STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) FLORIDA PUBLIC SERVICES UNION (FSPU), CHANGE TO WIN (CTW),

Case No. RC-2017-007

Petitioner,

v.

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES,

Respondent.

RESPONDENT'S EXCEPTIONS TO THE HEARING OFFICER'S FINDINGS OF FACT AND RECOMMENDED ORDER AND REQUEST FOR ORAL ARGUMENT

COMES NOW Respondent, University of South Florida Board of Trustees ("Respondent", or "USF"), pursuant to Rule 28-106.217(1), files these Exceptions to the Recommended Order issued by Lyyli Van Whittle, Hearing Officer for the Florida Public Employees Relations Commission ("PERC"), on October 13, 2017. Respondent further makes an official request for oral argument regarding issues raised herein. In support of these Exceptions, Respondent submits the following:

I. OVERVIEW OF THE CASE

On October 11, 2016, PERC issued its decision in *Service Employees International Union (SEIU), Florida Public Services Union (FPSU), Change to Win (CTW) v. Hillsborough Community College Board of Trustees*, 43 FPER ¶ 126, (2016), in which it found – for the first time – that a unit of adjunct employees at a state community college could constitute an appropriate bargaining unit under the law.

In the wake of that decision, on April 20, 2017, Service Employees International Union (SEIU), Florida Public Services Union (FPSU), Change to Win (CTW) ("Petitioner"), filed a petition seeking to represent certain adjunct instructors employed by Respondent. Specifically, Petitioner seeks to represent individuals employed as adjuncts at all three USF campuses on the date of the petition, while simultaneously seeking to exclude all of the adjuncts working at USF Health[1] at that time.[2]

In so doing, Petitioner attempted to seamlessly extend the *Hillsborough* ruling to apply to adjuncts working at a state university; however, under the specific facts of this case, as well as the distinct legal issues that are implicated by university governance, Respondent took the position that this effort is inappropriate as a matter of law. Respondent further proposes that this is a case of first impression, in which PERC must resolve the question of whether employees who – (a) have been designated, by Regulation, as "temporary;" (b) have been designated, by Regulation, as having no continued expectation of employment; and (c) are appointed to their positions for the specific purpose of filling unexpected "holes" in the teaching schedule – still

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[1] The collective "USF Health" includes the Morsani College of Medicine, the College of Nursing, the College of Public Health, the School of Physical Therapy, and the College of Pharmacy.

[2] The petition describes the proposed unit as follows:

Included: All part-time non-tenure track faculty (including Adjunct faculty, Adjuncts-Contingent, Adjunct, Adjunct Instructor, Skilled Craftsman, Into/Pathways, Instructor, Instructor I, Instructor II, and Hourly Employee) employed by the University of South Florida at its Tampa Campus (4202 Fowler Ave., Tampa, FL 33620), St. Petersburg Campus (107 7th Ave S, St. Petersburg, FL 33701) and Sarasota-Manatee Campus (8350 N Tamiami Trail, Sarasota, FL 34243), and teaching at least one college-credit bearing-course, including any employee who also works for the University in another capacity unless expressly excluded.

Excluded: All other faculty, including tenured and tenure-track faculty, full-time faculty, visiting or contract faculty, faculty who are currently part of an existing bargaining unit, all administrators (including academic advisors, deans, assistants to deans, provosts, directors, coordinators, and department chairs), student services advising generalists, athletic coaches, all faculty teaching at the College of Medicine, School of Nursing, School of Health Policy and Management, School of Public Health Practice, School of Epidemiology Biostatistics, School of Environmental and Occupational Health, Morsani College of Medicine, College of Public Health, School of Physical Therapy, School of Biomedical Sciences, and College of Pharmacy, all other employees who are not compensated additionally for teaching, managers, confidential employees, and supervisors.

have the requisite continued expectation of employment necessary to bargain collectively under Florida law. Moreover, PERC must also determine whether these adjuncts share a community of interest, despite the fact that all available evidence points to the vast differences in the terms and conditions of their employment. Considering the record facts, Respondent takes the position that this case does not present the appropriate vehicle for changing the law; that a unit could not be appropriate here; and that accordingly, the Petition should be dismissed.

A telephone hearing on bargaining unit appropriateness was held on June 13, 2017, before Hearing Officer Van Whittle. At this hearing, and in its Proposed Findings of Fact and Recommended Order, Respondent articulated multiple reasons why the unit sought by Petitioner was inappropriate, and questioned the legal propriety of organizing temporary employees in Florida. Beyond these Constitutional arguments, Respondent also noted the absence of any community of interest among adjuncts at USF; their lack of any expectation of continued employment; and – on a practical level – the impossibility of reconciling the real-world realities of adjunct appointment with a one-size-fits-all collective bargaining agreement.

On October 13, 2017, Hearing Officer Van Whittle issued her Recommended Order. The results-oriented Order ignores or misstates undisputed facts; contains findings of fact that are unsupported by any competent substantial evidence in the record; lacks meaningful analysis of the law on material issues; and categorically dismisses each of Respondent's concerns with little or no explanation. As such, Respondent files these Exceptions, and submits that the Recommended Order is erroneous as a matter of law, and urges PERC to undertake a full review of the law and the facts of this case.

II. RESPONDENT'S EXCEPTIONS TO THE HEARING OFFICER'S ERRONEOUS FINDINGS OF FACT

In issuing findings of fact, a Hearing Officer is bound by the requirements of § 120.57(j), Fla. Stat. (2017), which provides that such findings "shall be based upon a preponderance of the evidence," and "shall be based exclusively on the evidence of record and on matters officially recognized." While these findings are afforded significant deference by reviewing authorities, this deference is not absolute – an agency may modify a hearing officer's findings of fact if it "first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57, Fla. Stat. (2017).

As the courts have explicitly recognized, evidence is only competent if it is "substantial in light of the record as a whole." *Miller v. State, Div. of Ret.,* 796 So. 2d 644, 646 (Fla. 1st DCA 2001)(quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951), for the proposition that "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight"). And, certainly, "[t]he protections embodied in the administrative law system are thwarted when [...] an agency abandons its jurisdictional responsibilities with findings based upon insufficient facts and unexplained legal conclusions." *Alachua Cty. v. Florida Dep't of Highway Safety & Motor Vehicles*, 417 So. 2d 1073, 1074 (Fla. 1st DCA 1982). Accordingly, it is important that an examiner's findings are scrutinized, and not simply rubber-stamped, by a reviewing agency.

Bearing this precedent in mind, Respondent submits that the following findings were not based upon competent substantial evidence, and accordingly, should not be upheld by PERC:

Exception No. 1

The Hearing Officer improperly found that adjuncts' terms of employment, including benefits, are administered uniformly across the campuses and colleges. HORO[3] 5, ¶ 8.[4]

Discussion of Exception 1: While the Hearing Officer remained somewhat vague as to precisely which "terms" of employment are consistent across the campuses, the substantial evidence presented at the hearing established that, with the exception of their temporary employment status, there are no common "terms" of employment shared by all USF adjuncts. Moreover, while the Hearing Officer points specifically to benefits as a common denominator, this can hardly be seen as compelling evidence of similarity, given that benefits are not available for temporary employees. Contrary to her phrasing, no benefits are "administered uniformly," because no benefits are administered at all.

Meanwhile, beyond discussing benefits (or the lack thereof), the Hearing Officer avoided making specific factual findings regarding any other "terms." This is likely because, in addition to the significant disparities in wages, qualifications, and supervision (all discussed below), the record reflects that even the simplest terms of adjunct employment are not universal, and the adjunct's work experience varies widely across departments, colleges, and campuses. With respect to actual job duties, Jarad Fennell – an adjunct in the English Department – testified that

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[3] References to the Hearing Officer's Recommended Order are designated as "HORO [page], ¶ [paragraph, where applicable]." Respondent's Exhibits will be designated as "R. [exhibit number]:[page number]." Petitioner's exhibits will be designated as "P. [exhibit number]:[page number]." References to the Transcript will be designated as "Tr. [page: line]."

[4] This finding is referenced repeatedly in the HORO, with various additions or modifications. In discussing community of interest, the Hearing Officer states that "the adjuncts' terms of employment, including benefits, *are determined* and administered uniformly by the Board." HORO, 15 (emphasis added). As discussed throughout this document, there is no evidence that Respondent "determines" any benefits, and instead, terms of employment are determined by individual departments. Similarly, the Hearing Officer later concludes that "the adjuncts perform the same type of duties across the various colleges of USF." HORO 16. Elsewhere, she states that "adjuncts share in the manner in which their wages and other terms of employment are determined[;]" that "the Board has generally set forth a common structure of supervision, evaluations, wage structure, and hourly structure for adjuncts[;]" that adjuncts "share in the method by which jobs and salary classifications are determined[;]" and that adjuncts "perform similar duties to each other." HORO 17; 24. No evidence has been presented to support these conclusory statements, and each of these incorrect assertions are encompassed in this Exception.

he teaches three classes per week; that he does "a little bit" of prep the night before the classes; that he performs "grading[,] which is sometimes detailed[;]" and that he corresponds with students over email and in person. Tr. 27:15-22. By contrast, Tara Blackwell, an adjunct in the Department of Cell Biology, Microbiology, and Molecular Biology, testified that she has not taught a class in a physical classroom since the Spring of 2015; instead, she teaches online courses, so her job duties include preparing PowerPoint slides and filming the video lectures that accompany them, as well as writing online quizzes and activities. Tr. 45:1; 42:24-25; 43:1-5. Adjunct Rebecca Skelton, who teaches in the College of Arts and Sciences, testified that when it comes to her job duties, "each class is different" – for her drawing classes, for example, her preparation includes hiring a live model. Tr. 127:6; 12-13. In terms of time spent working on their assigned courses, Fennell estimated that for a course he was comfortable teaching, he works 20 to 25 hours per week, but a new course with a major assignment could take 40 or 45 hours per week. Tr. 31:21-25. Blackwell estimated that she spends 25 hours per week on an established class, and 50 for developing a new class. Tr. 47:5-8. Like Fennell, adjunct Mark Castricone testified that the amount of work he put into a course depends on what he is teaching, and his familiarity with the material; however, he estimated overall that he only works about ten hours per course per week. Tr. 109; 111:22. Skelton also estimated spending a total of about ten hours per week on a class; however, her estimation included six hours of class time and four hours of preparation and grading time. Tr. 129:13-16. As for office hours, Fennell stated that he spends an hour or so in the office, twice per week. Tr. 29:24-25. Blackwell testified that because her classes are online, she only has one office hour per week, and most communication is by email. Tr. 46:15-18. Skelton explained that she does not keep established office hours, and that the time she spends setting up the room and taking it down after the class count as her office hours. Tr. 128:10; 7-8.

With respect to time spent grading assignments, experiences were similarly inconsistent. Because Fennell is required to provide feedback to students in his writing program, he testified that grading "takes a long time[,]" up to 12-15 hours per week for a major project, Tr. 28:18; 29:10. Skelton, who described her grading process as primarily consisting of reviewing student portfolios, sketchbooks and other artwork, estimated spending about four hours per week in both preparations and grading. Tr. 129:13-16. For her part, Blackwell testified that she did not grade her class assignments at all – instead, tests she developed were multiple choice, and the answer sheets were processed by work study students; meanwhile, the written assignments were graded by the teaching assistants. Tr. 45:21-25; 46:1. And, of course, these differences do not include the fact that adjuncts work on different campuses, earn different compensation, and have no interchange.

Given the significant differences in the terms of employment – as described by Petitioner's own witnesses – it is thus unsurprising that the Hearing Officer provided only this summary finding that the "terms" were consistent. However, this conclusion is improper, and there is no competent or substantial evidence to support her finding; accordingly, this finding of fact should not be adopted by PERC.

Exception No. 2

The Hearing Officer improperly found that adjuncts are paid wages according to a "uniform pay structure that bases an adjunct's salary on the hours of courses that the adjunct will be teaching and determining the percentage of full-time equivalent (FTE)." HORO 5, ¶ 9.[5]

[5] Again, in relying on this finding in her analysis, the Hearing Officer added to the initial determination; in this instance, she stated that the offer letter "informs adjuncts of the uniform pay structure, providing that adjuncts are paid a salary that uses the hours of courses that the adjunct will be teaching and determining the percentage of FTE[.]" HORO 15. In the following paragraph, she states that adjuncts are "paid based on a set salary structure that is system wide[,]" although she concedes that the actual rates are determined individually. HORO 15. This Exception encompasses all of these erroneous statements relating to the fictitious "salary structure."

Discussion of Exception 2: While adjunct pay can be described in terms of hours taught or FTE percentage, these are not the bases of determining adjunct pay, and this does not render the pay structure to be "uniform." To the contrary, the undisputed evidence presented at the hearing – much of which the Hearing Officer acknowledged – established that there is no uniformity to wages. That an adjunct's compensation can be expressed in terms of its value relative to full-time faculty compensation is irrelevant; anyone's wages could be so expressed, and that figure has no more probative value than the fact that all adjuncts are paid in American currency. Ultimately, what matters is the amount of compensation and the manner in which it is determined, and it is undisputed that no "uniformity" exists.

In truth, the record evidence demonstrates a distinct variance in adjunct compensation. These differences were explained at the hearing by Dr. Dwayne Smith, Senior Vice Provost and Dean of Office of Graduate Studies, who testified that the individual colleges of Respondent are responsible for developing their own budgets, each college has its own method for distributing funds to different departments, and each department determines how much an adjunct will be paid. Tr. 174:21; 175:1-3; 175:7-9. Dr. Kofi Glover, Vice Provost for Human Resources, substantiated this testimony, explaining that adjunct pay rates are determined by individual department chairs; therefore, adjunct pay varies across the colleges of Respondent. He also explicitly denied that there is a university-wide formula for determining pay rates. Tr. 167:2-3; 168:2-4; 169:2-5. This testimony was undisputed, and there was no other contrary evidence on the record that would suggest that Dr. Glover was incorrect. Moreover, his testimony is further bolstered by a chart prepared by Respondent, which was included in its Recommended Order, and is reproduced on the following page.

College/Department	Campus	Salary	Course Hours	FTE	Exhibit No.
Department of World Languages	Tampa	$2,600	4	0.24	R.18:39
Department of World Languages	Tampa	$2,650	4	0.24	R.39
College of Arts and Sciences	St. Petersburg	$2,750	3	0.18	P.2
College of Arts and Sciences	St. Petersburg	$2,750	3	0.18	R.25
Department of Mathematics and Statistics	Tampa	$2,800	4	0.24	R. 18:1
School of Public Affairs	Tampa	$3,000	3	0.18	R.18:28
Department of World Languages	Tampa	$3,000	4	0.24	R.18:41
Department of World Languages	Tampa	$3,000	4	0.24	R.40
College of Education	Tampa	$3,000	3	0.25	R.55:1
Department of Mathematics and Statistics	Tampa	$3,200	3	0.24	R.18:1
Zimmerman School of Advertising and Mass Communications	Tampa	$3,500	3	0.18	R.18:23
Department of Sociology	Tampa	$3,500	3	0.18	R.18:33
Department of Communication	Tampa	$3,500	3	0.18	R.18:47
College of Education	Tampa	$3,500	3	0.375	R.55:3
Department of Anthropology	Tampa	$4,000	3	0.18	R.18:21
Department of Philosophy	Tampa	$4,000	3	0.18	R.18:50
School of Accountancy	Tampa	$4,000	3	0.25	R.47
College of Education	Tampa	$4,000	3	0.18	R.55:5
Department of School of Information	Tampa	$4,500	3	0.18	R.18:25
Department of Mathematics and Statistics	Tampa	$5,000	3	0.18	R.18:5
Department of Physics	Tampa	$5,000	2	0.12	R.18:7
Department of Integrative Biology	Tampa	$5,000	3	0.18	R.18:16
Accounting Department	Tampa	$5,000	3	0.25	R.48
College of Arts and Sciences	St. Petersburg	$6,000	6	0.36	P.3
School of Geosciences	Tampa	$6,000	3	0.18	R.18:19
Department of History	Tampa	$6,000	6	0.36	R.18:43
Department of Economics	Tampa	$6,600	6	0.36	R.18:37
Department of Cell Biology, Microbiology & Molecular Biology	Tampa	$8,000	6	0.36	R.18:10
Department of Cell Biology, Microbiology & Molecular Biology	Tampa	$8,000	4	0.24	R.18:12
Department of Economics	Tampa	$8,000	6	0.36	R.18:35
Department of Religious Studies	Tampa	$9,000	9	0.54	R.18:52
Department of Chemistry	Tampa	$10,000	4	0.24	R.18:14
Department of Sociology	Tampa	$12,000	9	0.54	R.18:31
Department of English	Tampa	$12,000	12	0.72	R.18:45

In this chart, which summarizes exhibits presented by both Petitioner and Respondent, pay ranges are demonstrably widespread, with adjuncts earning anywhere from $2,750 to $6,000 for a three-hour class. Even more adverse to the Hearing Officer's finding is the fact that in one example a .24 FTE for a 4 hour course translated into a salary of $2,600; while in another, a .24 FTE for a 4 hour course translated into a salary of $10,000.

This is not "uniformity;" rather, this is evidence that the Hearing Officer's finding of fact is directly contradicted by the record evidence, and that there is no controlling adjunct system of compensation. Accordingly, this finding should not be adopted by PERC.

Exception No. 3:

The Hearing Officer incorrectly found that adjuncts "will" be contacted months in advance of a position being open. HORO 7, ¶ 15.

Discussion of Exception 3: While it is true that adjuncts may be contacted months in advance about upcoming appointments, it is also true that they may be contacted mid-semester, or immediately before a semester begins, based on the fluctuating needs of USF.[6] Petitioner's witnesses described the various ways they were offered appointments. Adjunct Fennell testified that the manner in which his schedule and classes were offered and arranged "varied from semester to semester[;]" however, he indicated that he was usually contacted with an offer "shortly before the semester starts." Tr. 24:5; 34:10; 34:21. Adjunct Blackwell testified that she usually learns what she will be teaching "a semester or two in advance." Tr. 50:3-4. Adjuncts also testified as to the last-minute nature of some appointments; for example, Blackwell explained that she had once been given an appointment mid-way through the semester when another adjunct quit. Tr. 44:14-16. Accordingly, the Hearing Officer's conclusory finding is unsupported by the evidence, and should not be adopted by PERC.

Exception No. 4

The Hearing Officer incorrectly found that if an adjunct is unable to teach a class, the adjunct may "request to contact another adjunct to teach the class on that day." HORO 7, ¶ 18.

Discussion of Exception 4: In this instance, not only is there no evidence in the record that would support this finding, to the contrary, every adjunct who was asked questions about this practice testified that they did not rely on other adjuncts to cover classes for them. When asked if he had ever covered for another adjunct who had to miss class, Fennell testified that he had not, and indicated that he had not heard of that practice occurring at USF. When the same

[6] Notably, later in the HORO, the Hearing Officer qualified her earlier finding, noting that "generally," the adjuncts are contacted during the previous semester about teaching the following semester. HORO 10, ¶ 28.

question was presented to adjunct Skelton, she testified that she had no knowledge of adjuncts covering for each other at USF, although she explained that it was "pretty common" at other schools. Tr. 37:2-3; 132:14-16. Indeed, with respect to interaction, the adjuncts could not always identify other adjuncts working in their own departments. While adjunct Mark Castricone stated that he was familiar with the adjuncts in the Honors College, he testified that he did not know how many adjuncts he taught with in the Philosophy Department because it was "hard to determine" which instructors were adjuncts. Tr. 115:1-4; 114:21-23.

Again, the Hearing Officer eventually backed away from this conclusory finding, later stating that adjuncts could "seek permission to have another adjunct to teach the class on that day[,]" and later noting that the adjuncts "can substitute for each other, assuming the individual adjunct is qualified to teach in that area." HORO, 16; 17-18 (of course, that would be "assuming" a lot). Still, these "clarifications" raise even more questions – from whom would the adjuncts seek permission? A supervisor? Other adjuncts? With no evidence of this occurring at USF (or even being a possibility known to adjuncts, according to their own hearing testimony), there is simply nothing in the record to support these findings, and accordingly, they should not be adopted by PERC.

Exception No. 5

The Hearing Officer incorrectly found that "adjuncts have a regular pattern of continuing employment in past academic years." HORO 9, ¶ 27.

Discussion of Exception 5: This conclusory statement is too vague and unqualified to have any effect. The Hearing Officer is evidently basing this finding on the selective testimony of a few adjuncts presented by Petitioner; however, this selective sample cannot establish a "regular

pattern of continuing employment" for all adjuncts at USF.[7] Moreover, this finding ignores the evidence that appointments depend on a wide variety of factors, many of which are unpredictable; thus, the credible and substantial evidence does not support this determination.

Exception No. 6

The Hearing Officer incorrectly found that it was "common" for adjuncts to work "for years and years." HORO 9, ¶ 25.

Discussion of Exception 6: Again, the Hearing Officer has extrapolated the experience of a few onto all USF adjuncts by determining that they commonly work for "years and years." While the Petitioner's witnesses may have been fortunate enough to have been appointed for multiple semesters, even they admitted that this was not always the case, and that the availability of appointments was dependent on other circumstances.

Exception No. 7

The Hearing Officer improperly found that "adjuncts have developed a reasonable expectation that the Board will continue to employ them in the future." HORO 10, ¶ 29.

Discussion of Exception 7: As an initial point, the Hearing Officer's finding here is more properly considered as a legal conclusion rather than a factual finding, and thus, is a question for PERC (and one that is discussed in more detail in sections to follow). As the courts have recognized, in some instances hearing officers "may make legal conclusions that are 'disguised' as factual findings. These are more policy determinations than findings of fact." *City of Umatilla v. PERC,* 422 So. 2d 905, 907–08 (Fla. 1St DCA 1982). When this occurs, agencies may rely on

[7] Relatedly, Respondent Excepts to the Hearing Officer's subsequent finding of law that "the Union presented significant evidence that the Board developed a system in which it could retain adjuncts who demonstrated a prior proficiency in teaching its students and called those adjuncts back year after year." HORO 24. While individual colleges may utilize their own adjunct pools, there is no evidence in the record of Respondent developing pools in general or a USF-wide system for hiring adjuncts. Additionally, the Hearing Officer's recognition that only a subset of adjuncts might be called back year after year—*i.e.*, those who have demonstrated prior proficiency in teaching at USF—belies any finding that all adjuncts have a reasonable expectation of continued employment in the future.

the guidance provided by the First District Court of Appeal in *McDonald v. Dept. of Banking & Finance*, 346 So.2d 569 (Fla. 1st DCA 1977), which explained as follows:

> In determining whether substantial evidence supports the agency's substituted findings of fact, a reviewing court will naturally accord greater probative force to the hearing officer's contrary findings when the question is simply the weight or credibility of testimony by witnesses, or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight.
>
> At the other end of the scale, where the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings.
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> *McDonald*, 346 So.2d at 579.

In the present case, the finding in question does not rely on determinations of credibility or the weighing of evidence; instead, this finding is clearly no more than the Hearing Officer's "disguised" conclusion of law, so framed to comport with the relevant legal standard. Thus, PERC may afford this finding less weight, and draw its own conclusions based on the entirety of the record, the legal analysis, and its own unique knowledge of the policies involved.

Nevertheless, even if this were a proper finding of fact, it would still not find support in the record. Contrary to the Hearing Officer's statement, in addressing their expectations of adjunct employment, the witnesses were unequivocal in their awareness of their temporary status. They acknowledged that, by the explicit terms of their appointment, their jobs will necessarily end, and they may not be appointed again. While Dr. Uday Murtha noted that, in some instances, "adjuncts that don't do all that well and don't get rehired[,]" in many cases, the need for an adjunct is simply eliminated by lowered enrollment or the securing of full-time faculty – circumstances beyond the control of the adjunct or Respondent. Tr. 92:19-21. Nor is

this merely a speculative possibility – adjunct Castricone explained that in the Philosophy Department, he will ask if they have any work for him, but they "may or may not" have positions available; he further noted that, "as time has gone on, [he has received appointments] less and less because they just don't have as much for [him] as they used to." Tr. 107:10; 106:21-23. Castricone also testified that even in the Honors College, where there are usually available adjunct positions during Fall semester, they rarely have any openings in the Spring. Tr. 107:1-6. Fennell testified that the manner in which his schedule and classes were offered and arranged "varied from semester to semester[,]" and indicated that it was his goal to obtain "permanent employment[;]" while Skelton testified that she expected to be offered more positions at USF, she acknowledged that she held the expectation "theoretically[.]" Tr. 34:10; 38:21; 131:2. As for Blackwell, she testified that her classes are offered online, so scheduling irregularities were less of a concern; however, she explained that her appointments still depended on "student demand and class availability[.]"Tr. 49:22-24; 51:2. In summing up the situation, Blackwell succinctly acknowledged that, even though she has been hired before, "there's never any guarantee[.]" *Id.*

The testimony of the adjuncts themselves contradicts the Hearing Officer's conclusory finding that they enjoy a "reasonable expectation" of continued employment. Indeed, they may hope for continued employment, but they clearly know better than to expect it. They understand the variations in course demand, the opening and closing of gaps in the schedule, and the other unpredictable and unquantifiable factors that must be taken into account in securing an appointment. For this reason, the Hearing Officer's finding is unsupported, and like the others, should not be adopted by PERC.

III. RESPONDENT'S EXCEPTIONS TO THE HEARING OFFICER'S ERRONEOUS CONCLUSIONS OF LAW

When considering the legal determinations of a hearing officer, a reviewing agency is "free to disagree with hearing officer's recommended conclusions of law and [is] authorized to apply its own understanding and interpretation of law when entering its final order." *University Community Hosp. v. Department of Health and Rehabilitative Services*, 610 So.2d 1342 (Fla. 1st DCA 1992). In this instance, where the Hearing Officer gave only cursory attention to Respondent's arguments (when she mentioned them at all), and failed to engage in any meaningful analysis of the law, it is incumbent upon PERC to engage in its own review.

As is well established, in determining whether a bargaining unit is appropriate, PERC will consider the factors set forth in §447.307, Fla. Stat. (2017), as follows:

> (4) In defining a proposed bargaining unit, the commission shall take into consideration:
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> (a) The principles of efficient administration of government.
> (b) The number of employee organizations with which the employer might have to negotiate.
> (c) The compatibility of the unit with the joint responsibilities of the public employer and public employees to represent the public.
> (d) The power of the officials of government at the level of the unit to agree, or make effective recommendations to another administrative authority or to a legislative body, with respect to matters of employment upon which the employee desires to negotiate.
> (e) The organizational structure of the public employer.
> (f) Community of interest among the employees to be included in the unit, considering:
>
> 1. The manner in which wages and other terms of employment are determined.
> 2. The method by which jobs and salary classifications are determined.
> 3. The interdependence of jobs and interchange of employees.
> 4. The desires of the employees.
> 5. The history of employee relations within the organization of the public employer concerning organization and negotiation and the interest of the employees and the employer in the continuation of a traditional, workable, and accepted negotiation relationship.

(g) The statutory authority of the public employer to administer a classification and pay plan.
(h) Such other factors and policies as the commission may deem appropriate.

Additionally, pursuant to Fla. Admin. Code Rule 60CC-1.002, *Additional Unit Appropriateness Factors,* PERC may also consider the following factors when defining an appropriate bargaining unit:

(1) The fragmentation of bargaining units;
(2) The possible conflict of interest between employees in the proposed unit; and
(3) The reasonable expectancy of continued employment of employees in the proposed unit.

Applying the record facts to this framework, Respondent takes exception to the following legal conclusions of the Hearing Officer as being erroneous as a matter of law:

Exception No. 8

The Hearing Officer erroneously concluded that there was no merit to Respondent's argument that Board of Trustees Regulation 10.204(3) establishes that temporary employees have no right or expectation to continued employment. HORO 12.

Exception No. 9

The Hearing Officer erroneously determined that Respondent lacked the authority to pass a regulation that would negate collective bargaining rights. HORO 12.

Discussion of Exceptions Nos. 8 and 9:

As set forth in its Recommended Order, Respondent submits that the temporary employees at USF do not have a continued expectation of employment as a matter of law, and consequently, are not eligible for unionization. To this end, the Florida State University System is an entity created by the Florida Constitution, and which is comprised of all public universities in the state. While the overall statewide system is governed by a Board of Governors, the

Constitution provides that each public university system within the state shall be administered by its own Board of Trustees. Fla. Const., Art. IX, § 7(b).

In furtherance of this mandate, the Florida Board of Governors promulgated Regulation 1.001 (University Board of Trustees Powers and Duties), in which it legislatively delegated its Constitutional grant of authority to the various Boards of Trustees. This delegation includes control over employment, and in addition to establishing each Board as the "sole public employer" for university employees, the Boards were also specifically instructed to create systems to govern all aspects of the employment relationship:

> Each board of trustees shall provide for the establishment of the personnel program for all the employees of the university, including the president, which may include but is not limited to: compensation and other conditions of employment, recruitment and selection, nonreappointment, standards for performance and conduct, evaluation, benefits and hours of work, leave policies, recognition and awards, inventions and works, travel, learning opportunities, exchange programs, academic freedom and responsibility, promotion, assignment, demotion, transfer, tenure, and permanent status, ethical obligations and conflicts of interest, restrictive covenants, disciplinary actions, complaints, appeals and grievance procedures, and separation and termination from employment. To the extent allowed by law, university employees shall continue to be able to participate in state group insurance programs and the state retirement systems.

FL. BOG Regulation 1.001(5)(a).

Regulation 1.001 applies to all university systems in the state; however, USF BOT-07-001, approved by the Board of Governors, sets forth requirements specific to Respondent. R.5.

USF still "operates within the USF Board of Trustees governance structure[,]" and each institution and department must comply with the USF BOT Regulations. R.5:3,6; *see also*, R.6, R.7, R.8, R.9 (organizational charts describing USF governance).[8] This includes compliance

[8] Additionally, each institution, as well as Respondent, is required to comply with the policies and procedures of the Florida Board of Governors, the State University System (SUS), and with state and federal statutes and regulations. R.5:5.

with the regulations the Board of Trustees has promulgated with respect to employment – and, specific to this case, to those relating to the employment of adjuncts.

Without exception, Respondent's adjuncts are always appointed for a defined term of one semester, and are always designated as "temporary employees" subject to Chapter 10, Part II of the Board's Regulations (Administrative, Staff, and Temporary Personnel Matters). According to BOT Regulation USF 10.200(6)(d), this means their employment is "at-will;" more specifically, by the terms of BOT Regulation USF 10.204(3), it means that they "do not have or earn permanent status or tenure[,] and have no right or expectation to continued employment."

As temporary employees with specified appointment dates, adjuncts are not entitled to notice of non-appointment at the end of their terms. BOT Regulation USF 10.210(2)(a).[9] They are also not required to receive formal evaluations. BOT Regulation USF 10.207(3).[10]

Respondent's Division of Human Resources (DHR), which is responsible for enacting policies that support BOT Regulations, adopts the USF BOT's language when classifying and discussing adjuncts. Thus, according to the DHR's Appointment Modifiers and Descriptions of Faculty, an "adjunct" is defined as:

> A temporary appointment extended to persons of satisfactory professional qualifications who perform temporary teaching, research, or extension functions in connection with established programs. Such persons are appointed for one academic term at a time and possess no continuing contractual relationship with the university. Time spent in this appointment cannot be counted toward tenure or permanent status.
>
> R.10:2.[11]

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[9] Compare, USF 10.110(a) (requiring such notification for non-tenured faculty).

[10] Compare, USF 10.108 (requiring faculty evaluations on a regular basis, and giving faculty the right to respond to evaluations).

The BOT's Regulatory language is also quoted by the DHR in its USF "Temporary (Formerly OPS) Employment Guidelines," which provide that a "temporary appointment is on a short-term basis and carries with it no commitment for continuing employment (it is considered "at will" employment)." R.15:1.[12]

The BOT Regulation requirements are reflected in the DHR's sample "offer letter," some variation of which is sent to all adjuncts prior to their appointments. These letters track the provisions of BOT Regulation USF 10.203 precisely, noting that adjuncts are entitled to be paid for USF holidays, and that they are eligible to participate in TERP (the state Temporary Employee Retirement Program). P.2. These letters also emphasize the temporary characterization of the employment – the word "temporary" appears multiple times, and the starting and ending date of the adjunct's appointment are explicitly stated. P.2.

Although Respondent set forth this interpretation of Board authority in its post hearing documents, the Hearing Officer considered none of these facts. Instead, she bluntly announced that all analyses "must begin" with Article I, Section 6 of the Florida Constitution, which gives public employees the right to bargain collectively; however, she apparently ended with that Section as well, because she offered no further insight into the State Constitution, and did not even make a token attempt to reconcile the potentially competing grants of Constitutional rights.

Indeed, the Hearing Officer sidestepped any real exploration of this issue. After acknowledging that a prohibition on collective bargaining may be justified by a "compelling

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[11] The DHR also publishes an explanation of "Temporary Job Codes and Descriptions," which specifies that Temporary Job Code 9004, for a Salaried Instructor, is "Used for Faculty Adjunct Appointments." R.11:1.

[12] This document also describes some of the differences between temporary and permanent appointments – given that a temporary appointment is, by its terms, "short term," applicants can be considered without undertaking full searches, and can be recommended by "word of mouth[.]" R.15:1. Similarly, because certain temporary employees may not have previous work experience, personal references can be substituted for employment verification, and the requirements for reference verification are relaxed. R.15:1; *see also, for example*, R.39:5-6 (obtaining alternative qualification for adjunct).

state interest," citing *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030, 1033 (Fla. 1999), she then abandoned the analysis, arguing that because in the *Chiles* case, the legislature could not establish a compelling interest, certainly Respondent could not do so with a Regulation. But, had the Hearing Officer made any inquiry into Respondent's compelling interest, she would have been forced to recognize the testimony of the multiple Respondent witnesses, who explained the many reasons why flexibility in hiring adjuncts was warranted.[13] More importantly, however, she would have had to confront the fact that – under the Constitutional grant of authority – Respondent had the explicit right to make this designation to ensure the efficiency of the system.

While the Hearing Officer was quick to discount Respondent's concerns, the issue should not be so easily dismissed. In the same manner that the Florida Constitution bestows powers on the Governor, for example over appropriations, it has granted powers to the Board of Governors (and, in turn, Respondent) in this case. Accordingly, in the way that the Governor's exercise of authority over funding may restrict a public employee's constitutional rights, so may the actions of Respondent – so long as a compelling interest exists. *See also, State v. Florida Police Benev. Ass'n, Inc.,* 613 So. 2d 415, 418 (Fla. 1992)(noting that "the constitutional right to bargain must be construed in accordance with all provisions of the constitution").

But, while the Hearing Officer declined to consider this argument, she did choose this opportunity to note that PERC "is not bound by the label an employer has applied to a group of its employees when the Commission is determining whether a group of employees is appropriately included in a unit." HORO 12. The Hearing Officer does not elaborate on this assertion or explain its relevance. While she references part-time employees being improperly

[13] While the Hearing Officer did briefly consider this testimony elsewhere in her Recommended Order, she did not do so in conjunction with the *Chiles* standard set forth above.

categorized as temporary, she does not go so far as to imply that Respondent's adjuncts are part-time, rather than temporary (and, she would be unable to arrive at such a conclusion, given that her factual findings included recognition of their temporary status)(HORO 5, ¶ 6).

Ultimately, the Hearing Officer conducted no substantive analysis of the Employer's argument, and made no effort to reconcile her factual finding of adjuncts' temporary status – and accordingly, their statutory lack of an expectation of continued employment – with her conclusion that they were able to unionize. She also failed to engage in any inquiry as to whether the restriction on bargaining constituted a compelling State interest, ignoring the Respondent's reasonable points by summarily stating that the argument lacked merit. The Respondent submits that this was not an appropriate response to its proposed arguments; thus, the Respondent excepts.

Exception No. 10

The Hearing Officer erroneously concluded that Respondent's adjuncts share in a community of interest with each other. HORO 18.

Discussion of Exception No. 10: Respondent submits that, contrary to the Hearing Officer's conclusion, the overwhelming evidence in this case demonstrates that the petitioned-for bargaining unit is fundamentally inappropriate, because the adjuncts do not share in a community of interest as required by §447.307(4)(f), Fla. Stat. (2017).

Not surprisingly, in considering the appropriateness of the proposed bargaining unit at USF, the Hearing Officer turned to the *Hillsborough* decision for guidance. In that decision, in addressing the question of community of interest, the *Hillsborough* Hearing Officer found several areas of commonality. First, he reasoned that the adjuncts were compensated on the same scale, with adjunct faculty being "paid a set rate per instructional point based on semesters of experience and assigned load points." According to the *Hillsborough* decision, this particular

system-wide scale was quite detailed, requiring that "[a]djuncts with one to eight semesters of experience are paid $63.15 per instructional point, and adjuncts with more than eight semesters of experience are paid $63.33 per instructional point. One lecture credit generates ten points; one laboratory contact hour generates eight points; one clinical contact hour generates eight points; and one distance learning hour generates ten points." While this seems to have been the determinative piece of evidence in the case, the Hearing Officer also noted that the college published an annual Adjunct Faculty Handbook – based on the existence of that document, he concluded that the Hillsborough adjuncts must share common terms and conditions of employment, as described in their collective policies and procedures. And, of course, the existence of a community of interest was not disputed, as the parties stipulated to this point.

While all of those commonalities may exist at Hillsborough Community College, none of those factors are present in the instant case. Respondent's adjuncts are not paid according to a set formula like those in *Hillsborough*; instead, their pay is discretionary, determined by individual department chairs, dependent on experience and specialized knowledge, and subject to personal negotiation. As a result of this discretion, USF adjuncts are essentially employed pursuant to individual contracts, with rates of pay spread across the board and ranging from $2,500 to $10,000 per course. With such a wide difference, and in the absence of any standardized equation to set wages, community of interest is certainly not established based on that particular factor. *See, District Lodge No. 112 of the International Association of Machinists and Aerospace Workers of Jacksonville, Florida, v. Jacksonville Transportation Authority*, 43 FPER ¶ 218 (2017)(adopting Hearing Officer's decision, in which he found no community of interest where "there is no evidence demonstrating that the employees in the proposed bargaining unit share similar wages, hours, and terms and conditions of employment[.]"

As for an adjunct handbook, no such document exists. Rather, adjuncts are employed under the terms of their individual departments and colleges – which, as demonstrated at the hearing, are just as discretionary as their pay rates. Accordingly, this factor cannot establish a community of interest in this case, either.

Indeed, when considering all of the factors enumerated in §447.307(f), Fla. Stat., it would be impossible to establish any community of interest in the petitioned-for bargaining unit in this case, because the weight of the evidence demonstrates that Respondent's adjuncts have nothing in common at all. They vary in levels of teaching experience; educational backgrounds; expertise; area of study; job location; supervision; method of evaluation; pay rate; office hours; time spent on the job; and basic job duties. Adjuncts may be post-graduate students working on their dissertations, or they may be retired professors returning to Respondent in a limited role, to fill a gap until a replacement can be found. Some adjuncts teach courses in multiple colleges across the state; others are full-time accountants, engineers, or assistant superintendents, teaching one class in the evenings, as their schedules permit. Some are hands-on in the classroom; others teach courses exclusively online, and have not taught in a classroom in years. They have no functional interchange, and cannot even necessarily recognize their fellow adjuncts; the idea of covering classes for other adjuncts is a foreign concept. Indeed, the only thing the adjuncts have in common is the fact that they are employed temporarily, and for a specified duration.

Clearly, these facts cannot establish a community of interest, but from a practical perspective, they also underscore why a community of interest in a bargaining unit is required. In reality, it would be impossible to reconcile the interests of these distinct, varied individuals, and there is simply no way that the interests of the adjuncts, or Respondent, could be served by a "one size fits all" contract. The creation of a bargaining unit containing this many competing

interests would necessarily create a conflict of interest; and also stands in direct violation of Fla. Admin. Code Rule 60CC-1.002.

The Hearing Officer either misconstrued – or wholly ignored – all of this. Instead, in justifying her contrary finding, she again concluded that the adjuncts' terms of employment, including benefits, were determined and administered uniformly by the Board. But despite her blanket finding that the Board controls these "terms" of employment (a phrase she later qualifies in several ways, conceding that these constitute "general terms")(RO 6, ¶ 12), she goes into little detail as to the specific nature of those terms. For example, she claims that the adjuncts "receive the same benefits;" however, given that the adjuncts are temporary employees and are therefore not eligible for benefits (other than TERP), this is hardly overwhelming evidence. Indeed, if negatives count as evidence of commonality, then a Hearing Officer could find a community of interest based on the fact that none of the adjuncts receive corporate jets as a part of their compensation; such a finding would be irrelevant and without basis, and a lack of evidence cannot be substituted for evidence in a community of interest analysis.

The same is true of the Hearing Officer's attempts to qualify adjunct's wages as being the result of a "uniform pay structure that bases an adjunct's salary on the hours of courses that the adjunct will be teaching and determining the percentage of full-time equivalent (FTE)." RO 5, ¶ 9. As demonstrated above in these Exceptions, there is no mathematical support for a finding that there is any consistent, system-wide wage calculation at USF; to this end, .24 hours can mean anything from $2,500 to $10,000. Unlike *Hillsborough*, where adjuncts are paid a certain dollar amount based on their years of seniority, Respondent does not have a formula, and therefore, the use of FTE also cannot be relied upon to establish commonality.

Turning to the factor of interchange, the only evidence relied upon by the Hearing Officer was her finding that adjuncts can cover each other's classes, assuming they are qualified to do

so; however, as described above, this finding lacks any support whatsoever in the record. And, as this was the only proposed proof of interdependence and interchange of jobs, this factor must weigh against a community of interest as well.

In all, the Hearing Officer has engaged in no legitimate "analysis" of community of interest factors – and, indeed, if such a cursory and results-driven analysis could satisfy the standard, then there would be no case in which a community of interest could not be found. By taking an overly broad view of the statutory requirements, the Hearing Officer was able to determine adjuncts are "subject to the same structure of supervision, evaluations, wage structure, and other requirements[,]" and thus "subject to the same manner in which wages and other terms of employment are determined." HORO 24-25 (emphasis in original). To the extent that any of this is accurate, it is only so according to the most expansive and generous reading of the record – one in which the probative evidence is the fact that adjuncts are subject to supervision; that adjuncts may receive evaluations; that they are paid according to their positions; and they fulfill "other requirements" – however, this simplified description of the terms of their employment would describe virtually every working person in the country. Similarly, while the Hearing Officer emphasized that the commonality is to the "manner" in which these terms are determined, she offered no elaboration here; instead, she falls back upon her flawed premise that this overall structure was developed by Respondent, and therefore, the terms are necessarily "similar."[14] All Respondent did was designate the adjuncts as temporary employees and create a few sample documents (which colleges are not even required to utilize); every other substantive term is developed on the departmental level. Despite the Hearing Officer's efforts, this is simply not enough to establish a community of interest; moreover, her expansive approach renders the

[14] Along these same lines, the Hearing Officer's finding that adjuncts share "similar" educational backgrounds and work in "similar" settings is also too vague to constitute probative evidence; given the wide variety of backgrounds, job duties, location, and class delivery, her blanket finding of "similarity" is equally unsupported.

standard pointless, as virtually any unit would pass such a feeble analysis. This is contrary to the intention of the legislature in promulgating §447.307(4)(f), Fla. Stat., as well as PERC precedent, and as such, her legal conclusions should not be adopted by PERC.

Notably, however, if PERC adopted the majority of the Hearing Officer's factual findings, it would be compelled to agree with Respondent, and find that the credited evidence does not suggest a community of interest. Indeed, in her own findings, the Hearing Officer concluded that:

- Adjuncts work at different geographic locations, which are further divided into "different colleges, schools, and departments based largely on areas of study, research and instruction." HORO 4, ¶ 4.

- Adjuncts have different schedules, and may teach at different times of the year, as courses are offered in the Fall, Spring, and Summer. HORO 4, ¶ 4.

- Adjuncts differ in the types of courses they teach, with some teaching credit-bearing courses and some teaching non-credit bearing courses. HORO 5, ¶ 6.

- Adjuncts are hired for different reasons and to fill different gaps in coverage, based on the generally unpredictable and individual needs of the colleges, including the unavailability of full-time professors and unanticipated student demand. HORO 6, ¶ 12.

- Adjuncts have different education and experience levels, and different certifications and credentials are necessary depending on the individual college and course. HORO 6, ¶ 12. This includes "certifications or other specialized mastery as required by the college offering that subject." HORO 8, ¶ 19. In some instances, these requirements may be imposed by the state. *Id.*

- Adjuncts have different job responsibilities, and some adjuncts are required to redesign classes. HORO 8, ¶ 20.

- Adjuncts pay differs significantly, because "the individual colleges" set a pay rate for **each** of the "**specific classes**" taught. HORO 6, ¶ 13 (emphasis added). The rate for each class is set after consideration of the difficulty of the course; the credentials required; and "other factors." HORO 6, ¶ 13. Even if a college has a "regular" pay rate for a specific course, that rate is still not controlling, and discretion is still permitted; to this end, adjuncts may be paid more or less based on "other dynamics." HORO 6, ¶ 13.

- Adjuncts pay varies based on specific job duties. As described above, adjuncts who are responsible for redesigning a class will be compensated for the redesign, based on course complexity. HORO 8, ¶ 20.

- Adjuncts sign different offer letters when hired. While the Office of the Provost provides a template offer letter, the colleges are not required to use this letter and can – and do – use their own versions. HORO 6, ¶ 14. Along these same lines, the assorted offer letters provide "various" and differing reasons why employment may be terminated. HORO 6, ¶ 14.

- Adjunct appointments can end, and classes can be cancelled, for a variety of factors, including those outside the adjuncts' – or the college's – control, such as low enrollment. HORO 6, ¶ 14.

- Adjuncts are subject to different types and methods of evaluations and different evaluation forms, depending on the college and department. HORO 7, ¶ 16.

- Adjuncts have different requirements with respect to office hours; some are required to keep office hours, while others may make different arrangements to communicate with students. HORO 7, ¶ 17.

- Adjuncts are hired by different people and do not share common supervision between departments; rather, they are overseen by their individual department or college deans or chairs. HORO 8, ¶ 22.

- Adjuncts are hired for different reasons. Some are hired to "cover gaps" caused by full-time faculty becoming unavailable; others are hired because they have a particular expertise; others are hired because demand for a course exceeds what full-time faculty can accommodate. HORO 8, ¶ 22.

- Adjuncts have different workloads and different schedules. Some teach only one semester per academic year, while others teach multiple semesters. HORO 9, ¶ 26.

- Finally, adjuncts have different employment goals. Some adjuncts work elsewhere during the week and teach only one course, while others are retired full-time faculty who have returned to teach classes as adjuncts. HORO 9-10, ¶ 27.

Clearly, any substantive review of these facts demonstrates that the adjuncts at USF have very little in common, other than the temporary nature of their employment; accordingly, it would be inappropriate to find that a community of interest exists in this case.

As a final note, the Respondent submits that the Hearing Officer's repeated reliance on the desires of employees, going so far as to state that the "showing of interest supports a finding of community of interest," sets a dangerous precedent. HORO, 17. While the desires of

employees may be relevant in certain unit determinations (for example, in accretion cases), the wishes of employees have no fundamental bearing on a community of interest analysis. Indeed, given that a successful showing of interest is necessarily a procedural prerequisite to a community of interest analysis, this would mean that every petitioned-for unit could be certified based on this factor. And, while the Hearing Officer claims this evidence is not "controlling," she admits that it "supports" her ultimate finding, and she mentions it twice in her community of interest analysis. HORO 17; 18. Thus, for this reason as well, Respondent excepts to her findings here.

Exception No. 11

The Hearing Officer erroneously concluded that Respondent's adjuncts have an expectation of continued employment. HORO 21.[15]

Exception No. 12

The Hearing Officer erroneously concluded that an employment contract for a limited term does not destroy an adjunct's reasonable expectation of continued employment. HORO 20.

Discussion of Exception Nos. 11 and 12: As described above, in certifying the stipulated adjunct unit in *Hillsborough*, the Hearing Officer adopted, and PERC approved, a framework for analyzing the appropriateness of adjunct bargaining units.[16] Drawing from §447.307, Fla. Stat. (2016) and 60CC-1.002, the Hearing Officer identified three critical inquiries – specifically, whether the adjuncts had a "continued expectation of employment," whether they shared a

[15] The Respondent also excepts to the related finding that "being sought out in subsequent semesters has provided the adjuncts with a reasonable expectation of continued employment in the future[.]" (HORO 20).

[16] *Hillsborough Community College Board of Trustees*, 43 FPER ¶ 126 (2016)(Commission explicitly holding that "for the reasons stated by the hearing officer, we conclude that the proposed unit is appropriate for the purpose of collective bargaining").

community of interest, and whether the proposed unit would result in impermissible fragmentation. Although there were no disputed issues in that case (the parties stipulated to most points, including the existence of a shared community of interest) the Hearing Officer nonetheless recognized the precedential value of his decision, and announced that he would conduct an analysis of the underlying facts to ensure that the statutory requirements were met.

In *Hillsborough*, the Hearing Officer acknowledged that historically PERC "has excluded intermittent, temporary, or seasonal workers from units because they do not have a reasonable expectation of continued employment." He reasoned, however, that if adjunct faculty members did possess a reasonable expectation of continued employment from year-to-year, "there would be no bar on forming a separate unit." Unfortunately, the Hearing Officer did not engage in a particularly enlightening analysis as to whether the adjuncts at Hillsborough did, in fact, have this expectation; instead, he adopted the parties' stipulations and the nonbinding precedent of the National Labor Relations Board, and presumptively determined that, if a "look-back" stipulation was included in determining election eligibility, this would satisfy the requirement. And, while that approach may work under the National Labor Relations Act or within the legislative framework of the Florida College System, community colleges do not operate like state universities, and the law that applies to private employers cannot apply to a public institution.

As described above in the legal summary, Respondent's Regulations – which were promulgated under a Constitutional delegation of authority – provide that adjuncts are temporary employees, and the existence of any expectation of continued employment is categorically prohibited by law. By the explicit terms of BOT Regulation USF 10.204(3) temporary USF employees "do not have or earn permanent status or tenure, and have no right or expectation to continued employment." This, standing alone, should end PERC's inquiry. Respondent was authorized to adopt the Regulations, to use the language of its choosing, and to designate

employment status based on the needs of Respondent. Here, Respondent made an obvious, and clearly intentional, choice to preserve the flexibility and discretion required in order to best utilize its adjuncts; to maximize its course offerings; and to maintain its reputation for academic excellence. Under the clear law, each of these determinations was Respondent's to make. Still, while the existence of the statutory authority should be determinative here, the Hearing Officer gave Respondent's regulation no weight in her analysis.

Statutory authority aside, the Hearing Officer also erred in determining that, as a matter of law, the adjuncts have an expectation of continued employment. Unlike those adjuncts at Hillsborough, where this expectation was established by stipulation, in this case, it is undisputed that the adjuncts are hired only for a specific and limited term, and – upon hire – agree to their understanding of this employment condition. They do not expect the employment to "continue indefinitely[.]" *International Union of Operating Engineers, Local 653 v. Gulf County Board of County Commissioners,* 16 FPER ¶ 21364 (1990). They do not enjoy "long-term uninterrupted employment;" instead, the evidence categorically proves that their employment is expected to "end upon a date certain." *International Brotherhood of Painters and Allied Trades, AFL-CIO, Local Union 1010, v. City of Deerfield Beach*, 14 FPER ¶ 19099 (1988); *see also, Florida Public Employees Council 79, AFSCME v. City of Jacksonville,* 13 FPER ¶ 18273 (1987).

USF adjuncts simply cannot count on continued employment, either as matter of law or fact. As they recognize, their appointments are typically dependent on scheduling and staffing needs, such as the unanticipated emergence of "holes" in the schedule that cannot be filled by a full-time faculty member. From the outset of an appointment, each adjunct's offer letter sets forth the specific expectations of the job, and adjuncts are aware of, and agree to, the fact that their appointments are for a limited duration and a set amount. And, they know that, while they may be reappointed to another position in another semester, their appointments cannot be

extended; they also know that appointments are based on schedules and needs, and can change. Perhaps they will pick up a class when another adjunct quits, mid-semester; perhaps their class will be canceled because the minimum enrollment is not reached – regardless, every adjunct understands that appointments are inherently unpredictable. Thus, while you can hope for appointments, in the words of Dr. Blackwell, "nothing is guaranteed." Even the Hearing Officer admitted that the "adjuncts recognize that their contract states the current term of their employment and that the Board is not required to hire them for future semesters." HORO 10, ¶ 29. Still, the Hearing Officer gave these facts no weight.

Ultimately, despite the fact that the Hearing Officer conceded that the nature of adjunct appointments are to fill gaps in the schedule and are thus inherently unpredictable, she still found that the adjuncts at USF enjoyed this continuing expectation.[17] She further found that, like the Board regulation, the existence of a signed contract between individual adjuncts and USF had no material effect on their expectations, and that they were still entitled to view their employment as continuous, and likely to continue. Once again, this ignores the record facts, and is wholly contrary to the law.

The other aspect of this that the Hearing Officer has ignored, however, is the fact that Respondent has never denied that some adjuncts *are* rehired, and may work for multiple semesters; Respondent also does not deny that it tries to secure adjunct talent and invites top performers back to teach when it can. But, once again, the hope of reemployment is simply not the same as an expectation of reemployment. As Respondent has repeatedly pointed out, the nature of adjunct employment makes openings difficult to predict, and thus even the most

[17] The Hearing Officer also acknowledged the unpredictable nature of adjunct employment, finding that adjuncts are hired to "cover gaps in teaching courses that full-time faculty members are unable to cover based on various factors, including retirement, leave, or a lack of specialized expertise in an area." HORO 8, ¶ 22. She further recognized that adjuncts may also be necessary when student demand exceeds what full-time faculty can accommodate. HORO 8, ¶ 22.

talented adjuncts may not receive appointments – through no fault of Respondent, and through no fault of the adjunct. As mentioned above, every adjunct who testified confirmed that this was the case; thus, for this reason as well, the Hearing Officer's conclusion is in error.

Exception No. 13

The Hearing Officer improperly ignored the realities of adjunct appointments.

Discussion of Exception No. 13: While Respondent believes that, in light of the evidence presented, the instant case is already easily distinguishable from *Hillsborough*, it still submits that the petitioned-for unit is inappropriate on other grounds as well – specifically §447.307(4)(a), Fla. Stat., which requires that PERC consider "the principles of efficient administration of government." In undertaking an analysis under this subsection, PERC must consider what practical effect the imposition of a bargaining obligation would have on Respondent, and whether it could unreasonably interfere with Respondent's ability to provide competitive, high quality education to the public. Unfortunately, according to the testimony elicited at the hearing, the organization of adjuncts would pose a grave concern.

Specifically, the record evidence indicates that imposing a bargaining obligation and attempting to standardize employment among the numerous disciplines, departments, and campuses would be fundamentally incompatible with Respondent's ability to serve its students. To this end, Dr. Weller testified that when special arrangements have to be made with adjuncts, this affects the scheduling of courses, and any restrictions on his flexibility in hiring adjuncts would make his job more difficult. Tr. 71:1-9. Dr. Murtha similarly explained that having to be bound by a collective bargaining agreement in hiring and rehiring adjuncts would "pretty severely limit [his] flexibility," because the need for adjuncts is dependent on the schedule. If limitations were put into place, Dr. Murtha warned that he could see the process taking longer, which is problematic in cases where a gap needs to be filled fairly quickly. As Dr. Murtha

explained, "we literally sometimes make this happen in a few days[,]" and having limitations on appointing adjuncts could "severely limit our ability to get those classes covered." Tr. 98:13-21, 23-24. Dr. Glover testified that organizing the adjuncts could pose a serious problem for Respondent, because departments tend to change their curriculum, and must lay instructors off as they become irrelevant. Restrictions on ending temporary appointments would therefore be problematic. Tr. 169:12-23. Along those same lines, Dr. Smith opined that the unionization of adjuncts could lead to the diversion of funds away from hiring new faculty or funding graduate stipends. Taken to the extreme, he stated, this practice could "derail the university." Tr. 177:20-22.

In the end, Dr. Smith best expressed the most commonsense concern, by explaining that unionization of the adjuncts would result in "a loss of flexibility that I think is the very essence of the reasons why we hire adjuncts to begin with." Tr. 177:20-22. Noting that "adjuncts are sort of freelancers[,]" Dr. Smith explained that they have the ability to negotiate their own terms, and often, "there are really distinct reasons why people are hired at a certain higher rate than others [...] It may be a matter of [...] longevity. It may be their expertise. It may be skills that they bring that other individuals don't have. So there can be any number of reasons that could be lost in standardization." Tr. 179:1, 3-9. And, while the unionization of the adjuncts likely wouldn't shut USF down, Dr. Smith did express the reasonable concern that the loss of flexibility could cause a college to choose to hire fewer adjuncts, or it might not hire upper level adjuncts; either outcome would risk losing "skills that are particularly important to the university." Tr. 179:19-20.

Once again, this testimony underscores the fact that the proposed bargaining unit is fundamentally inconsistent with the practical realities of adjunct appointment. Currently, department heads have the discretion, and individual adjuncts have the ability, to negotiate their

own wages, terms, and conditions of employment; the imposition of a "one size fits all" contract would completely destroy this traditional, workable, and accepted relationship. §447.307(4)(f)(5), Fla. Stat. (2017). Equally critical, and as recognized by the department heads, the imposition of adjunct appointment rules, non-reappointment provisions, and other restrictions would bind the hands of directors trying to cover last-minute course needs and emergency vacancies. This, unfortunately, could result in popular core courses not being adequately covered – creating a serious problem for students and administration, and damaging Respondent's academic integrity. But, once again, each of these arguments – and each of these undisputed facts – fell on the Hearing Officer's ears, and she ignored them as being irrelevant to the issue of proliferation of units. Thus, for this reason as well, the Respondent excepts to her findings.

Exception No. 14:

The Hearing Officer incorrectly determined that the petitioned-for bargaining unit would not result in the unnecessary proliferation of bargaining units. HORO 23; 26.

Exception No. 15:

The Hearing Officer unreasonably ignored record evidence in this case and stated that there is no evidence that USF Health employs adjuncts. HORO 26.

Discussion for Exceptions Nos. 14 and 15: In its Proposed Recommended Order, Respondent submitted that, even assuming, arguendo, that the petitioned-for workers do have an expectation of continued employment, that they do share in a community of interest, and that their organization would not pose any institutional concerns within USF, Respondent nevertheless submits that this unit would still be inappropriate, as it would represent the impermissible fragmentation of the Tampa adjuncts, and would result in the proliferation of bargaining units.

Specifically, Respondent argued that the Petitioner's exclusion, without explanation, of all adjuncts teaching at the College of Nursing, the College of Public Health, School of Physical

Therapy, Morsani College of Medicine, School of Biomedical Sciences, and College of Pharmacy was inappropriate as a matter of law. To this end, Respondent noted that it would necessarily result in the impermissible fragmentation of the unit, the disenfranchisement of similarly situated adjuncts, and would result in the possibility of Respondent being forced to negotiate with an unreasonable number of labor organizations – an outcome prohibited by §447.307(4)(b), Fla. Stat. (2017). *See also, Laborers International Union of North America, Local Union 517, AFL-CIO v. Marion County Board of County Commissioners,* 43 FPER ¶ 65 (2016)(dismissing a petition seeking to represent full and part-time Marion County Animal Control Officers while seeking to exclude all other employees, without explanation for the limitation; noting that in the absence of "additional facts demonstrating exceptional circumstances, a unique community of interest, or a conflict of interest justifying the fragmentation, the petition is insufficient").

By the terms of its instant Petition, the Petitioner seeks to represent an already highly differentiated group of adjuncts. Adjuncts work across three academically different campuses, in different colleges and departments; they have different responsibilities, skill sets, education levels, wages, and supervision. To imagine them as a body collective is already a stretch of the imagination; accordingly, it is incomprehensible that the Petitioner would choose to exclude several hundred adjuncts working on one of the petitioned-for campuses, simply because they are classified as working in the USF Health schools. This division is particularly inexplicable, given that Tampa is already a research campus, with many of the petitioned-for adjuncts appointed to scientific positions. Indeed, Petitioner's own witness, Tara Blackwell, is an adjunct at the Department of Cell Biology, Microbiology, and Molecular Biology at Tampa. It would be reasonable to conclude that she would be more likely to share a professional community of

interest with an adjunct at USF Health who was located on her campus than a fine art adjunct appointed to work in St. Petersburg.

Still, in possibly her most errant conclusion, the Hearing Officer rejected this entire argument on the grounds that there is no evidence that adjuncts are employed at USF Health. Not only does this ignore the record evidence, it is also blatantly disingenuous given the ongoing motions, pleadings, and discussions between the parties – and involving the Hearing Officer – regarding the USF Health adjuncts. Indeed, Respondent has argued for the inclusion of these adjuncts in the unit since filing its initial Prehearing Statement; it has also repeatedly referenced the USF Health adjuncts in pleadings, and has even submitted a list of USF Health adjuncts as an Exhibit to its Supplemental List of Eligible Voters, served upon the Hearing Officer and the Petitioner on June 6, 2017. Accordingly, there is overwhelming evidence of the existence of the USF Health adjuncts in the case records. These individuals were also discussed at the Hearing, as Dr. Glover specifically affirmed that the USF Health adjuncts, like those on the other campuses, had their pay determined by their department chairs. Tr. 168: 2-7. Accordingly, Respondent submits that the Hearing Officer's conclusion here was unreasonable, unsupported by the record, and indicative of a troubling bias against Respondent. Thus, for this reason as well, Respondent excepts to her conclusions.

Exception No. 16

The Hearing Officer erroneously concluded that Petitioner met its burden in proposing a facially appropriate bargaining unit. HORO 23.

Exception No. 17

The Hearing Officer erroneously concluded that the bargaining unit proposed by Petitioner was appropriate for collective bargaining. HORO 28, ¶ 2.

Discussion of Exceptions No. 16 and 17: For the reasons described throughout this document, Respondent submits that the record does not support the Hearing Officer's ultimate conclusions

in this case, and that the proposed unit of temporary employees is not appropriate for collective bargaining.

IV. CONCLUSION

Despite the best efforts of Petitioner, the facts presented in the instant case are simply not the same as those presented in *Hillsborough*. Accordingly, a different outcome is warranted, and PERC should engage in a genuine legal analysis to analyze the continued expectation of employment for public university adjuncts, as well as whether they share in a sufficient community of interest, and – ultimately – whether they constitute an appropriate unit for collective bargaining. Additionally, given the importance of these issues, Respondent requests oral argument on these questions.

Respectfully submitted this 27th day of October, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 2017, the foregoing was served via e-mail on the following:

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