Office of Administrative Hearings and Rules, acting on behalf of the Michigan Employment Relations Commission. Based on the entire record, including post-hearing briefs filed on March 24, 2008, the Commission finds as follows:

The Petition and Positions of the Parties:

Petitioner Lecturers' Employee Organization, AFT Michigan, represents a bargaining unit of non-tenure track instructors employed by the University of Michigan. It filed this petition on September 11, 2007, after the Employer removed an instructor, Aric Knuth, from Petitioner's bargaining unit on the grounds that he supervises bargaining unit employees as the interim director of the New England Literature Program (NELP).

The NELP is an intensive literature and creative writing seminar for undergraduates conducted each year at a camp in rural Maine during the Employer's spring half semester. The parties agree that the NELP director is a supervisor, as we have defined that term, of the

bargaining unit instructors hired to work in the NELP. During the ten and one-half months per year that the NELP is not in session, the NELP director works part time performing the tasks necessary to ensure that the next NELP runs smoothly, including selecting instructors and working with them to choose students and establish the curriculum. The NELP director is also an instructor in the English department during the fall and winter semesters.

Petitioner argues that Knuth is a dual-function employee who should be included in the bargaining unit except during the half semester when the NELP is conducted. According to Petitioner, Knuth's position as a NELP director is clearly demarcated and unrelated to his primary job as an instructor. It also asserts that the NELP director's sporadic and insignificant exercise of supervisory authority during the semesters when the NELP is not in session does not justify his exclusion from the unit for these periods.

The Employer disagrees with Petitioner's characterization of Knuth as a dual-function employee. It contends that the NELP director is not a separate position but a set of job duties, including supervisory responsibilities, assigned to a position that also teaches. It also contends that Knuth is not merely a seasonal supervisor because he exercises his supervisory authority throughout the year. The Employer asserts that including Knuth in the unit for any part of his employment would impair his ability to make the hiring, discipline and evaluation decisions necessary to his role as the supervisor of the NELP staff.

Findings of Fact:

Non-tenure track instructors with permanent positions within Petitioner's bargaining unit hold one of five job titles: lecturer I, lecturer II, lecturer III, lecturer IV or adjunct. Employees classified as lecturer I and lecturer II are instructors whose employment is limited to teaching assigned courses. These instructors are compensated on a per-course basis. Instructors classified as lecturer III and lecturer IV perform a range of instructional duties, including but not limited to teaching, and may also be assigned administrative and/or service duties. These instructors are compensated on a salary rate basis and have full year appointments. Adjuncts are employees of the Employer holding non-instructional positions who are appointed to teach on a temporary basis. In addition to these permanent employees, the unit includes intermittent lecturers hired to teach for only a single semester.

History of the NELP Directorship

The Employer has conducted the NELP each year since about 1972. About forty students and fourteen staff members, including the NELP director, live at the Maine camp for approximately forty-five days during the Employer's spring half-term. As discussed below, in the fall of each year the NELP director selects the instructors for the next NELP. Some of the NELP instructors have permanent positions as lecturers within the bargaining unit and others are hired as intermittent lecturers only for the NELP. The NELP is informal and collegial. In keeping with the spirit of the program, as many decisions as possible are made by consensus of the NELP staff. However, as the individual in charge of the NELP, the director has the authority to direct the work and effectively recommend discipline of all NELP

instructors. He also has the authority to take any action necessary to keep order and protect the welfare of students and staff members while the NELP is in session.

From 1993 until the summer of 2007, the position of NELP director was held by Jackie Livesay, a lecturer IV. During the fall and winter semesters, Livesay taught English classes and worked as a concentration advisor in addition to performing her NELP director duties. For these semesters, Livesay's appointment letters from the Employer indicated that it considered her position to be covered by Petitioner's contract. Each year, Livesay received a separate appointment letter covering her employment as a lecturer IV in the NELP program for the spring half semester. These letters stated that due to supervisory responsibilities, Livesay's assignment for that term was excluded from Petitioner's bargaining unit. As a lecturer IV, Livesay was paid a 12-month salary and had union dues deducted from her paycheck throughout the year. Each year, Petitioner rebated the portion of her dues attributable to the spring half-semester.

In the spring of 2007, the Employer posted an opening for a lecturer III position in the English department which included teaching upper level courses in writing, coordination of the department's upper level writing courses, undergraduate advising and, optionally, directing the NELP. The posting stated that if the NELP duties were included, the position would probably be exempt from Petitioner's bargaining unit.

At the end of June 2007, Aric Knuth, a lecturer II in the English department, agreed to serve as interim NELP director for the 2008 NELP. Knuth had taught at the NELP since 1998. On September 5, 2007, Knuth received an amended appointment letter stating that he was appointed as a lecturer II in the English department to teach classes in the fall and winter semesters for 2007-2008 academic year ending on May 31, 2008 and also appointed as interim director of the NELP for the period September 1, 2007 through August 31, 2008. For his NELP duties, Knuth was paid what is known as an administrative salary differential over a period of 12 months. The letter stated that because of the supervisory responsibilities associated with the interim director position, Knuth's lecturer appointment would be excluded from Petitioner's bargaining unit for the 2007-2008 academic year.

Duties and Authority of the NELP Director

Knuth's September 5, 2007 appointment letter contained the following summary of his supervisory responsibilities as interim NELP director:

Your duties as Interim Director will include authority to recruit, interview, extend offers to, and review the performance of, instructors for NELP (most of whom will be Lecturers.) You will also have authority to make course and class assignments for the instructors in NELP and make curriculum decisions for NELP. Your authority as Interim Director of NELP to perform these and other tasks associated with the position will be ongoing throughout your initial 12-month appointment (i.e., you may exercise this authority year-round).

Knuth was given a detailed list of the NELP director's tasks, broken down by month. Knuth and the English department administrator supervising the program, Jane Johnson, met and made some changes to this list, and some of the tasks were assigned to a department clerical employee. In addition to the duties described below, the NELP director and his clerical assistant are responsible for the logistics of the NELP. This includes, but is not limited to, making the reservations for the camp, arranging for side trips, hiring a kitchen manager, and purchasing books, food, and supplies.

In September, the NELP director meets with Johnson and the accountant for the English department to review the NELP budget. The NELP budget is determined by the program fee paid by the students, and the NELP director has no control over the amount of this fee. However, he can decide, within limits, how much money will be spent on various operational expenses, including food, travel, and fees paid to visiting writers and artists. In September, the NELP director also chooses the dates for the NELP and works on marketing efforts aimed at students, including updating brochures and the English department's NELP program website page.

The NELP director begins the process of selecting the thirteen or fourteen NELP instructors in September or October. He starts by contacting individuals who taught at previous NELPs. If the director was dissatisfied with an instructor's performance, he does not contact that instructor. In 2007, Knuth contacted former instructors at the end of September and asked them to commit to the program by October 15. About half of the positions were filled in this manner. The director also posts the NELP instructor position on the Employer's employment site and circulates a job description to all the bargaining unit lecturers in the English department. At the end of October, the NELP director reviews the applications and selects whom to interview for the open positions. He conducts the interviews, either in person or by telephone, chooses whom to hire, and sends informal offers by e-mail.

Although the NELP instructors are paid salaries consistent with Petitioner's contract, the English department has some discretion to determine individual pay levels. In November, the NELP director meets with Johnson and makes recommendations regarding salary. In 2007, all Knuth's recommendations were accepted by the department. The department then sends formal appointment letters to the instructors. Hiring is generally completed by the end of December.

Between October and January, the NELP director meets with English department faculty to get their input into the NELP curriculum. In the fall of 2007, Knuth had several meetings with the faculty and also met with the English department chair about ways to update the curriculum. During this period, the NELP director also recruits visiting writers and outside lecturers, e.g., experts on nature and/or environmental topics, to supplement the curriculum. In addition, he holds informational meetings for students and solicits student applications.

During the second week of January, all the NELP instructors who live in the Ann Arbor area participate in interviewing student applicants for the program. A week before the

interviews begin, the NELP director conducts a training session for instructors on how to conduct and organize the interviews. The NELP director sits in on some interviews conducted by instructors as well as interviewing students himself. After the interviews, the NELP director facilitates a meeting at which he and the instructors collaboratively decide who will be selected for the program.

In February, NELP holds a three-day weekend retreat for both local NELP instructors and those who live outside the area. Prior to the retreat, the NELP director updates the NELP staff manual, prepares an agenda for the weekend, and asks individual NELP instructors to facilitate specific sections of the agenda. At the retreat, NELP instructors get to know each other and are given their job descriptions, preliminary schedules for the NELP and other information about the program. The most important function of the retreat is the planning of the curriculum. At the retreat, the NELP director and instructors meet to plan weekly class schedules and themes for reading. They also form committees to plan specific events, classes, and reading assignments.

In January and February, the NELP director and one or two NELP instructors selected by him review student scholarship applications and make awards. Throughout February and March, the NELP director monitors the progress of the instructor committees and meets with instructors as necessary. In March, the NELP holds an orientation session for students, which includes hiking, a dinner, and a meeting. All the NELP instructors who live in the Ann Arbor area participate in the orientation. In April, the NELP director holds a final orientation meeting with students in Ann Arbor, reviews the work of the instructor committees, and plans the program for the week the instructors spend at the camp before the students arrive.

The NELP itself takes place between the end of April and the end of June. At the end of the six week program, student journals are distributed among the instructors to read and to prepare a letter to the student with comments and evaluations. The students also prepare evaluations of each individual staff member. In July and August, the NELP director reviews the students' program evaluations, including their evaluations of individual staff members. These evaluations are collated and each instructor receives copies of all of his or her evaluations. The NELP director also writes his own evaluation of each instructor.

As noted above, the NELP director has the authority to effectively recommend discipline of a NELP instructor for anything that occurs while that instructor is working for NELP, as well as to assign and direct the work of NELP instructors at any time of the year. The disciplinary procedure contained in Petitioner's contract includes a review committee consisting of individuals appointed by the Employer to review issues of misconduct or unsatisfactory performance. Although there was no testimony that any NELP instructor had ever been disciplined, the chairman of the Employer's English department testified that if disciplinary issues arose with respect to any intermittent lecturer working as a NELP instructor, the NELP director would serve on this committee. The NELP director is also responsible for responding at the first step to a grievance filed by a NELP instructor, although no one recalled any grievance being filed.

Discussion and Conclusions of Law:

Petitioner claims that Knuth's position is no different than that of his predecessor, Jackie Livesay, who as the NELP Director for 14 years was a member of the bargaining unit. Asserting that there is nothing to indicate any difference in the work performed by Knuth and that of Livesay, the Union argues that his position should similarly be in the bargaining unit.

Our analysis in this case, however, is not that simple. As we noted in *Riverview Cmty Sch*, 16 MPER 51, at 166-67 (2003):

We must determine whether a position is supervisory whenever that claim is made in a unit clarification proceeding, even if there is a bargaining history and no recent changes in the job duties of the position, because PERA prohibits supervisors from being included in the same bargaining unit with the employees they supervise. *City of Detroit (DPW)*, 1999 MERC Lab Op 283; and *City of Mt Pleasant (Public Safety Dep't)*, 1996 MERC Lab Op 425.

Thus, besides concluding whether Knuth is a dual-function employee as Petitioner asserts, we must determine whether by virtue of the work he performs as the NELP director and the supervisory duties associated with that position, he should be excluded from the bargaining unit.

A dual-function employee is an employee who performs more than one function for the same employer. In determining whether an individual is a dual-function employee, the National Labor Relations Board (NLRB) considers such factors as whether the employee is paid two different salaries or receives different benefits for his two positions, whether he has different terms and conditions of employment in his two jobs, whether he has different supervisors, and whether he keeps track of his time separately. See *Marine Petroleum Co*, 238 NLRB 931, 932 (1978); *Alpha Sch Bus Co*, 287 NLRB 698 (1987). The NLRB's test for determining whether a dual-function employee should be included in a unit is whether the employee performs unit work for sufficient periods of time to demonstrate that he has a substantial interest in the unit's wages, hours, and conditions of employment. *Berea Publishing Co*, 140 NLRB 516, 518-519 (1963); *Columbia Coll*, 346 NLRB No. 69 (2006).

There is no dispute that Knuth spends a substantial portion of his time performing the work of a bargaining unit instructor. The question here, however, is whether Knuth is a dual-function employee who holds two separate positions with the Employer or an individual holding a single position with duties that include both teaching and the administration of the NELP. As NELP director, Knuth is responsible for the curriculum in an English department program, and he meets with English department faculty to receive their input. Knuth is also responsible for selecting instructors who meet the department's instructional standards. Knuth is supervised, in all his duties, by administrators in the English department. We find that Knuth's work as an English instructor and his duties as NELP director are sufficiently related to be considered the duties of a single position. We note that as a lecturer II, Knuth could not be appointed to a year-round position with administrative duties, and so his 2007-

2008 appointment letter listed his interim appointment as NELP director and his lecturer appointment separately. However, as indicated by its job posting in the spring of 2007, the Employer's intent is to combine the primarily administrative responsibilities of the NELP directorship with teaching and advising duties in a single position receiving a yearly salary. We agree with the Employer that Knuth is not a dual-function employee. We find instead that he is an employee holding, on an interim basis, a position that combines teaching responsibilities with the administrative and supervisory duties of the NELP directorship.

Petitioner initially, although not in its brief, argued that Knuth should be considered to be a seasonal supervisor like the individual in *Schoolcraft Co Rd Comm*, 1966 MERC Lab Op 308. Drawing on an NLRB decision, *Great Western Sugar Co*, 137 NLRB 551 (1962), we held in that case that a year-round employee who supervised a brush-cutting crew in the summer was a seasonal supervisor who should be excluded from a nonsupervisory unit only during the summer months. Both *Schoolcraft* and *Great Western* involved employees who served in bargaining unit positions with no supervisory responsibilities at all for the majority of the year and whose seasonal supervisory and nonsupervisory roles were "sharply demarcated." *Great Western*, at 554-555. We agree with the Employer that since the supervisory duties of the NELP director are not in fact confined to a single season, these cases are not applicable here.

Petitioner also relies on a line of NLRB cases holding that the isolated and infrequent exercise of supervisory authority does not justify excluding an employee from the protections of the National Labor Relations Act. As Petitioner points out, when an employee spends the majority of his or her time performing bargaining unit work but also performs supervisory duties, the NLRB looks at whether the employee spends a "regular and substantial" portion of his or her work time performing supervisory functions. "Regular" means according to a pattern or schedule, as opposed to sporadic. See *Aladdin Hotel*, 270 NLRB 838, 840 (1984); *Gaines Electric Co*, 309 NLRB 1077, 1078 (1992); *Canonie Transp Co*, 289 NLRB 299 (1988). These cases, however, involve either employees assigned to substitute for a regular supervisor or employees given supervisory duties for very brief periods of time. Knuth is not a substitute supervisor. Moreover, although Knuth spends only a small percentage of his total work time outside of the spring term on supervisory duties, he has some supervisory responsibilities in nearly every month of the year and performs these duties on a regular schedule.

Finally, Petitioner argues that Knuth should not be excluded from the unit based on the supervisory duties he performs during the winter and fall terms because his supervisory authority extends only to persons in a discrete program – the NELP – which exists on its own and has no overlap with other bargaining unit work. However, some of the instructors Knuth supervises and evaluates have permanent positions in Petitioner's bargaining unit; others are intermittent instructors who conceivably might be hired into permanent positions in the future. Part of the reason for the prohibition against supervisors being placed in the same unit with nonsupervisory employees is the fear that fraternal feelings will impair a supervisor's ability to exercise his authority in his employer's best interests. *Police Officers Ass'n of Michigan v Fraternal Order of Police, Montcalm Co Lodge No 149*, 235 Mich App 580, 588, (1999). We

find that the position currently held by Aric Knuth supervises bargaining unit employees on a regular basis and should be excluded from Petitioner's unit because of these duties. Accordingly, we enter the following order.

ORDER

Based upon the above findings of fact and conclusions of law, the petition for unit clarification is hereby denied.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Dardarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____