STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) FLORIDA PUBLIC SERVICES UNION (FPSU), CHANGE TO WIN (CTW),	:	
Petitioner,	:	Case No. RC-2017-007
v.	:	ORDER DIRECTING ELECTION AND TRANSFERRING CASE TO ELECTIONS DIVISION
UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES,	:	
Respondent.	:	Order Number: 18E-011 Date Issued: January 9, 2018

Dustin L. Watkins and D. Marcus Braswell Jr., Coral Gables, attorneys for Petitioner.

John F. Dickinson and Daniel P. Murphy, Jacksonville, and Gerard D. Solis, Tampa, attorneys for Respondent.

On April 20, 2017, the Service Employees International Union (SEIU) Florida Public Services Union (FPSU), Change to Win (CTW) (Union), filed a representation-certification petition seeking to represent a unit of part-time, non-tenure-track faculty members (adjuncts) employed by the University of South Florida Board of Trustees (Board). On April 26, the Commission found the petition sufficient and appointed a hearing officer. On May 10, the Board filed its answer to the petition challenging, among other things, the appropriateness of the proposed bargaining unit.

On June 13, the Commission-appointed hearing officer conducted an evidentiary hearing, and on October 13, she issued an order recommending that the Commission

approve a bargaining unit of University of South Florida (USF) adjuncts assigned to the Board's Tampa, St. Petersburg, and Sarasota-Manatee campuses.[1]

On October 27, the Board filed seventeen exceptions to the recommended order and a request for oral argument.[2] The Union did not file exceptions to the recommended order. Rather, on November 6, the Union filed a response to the Board's exceptions in which it opposes the Board's request for oral argument. Having reviewed the recommended order, exceptions and the response thereto, and the record in this case we conclude that oral argument would not assist the Commission in resolving the issues presented by this petition. Therefore, the motion for oral argument is denied.

Exceptions to the Findings of Fact

Before addressing the Board's legal arguments, we resolve its exceptions to the hearing officer's findings of fact. In so doing, we are mindful that it is the hearing officer's province to consider all of the evidence presented, resolve conflicts, determine credibility, weigh evidence, and make ultimate findings of fact. *See* § 120.57(1)(l), Fla. Stat. (2017);[3] *Heifetz v. Department of Business Regulation,* 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). If the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue, and the Commission can only reject a hearing

[1]The hearing officer's description of the recommended unit as "proposed by the parties" is a scrivener's error.

[2]A transcript of the evidentiary hearing has been filed. The recommended order is referred to herein as the "HORO." References to the transcript are designated by "T" followed by the appropriate page number(s). The Union's exhibits are referred to as "Ex. P" followed by the appropriate exhibit number(s).

[3]All references to the Florida Statutes are to the 2017 edition of the Florida Statutes.

officer's finding of fact when there is no competent substantial evidence from which the finding can reasonably be inferred. *Boyd v. Department of Revenue,* 682 So. 2d 1117 (Fla. 4th DCA 1996); *Holmes v. Turlington,* 480 So. 2d 150 (Fla. 1st DCA 1985). Our review of a factual finding is limited to determining whether it is supported by competent substantial evidence as stated. § 120.57(1)(l), Fla. Stat.

In exception one, the Board takes issue with the portion of finding of fact eight that states that the Board has determined the adjuncts' terms of employment, including benefits, which are administered uniformly across the campuses and colleges. The Board asserts that, with the exception of their temporary employment status, there are no common terms of employment shared by all USF adjuncts and there are no benefits administered.

The record evidence shows that a separate grievance procedure is open to all adjuncts as well as a temporary employment retirement plan (TERP). In addition, finding ten describes the benefits that the Board does not provide to the adjuncts, such as health coverage, sick leave, and annual leave. A review of the record shows that the disputed finding is supported by competent substantial evidence. (Exs. P-19 and 20; T 35, 37, 52-54, 80, 114-15, 132) Therefore, exception one is denied.

Exception two takes issue with finding of fact nine, which states 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)." The Board contends that there is no uniformity in wages and that there is a distinct variance in adjunct compensation inasmuch as the individual

colleges 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.[4]

The hearing officer's findings accurately describe the manner in which the adjuncts are paid. Finding thirteen states that the individual colleges set the rate for the specific classes based on the difficulty of the course, the credentials required, and other factors. In addition, the colleges provide some flexibility with the specific rate to account for other dynamics that are necessary to retain the appropriate faculty. Thus, the record evidence supports the disputed finding as to the Board's pay structure. (T 35, 42, 51, 64-66, 78, 82, 113-14, 120, 131, 168-69, 174) Therefore, exception two is denied.

In exception three, the Board takes issue with finding of fact fifteen which states that a college "will contact an adjunct months before the next semester is to begin to ask if the adjunct is available to teach the following semester." The Board asserts that adjuncts may also be contacted mid-semester or immediately before a semester begins.

As finding twenty-eight states, adjuncts generally receive a contract for teaching the following semester while they are still completing their current term. The record evidence also shows that there are occasions when adjuncts are contacted weeks prior to the beginning of a semester regarding availability to teach during the upcoming

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[4]The Board enclosed a chart in its exceptions in support of its contention that it does not have a uniform pay structure. We deny the Board's request to reopen the record to admit evidence it could have presented during the hearing. *See Brunn v. Department of Revenue,* 3 FCSR ¶ 150 at 492 (1988), *aff'd per curiam,* 545 So. 2d 1370 (Fla. 1st DCA 1989) (establishing the standard for reopening a record).

semester, and on occasion, adjuncts may be contacted mid-semester or immediately before the semester begins. (T 24-25, 33-34, 43-44, 50, 66-68, 80-81, 85, 125-26)

Therefore, we modify finding fifteen to state that the colleges typically contact adjuncts months before a semester begins to determine whether the adjunct is available to teach the following semester. On occasion, adjuncts may be contacted mid-semester or immediately before a semester begins. (T 24, 34, 44, 50, 66-68) Therefore, exception three is granted.

In exception four, the Board asserts that there is no record evidence supporting finding eighteen, which states that "if an adjunct is unable to teach a class based on sickness or a conflict, that adjunct can request to contact another adjunct to teach the class on that day." This finding is supported by adjunct Jarad Fennell's testimony describing his practice and his observations of other adjuncts. (T 36-37) Therefore, exception four is denied.

In exception five, the Board takes issue with finding twenty-seven, which states that the "adjuncts have a regular pattern of continuing employment in past academic years." Similarly, in exception six, the Board challenges finding twenty-five, which states that "it is common for adjuncts to work for years and years." In addition, footnote seven to exception five takes issue with the hearing officer's determination 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 at p. 24)

The record evidence demonstrates that the adjuncts have a regular pattern of continuing employment in past academic years and it is common for adjuncts to work for years and years at USF. (T 22-24, 41-42, 49-51, 62-64, 92-93, 102, 123-24) Moreover, the portion of the hearing officer's analysis indicating that "the Board" developed the retention system is an apparent scrivener's error inasmuch as finding twenty-three states that the colleges have developed adjunct pools to guarantee that the Board can retain the most qualified instructional staff. (HORO at pp. 8 and 24) Therefore, exceptions five and six are denied.

In exception seven, the Board takes issue with finding twenty-nine, which states that the "adjuncts have developed a reasonable expectation that the Board will continue to employ them in the future." As more fully discussed in our resolution of exceptions eleven and twelve, the disputed finding is supported by competent substantial evidence. (T 22, 41-42, 50-51, 64, 82-83, 92-93, 102, 123-24, 130-33) Therefore, exception seven is denied.

Upon review of the complete record, including the transcript, we conclude that the hearing officer's findings of fact are supported by competent substantial evidence received in a proceeding that satisfied the essential requirements of law. Therefore, we adopt the hearing officer's findings, except as modified herein. § 120.57(1)(l), Fla. Stat. We turn now to the Board's exceptions to the hearing officer's analysis and conclusions of law.

Exceptions to Analysis and Conclusions of Law

The Board raises two issues for the Commission's consideration in determining whether the proposed bargaining unit is an appropriate unit. First, it argues that the adjuncts lack the requisite continued expectation of continued employment necessary to bargain collectively under Florida law because they have been, by Board regulation, designated as "temporary" and as having no continued expectation of employment; and they are appointed to their positions for the specific purpose of filling unexpected "holes" in the teaching schedule. Next, the Board argues that the adjuncts do not share a sufficient community of interest within the meaning of Section 447.307(4)(f), Florida Statutes.

In exceptions eight and nine, the Board takes issue with the hearing officer's determination that it lacked the authority to pass regulations negating the adjuncts' collective bargaining rights. The Board's argument is straightforward. It points out that the Florida State University System is an entity created by the Florida Constitution which is composed of all public universities in Florida. While the overall statewide system is governed by a Board of Governors, the Florida Constitution provides that each public university system within the state shall be administered by its own board of trustees. *See* Fla. Const., Art. IX, § 7(b).

In furtherance of this mandate, the 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 establishes each board as the sole

public employer for university employees. In addition, boards of trustees were specifically instructed to create systems to govern all aspects of the employment relationship.

The Board points out that pursuant to BOT Regulations USF 10.200(6)(d) and 204(3), the adjuncts' employment is "at-will," they do not have or earn permanent status or tenure, and they have no right to or expectation of continued employment. Furthermore, adjuncts are not entitled to notice of non-appointment at the end of their terms, and they are also not required to receive formal evaluations pursuant to BOT Regulations USF 10.210(2)(a) and USF 10.207(3). The Board adds that its Division of Human Resources, in classifying and discussing adjuncts, has determined that adjuncts are appointed for one academic term at a time, and possess no continuing contractual relationship with USF. The Board further notes that time spent in this appointment cannot be counted toward tenure or permanent status. Thus, the Board argues that the adjuncts at USF do not have a continued expectation of employment as a matter of law and, consequently, are not eligible for unionization.

The Board asserts that the hearing officer failed to consider its interpretation of its authority in her analysis and failed to reconcile the potentially competing grants of constitutional rights. The Board further contends that the hearing officer (1) failed to make any inquiry into its compelling interest demonstrated by multiple Board witnesses who explained why flexibility in hiring adjuncts was warranted, and (2) failed to consider that the Board had the explicit right to designate the adjuncts as "at-will" employees to

ensure the efficiency of the system. We are not persuaded by the Board's arguments for the reasons expressed below.

As the hearing officer stated, the Board does not dispute that its adjuncts are public employees within the meaning of Section 447.203(3), Florida Statutes. The hearing officer also correctly determined that Article I, Section 6, of the Florida Constitution guarantees that "[t]he right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." The Florida Supreme Court has held that public employees have the right to "effective collective bargaining" and it has determined that even the legislature cannot abridge public employees' right to bargain collectively, absent a compelling state interest making it necessary to do so. *See Hillsborough County GEA v. Hillsborough County Aviation Authority,* 522 So. 2d 358, 363 (Fla. 1988); *Chiles v. State Employees Attorneys Guild,* 734 So. 2d 1030, 1033 (Fla. 1999) (holding that the legislature failed to prove the requisite necessity for a wholesale ban on collective bargaining by government lawyers).

Based on this precedent, the hearing officer correctly concluded that the Board cannot negate a group of public employees' constitutional right to collectively bargain by passing a regulation. In its exceptions the Board contends that a more extensive analysis is required that reconciles the adjuncts' constitutional right to engage in collective bargaining with the Board's delegated authority to determine by regulation that the adjuncts' employment is "at-will," that they do not have or earn permanent status or tenure, and that they have no right to or expectation of continued employment. The

Board argues that its restriction on the adjuncts' collective bargaining rights constitutes a compelling state interest which must be considered. We do so here.

The Board does not identify any provision in Article IX, § 7(b), of the Florida Constitution authorizing the board of trustees to deny constitutional collective bargaining rights to employees. Furthermore, the Board has not identified any concomitant provision in its delegated authority authorizing it to deny constitutional bargaining rights. Simply put, BOT Regulations USF 10.200(6)(d), 204(3), 10.210(2)(a) and 10.207(3), standing alone, do not negate the adjuncts' constitutional collective bargaining rights.[5]

Furthermore, the Board has not presented persuasive evidence that its attempted restriction on the adjuncts' collective bargaining rights constitutes a compelling state interest. To that end, the Board points to the testimony of its witness who explained why flexibility in hiring adjuncts is warranted. Professor and Chair of Electrical Engineering Thomas Weller testified that, when it becomes necessary to make special arrangements with the adjuncts, course scheduling is often affected and this presents a difficult situation. Weller further testified that anything that adds complexity or places more restrictions on his department's flexibility would make the job more difficult. (T 71)

Judith Ponticell, chair of the Department of Leadership Counseling Adult Career and Higher Education, was also questioned concerning the impact that having to deal with a labor organization representing adjuncts would have on the School of Business. She similarly testified that this would severely limit her flexibility to quickly reach out to the

[5]For example, an employee does not automatically lose his bargaining rights simply because he is an "at-will" employee.

pool of adjuncts and determine who can cover a class. She testified that, if that flexibility is limited by a union dictating how the process should be done, this could severely limit the ability to cover classes. (T 97-98)

Vice Provost for Human Resources Management and Space Planning Kofi Glover testified that adjuncts being organized would present a serious or difficult problem for USF's departments because, during changes in curriculum, adjuncts, like regular faculty, can be laid off. Glover fears that if the "adjuncts or a temporary faculty cannot be laid off as a change -- in a change of curriculum that really will be a serious problem for a department." (T 169) Senior Vice Provost Dwayne Smith testified that, in his perception, if there are significant costs in employing adjuncts, employment funds would have to be shifted around to cover costs which could affect hiring new faculty or funding graduate stipends. He also testified that there would be a loss of flexibility and these two impacts could have a very deleterious effect on USF. (T 176-77)

The hearing officer considered the Board's witnesses' testimony and correctly noted that the Commission has never held that a proposed bargaining unit should not be recognized because unionization decreases a public employer's flexibility. (HORO at p. 25) An employer's flexibility and ability to make unilateral decisions regarding mandatory subjects of bargaining is always reduced once its employees choose to be represented by a bargaining agent. That is the essence of collective bargaining. Thus, we agree with the hearing officer's determination on this point, and we reject the Board's argument that its loss of flexibility is a compelling state interest which outweighs the

adjuncts' constitutional right to engage in collective bargaining. *See also United Faculty of Florida, Local 1847 v. Board of Regents, State University System,* 417 So. 2d 1055 (Fla. 1st DCA 1982) (stating that the danger that costs would go up through higher compensation to graduate assistants if unionization were allowed did not justify abridgement of graduate assistants' constitutional rights to organize and bargain collectively). Therefore, exceptions eight and nine are denied.

In exceptions ten through twelve, the Board takes issue with the hearing officer's determination that the adjuncts have a reasonable expectation of continued employment and share a community of interest. In resolving these exceptions, it is helpful to consider this issue from a historical perspective. In 1988, the Commission considered an employer's request to include regular part-time faculty in a proposed unit of full-time faculty, professors, counselors, and librarians at the Central Florida Community College (CFCC). *See Central Florida Faculty Association, United Faculty of Florida v. Central Florida Community College,* 14 FPER ¶ 19218 (1988). In that case the Commission noted that:

> There is no constitutional, statutory, or rule provision defining part-time employees. In the past, we have included part-time employees in units with full-time employees if their employment was "regular" and they shared a community of interest with the full-time employees. *In re School Board of Collier County,* 10 FPER ¶ 15169 at 346 (1984) (unit of blue collar employees).
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> Employment is characterized as regular if there is a reasonable expectation that it will continue. Factors considered in making this determination include the number and schedule of hours worked, the length and continuity of the part-timers' employment, and whether the employment will end on a date certain. *See IBPAT, Local Union 1010 v. City of Deerfield Beach,* 14 FPER ¶ 19099 (1988).

In *Central Florida Community College,* the schedule and number of hours worked by part-time employees were not consistent from one part-time employee to the next or from one term to the next and the part-timers' contract was captioned "Agreement for Part-Time or Temporary Instructional Employment" and was limited to one academic session. If CFCC wanted the part-time employee to teach during another academic session, it had to offer that employee a new contract. In addition, the terms of the contract indicated that there was no promise of recurring or continuing employment and further set forth that CFCC could cancel the agreement at its option, without obligation, any time the number of students enrolled does not justify offering or continuing the course(s). Moreover, regardless of the length of their employment, the part-timers were not eligible to receive a continuing contract (tenure). Thus, the Commission determined that the part-time employees were inappropriate for inclusion in a bargaining unit with the full-time employees based upon the lack of a shared community of interest. *Id.* at 520.

After its ruling in *Central Florida Community College* the Commission has consistently excluded adjunct faculty from units of regular full-time faculty based upon the lack of a community of interest. *See, e.g., United Faculty of Florida v. St. Petersburg College Board of Trustees,* 43 FPER ¶ 208 (2017); *Florida Community College Faculty Federation v. Florida Community College at Jacksonville,* 28 FPER ¶ 33100 (2002). However, *Central Florida Community College* and its progeny are distinguishable from the instant case because the issue here is not whether adjuncts are appropriate for inclusion in the existing faculty bargaining unit, but rather, whether a bargaining unit of adjuncts is facially appropriate.

This Commission has recently approved two bargaining units composed of part-time adjunct faculty. *See 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) (approving a unit of part-time adjunct faculty at a state community college); *Service Employees International Union (SEIU) Florida Public Services Union (FPSU), Change to Win (CTW) v. Broward College Board of Trustees,* 44 FPER ¶ 142 (2017) (approving a unit of part-time, non-tenure-track adjunct faculty at a college). In both cases the parties stipulated to the bargaining units.

In reviewing similar federal and state cases, we have found that separate units of adjunct faculty in both private and public colleges and universities are fairly commonplace. In 1982, the National Labor Relations Board (NLRB) approved a bargaining unit composed of all part-time faculty members in the University of San Francisco's colleges of liberal arts, science, and business and the schools of education and nursing, including clinical teaching assistants and all part-time academically closely related employees, at locations throughout California. *University of San Francisco v. University of San Francisco Faculty Association,* 265 NLRB No. 155; 265 NLRB 1221 (1982). In 1992, the Vermont Supreme Court affirmed the Vermont Labor Board's decision approving a bargaining unit of adjuncts employed by the Vermont State Colleges under the State Employees Labor Relations Act. *Vermont State Colleges Faculty Federation, AFT Local 3180 v. Vermont State Colleges,* 159 Vt. 619 (1992). In 2002, the Supreme Court of New Hampshire affirmed, in pertinent part, the State Public Employee Labor Relations Board's decision that adjunct professors at a state college had the right

to form a union under state legislation. *Appeal of the University System of New Hampshire Board of Trustees (New Hampshire Public Employee Labor Relations Board),* 147 N.H. 626 (N.H. 2002). In 2003, the Michigan Employment Relations Board approved a bargaining unit of adjunct faculty members whose teaching load equaled or exceeded twenty-five percent of the teaching load of the regular faculty. *Macomb Community College v. Michigan Education Association,* 16 MPER ¶ 35 (2003). In 2006, the Illinois Educational Labor Relations Board approved a unit of community college part-time adjunct faculty who provided at least forty-five contact hours of instruction in certain adult education courses for three consecutive semesters under the provisions of that state's labor relations act. *Waubonsee College Adjunct Faculty Association, IEA-NEA v. Waubonsee Community College,* 22 PERI ¶ 173 (2006).

We note that, in defining units of adjuncts in the above-referenced cases, the courts and boards have wrestled with and resolved issues such as those raised by the Board in this case. Therefore, we draw upon these decisions as well as our own case law in determining whether the proposed unit of adjuncts in this case is an appropriate unit.

As previously stated, the Board argues that the adjuncts it employs do not possess a reasonable expectation of continued employment based on the explicit terms of BOT Regulation USF 10.204(3), which states that temporary USF employees do not have or earn permanent status or tenure and have no right or expectation to continued employment. The Board points out that it has 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. The Board further states that the adjuncts in this case are hired only for a specific and limited term and upon hire they agree to their understanding of this employment condition. 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. 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.

We are not persuaded by the Board's arguments. As we previously stated, the notion that the Board can, by regulation, deny its employees' constitutional collective bargaining rights is misplaced. In the same vein, the Board's regulations, standing alone, do not destroy an employee's reasonable expectation of continued employment. This notion has been rejected by the NLRB and the courts. In *University of San Francisco,* 265 NLRB at 1223 (1982), the NLRB stated:

> ... we note that part-time lecturers are not restricted from applying for reappointment, and there is no evidence that they are told, when hired, that the position which each is filling is a temporary one which will not exist in subsequent semesters. Instead, their contracts merely make clear that the appointment to a teaching position in one year does not establish a right to reappointment in successive years. Such a disclaimer of "tenure" does not, without more, demonstrate temporary status. The key question which remains unanswered is whether, apart from the fact that the Employer is not obligated to reappoint such employees, it, in fact, does so. The Employer made no effort to prove that part-time lecturers are not, in fact, offered reappointment. On this record, therefore, there is no showing that the part-time faculty are temporary employees.

See also Community College of Philadelphia v. Commonwealth of Pennsylvania, Pennsylvania Labor Relations Board, 432 A.2d 637 (P. Commu. Ct. 1981), *aff'd per curiam,* 437 A.2d 942 (Pa. 1981) (concluding that adjunct faculty had a reasonable expectation of continued employment despite the fact that their contracts and correspondence from their employer emphasized that the employer was not bound to hire anyone for an additional term); *In Re University System of New Hampshire Board of Trustees,* 147 N.H. at 633 (concluding that the adjunct faculty's lack of a contractual right to renew their contracts does not necessarily diminish their reasonable expectation of continued employment).

Rather, an employee's reasonable expectation of continued employment, or lack thereof, depends on the factual circumstances. We agree with the view of the NLRB and courts that a regular pattern of continuing employment in past academic years can be indicative of the type of expectation of future employment necessary to establish a continuing interest in the unit. *C. W. Post Center*, 198 NLRB 453, 454; 80 LRRM 1738, 1739 (1972); *Community College of Philadelphia*, 432 A.2d at 639 (1981).

Thus, notwithstanding the Board's regulations, the record evidence demonstrates that the adjuncts are not one time or sporadic hires. The USF colleges have developed an adjunct pool in order to guarantee that the Board can retain the most qualified instructional staff. In explaining the use of adjuncts at USF, the Board's witnesses' testimony demonstrates the importance of adjuncts in its effort to retain the most qualified instructional staff. Senior Vice Provost Smith testified that USF's colleges and departments have developed "pools of adjuncts that they will draw from." (T 176-77)

Judith Ponticell testified that the School of Business maintains a pool of adjuncts. (T 82-83) Likewise, Dr. Uday Murthy, director of the School of Accountancy, testified that her school maintains a pool of adjuncts which it draws from on a semester-by-semester basis, primarily to teach lower-level classes. (T 90-91)

The chairs of the departments within USF pay special attention to how the adjuncts perform their duties, so they can evaluate whether adjuncts should be contacted in the future. The adjuncts are evaluated each semester, both by supervisors and by students. Adjuncts who have demonstrated a proficiency in teaching USF students have been sought by USF staff to come back year after year. It is common for adjuncts to work for years and years. The adjuncts are also offered the opportunity to attend specialized training to further develop their skills in teaching, and a pattern exists such that, after an adjunct has received favorable evaluations, that adjunct is repeatedly sought out in subsequent semesters. (Findings of Fact 21, 23-25, 27 and 29)

Thus, the nature and extent of the Board's reliance upon the adjunct faculty could reasonably lead them to expect that they will likely be rehired provided they demonstrate a proficiency in teaching and receive favorable evaluations. *See, e.g.*, *In Re University System of New Hampshire Board of Trustees*, 147 N.H. at 633 (ruling that evidence that the college would be hard-put to operate without its established cadre of adjunct lecturers is relevant to determining whether the adjuncts have a reasonable expectation of continued employment). The factual record before us establishes that the adjuncts employed by the Board possess a reasonable expectation of continued employment at USF. Therefore, exceptions eleven and twelve are denied.

In exception ten, the Board takes issue with the hearing officer's determination that the adjuncts share a community of interest pursuant to Section 447.307(4)(f), Florida Statutes. It argues that the adjuncts have nothing in common, inasmuch as their pay is determined by individual department chairs, is dependent on experience and specialized knowledge, and is subject to personal negotiation.[6] The Board asserts that the adjuncts are employed under the terms of their individual departments and colleges and 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. The Board argues that it would be impossible to establish a community of interest in the proposed bargaining unit because the adjuncts 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.

As the hearing officer correctly stated, several factors are relevant in determining the existence of a community of interest. They include the manner in which wages and other terms of employment are determined; the method by which jobs and salary classifications are determined; the interdependence of jobs and the interchange of employees; the desires of the employees; 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. § 447.307(4)(f), Fla. Stat.

[6]The record evidence does not support the Board's assertion that the adjuncts' salaries are subject to personal negotiation.

The Board's argument suggests that a community of interest requires a finding of complete identity of employee terms and conditions of employment. However, the Commission has stated that it does not require, nor could it reasonably require that all employees possess complete identity of terms and conditions of employment as a prerequisite to a finding of community of interest sufficient for inclusion in a unit. Indeed, the Commission frequently certifies units of employees, such as comprehensive units of blue-collar and white-collar employees, who possess dissimilar terms or conditions of employment. An employer and a certified bargaining representative must simply bear in mind the differing interests of various groups of employees within the unit as they negotiate those employees' terms and conditions of employment. *City of Tampa v. Amalgamated Transit Union, Local 1464, AFL-CIO-CLC,* 7 FPER ¶ 12141 at 326 (1981).

This point is illustrated by examining an existing bargaining unit of the Board's employees. In *Florida Public Employees Council 79, American Federation of State, County and Municipal Employees v. University of South Florida Board of Trustees,* 30 FPER ¶ 176 (2004), the parties consented to a bargaining unit composed of approximately 1,700 of the Board's white-collar and blue-collar non-professional employees in classifications such as custodial worker, licensed practical nurse, computer repair technician, plumber, and clerk typist. *Id.* at 397-98. As the job titles suggest, these employees work in different departments and perform a multitude of different job functions. Nonetheless, they possess a community of interest for the purpose of collective bargaining through their certified collective bargaining agent.

In the instant case, the record evidence demonstrates that the adjuncts across all the campuses and various colleges of USF are part of the same classification and they perform the same type of duties. They prepare lessons, teach courses, create syllabi for their courses, grade the students' tests and assignments, and meet with students to answer questions. Adjuncts also keep office hours in a USF-provided shared office or must be available to their students by other means.

Moreover, the adjuncts' terms of employment, including benefits, are determined and administered uniformly by the Board. Although they are paid different amounts as determined by their respective colleges, they are subject to a uniform pay structure. The Board acknowledges that the adjuncts are eligible for TERP, a private retirement plan, and it does not dispute that the adjuncts are subject to the same regimen of supervision and evaluations. Given the record in this case, we agree with the hearing officer that the adjuncts have a community of interest within the meaning of Section 447.307(4)(f), Florida Statutes. Accordingly, exception ten is denied.

In exception thirteen, the Board argues that the hearing officer failed to consider Section 447.307(4)(a), Florida Statutes, which requires consideration of the principles of efficient administration of government when defining a bargaining unit. It argues that the Commission must consider the practical effect the imposition of a bargaining obligation would have on the Board and whether it could unreasonably interfere with the Board's ability to provide competitive, high quality education. It argues that the imposition of a bargaining obligation and attempting to standardize employment among numerous

disciplines, departments, and campuses would be fundamentally incompatible with the Board's ability to serve its students.

In support of this argument the Board points to Dr. Weller's testimony that any restriction on his flexibility in hiring adjuncts would make his job more difficult and Dr. Murtha's testimony that being bound by a collective bargaining agreement in hiring and rehiring adjuncts would severely limit his flexibility. We agree with the hearing officer that a perceived restriction on a department head or manager's flexibility in hiring and rehiring employees is an unrealistic basis on which to deny collective bargaining rights. This is because, assuming that the adjuncts elect to collectively bargain, the concerns expressed by Drs. Weller and Murtha and the other Board administrators may be appropriately addressed during the collective bargaining process. Accordingly, exception thirteen is denied.

In exceptions fourteen and fifteen, the Board takes issue with the hearing officer's determination that the petitioned-for bargaining unit would not result in unnecessary proliferation of bargaining units. The Board points out that it argued in its proposed recommended order that the proposed bargaining unit would result in impermissible fragmentation of the Tampa adjuncts and would result in the proliferation of bargaining units because the Union excluded, without explanation, the adjuncts teaching at the College of Nursing, the College of Public Health, the School of Physical Therapy, the Morsani College of Medicine, the School of Biomedical Sciences, and the College of Pharmacy. The Board also argues that the hearing officer ignored record evidence in

stating that there is no evidence that USF Health employs adjuncts. This contention lacks merit.

As the hearing officer correctly found, the Union has proposed a facially appropriate unit of adjuncts employed by the Board. Thus, the Board carries the burden to demonstrate that the unit is inappropriate. *See Chipola Educational Support Personnel Association v. Chipola Junior College*, 21 FPER ¶ 26067 (1995). The hearing officer found, and the record confirms, that the Board had the opportunity to present all of its evidence at the hearing, but it failed to present evidence to support its argument regarding unnecessary fragmentation of bargaining units. Furthermore, the Commission is not required to define the most appropriate unit, but only an appropriate unit. *See Federation of Public Employees v. Collier County,* 8 FPER ¶ 13145 (1982).

In this exception the Board also alleges that the hearing officer's conclusion was unreasonable, unsupported by the record, and indicative of a troubling bias against the Board. We take seriously any allegation of improper conduct by a hearing officer. Thus, we have reviewed the recommended order, the hearing transcript, pleadings, and the entire record to determine if there are any facts demonstrating bias, prejudice, or improper interest by the hearing officer. § 120.656(1), Fla. Stat.; *see also FOP, District 5 v. Town of Davie*, 12 FPER ¶ 17140 (1986) (ruling that the evidence did not support employer's claim that hearing officer's alleged ex parte communication with union's counsel was direct towards the merits of the case). We have also considered whether the facts alleged would cause a reasonable person to have a well-founded fear that the

hearing officer prejudged the case. *See, e.g., Lukacs v. Ice*, 227 So. 3d 222 (Fla. 1st DCA 2017).

Here, it is apparent that the hearing officer relied on the evidence adduced at the hearing in determining whether the Board presented evidence in the record to meet its burden of establishing that the proposed unit is an inappropriate unit. She found that the Board had the opportunity to present all of its evidence at the hearing, but provided no factual support for its argument that the petitioned-for unit would result in unnecessary proliferation of bargaining units.

It is well established by the Florida Supreme Court that adverse adjudicatory rulings may not be the basis for the disqualification of a judge for bias or prejudice. *See, e.g., Wilson v. Renfroe*, 91 So. 2d 857 (Fla. 1956). Thus, we are not persuaded that the hearing officer's statements or ruling, in context, evinces bias against the Board. Based on the foregoing, exceptions fourteen and fifteen are denied.

In exceptions sixteen and seventeen, the Board generally excepts to the hearing officer's conclusion that the Union met its burden in proposing a facially appropriate bargaining unit and her conclusion that this bargaining is an appropriate unit for the purpose of collective bargaining. Our decision is consistent with our recent decisions defining bargaining units of adjuncts at Broward College and Hillsborough Community College. While we accept the Board's assertion that there are distinctions in governance between Broward College and Hillsborough Community College, and USF, we are not persuaded that the same collective bargaining rights available to the adjuncts at Broward College and Hillsborough Community College, should be unavailable to the adjuncts

employed by USF based on differences in institutional governance. Based on our resolution of exceptions one through fifteen, these general exceptions to the hearing officer's conclusions are also denied.

Finally, in recommending which adjuncts should be eligible to participate in an election, the hearing officer recommended a "look-back" period of one full academic year on a rolling calendar as an appropriate eligibility period so that the unit will encompass all three semesters. This is consistent with our recent decision in *Hillsborough Community College Board of Trustees,* 43 FPER at 188. Therefore, we adopt that recommendation.

Upon consideration, and for the reasons stated by the hearing officer as modified by our resolution of the Board's exceptions, we agree that the recommended bargaining unit is appropriate for the purpose of collective bargaining. Accordingly, the hearing officer's recommended order, as modified, is incorporated herein, and the recommended unit is approved. *See* § 120.57(1)(l), Fla. Stat.

Pursuant to Section 447.307(3)(a)3, Florida Statutes, the Commission orders that a secret ballot election be conducted in the following bargaining unit as soon as practicable:

> INCLUDED: All part-time non-tenure-track faculty (including adjunct faculty, adjuncts-contingent, adjunct, adjunct instruct, skilled craftsman, Into/Pathways, instructor, instructor I, instructor II, and hourly employee) employed by the University of South Florida at its Tampa Campus, St. Petersburg Campus, and Sarasota-Manatee Campus, who is 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 administrations (including academic advisors, deans, assistants to deans, provost, directors, coordinators, can department chairs), student services advising generalists, athletic coaches, all faculty teaching at the College of Nursing, 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.

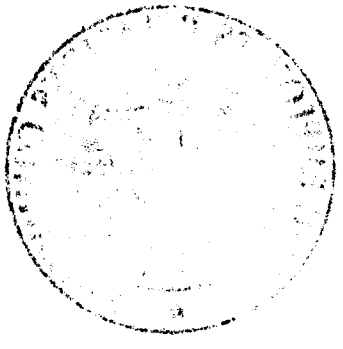
Pursuant to Florida Administrative Code Rule 60CC-2.002, the Board shall, within fifteen days from the date of this order, file with the Commission and deliver to the Union an election eligibility list containing the names and addresses of all eligible voters in the bargaining unit. The parties are directed to establish an election eligibility date and provide it to the Supervisor of Elections. Eligibility includes those adjuncts who were employed during the spring, summer, or fall semesters of 2017 up to September 15, 2017. The election shall be conducted as specified in the notice of election to be issued by the Commission. The notice shall be posted by the Board pursuant to Florida Administrative Code Rule 60CC-2.001. Accordingly, this case is transferred to the Elections Division.

It is so ordered.
POOLE, Chair, BAX and KISER, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on January 9, 2018.

BY: Barry Edwards
Clerk

/bjk



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P.1 Jan 9 2018 03:42pm

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Tallahassee, Florida 32303
850.488.8641
Fax: 850.488.9704
www.perc.myflorida.com

To: D. Marcus Braswell Dustin Watkins Sugarman & Susskind, P.A.	From: Office of the Clerk Public Employees Relations Commission
Fax: (305) 447-8115	Pages: 27
Phone: (305) 529-2801	Date: 01/09/2018
Case: RC-2017-007	Re: Order Directing Election and Transferring Case to Elections Division

Comments:

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P.1 Jan 9 2018 03:50pm

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To: Erika Lenhart Service Employees International Union, Florida Public Services Union	From: Office of the Clerk Public Employees Relations Commission
Fax: (561) 965-0151	Pages: 27
Phone: (510) 712-0412	Date: 01/09/2018
Case: RC-2017-007	Re: Order Directing Election and Transferring Case to Elections Division

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To: Daniel Crossen Service Employees International Union	From: Office of the Clerk Public Employees Relations Commission
Fax: (202) 429-5565	Pages: 27
Phone: (202) 730-7149	Date: 01/09/2018
Case: RC-2017-007	Re: Order Directing Election and Transferring Case to Elections Division

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To: John F. Dickinson Daniel P. Murphy Constangy, Brooks & Smith, LLC	From: Office of the Clerk Public Employees Relations Commission
Fax: (904) 356-8200	Pages: 27
Phone: (904) 356-8900	Date: 01/09/2018
Case: RC-2017-007	Re: Order Directing Election and Transferring Case to Elections Division

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To: Gerard D. Solis University of South Florida	From: Office of the Clerk Public Employees Relations Commission
Fax: (813) 974-5236	Pages: 27
Phone: (813) 974-2131	Date: 01/09/2018
Case: RC-2017-007	Re: Order Directing Election and Transferring Case to Elections Division

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