

**BEFORE THE
STATE EMPLOYMENT RELATIONS BOARD**

STATE EMPLOYMENT
RELATIONS BOARD

2001 JUN 23 AM 10:10

IN THE MATTER OF FACT FINDING BETWEEN:

**CINCINNATI STATE TECHNICAL
AND COMMUNITY COLLEGE**

- AND -

S.E.R.B. CASE NO. 00-MED-10-1229

**AMERICAN ASSOCIATION OF UNIVERSITY
PROFESSORS, CINCINNATI STATE TECHNICAL
AND COMMUNITY COLLEGE CHAPTER**

APPEARANCES:

For the College: Brenda V. Thompson, Esq.
Graydon, Head & Ritchey, LLP
Cincinnati, Ohio

For the Association: Donald J. Mooney, Jr., Esq.
Ulmer & Berne
Cincinnati, Ohio

And

John M. Battistone
Chief Negotiator

REPORT AND RECOMMENDATIONS OF THE FACT FINDER

Frank A. Keenan
Fact Finder

BACKGROUND:

This case, well presented by the parties' advocates, was heard in Cincinnati, Ohio on January 5, 2001. This proceeding involves the forming of the parties' second collective bargaining agreement, a successor agreement to the parties' first agreement, the December 23, 1997 through December 22, 2000 agreement. The parties came into Fact Finding with some six (6) issues at impasse. Those issues involve Article VI - Compensation; Article VII - Workload; Article VIII - Benefits, Paragraph F, Health Insurance; Article X - Tenure; Article XIX - Duration & Amendment; and a [New] Article - E.P.M.I.

In arriving at the Recommendations made herein, the Fact Finder has taken into account and relied on the factors listed in Ohio Revised Code Section 4117.14(G)(7) and Ohio Administrative Code 4117-9-05(J), to wit; past collectively bargained agreements between the parties; comparison of unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved; the interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service; the lawful authority of the public employer; the stipulations of the parties; and such other factors not confined to those listed above which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.

In this regard, the parties entered into the following stipulations:

1. The job duties of the Pre-Tech Advisors in the bargaining unit AAUP-II (incumbents are Richard Daniels, Bernell Prince, and Effie Rosa) are essentially the same as the job duties of Pre-Tech Advisors in the bargaining unit AAUP-I (incumbents are Susan Marcotte and Athealia Bell).
2. Two positions in the AAUP-II bargaining unit as of the date of the 1997 fact-finding were eliminated as a result of termination of the Jump Start Grant. Those positions were the Program Advisor positions held by Mark Giles and Bernell Prince.
3. The 1997 Fact-Finder's report included a recommendation that the 180 day schedule be "phased in" for the AAUP-II unit employees. The College rejected the 1997 Fact-Finder's report.

Since 1989, the Association has represented the unit of some 160+ teaching faculty and some support staff, in a bargaining unit which expressly excludes the members of the bargaining unit involved here. In a nutshell, the instant bargaining unit employees' positions are funded entirely or partly by grant money, or contract service money from other institutions, and as opposed to the College's "hard money" General Fund, and as such, are referred to by the parties as "soft money" employees. The teaching faculty "hard money" bargaining unit is designated by the parties as AAUP Unit I; the bargaining unit here is referred to as AAUP Unit II. References hereinafter to the "Current Contract," are more accurately a reference to the-most-recently expired 1997 Contract, too cumbersome a phrase to be repeated throughout the Report.

THE HISTORIC CONTEXT:

The record reflects that the Association came to represent AAUP Unit I pursuant to a SERB-conducted election pursuant to a Consent Election Agreement, which expressly excluded "soft money" faculty. In 1993, the Association filed with SERB an amended Petition for Representation Election, an amended Petition for Amendment of Certification, and an amended Petition for Clarification of Bargaining Unit. By these petitions, the Association sought to include "soft money" faculty into the existing AAUP Unit I, either by accretion or by "opt-in" election. The College opposed all three petitions. The Board dismissed all three petitions in Case No. 93-REP-05-0098, June 9, 1994. As the Board saw it, the question before it was: "Whether and under what circumstances a bargaining unit agreed upon by the parties in a consent election agreement can be altered over the objections of one of the parties." In resolving this issue, the Board noted in the Opinion as follows:

"At the time the consent election agreement was negotiated and signed in 1989, Perkins funds accounted for approximately 85% of the salaries and fringe benefits attributable to the four existing positions. In 1990, a fifth "soft" money position was created. From 1989 to 1993, the percentage of funding attributable to Perkins funds first decreased and later increased. For the 1993-1994 academic school year, the amount of Perkins funds available was approximately 24% of the compensation for the five positions in question. We do not find that the change from 85% contribution to 24% is a substantial change in the factual underpinnings of the parties' agreement to warrant ignoring an agreed term in the consent election agreement. The parties' apparent intention was to exclude "soft" money positions because of the insecure and unstable nature of these

sources of money. The fluctuation in the amount of "soft" money is as much a problem as the amount of money itself. The factual underpinning of the parties' agreement was a recognized difference in funding sources, one, more stable and controlled by CTC from the general fund, and the other, more insecure and not under the CTC's control from "special grants." The factual underpinning of the agreement in this case was not the specific amount of contribution from the Perkins funds but the existing difference in the funding sources. Hence, while the amount in contribution from the special funds has clearly changed, the factual underpinnings of the parties' agreement have not changed. The excluded employees are still funded by Perkins funds as was the case when the parties entered the consent election agreement. The instability of "soft" money by the nature of its source and its unpredictable fluctuation is still an existing factor as it was at the time of the signing of the consent election agreement. Thus, we believe that in the case before us, no substantial change occurred in the factual underpinnings of the parties' agreement.

Since no substantial change occurred in the factual underpinnings of the parties' consent election agreement nor was there any claim of fraud or mistake, the consent election agreement negotiated and signed by the parties should stand intact. The parties of course may modify the unit by agreement and then present it to the Board for approval."

The Board dropped a footnote stating: "[t]his ruling does not prohibit the employees at issue from exercising any statutory right they may have under O.R.C. Chapter 4117 to be represented by the AAUP in a separate unit." In its Conclusion, the Board found that "the parity between flexibility and stability in the structure of bargaining units must be maintained while protecting the integrity of the consent election process," and established a standard for varying from the terms of a consent election agreement's unit description, to

wit, "a substantial change in the factual underpinnings of the parties' agreement after signing of the agreement." Finding no such change, the Board dismissed the Association's petitions.

ARTICLE XIX - DURATION AND AMENDMENT

DISCUSSION:

The predecessor Contract, the parties' initial Contract had a three year duration and expired on December 22, 2000. The College seeks here another three (3) year Contract. The Association proposes a Contract which begins effective December 22, 2000. The second year of the Contract would begin on the first day of the September (Early Fall) academic term 2001, and would end at midnight of the day prior to the beginning of the Early Fall 2002 academic term. The Association asserts, as it did to Fact Finder Kosanovich in 1997, that its proposal would put collective bargaining negotiations on the same track as those for AAUP Unit I, which only makes sense "since issues are almost always the same," thereby avoiding duplicative preparation. To the contrary, argues the College, by its duration proposal, the Association simply "seeks to gain leverage in its bargaining position." The College made essentially the same argument to Fact Finder Kosanovich, when it argued that a similar Association proposal in 1997 served to "strengthen the hand of the Union without [a] corresponding benefit to the College." Kosanovich agreed with the College's perspective and recommended the three year Contract the parties eventually came to agree upon.

RATIONALE:

The statutory factor of past collectively bargained agreements favors the College's position. The Association's position does not appear to be supported by any statutory factor. Accordingly, the College proposed three year Contract shall be recommended.

RECOMMENDATION:

It is Recommended that the parties adopt a three year Contract and hence it is Recommended that the parties' Contract, at Article XIX - Duration and Amendment, read as follows:

"This Agreement shall be effective as of December 23, 2000, and shall continue in full force and effect for three years until and including midnight December 22, 2003.

Any amendment, modification, or addition to this Agreement must be in writing and duly signed by the Parties in order to be effective."

ARTICLE XIII - BENEFITS, PARAGRAPH F. HEALTH INSURANCE (ETC.)

DISCUSSION:

The record reflects that the College has proposed changes in the current Contract's health insurance benefit designed to convert members of the bargaining unit to a cafeteria-style plan as are all other bargaining units in the College, with phased in incentives for employees to move to the Choice Care coverage. The Association is agreed, except for the third year, inasmuch as the Association has proposed only a two (2) year Contract.

RATIONALE:

Since a three (3) year Contract has been recommended, and in light of the Association's Agreement with the College's incentive plan for the first two years of the Contract, it is inferred that no strong objection exists to extending the College proposed Health Plan over the recommended three year term of the Contract. Internal comparability, a statutory factor, favors such.

RECOMMENDATION:

It is Recommended that the College's Health Plan changes be incorporated into the parties' Contract.

[NEW] ARTICLE ___ -

ELECTRONICALLY PURVEYED METHODS OF INSTRUCTION (EPMI)

DISCUSSION:

In the most recently negotiated AAUP Unit I Contract, the parties agreed to Contract language concerning ownership of the intellectual property generated by the use of technologically innovative methods of instruction to reach a broader spectrum of potential students. The Association seeks to have that provision incorporated into the AAUP Unit II Contract. (See Appendix II.) The College is opposed to any such incorporation. It notes that this AAUP Unit I provision was designed to encourage Unit I teaching faculty to develop such methods of instruction. The College notes that in the face of contractual silence in the matter statutory provisions would principally vest ownership in

the College. As a part of their regular duties, the Unit II bargaining employees are not assigned to teach; they do so only voluntarily. Thus, asserts the College, an EPMI provision is irrelevant to the AAUP-II bargaining unit employees, and represents an unwarranted diminution of the College's intellectual property rights.

It is noted that the parties' Current Contract, at Article VI - Compensation, Paragraph D., specifically addresses those occasions when "[t]hose members of the AAUP-2 bargaining unit ... teach classes in addition to their regular duties," and sets forth what they shall be paid per contract hour course on such occasions.

RATIONALE:

In light of the contractual recognition that bargaining unit employees do teach, albeit voluntarily, and the contractual setting of terms as to their compensation on such occasions, in my view this issue devolves into a straightforward issue of fairness. One asks rhetorically: Why should one teacher whose services the College takes on, who develops a technologically innovative method of instruction share in an enhanced ownership equation of his innovation, while another teacher whose services the College takes on, who develops a technologically innovative method of instruction, not share in such an enhanced ownership equation of his innovation?

RECOMMENDATION:

It is Recommended that the parties' Contract contain a "new" EPMI Article, as more fully set forth in Appendix II.

ARTICLE X - TENURE

DISCUSSION:

The current AAUP Unit II Contract provides for tenure. And, historically, the AAUP Unit I has provided for tenure as well. In the most recent AAUP Unit I negotiations, the parties agreed to streamline the tenure process. The Association proposes to retain tenure and, in doing so, to mirror the streamlining language of the AAUP Unit I Contract in order to continue the practice of having only one kind of tenure and process for obtaining it. (See Appendix I.) At the hearing herein, the Association clarified that it proposes to retain the Current Contract's concept of tenure being subject to termination "as a result of ... substantial reduction or elimination of grant funding as set forth elsewhere herein."

The College proposes that AAUP Unit II employees no longer be eligible for tenure, but that those employees who were previously granted tenure would be grand-fathered. The College asserts that the loophole for termination of tenure as a result of substantial reduction or elimination of grant funding renders Article X meaningless. The College notes that at one point in negotiations, as part of an overall package, the Association agreed to the College's proposal.

The Fact Finder notes employee Cover's testimony to the effect that he sought employment at the College in part because of the potential for tenure, a potential which he himself came to realize.

RATIONALE:

The only statutory factor identified is that of past collectively bargained agreements,

and that factor clearly favors the Association's position. Moreover, employee Cover's testimony shows that the existence of the potential for tenure, whatever its limitations in the AAUP Unit II context, is perceived as both a valuable benefit and as a recruitment draw.

Accordingly, the Association's proposal will be recommended.

RECOMMENDATION:

It is Recommended that the parties adopt Article X as set forth in the Association's proposal, attached as Appendix I.

ARTICLE XV - COMPENSATION - & - ARTICLE VII - WORKLOAD

DISCUSSION:

Interrelated, these matters are discussed together. The Association proposes that the two tenured members of the bargaining unit (David Cover and Bernell Prince) receive compensation increases of 2.25% for the first year. Non-tenured members of the bargaining unit would receive compensation increases of twenty-five percent (25%), but remain on 270 day (twelve month) work schedules. Effective September 1, 2001, all members of the bargaining unit would receive 4.5% wage increases and the tenured bargaining unit members would go on the 180 day schedule, which all AAUP Unit I employees work.

The College, on the other hand, proposes that workload remain the same, and that all members of the bargaining unit receive 4.5% increases for each year of the three year

Contract. This is the same increase given to AAUP Unit I faculty and 5% more than was given to other plant and security bargaining units.

The Association looks to the by now well established "fact," conceded in stipulations to SERB, and established in record evidence both here and in front of the Fact Finder Kosanovich, that the bulk of AAUP Unit II employees essentially have counterparts in AAUP Unit I, and perform very similar work for 270 days per annum instead of the 180 days schedule of AAUP Unit II employees. In the final analysis, the Association seeks "parity" between AAUP Unit I and AAUP Unit II, relying on internal comparables.

In support of its proposal, the College notes that whether reducing hours or increasing compensation, as proposed by the Association, the College will experience a 25% increase in the College's costs if these services must be provided year round. The Perkins Grant, the TRIO Grant and the DHS Grant, which fund the bargaining unit positions, are premised on the provision of services year round, not simply for 180 days. The HCDHS Grant, for example, will not provide additional funding to provide for services during this additional time off. In addition, with regard to the tenured ADA/Special Needs Counselor, this employee is specially trained to provide services needed for this group of students. These students are present for all 5 terms, not for only 4 terms and require consistency in service delivery. Further, community agency contacts are an important part of this job. No other person within the College has these contacts.

The bargaining history on this issue clearly evidences that the College has repeatedly rejected any proposal requiring either a 25% increase in compensation or 25% workload decrease for the members of this bargaining unit.

RATIONALE:

As things stand now, the parties are truly at an impasse on these two issues of compensation and workload. In my view, however, the Board's Opinion for the parties in SERB Case No. 93-REP-05-0098, dated June 9, 1994 (and referenced herein above) provides guidance to the Fact Finder, and the parties alike, for an analytical framework which can extricate the parties from the impasse and dilemma in which they find themselves. Thus, in that Opinion, the Board sanctioned the parties' initial wisdom in declining to join this bargaining unit with Unit I due to "the insecure and unstable nature of these [fund] sources of money," and "fluctuation in the amount of 'soft' money is as much a problem as the amount of money itself," vis a vis Unit II positions. At the same time, however, the Board, in footnote 7, sanctioned the separate bargaining unit we have now. In sanctioning a separate bargaining unit, the Board had to know that in the event of an impasse, the statutory scheme contemplated and sanctioned a Fact Finder looking at internal comparables and ability to pay issues. Similarly, the Board of course is deemed to have been aware that the Statute does not prioritize or weight these often, as here, competing factors. Nonetheless, in my judgment, the Board's Opinion implicitly tells us that the unique "funding" circumstances present here must be given considerable weight under the statutory ability-to-pay factor. And historically, comparables, especially internal comparables, have likewise been given considerable weight under the Statute. Accordingly, since both of these factors must be given considerable weight, "parity" does not seem feasible. However, better pay "equity" does seem feasible. In my judgment, the internal comparable of considerably higher compensation for Unit I incumbents performing

very similar work to Unit II incumbents warrants a modest upward pay equity adjustment for Unit I employees. Since grant money is typically annual, such modest equitable pay adjustment is best phased in, to minimize the impact on grant requests. Modest and incremental increases are more likely to be accepted by outside funding sources.

As for the across-the-board increase, the College's 4.5% is well supported by internal comparables and other data of record.

Unlike modest and incremental equitable increases in base pay, the dramatic decreases in workload for some bargaining unit members proposed by the Association threatens the outside funding sources. As the College points out, access to these funds is competitive; all are accustomed to the longer work year, and in any event, the students being served are year round. Hence, no changes will be recommended to Article VII - Workload.

It appears that there are some "loose ends" with respect to Paragraphs B., C., D., and E. of Article VI. The Association has submitted a proposal for Paragraph D., Overload, Professors Emeriti, and Retirees and Paragraph E. - New AAUP - 2 Bargaining Unit Members. The College did not. Neither party submitted any proposals *vis a vis* Paragraph B. - Increase in Compensation for Earning Tenure Status, or Paragraph C. - Longevity Pay. Presumably, therefore, these two paragraphs have been resolved.

RECOMMENDATION:

It is Recommended that the parties retain the provisions of Article VII - Workload of the Current Contract.

It is Recommended that effective December 23, 2000, all bargaining unit employees receive a two percent (2%) increase to their base salary, resulting in a new base salary which shall then be increased by an additional four and one half per cent (4.5%).

It is Recommended that effective December 23, 2001, all bargaining unit employees receive a two percent (2%) increase to their base salary, resulting in a new base salary which shall then be increased by an additional four and one half percent (4.5%).

It is Recommended that effective December 23, 2002, all bargaining unit employees receive a two percent (2%) increase to their base salary, resulting in a new base salary which shall then be increased by an additional four and one half percent (4.5%).

It is Recommended that the parties arrive at the provisions for Article VI, Paragraphs D. and E. in the same manner and fashion as said provisions were arrived at in the parties' predecessor Contract.

This concludes the Fact Finder's Report.

Dated: January 22, 2001



FRANK A. KEENAN
Fact Finder

APPENDIX I

Article X Tenure

A. Definition

1. Tenure is the status of continuous employment granted by the College to full-time members of the bargaining unit in recognition of demonstrated excellence and consistent contributions to the College community.
2. Tenure may be awarded to a full-time member of the bargaining unit who occupies a position at the College and who has satisfied the criteria for tenure.
3. Tenure shall not be granted by default, but shall require a positive action by the Board of Trustees based upon the recommendation of the Faculty Tenure Committee, the appropriate Dean, the appropriate Vice President or academic affairs designee, and the President.
 - a. The Faculty Senate shall, in accordance with its bylaws, establish a standing Faculty Tenure Committee.
4. Tenure is terminated or subject to termination only for adequate cause or as a result of a reduction in force ~~as set forth elsewhere herein.~~
5. Only full-time members of the bargaining unit shall be considered eligible for tenure consideration. *OR substantial reduction or elimination of grant funding*

B. Eligibility for Tenure Application

Upon completion of four (4) years of full-time service (as defined by the provision for non-renewal of contract in Article XI C 1), members of the bargaining unit may choose to apply, one time and one time only, for tenure. If they choose to apply, they will do so by September 15 of their fifth year, by providing to the Dean or Director of the applicant's division or department and to the Faculty Tenure Committee the evidence that they meet the following required criteria below.

1. A recommendation by at least one (1) tenured faculty member within the applicant's division that the applicant be granted tenure.
2. Evidence that the applicant has attained a bachelor's or master's degree or equivalent appropriate certificate relevant to his/her field or area of expertise.
3. Evidence demonstrating recognizable excellence in the applicant's field or area of expertise. To the extent that such information is available to the applicant, this evidence should include, but not be limited to, student, peer, or administrative evaluations, and information from the applicant's Peer Mentoring Committee, appointed by the Faculty Senate.
4. Additional evidence which should include, but not be limited to, the following:
 - a. evidence of professional growth, including possible scholarly publications

- b. *evidence of constructive activities in support of professional associations and societies within the applicant's fields of interest or related areas*
- c. *evidence of the faculty member's value to the College, including evidence of performance of professional responsibilities consistent with professional standards and the mission and objectives of the College. Such evidence may include, but not be limited to:*
 - *student advisement/guidance/recruitment*
 - *program and curriculum development*
 - *participation in College committees*
 - *participation in program or College accreditation activities*
 - *participation in relevant business or community affairs*
5. *The process and basis for tenure must remain flexible to allow for individual uniqueness and creativity in performance. Applicants need not satisfy all the criteria listed above, but will be expected to have records which demonstrate excellence in the performance of their duties.*
6. *The evidence submitted by the applicant should be complete as of the time of submission, but can be supplemented if new or clarifying information becomes available during the tenure application review process, up to March 15 of the year in which the Board of Trustees acts upon the final recommendation. Such supplements should be provided to all persons who have reviewed the application as of that point in the application review process.*

C. *Tenure Committee and Review of Tenure Applications*

1. *The Dean of the applicant's division shall make a written recommendation regarding the applicant's request for tenure, directly to the Academic Vice President. Prior to making such recommendation, the Dean shall evaluate the submitted materials, as well as the applicant's performance, including annual administrative evaluations which have previously been conducted. The Dean's recommendation shall be made to the Academic Vice President no later than December 15, with a copy to the applicant and to the Tenure Committee.*
2. *The chairperson of the Tenure Committee shall notify the Academic Vice President and all applicants of the Committee's recommendation by December 15. Such notification shall be in writing. In the event of a negative recommendation, the Committee shall submit a written statement of the reasons for the negative recommendations.*

3. Upon receipt of a recommendation by the Faculty Tenure Committee and the Dean, the Academic Vice President, upon reviewing the recommendations and the submitted material, shall, as soon as is reasonably possible, but by no later than February 15, submit to the President a written recommendation regarding the applicant's request for tenure, along with the recommendations of the Dean and the Faculty Tenure Committee.
4. Upon receipt of the recommendations and the Academic Vice President, the Faculty Tenure Committee, and the Dean, the President, upon reviewing the recommendations and submitted material, shall, as soon as is reasonably possible, but not later than March 1, submit to the Board of Trustees a written recommendation regarding the applicant's request for tenure, along with the recommendations of the Academic Vice President, the Dean, and the Faculty Tenure. The President shall submit copies of his or her recommendation to the Faculty Tenure Committee and to the applicant(s).
5. The Tenure Committee, the Dean, or the Academic Vice President may consider other pertinent information deemed necessary for a complete review of the applicant's eligibility for tenure. Such information must be in written form and be provided to the applicant and all persons who have reviewed the application as of that point in the application review process. The applicant shall be afforded an opportunity to respond in writing to the material no later than ten (10) days after he or she is given a copy of the material or up to March 15, whichever date is earlier. Such responses will be added to the file.
6. The Board of Trustees shall notify the applicant by April 15 of its decision to award or deny tenure. Such notification shall be in writing. In the event that the decision of the Board of Trustees is contrary to the recommendation of the Faculty Tenure Committee, the Board of Trustees shall put into writing its reasons for such decision.

D. Denial of Tenure

In the event tenure is denied by the Board of Trustees, the faculty member shall not be offered a contract for the following academic year.

E. In the event that a member of the AAUP-2 bargaining unit does not apply for tenure, such member remains subject to annual contract renewal as any other member of the AAUP-2 bargaining unit who is not eligible for tenure.

APPENDIX II

New Article Electronically Purveyed Methods of Instruction

- A. *The Parties recognize that advances in technology within the term of this contract may allow for the development of technologically innovative methods of instruction, including, but not limited to, electronically-purveyed methods of instruction through live or recorded audio and/or visual presentations and material using direct signal or cable, transmission by telephone lines, fiber optic lines, digital and/or analogue video tape, audio tape, CD-ROM, Internet, E-mail, or other electronic means now known or hereafter developed (referred to herein as "EPMI").*

As set forth in Article V(B)(1), the Parties recognize that responsibility for making recommendations on fundamental academic matters, such as the curriculum, subject matter, and such methods of instruction as may be developed through electronic or other alternative means, remain the significant responsibility of the faculty, with final approval by the Board of Trustees, and that the faculty and the College administration have a mutual desire to assure the quality and academic integrity of its course offerings.

- B. *The College and the AAUP recognize the value of such technologically innovative methods of instruction and agree that there is mutual interest in further developing these alternative techniques for reaching a broader spectrum of the potential students in the community. Faculty are encouraged to participate in developing and delivering courses using electronically purveyed methods of instruction (EPMI), and the College will endeavor to support the faculty members who wish to incorporate innovative alternative technologies in their pedagogical approach, as follows:*

- 1. In furtherance of the above enumerated objectives, faculty members are hereby encouraged-- but not required-- to develop and/or deliver courses utilizing EPMI.*
- 2. A faculty member who desires to develop EPMI methods of instruction, shall consult with the appropriate dean or director to arrive at a written agreement which details the scope of the EPMI material to be developed, a schedule for completion, and the terms and conditions of ownership of any intellectual property rights in the materials developed. This agreement shall also identify the number of special project workload units to be assigned for the development of the EPMI material. In no instance shall the special project workload units assigned be fewer than the unit-value-plus-one workload units of the course contemplated.*
- 3. A faculty member who delivers electronically-purveyed courses shall receive workload units equal to no fewer than the unit-value-plus-one workload units of the course.*
- 4. A faculty member who develops such electronically-purveyed courses shall have the right of first refusal for delivering such courses, in consultation with the appropriate divisional dean or director.*

5. *Appropriate "class" capacities and maximum student enrollments in electronically-purveyed courses shall be established by the appropriate divisional faculty, in consultation with the appropriate divisional dean or director.*
6. *A faculty member who develops, creates, makes, or originates EPMI materials shall retain in perpetuity the sole and exclusive rights to all such property, to the extent permitted by law, except as specifically modified by written agreement in advance, as described in §II(b) of this Article.*

C. Intellectual Property

1. Scope

This section sets forth the rights and obligations of the Parties hereto as to intellectual property rights of the College and of the members of the bargaining unit, in any materials comprising EPMI material as described in Section I above, such rights to include, but not to be limited to, rights in intellectual property that are the subject of protection under applicable laws pertaining to copyright, patent, trade secret, trademark, service mark, and all other intellectual property rights.

2. Definitions

a. Copyright/Copyrightable

Original works of authorship, including computer programs, fixed in any tangible medium of expression, now known or later developed, from which such works can be perceived, reproduced, or otherwise communicated, either directly, or with the aid of a machine or device. Works of authorship include the following categories:

- (1) *literary works*
- (2) *musical works, including any accompanying words*
- (3) *dramatic works, including any accompanying music*
- (4) *pantomimes and choreographic works*
- (5) *pictorial, graphic, and sculptural works*
- (6) *motion picture and other audiovisual works*
- (7) *sound recordings*
- (8) *architectural works*

b. Intellectual Property

Any trademark, service mark, trade secret, copyrightable, or patentable matter or any intellectually created tangible thing, matter, or work of authorship, including, but not limited to, books, texts, articles, monographs, glossaries, bibliographies, study guides, laboratory manuals, syllabi, tests and work papers, lectures, inventions discoveries, musical and/or dramatic compositions, published or unpublished scripts, films, filmstrips, charts, transparencies, other visual aids, video and audio material, computer programs, live video and/or audio broadcasts, programmed instructional materials, drawings, paintings, sculptures, photographs, and other works of art, and any other original work recorded, fixed, or otherwise embodied in any medium.

c. Patent/Patentable

- (1) *utility inventions or discoveries, which constitute any new and useful process, machine, manufacture, or composition of matter, or any new*

and useful improvement thereof, as such is further defined in 35 USC sections 100, 101.

- (2) ornamental designs, being new, original and ornamental designs for an article made, as such is further defined in 35 USC section 171 et seq.*
- (3) plant patents, being for the asexual reproduction of a distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or plant found in an uncultivated state such as is further defined in 35 USC 161 et seq.*

d. Trademark/Trademarkable

Any word, name, symbol, or device, or combination thereof adopted and used by an employee to identify his/her goods and distinguish them from those made, manufactured, or sold by others.

3. *Presumption of Ownership*

It shall be presumed that all rights in any intellectual property created, made, or originated by a faculty member who is an employee covered by this Agreement, shall be the sole and exclusive property of such faculty member in perpetuity, or so long as the state or federal laws applicable thereto allow, except as that faculty member may choose individually to transfer, assign, or contract away such property in full or in part, and further except as the employer may expect a faculty member to create syllabi, assignments, and tests for students limited to classes taught in the faculty member's department or program, in which case the College shall have the right to expect the faculty member to use such materials in his or her aforesaid classroom, and the College shall not be expected to pay royalties for said materials, but may not transfer ownership or sell the use of said to others than the creator, provided further, that if such contractual arrangements are made between the faculty member and the College, the AAUP also be a party, thereto; otherwise there shall be no restrictions upon the faculty member except as otherwise explicitly set forth herein. Creatorship of intellectual property shall be presumed in the claiming faculty member, as against the College. Intellectual property created by the faculty member in the fulfillment of the employee's normal duties and responsibilities under this collective bargaining Agreement is presumed to belong to the faculty member for proprietary or marketing purposes outside the College, but is available to the College for internal review and for review by external agencies regulating the College.

The College is the presumed owner of intellectual property only when the College enters into an agreement with the faculty member to specifically create such specified intellectual property in exchange for compensation and

the agreement specifically outlines the development obligations and the College's exclusive ownership.

The College and the employee are joint owners of intellectual property when they enter into a specific agreement to create such intellectual property, and this agreement defines the development obligations and ownership share of each party.

4. Use of Funds from Sale of Intellectual Property

- a. Funds received by the College from the sale of intellectual property owned by the College shall be allocated and expended as determined solely by the College*
- b. Funds received by the faculty member from the sale of intellectual property owned by the employee shall be allocated and expended as determined solely by the faculty member.*
- c. Funds received by the faculty member and by the College from the sale of intellectual property owned jointly by the faculty member and the College shall be allocated and expended in accordance with the specific agreement negotiated by the faculty member and the College concerning such jointly owned property.*
- d. Disputes regarding such funds from sale of intellectual property shall be appealed to a College panel consisting of two voting members appointed by the Faculty Senate, and two voting members appointed by the College's Chief Information Officer. The Vice President of Academics shall chair the panel and shall have a vote only in the event that the panel is deadlocked.*

D. Development Obligations

- 1. The College supports the development, production, and dissemination of copyrightable, trademarkable, patentable, and other intellectual properties by its employees.*
- 2. It is understood that intellectual property developed by employees on or off College time, except for those materials for which the College had specifically contracted prior to June 9, 1998, shall remain the property of such employees, but shall continue to be used for the benefit of the College while the employee remains an employee of the College.*