

OPINION AND AWARD

IN THE MATTER OF ARBITRATION

BETWEEN

THE FLORIDA STATE UNIVERSITY
BOARD OF TRUSTEES

And

UNITED FACULTY OF FLORIDA

Grievance concerning layoffs
and non-reappointments

Grievants: Anthony Arnold,
Leslie Howard, Nancy Davis,
Joseph Donoghue, Alejandro
Gallard, Elizabeth Jakubowski,
Dale Jordan, Steven Kish, Susan
Lynn, William Parker, Elizabeth
Peters, David Thistle, and John
Raulerson

Date of Hearings: 5/13-14,
7/20-21 and 8/11/10

Briefs Received: 9/23/10

Date of Decision: 11/3/10

APPEARANCES

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I. STATEMENT OF THE CASE

The Florida State University Board of Trustees (University or FSU) and the United Faculty of Florida (UFF or Union) are parties to a collective bargaining agreement which governs the wages, hours and other terms and conditions of employment of members of a bargaining unit comprised of faculty and staff employed by the University. It also provides for a grievance procedure culminating in final and binding arbitration as the mechanism to be used to resolve any disputes concerning the interpretation or application of its terms.

At issue in this case is a grievance which was filed on October 22, 2009, by the Union on behalf of some twenty-three tenured faculty members employed by the University. The grievance reads, in pertinent part, as follows:

II. GRIEVANCE

Article(s) and Section(s) of Agreement allegedly violated:
Articles 1, 2, 3, 5, 6, 7, 8, 12, 13, 15, 20, 26 and all other applicable articles.

Statement of grievance (must include date of acts or omissions complained of):

(1) The University failed to provide proper notice of layoffs as required. (2) The University failed to properly specify the layoff unit. (3) The University failed to properly apply layoff criteria as required. (4) The University has improperly enacted layoffs as non-reappointments.

Charges 1 through 4 are filed on behalf of the UFF-FSU Chapter. Charges 2 and 3 are filed on behalf of all Grievants named. Charge 4 is filed on behalf of Grievants Kariko, Arbic, Raulerson, Mosier, Dietz, Taite, Tang and Wetz.

Remedy Sought:

Rescind layoffs and make all grievants whole. Provide proper notice to UFF, identify the layoff unit, follow the layoff criteria and reclassify the non-reappointments as layoffs.

The University's response to the grievance at Step Two of the grievance procedure is dated December 22, 2009 and reads, in pertinent part, as follows:

"1. Step 2 Grievance Form Received on December 3, 2009, with attachments.

A Step 2 meeting was held on Monday, December 14, 2009 and the attendees were as follows: yourself, UFF Grievance Chair; Jack Fiorito, President UFF-FSU Chapter; Tom Wazlavek, Service Unit Director, United Faculty of Florida; Susannah Miller, Director of Faculty Relations, and myself.

The issue in this grievance is whether the this Agreement was violated when the University administered layoff and non-reappointment notices to faculty on or about July 1, 2009.

There were four Step 1 responses to this grievance because the deans made the specific decisions with regard to how the budget reductions would take place within their respective colleges. Overall the Step 1 responses indicated that the layoff criteria outlined in the Agreement were followed. None of the four deans responding found a violation of the Agreement as alleged.

At the Step 2 meeting the union alleged the following:

1. "The University failed to provide proper notice of layoffs as required." The union advised that the notice provided to them on or about May 29, 2009, lacked specificity and without details it was not meaningful to them.
2. "The University failed to properly specify the layoff unit." Upon questioning the union further, President Fiorito advised that he did receive a list from Susannah Miller in June 2009, and another list in August 2009, both of which indicated the units designated for layoff. The union then alleged that it believed that because there was only one notice, the layoff unit should be singular and as such the unit should have been designated as the University. They alleged that because the layoff unit should be the University, all untenured faculty should have been impacted prior to tenured faculty.
3. "The University failed to properly apply layoff criteria as required." The union alleged that the University could not "mix and match" the criteria in the Agreement when determining the impacted faculty members. The union refrained from commenting further on this allegation.
4. "The University has improperly enacted layoffs as non-reappointments." The union alleged that the layoff criteria outlined in Article 13 (Layoff) of the Agreement should have applied to the non-reappointed faculty as well.

I have reviewed all of the information relevant to this grievance and my response to each allegation is as follows:

1. With regard to the allegation that the University failed to provide proper notice as required, I find that notice was indeed provided to the UFF on or about May 29, 2009. Article 13.1(a) of the Agreement specifically states "...the University shall notify the local UFF Chapter and the UFF state office no less than thirty (30) days prior to taking such action." Upon review of the plain language of the Agreement, the University has provided more than sufficient notice. Indeed the University went beyond its obligation when the University has not yet taken "such action" and will not do so until Spring 2010 at the earliest. Moreover, the plain language of the Agreement does not support the UFF's claim regarding the content of the notice.

layoff, the unit was defined in accordance with the Agreement. The Agreement specifically defines a layoff unit in Article 13.I(b) as "...an organizational level of the University, such as a campus, division, college/unit, school, department/unit, area, program, or other level of organization as the University deems appropriate." In this case, the layoff units fell within the definition of the Agreement and were identifiable organizational levels of the University (a department, program, major, etc.). With regard to the union's argument that the layoffs and non-reappointments should be considered singular and therefore the unit should be defined as the University, I find that an unreasonable interpretation of the Agreement. The budget reductions were handled in a decentralized manner by the respective deans of the colleges. It is not reasonable to expect an organization of this University's size and nature to take such a simplistic approach to budget reductions. Each college managed its own reductions in a unique way that best met the needs and mission of the respective college. Furthermore, the union's argument that because there was only one notification there is therefore only one unit is a strained interpretation of the Agreement, especially in light of the fact that the actions have yet to be taken (and may well be extended by an additional year if additional stimulus funds are approved by the Legislature this spring). In each instance, layoffs were made within a college, department, program, major, or other existing organizational unit identified by the University, as required by the Agreement.

3. The University followed the layoff criteria outlined in Article 13 of the Agreement within each organizational unit. Some units were identified because of low student enrollment, others because of lack of scholarly activity among the faculty, and others because of future prospects and planning, among the other reasons outlined in the four Step 1 responses to this grievance. Once units were identified, the criteria in Article 13 were applied uniformly within that unit.
4. The University did not violate the Agreement by issuing notices of non-reappointment as opposed to layoff

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2. The University did not fail to specify the layoff units as alleged. In each instance of

notifications to non-tenured faculty members. Article 12.4 (Non-Reappointment Considerations) specifically contemplates adverse financial circumstances as one of the possible reasons for a non-reappointment: "If the decision not to reappoint was based solely upon adverse financial circumstances..." The Agreement goes on to delineate the recall rights of such individuals. Clearly the Agreement contemplates non-reappointments related to budgetary shortfalls. Moreover, if the University had instead followed the layoff procedure for all of the faculty positions, the impact of the decision would have been exactly the same. In other words, no one was non-reappointed in order to avoid an "order of layoff" requirement outlined in Article 13.

Based on the *above* circumstances, I do not find a violation of the Agreement as alleged. Therefore, this grievance and remedy sought are denied."

When the parties were unable to *reso*lve the dispute through the grievance procedure, the Union invoked arbitration. Following the selection of the undersigned as arbitrator by mutual agreement of the parties, a hearing was conducted in Tallahassee, Florida on the dates indicated above. In the course of the hearings both parties were afforded ample opportunity to present evidence and to cross-examine witnesses called by the opposing party. At the conclusion of the hearing the record was closed pending the issuance of post-hearing briefs.

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II. THE ISSUES

The parties stipulated to the following issues:

Did the University violate the Collective Bargaining Agreement by:

1.) failing to provide proper notice of layoffs; 2.) failing to properly specify

the layoff unit; 3.) failing to properly apply layoff criteria; and, 4.) improperly enacting layoffs as non-reappointments?

If so, what should be the remedy?

III. RELEVANT CONTRACT PROVISIONS

ARTICLE 12. Non-Reappointment

12.1 No Property Right. No appointment shall create any right, interest, or expectancy in any other appointment beyond its specific terms, except as provided in Sections 13.2 and Article 15.

ARTICLE 13. Layoff and Recall

13.1 (a) Layoff. When a layoff is to occur as a result of adverse financial circumstances; reallocation of resources; reorganization of degree or curriculum offerings or requirements; reorganization of academic or administrative structures, programs, or functions; or curtailment or abolition of one or more programs or functions; the University shall notify the local UFF Chapter and the UFF state office no less than thirty (30) days prior to taking such action. The UFF may request a consultation with the President or his representatives pursuant to Article 2 during this period to discuss the layoff.

(b) Layoff Unit. The layoff unit may be at an organizational level of the University, such as a campus, division, college/unit, school, department/unit, area, program, or other level of organization as the University deems appropriate.

13.2 Layoff Considerations. The selection of faculty members in the layoff unit to be laid off will be determined as follows:

(a) No tenured faculty member shall be laid off if there are un-tenured faculty members in the layoff unit.

(b) No faculty member in a non-tenured position in the layoff unit with more than five (5) years of continuous University service shall be laid off if there are any non-tenured faculty members with five (5) years or less service in the layoff unit.

(c) The sole instance in which only one (1) faculty member will constitute a layoff unit is when the functions that the faculty member performs constitute an area, program, or other level of organization at the University.

(d) The provisions of 13.2 (a) and (b) will apply unless the University determines that an Affirmative Action employment program will be adversely affected. When an Affirmative Action Program has been so affected, the University shall notify the UFF in writing.

(e) Where faculty members are equally qualified under (a) or (b) above, those faculty members will be retained who, in the judgment of the University, will best contribute to the mission and purpose of the institution. In making such judgment, the University shall carefully consider faculty members' length of continuous University service, and shall take into account other appropriate factors, including but not limited to performance evaluation by students, peers, and supervisors, and the faculty member's academic training, professional reputation, teaching effectiveness, research record or quality of the creative activity in which the faculty member may be engaged, and service to the profession, community, and public.

(f) No tenured faculty member shall be laid off solely for the purpose of creating a vacancy to be filled by an administrator entering the bargaining unit.

ARTICLE 15. TENURE

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15.1 Definition and Policy

(a) Tenure is one of the principal means by which the quality of the University is maintained and developed and is an indispensable element of any university of quality. Institutions of higher education are conducted for the common good. The common good depends upon the unfettered search for truth and its free exposition. Academic freedom and tenure exist in order that society may have the

benefit of honest judgment and independent criticism. Tenure is a condition attained by a faculty member through exemplary teaching, research and other creative or scholarly activities, service, and contributions to the University and to society.

(b) A faculty member who has been granted tenure shall have the status of a permanent member of the faculty and remain in the employment of the University, guaranteed annual reappointment for the academic year, until the faculty member:

- (1) voluntarily resigns,
- (2) voluntarily retires,
- (3) is terminated for just cause in accordance with the provisions of Article 16 Disciplinary Action and Job Abandonment of this Agreement, or
- (4) is laid off pursuant to the provisions of Article 13 Layoff and Recall of this Agreement.

(c) Tenure decisions shall be based on the faculty member's performance of assigned duties and responsibilities. Those assignments should be made with full knowledge of the applicable promotion and tenure criteria.

IV. SUMMARY OF THE EVIDENCE

A. Procedural History

On or about October 5, 2009, the United Faculty of Florida, Florida State University Chapter filed a chapter grievance against the Florida State

University concerning notices of layoff and non-reappointment issued to faculty in or about June, 2009.

Issues one through four were brought on behalf of the UFF Chapter.

Issue two and three were brought on behalf of the individual faculty member Grievants.

Issue four was brought on behalf of individual faculty member Grievants Kariko, Arbic, Raulerson, Mosier, Dietz, Taite, Tang, and Wetz.

Step one meetings occurred on the dean's level of the colleges in which the notices were issued and the respective deans replied in writing. A request for a step two review was made by the UFF; the University's step two response is found at Joint Exhibit 2-D and is set out above.

The UFF timely requested arbitration. The parties selected the Arbitrator and this proceeding ensued. At the start of this proceeding, the only two Grievants remaining with respect to issue four were Kariko and Raulerson.

By stipulation of the parties entered at the July 20, 2010, hearing, the UFF has withdrawn its grievance with respect to Grievants Rinn Cloud, Kay Grise, and Daniel Kariko. All matters related to Grievants Cloud and Grise, and to the College of Human Sciences generally, have been resolved between the parties. Grievant Kariko has tendered his

resignation. No further action is necessary in this proceeding with respect to these Grievants.

B. Statement of the Facts

The instant dispute arose as a result of layoffs that were implemented by FSU in 2009 in response to significant budget cuts it had experienced during the last three years. The cuts amounted to over \$30 million in 2007 and 2008, and \$56.6 million in 2009. Although the University managed to avoid any layoffs in 2007 and 2008, the additional budget cuts that were made in 2009 made some layoffs inevitable.

In response to the budget crisis in December, 2008, the University created a Budget Crisis Committee, which included three faculty members. During the process of planning for layoffs, each Dean was charged with looking at his own College and determining problem areas, as well as the most efficient and least efficient departments. The Dean then submitted plans to the Budget Crisis Committee. As part of that process the University decided that nothing smaller than an identified major, which it considers to be a "Program" would constitute a layoff unit.

The first witness for the Union was Professor Jack Fiorito, who has served as a professor specializing in labor relations in the Department of Management for the past twenty years. He has been President of the FSU Chapter of the UFF for the past nine years and was involved in the

negotiation of the current collective bargaining agreement. He testified that the layoff language in that agreement is the same as that which appeared in the Legacy Agreement.

Professor Fiorito testified that he first learned of a possible layoff in October, 2008. On June 19, 2009, the Union received official notification of the layoff units and the specific faculty members to be laid off. He stated that the Union did not consider that to be sufficient notice under Article 13 of the CBA but he did not elaborate as to why.

Fiorito explained that one of the Union's contentions in this matter is that a Graduate Degree Program or Major is not an organizational level for purposes of determining a layoff unit. To support that contention he eluded to the fact that the organizational chart for FSU (Union Exhibit 1) does not list any academic programs. He also noted that a spreadsheet showing the layoff units defined by the University listing faculty members to be laid off shows that some of the layoff units are purely academic programs.

Fiorito further testified that the non-renewal of some faculty members under Article 12 was based on budget considerations and should therefore be considered a layoff under Article 13.2(b). He noted that eight of the faculty members who were considered for layoff had more than five years of service.

On cross-examination Fiorito acknowledged that the last section of Article 13.I(b) gives the University the discretion to determine the appropriate organizational level. It also gives it the discretion to decide between equally qualified faculty members for layoff purposes. He also acknowledged that under the terms of Article 20 of the Collective Bargaining Agreement an arbitrator has no authority to disturb an exercise of discretion by the University that is allowed under the terms of the agreement. Finally, he acknowledged that members of the bargaining unit were involved in the process of selecting the faculty members to be laid off.

Fiorito explained that none of the grievants has actually been laid off at the present time. Instead, they have been given a Notice of Layoff and their positions have been extended for one year. He stated that the Union never requested a consultation with FSU, regarding the layoff, but did request impact bargaining. He added that he intends to ask for a consultation when the faculty members are laid off.

In connection with Fiorito's testimony, the University introduced the FSU Degree Program Inventory (FSU Exhibit 1), which shows all of the degree programs approved by the Board of Governors. In it the following are listed as Departments, Degree Programs and Majors: Anthropology, Geology, Oceanography, Mathematic Education, Sciences Education, Physical Education, Sports Management, Textiles, Visual Arts-Scenic

Design. These majors cover all of the grievants who held tenure and were scheduled for separation under the layoff article. Notwithstanding the listing of these programs in the FSU Degree Program inventory, the Union still contends that a "Major" is not an organizational unit.

David Thistle has been employed by FSU as a Professor of Oceanography since 1977. He became tenured in 1982. He specializes in Deep Sea Biology, which ties in with an area of Environmental Sciences which is housed in the Arts and Sciences Department. He stated that on April 10, 2009, the Department of Oceanography was abolished and merged with a new Department of Earth, Ocean and Atmosphere Sciences. On June 29, 2009 he got a Notice of Layoff to take effect May 7, 2010. He was also notified that if stimulus funds are approved, the layoff will be delayed for a year but at the present time he did not know if they had been approved.

Thistle testified that Dean Travis told him that he was being laid off because he did not "fit in the new department", but did not elaborate as to why. He testified that he thought he would fit quite well based on his background and experience. He stated that he taught graduate classes in Marine Ecology, Basic Biology, Oceanography and additional courses are still in the curriculum that he is qualified to teach, such as Marine Biology and Marine Environment Sciences. Thistle stated that there are some non-tenured faculty members in the new department that were formally in

Oceanography, but stated that they have been given notice of non-renewal.

On cross-examination Thistle acknowledged that he has been given assignments for the 2010-11 Academic Year, which would indicate that his layoff will be postponed for at least a year. He also acknowledged that he was not the only faculty member qualified to teach the courses in Oceanography that he mentioned that are targeted toward undergraduates.

Joe Donoghue is an Associate Professor at FSU in what used to be the Department of Geology but is now the Earth, Ocean and Atmospheric Sciences Department. He is a specialist in Coastal Geology, which is his primary area of research.

Donoghue testified that he received a layoff notice on June 25, 2009, at which time the Geology Department was still in existence. He stated that the plan to merge that Department with the Earth, Ocean and Atmospheric Sciences Department was developed years ago and it was believed that it would make the Department more productive and more relevant.

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Donoghue testified that when he asked the Dean of his college why he was being laid off he was told that it was due to program needs, and not because of his productivity, but never really provided him a good explanation. He testified that he felt that he is qualified to remain in the

new department because all of his work in the last ten years has been in the area of Environmental Interdisciplinary Studies. In addition, a new degree program in BA and BS in Environmental Studies is being created that he is highly qualified to teach, as well as Environmental Geology. In connection with his testimony his current curriculum vitae was introduced in evidence showing some of the work he has done, as well as some of his publications relating to environmental issues.

Donoghue testified that after he received his layoff notice he sent a memo dated July 24, 2009, to the Dean of the College of Arts and Sciences outlining his productivity in teaching, research, and environmental science and explaining the importance of geology. He stated that although he asked the Dean to reconsider his layoff, he never heard back from him.

On cross-examination Donoghue acknowledged that at the time of his layoff every non-tenured member of his department was given a notice of non-renewal.

Steven Kish has been employed at FSU since 1986 and is currently a faculty member in the Earth, Ocean and Atmospheric Science Department. He was formerly in Oceanographic Sciences and was tenured in 1992. He has developed courses in Remote Sensing and GIS, which are taught at both the undergraduate and graduate level. He stated that they fit in with the curriculum in the new department.

Kish testified that after he got his notice of layoff in June, 2009, he met with the Dean the following month to discuss the reasons for his layoff. During that meeting he pointed out that he had expertise in some areas that remaining faculty members did not have. He also pointed out that Introductory Geography and several other courses remain, including Remote Sensing, which he could teach. He also noted that Remote Sensing and G15 are courses that only he is qualified to teach.

Dr. Anthony Arnold began his teaching career at FSU in 1983 and became tenured in 1988. He was formerly an Associate Professor in the Geology Department but is now in the Earth, Ocean and Atmospheric Sciences Department. He specializes in studying protozoas as environmental indicators for pollution.

Arnold testified that before the consolidation of the Department he taught two introductory courses in geology for two majors, paleontology and several graduate courses in his specialty. He stated that some are still part of the new department such as Dinosaurs and Disasters.

Arnold testified that in June, 2009, he was called to Dean Travis' office and given a letter notifying him that he was being laid off due to a budget cutback. He was also told that it was based on pragmatic needs.

Arnold testified that although the name of the department was changed, they are still doing many of the same things. He admitted, however, that he is not familiar enough with the needs of the Department

to determine whether he would fit in. He noted that if a major in Geology continues, there are a number of courses he could teach.

On cross-examination Arnold stated that at the time he was laid off all non-tenured faculty members were given notice of non-renewal.

Dr. Bill Parker began his career with FSU in 1980 and became tenured in 1986. He was an Associate Professor in the Geology Department, which has now been merged with the Earth, Ocean and Atmospheric Sciences Department. Paleontology is his specialty.

Parker testified that the primary courses he taught in Geology were Historical Geology, Sedimentary Petrology and graduate courses in Paleontology, some of which will be required courses in the Environmental Sciences major. He stated that he was told that the reasons for his layoff were changes in pragmatic needs, but the Dean did not further elaborate.

On cross-examination Parker testified that a Meteorology degree will be offered in the future but he was not sure about whether a Geology degree would be offered.

The next group of professors to testify was associated with the College of Education. The first, Dr. Elizabeth Jakubowski, has been employed by FSU in the School of Teacher Education in the College of Education since 1987 and acquired tenure in 1992. Her primary assignment involves teaching prospective teachers at undergraduate and graduate levels. She has Bachelor, Master and Ph.D. degrees.

Jakubowski testified that the School of Teacher Education is a Department and that in the past three years there have been faculty members in that Department, one of which is non-tenured. The Assistant Dean and Chairman of the Department, Walt Wagner, was her supervisor.

She testified that she received the notice of layoff when called to meet with her Dean on June 23, 2009. The letter informed her that her position was to be eliminated effective May 7, 2010, due to budget constraints. She stated that when she asked the dean what criteria was used to make the layoff decision, the Dean informed her that it was a subjective decision about which he had little or no knowledge. She was told that the Mathematics Education Program, which is an area in which she teaches, was also being suspended as a result of the budget reductions.

She further testified that it was her understanding that one non-tenured person, Kathleen Clark, was retained and being moved into the program known as FSU-Teach, which was developed in 2007. She testified that she had taught both of the courses that Kathleen Clark was scheduled to teach but was never offered the opportunity to do so rather than being laid off. She added that a number of non-tenured and tenured faculty members were retained, but not in Mathematics. She stated that she is qualified to teach a number of courses that those faculty members will teach.

On cross-examination Jakubowski acknowledged that both of the members of the FSU-Teach were placed in the Core Faculty for that program a year prior to layoff and both were involved in building that program. FSU-Teach has never been suspended.

Dr. Les Aspinwall is a tenured Associate Professor at FSU. He was employed in August, 2000 and gained tenure in April, 2003. He teaches a variety of Mathematics Education Courses in the College of Education in the Department of Teacher Education. He also conducts research and has published a variety of papers. He testified that he was notified of his layoff in June, 2009, when he was called to the Dean's office.

Aspinwall testified that the Chair is his superior in the School of Teacher Education. Dr. Jakubowski and Kathy Carr are both in that program, but Carr is not tenured.

On cross-examination Aspinwall agreed that his CV position was Associate Professor Mathematics Education. He also acknowledged that he understands that it is a program.

Nancy Davis is employed by FSU as an Associate Professor in the School of Teacher Education. She began her employment in 1988 and received tenure in 1995. In her position she focuses on teacher education and on-line programs. The primary courses she teaches are in sciences, English and elementary education. She served as a coordinator in a voluntary basis. Davis testified that she received a notice of layoff on

June 26, 2009 and was told it was for economic reasons. When she asked the Dean what criteria were used to determine layoffs, she had no answer.

Davis presented a document (Union Exhibit 3) showing that a non-tenured member of her group, Victor Sampson, was not laid off. She also presented a document (Union Exhibit 24) showing a number of courses she is qualified to teach, including courses in FSU-Teach. Many of those courses are still offered. She stated that she was never given the option to move to the FSU-Teach curriculum before her layoff.

In connection with Davis' testimony, the parties entered into a stipulation that there are non-tenured faculty members in the School of Education who are still employed.

During cross-examination Davis was presented an FSU document showing that Clark and Sampson were in the core faculty for the FSU-Teach curriculum a year prior to the issuance of the layoff notices.

Alejandro Gallard is employed in the Science Education Program in the School of Teacher Education at FSU. He was hired in 1989 and became a tenured Associate Professor in 1995. His assignment is divided among teaching, research and service. He was made Coordinator at one point in time but had no supervisory authority.

Gallard testified that when he received his notice of layoff he was informed that it was for financial reasons. When he inquired of the Dean

about the criteria that was applied in determining who would be laid off, no answer was provided.

In connection with his testimony a list of some thirty-one courses that he is qualified to teach at FSU was introduced into evidence. All were within the area of science education. He further testified that he is familiar with the courses being taught in FSU-Teach and is qualified to teach in that program but was not offered that option.

On cross-examination Dr. Gallard identified himself as an "Associate Professor-Science Education Program". He stated that it is a program that has been in effect for many years. He also agreed that the FSU website for the Science Education Program lists him as an Associate Professor in the Science Education Faculty.

Professor Dale Jordan has been employed at FSU fourteen years and received tenure after seven years. He has been a Professor in the College of Visual Arts, Theater and Dance for the last four years. His area of expertise in the School of Theater is in Scenic Design and teaching a lighting course. He testified that scenic design offers a wide variety of courses, which includes costume design, co-writing, acting and directing.

Jordan testified that his supervisor is the Director of the School of Theater. The Director is responsible for deciding on the number of students that can enroll in scenic design, as well as the development of the curriculum. He stated that there was no Chair or Director of the

Scenic Design Program but that at one time he was the point person for the program. He designed the program and did recruiting. However, this stopped some three years ago.

Jordan testified that last summer his Dean notified him that his program was targeted by the Provost for termination and that his job was in jeopardy. He stated that in June he received a notice of layoff that was based on financial difficulties. He stated that he was not offered a job in any of the other positions in the School of Theater. He stated that he is qualified to teach some courses such as Lighting and Design, but he is not sure they will be offered next year.

In connection with his testimony his CV was introduced into evidence. It shows that he has extensive experience in the field of scenic design and lighting design. It describes his present position as Director of the MFA Scenic Design Program. He is also listed as such in the FSU website for the School of Theater.

On cross-examination Jordan acknowledged that all of his graduate students had graduated and that none are enrolled in the scenic design program for the fall.

Dr. Susan Lynn is a Professor in the Physical Education program in the College of Education at FSU. She began her employment in 1989 and became tenured a few years later. Her specialties involve providing instructions and curriculum for K-12 teachers, as well as for students

seeking Masters and Doctorates. She also works on grants from the National Institute of Health to deal with child obesity issues. She testified that the program had four faculty members in 2008-09 and currently has three faculty members for the 2009-10 fiscal year.

Dr. Lynn testified that as a result of the budget cuts and layoffs the physical education program was closing. She met with the Dean and was given a letter informing her that her position was being abolished. When she asked Dean Driscoll what criteria was being used to determine who would be laid off, she said it was simply based on the reorganization.

Dr. Lynn testified that the non-tenured member in her program was non-renewed but that another tenured faculty member was told he was not being laid off but would be transferred to a different area - Elementary Education - which is an area in which he had taught previously. She stated that the Dean never discussed the possibility of transferring her to another area, despite the fact that she is qualified to teach a variety of subjects.

Dr. Lynn testified that in the Department of Sports Management two programs were closed and one was not. They currently have two non-tenured faculty and two tenure track faculty (Kim and Rudd). She testified that she was qualified to teach in this department.

She further testified that there have been two faculty positions in Sports Management that have since been filled that she is qualified to

perform. She stated that she did not apply for these because she was not aware of them at the time and the deadline for applying had passed.

On cross-examination Dr. Lynn acknowledged that she is the Coordinator of the Physical Education Program.

Professor Elizabeth Peters was employed by FSU and an Adjunct from 1981 to 1985 and has been tenured as an Associate Professor of Anthropology in the Department of Anthropology since 1985.

Dr. Peters testified that she received a call from the Chairman of her Department on June 18, 2009 and was told that she was one of the three teachers in the department to be laid off. She received a letter confirming her layoff but she never spoke to the Department Chair about the reason she was being laid off.

According to Peters, the layoffs in her department are financially disastrous to both the department and to the University. She explained that studies showed that the Department was producing a \$3.5 million annual surplus. She based this opinion based on a document (Union Exhibit 35), which shows that calculating the value of student credit hours, and subtracting the cost of running departments, shows that the Anthropology Department generates an annual surplus of about \$3.5 million. She also noted that the programming cuts will cause the National Park Service to withdraw from its cooperative agreement with FSU at a substantial cost to the University.

Dr. Peters testified that her teaching experience is very broad and she has taught more types of Anthropology classes than anyone in the Department. She added that there is no one in the Department who teaches the number of Mass Section classes she teaches.

Dr. Peters implied that her layoff was in retaliation for filing a gender discrimination grievance for which she was given the right to sue and which is going to trial in the future. She stated that four faculty members were retained in the Department because they have not "angered" their superiors.

On cross-examination Dr. Peters acknowledged that while she has no research component to her assignment, all those that were retained do have such a component. She also acknowledged that the Step 1 answer to her grievance explains that the Department of Anthropology was being cutback due to a lack of scholarly activity. She stated that for the last eight years her sole function has involved teaching. She has not done research since the year 2000. She also acknowledged that no non-tenured faculty members were retained in the Department.

When the hearing resumed on July 20, 2010, the parties stipulated that the grievances of Rinn Cloud and Kay Grise, both of whom were in Textiles, had been resolved and that one of the grievants, Daniel Kariko, had resigned.

The first witness called by the University was Dr. Robert Bradley who has been employed by FSU for twelve years and is currently the Vice President for Planning and Programs. Several groups such as Libraries, Southern Association of School Accreditation and QER (Quality Enhancement Reviews) report directly to him. He reviews all accreditation documents.

Dr. Bradley explained that each undergraduate program is reviewed on its own. All entities that have programs have CIP (Classification of Instructional Program) codes. The code system was developed by the Carnegie Foundation and it is used nationally to identify academic programs.

Dr. Bradley noted that the FSU degree program inventory (Union Exhibit 1) shows that the Anthropology Department, which was a single program department, has been suspended; that Geological Sciences is a single program; that Oceanography is a department and a program and that the College of Education has various programs within the College which have separate and distinct CIP codes and are distinctly different programs. Each program is independently certified by the Florida Department of Education. As to Visual Arts Theater and Dance, he testified that they have an overall theater degree and several programs within that, such as Scenic Design.

Dr. Bradley testified that he disagrees with the Union's position that the smallest recognizable unit is at the departmental level. He stated that when dealing with faculty positions, they commonly identify them with one program or another. Moreover, they can look at a number of factors to determine what a program is. He also noted that not all programs have a program director. Instead, some have a program coordinator.

Dr. Bradley testified that in his role in planning he is involved in budgetary matters and strategic planning. Budgeting is not done at the program level.

Dr. Bradley noted that the timeline of legislative budget reductions (FSU Exhibit 7) shows that for the period from 2007 through 2010 there were total cuts of \$81.8 million, which is approximately twenty-five percent of faculty salary funds. He stated that he was a member of the Budget Crisis Committee which had the responsibility of helping plan for the cuts. He noted that there were three faculty representatives on the committee, which met on a regular basis in the spring of 2009. He explained that they spread the cuts over three years to try to reduce the impact of the layoffs until this situation improved. He stated that the layoffs that took place were solely the result of the budget cuts.

On cross-examination Dr. Bradley acknowledged that there was a fifteen percent tuition increase in both 2008-09 and 2009-10 school years.

He explained, however, that the University is restricted in what these additional funds can be used for.

Susannah Miller is the Director of Faculty Relations. She was the chief negotiator for FSU in negotiations for the collective bargaining agreement and she is responsible for administering it. Miller testified that on May 29, 2009, she sent a letter to Jack Fiorito, President of the UFF Chapter, informing him of impending layoffs of in-unit faculty members. She stated that the previous notice to that effect had been given to the Union in December, 2008. She noted that the Union did not object to the content of the notice or complain that it did not comply with the collective bargaining agreement. She stated that a complaint was first voiced in June, 2009. She explained that Article 13.1 (a) sets out the notice requirement. It does not require the University to identify the layoff unit. It simply requires thirty-days' notice, which the University fully complied with.

Miller also noted that Article 10.2 (g) provides that faculty members can hold a joint appointment and will be evaluated accordingly. She noted that the faculty who were retained in the FSU-Teach Program had joint appointments. Miller testified that she assisted the various deans in defining the various layoff units and advised them that the program level was the smallest unit available. This determination was based on the language of Article 13.1 (b) of the Agreement.

Dean Marcy Driscoll has been on the faculty at FSU for thirty years and is currently the Dean of the College of Education. She testified that in the spring of 2009 a series of bulletins were sent out by the Provost indicating a possible budget cut of fifteen to eighteen percent. After receiving that information she met with the leadership group in her College to make plans for layoffs and other cost reductions. She stated that they had two previous budget cuts of approximately four percent each, so they were already "lean". She stated that they came up with a variety of criteria, such as reputation of the program, to determine what programs would be eliminated in the College of Education.

Dr. Driscoll noted that all teacher education programs are state approved and nationally accredited. She stated that the committee decided that the Math Education and Science Education were to be suspended based on low enrollment. For example, Science Education was generating less than ten graduates. It also selected the Physical Education Program due to low enrollment and a lack of quality. She also noted that all non-tenured faculty members were laid off prior to Dr. Linn.

Dean Driscoll noted that there was an email exchanged between her and a member of the Provost office regarding the fact that there were no plans to change the FSU-Teach Program. He explained that it is a method of training math and science teachers more effectively that was developed at the University of Texas. After learning more about it, Dean

Driscoll recommended that it be initiated at FSU in the fall of 2006. Students in the program are recruited as freshmen and major in Education, Science or Math. They are assigned to begin working in schools as soon as possible. She noted that the courses in FSU-Teach are not the same as those that were taught in the past.

Dean Driscoll noted that both Dr. Kathleen Clark and Dr. Victor Samson are listed as members of the FSU-Teach faculty. They both received excellent evaluations from the Co-Directors of the FSU-Teach Program. She also noted that both Clark and Samson are paid out of the School of Teacher Education budget.

Dean Driscoll stated that it is not unusual for a faculty member in the College of Education to teach outside his/her assigned program on a casual basis. She also noted that in the Department they have a number of joint appointments where they contribute their time to two different units.

Dean Driscoll denied that she ever told one of the grievants that one of the faculty members was being moved to FSU-Teach. She added that the FSU-Teach has had its own CIP code for over a year.

Dean Driscoll referred to the website of faculty members as of June 19, 2009 (FSU Exhibit 49) and noted that Dr. Linn was listed under Physical Education. She stated that Dr. Linn is not qualified to teach in Sports Management. As to Elizabeth Jakubowski, Dean Driscoll noted that

she has never taught FSU-Teach courses. Moreover, the courses listed in the School of Teacher Education are outside her program, which is mathematics and is in the College of Arts and Sciences.

She stated that Dr. Aspinwall is similarly not qualified for FSU-Teach and that Mathematics is in another Department.

As to the list submitted by Alejandro Gallard of courses he allegedly could teach, Dean Driscoll agreed that most are in his current department but are in a suspended program and are being phased out.

As to the courses on a list that Nancy Davis stated she could teach, Dean Driscoll testified that some of those courses do not exist and others are being phased out or are parts of other programs. She also noted that the FSU-Teach is outside her current program area.

In regard to the list of courses submitted by Dr. Susan Linn, Dean Driscoll noted that some of those courses are in the Physical Education Department and all but the last one under Teacher Education are outside her program, department or area of expertise.

On cross-examination Dean Driscoll acknowledged that she is not saying that these teachers are not qualified to teach the courses they claim they can teach. It is her position, however, that they have never actually taught most of them.

Although she acknowledged that Clark and Samson are not tenured, she agreed that they were retained when tenured teachers in

their area were laid off. She explained that the reason was that they are in the FSU-Teach Program, which has been in place since 2007 and will be retained in the future. She also noted that Clark and Samson were in the Math Ed and Science Ed programs, as well as FSU-Teach. Although Math Ed and Science Ed were suspended, they were retained because they were also in the FSU-Teach Program.

Dean Driscoll testified that she was aware that Dr. Linn was involved in the development of a Sports Management Program but she does not associate with it in any professional way. According to Dean Driscoll, she has no training in that field, which requires substantial preparation for teaching. As a result, she recommended Linn for either non-renewal or a move to Teacher Education. Dean Driscoll testified that on June 4, 2009, she had an exchange of emails with the Provost (UFF Exhibit 40) in which he agreed that she should consider including the four faculty members (two in Math Ed and two in Science Ed) as part of the layoff plan with the hope that they could be added to the FSU-Teach Program at a later date. Thereafter, on June 6 she submitted a plan to lay off two faculty members in Math Ed, two in Science Ed, as well as two faculty members in Physical Ed (one tenured and one non-tenured) and all five faculty members in Recreation and Leisure Management. The proposal involved the layoff of the five grievants in the Department of Education.

She explained that Dr. Linn was treated as a part of the Physical Education Program, rather than Sports Management. She also noted that she selected her for lay off, rather than Dr. Ratliff, because his focus was on young children and he could bring expertise to the Early Childhood program.

Dr. Sherry Southerland has been employed by FSU since 2002. She is the Director of the School of Teacher Education in the College of Education and is Co-Director of the FSU-Teach Program. Dr. Southerland explained that the governance structure of FSU-Teach is divided between Arts and Science and Education. They report to the two Deans and two Co-Directors, who oversee the operations of the unit. They utilize an affiliated faculty in the fields of biology science, etc. They also have a core faculty which plays a role in recruiting, helping, advising and fine-tuning teaching. She stated that Dr. Clark and Dr. Samson, the two non-tenured faculty members that were not laid off, are involved in this process. She noted that the website for the FSU-Teach faculty as of 2008 showed the core faculty members as Clark, Harper and Samson.

Dr. Southerland referred to a proposal (FSU Exhibit 21) that was submitted in July, 2007 to establish the FSU-Teach Program. It shows that the faculty would include Victor Samson and that a math educator would be hired, which later turned out to be Kathleen Clark. She also noted that in a proposal that was submitted in the spring of 2009 for a

Federal Grant (FSU Exhibit 22) Clark and Samson were submitted as Co-investigators. She explained that they were included in the proposal because they were the core faculty at FSU-Teach.

She also referred to a proposal for the University to create a new major for the secondary science or mathematics teaching in FSU-Teach (FSU Exhibit 23) in 2008. It was approved in late fall of 2008 and it lists Samson and Clark as the core faculty. She noted that none of the faculty members who were laid off were listed as core faculty. Moreover, Dr. Aspinwall has not been affiliated with the program since early 2008 and he chose not to be mentioned in the proposal. She added that none of those who were laid off from Math or Science were denied the chance to participate in FSU-Teach.

Dr. Southerland also referred to the initial approval folio (FSU Exhibit 24), which was submitted in February 2009 for approval of the FSU-Teach Program so the graduates could be certified as teachers. She noted that while Tab A of the folio lists Clark and Samson as faculty members, none of the four who were laid off were ever listed as faculty in the folio.

She also noted that the Operating Agreement Center for Science and Teacher Preparation (FSU Exhibit 25), which is dated October 2007 outlines how the program operates. She noted that page three of that

agreement describes the core faculty, which eventually became Clark and Samson in FSU-Teach.

On cross-examination Southerland acknowledged that Clark and Samson's tenure track home is the College of Education. She added that for incoming students, the only pathway to graduation in Math Ed or Science Ed is FSU-Teach.

Dr. Southerland also acknowledged that none of the grievants were ever told that unless they move to the FSU-Teach Program, they would lose their jobs.

Dean Sally McCouric has been on the Faculty for fourteen years and has been Dean of the College of Visual Arts Theater and Dance for the past nine years. She participated in the planning for budget reductions in 2009. She stated that during that process she got input from faculty members and looked to areas that would have the least impact on students. She noted that the total budget reduction for her department was ten percent or approximately \$1.2 million.

Dean McCouric noted that the Masters in Fine Arts in Scenic Design was scheduled for elimination. The website for her College describes the Scenic Design Program and shows that Dale Jordan was the head of the Masters in Fine Arts Scenic Design Program. In addition, the Masters in Fine Arts Scenic Design Program detail (FSU Exhibit 45) shows Dale Jordan as the Professor/Head and others are listed as staff members.

Dean McCouric noted that Scenic Design had its own allotment of tuition waivers. She also noted that there are no longer any students in Scenic Design, the last having graduated in May, 2010. Dale Jordan was the only faculty member in that program at that time.

Dean McCouric noted that Joe Raulerson signed an employment contract in the Art Department on August 25, 2009. He stated that he was a non-tenured track faculty member who had been employed for over five years. At the time of the layoffs he was given a Notice of Non-renewal. She stated that he was among a number of faculty members who were scheduled for layoff because they were non-tenured faculty members.

Dean Joseph Travis has been Dean of the College of Arts and Sciences at FSU for the past five years. He was previously a Professor in Biological Sciences. He testified that in December, 2008, all of the Deans received a notice from the Provost to begin preparations for drastic budget cuts. After receiving that notice he convened the thirty chairs and directors in the College of Arts and Sciences and explained the need for the budget cuts and discussed the decisions that needed to be made. They met for that purpose on several occasions.

Dean Travis testified that he wrote several exercises in response to the Provost's demands and tried to persuade him to cut the Arts and Sciences budget as little as possible. In the end the cut was eight

percent, which represented a dollar amount of six million, seven hundred eighty five thousand. He noted that Arts and Sciences is the largest single college on Campus. It comprises eighteen departments and twelve programs and has 380 tenured, 425 tenure track, and 90 non-tenured professors.

Dean Travis testified that he did a series of calculations (FSU Exhibit 14) in an effort to determine which departments were costing the most per degree. Using these calculations he determined where cuts would have the least affect on students and on the budget. Based on a determination that enrollments were low and costs were high, Physics, Geological Sciences, Oceanographic and Materials, Research and Technology were targeted for cuts. They also made the decision to consolidate these disciplines into one department which would have to generate more enrollment.

Dean Travis testified that some of the decisions that were made to implement the budget cuts were as follows:

- David Thistle, a non-tenured faculty member was laid off from Oceanography.
- Closed the Materials, Research and Technology program at a savings of \$800,000.
- Gave three assistant non-tenured track professors in Oceanography layoff notices.
- Made a decision as to who to keep in Oceanography based on the individuals who had best options for moving forward in the area of Geo Sciences. In that regard, they needed

people with strong research programs. Dr. Thistle was an outlier whose research and expertise was not conducive to the program. Although he was described by Dean Travis as a superb scientist, his area of expertise did not fit in with what was needed for the core strength of the group, which was the interdisciplinary sciences.

- Dr. Ian McDonald accepted a position in the Department of Oceanography in December, 2008 and began work at FSU in 2009. According to Dean Travis, he works at an interface of a very different direction than Dr. Thistle and he fit in well in the new department due to his work on methane issues with Chemical and Biological Oceanography.
- Dean Travis explained to faculty that some of the layoffs were based on pragmatic needs, which meant achieving the best combination to carry out the mission of the Department.
- In Geological Sciences they tried to determine which sub-set of individuals would best provide strong grant and contract research activity. Based upon that criteria, they determined that Odom, Arnold, Parker and Kisch did not have records as strong as the others and were therefore given layoff notices.

Dr. Travis further testified that Anthropology and Geosciences had the lowest student enrollment and, at the time, Anthropology was at the end of contract and grant activity. Although they initially recommended that the Anthropology Department be closed and all faculty members be laid off, the Provost opposed that proposal because it would be difficult to start it up again in the future. At the time there were eight faculty members in Anthropology, all of whom were tenured and one of whom was retiring. He stated that they wanted to determine which sub-set would provide the best teachers and who could be placed elsewhere if

necessary. Three were chosen to remain based on their expertise in certain areas.

Dean Travis disputed Elizabeth Peters' testimony regarding the courses she claims she is qualified to teach at FSU. He stated that she is not qualified to teach several of those courses and she noted that she has not published a peer review publication in over fifteen years.

On cross-examination Dean Travis acknowledged that the original plan called for the closure of the Geological, Meteorology, Oceanography departments and the lay off all of the faculty in those departments because they were the four least cost effective. However, as of January 8, 2009, when he issued his final recommendation (UFF Exhibit 49) he was convinced that three departments i.e. - Oceanography, Anthropology and Geological Sciences - should be merged. As a result on April 6, 2010, a formal announcement was issued regarding the activation of the new department known as Department of Earth, Ocean and Atmospheric Science, as of April 22, 2010, which reflected the merger of Meteorology, Geological Sciences and Oceanography Departments. Dean Travis testified that there are program levels in this Department that were used as layoff units.

Dr. Travis testified that in deciding who to lay off in the Anthropology Department he did not consider salaries. He stated that two of the faculty members laid off had the least experience. He noted that

Dr. Peters had taught the Introduction to Anthropology course, as have other teachers and he stated that she is not active in the field and is not qualified to teach the upper level courses. He added that they did not have any reservations about recalling Peters and all the other faculty members who were given layoff notices if they had the funds to do so. In that regard, he stated that if he could obtain \$2 million in funding, he would try to rescind all of the layoffs.

Elizabeth Peters was called as a rebuttal witness by the UFF. She presented a list she had prepared (UFF Exhibit 52) which showed the undergraduate courses that had been taught by each of the FSU Anthropology faculty members over the last twenty-five years that she has been employed. She stated that it shows that she has far more breadth of teaching experience than any of the other teachers, and it includes Introductory Anthropology, which she has taught since 2007. She testified that she has also taught multiple sub-fields in the Anthropology program, which is even more important under the new arrangements. She also teaches multiple Math sessions which have high enrollments. She also noted that she could teach an evaluation class in the Biology Department.

Peters further testified that the economic loss to FSU from the cuts in Anthropology was substantial. To support that contention she referred to UFF Exhibit 35, which showed that \$4.1 million was generated for the

credit hours they produced in that department. She stated that since it takes only \$1.3 million to run the Anthropology Department, they produce a \$3.5 million surplus that is used to subsidize other departments.

On cross-examination Peters acknowledged that she did not check the CV's for the faculty members listed on the document she had created showing the courses they taught. She also acknowledged that the employees who were retained in the department had active research agendas.

Called as a rebuttal witness by the Union, Dr. Susan Linn stated that she disagreed that Dr. Ratliff was more qualified than her. She stated that in Physical Ed the State requires that they certify from grades K to 12. She stated that she teaches all of the same courses as Dr. Ratliff, with the exception of one. Moreover, she has twenty years of experience and is qualified to teach at the elementary education level. Dr. Linn also noted that she has training and experience in the Sports Management Area. As a product of her work in Physical Education she helped develop the program in the early 1990's and her CV shows that she served as a major advisor to students in Phys Ed and Sports Management. She also noted that she participated in the supervision of graduate students and served as a Chair to the Doctorate Committee and worked regularly with the students.

On cross-examination she acknowledged that she is in the Physical Education Program and not the Sports Management Program. Her discipline involves teaching physical education to children.

She acknowledged that she does not contend that Dr. Ratliff is not qualified to hold the Sports Management position. She also agreed that Dean Driscoll compared their qualifications and made a decision to select Ratliff for retention.

V. DISCUSSION AND DECISION

Each of the issues to which the parties have stipulated will be considered in turn.

1. DID THE UNIVERSITY FAIL TO PROVIDE PROPER NOTICE OF THE LAYOFF?

This aspect of the dispute is governed by Article 13.I(a), which provides as follows with respect to notice to the UFF:

\\When a layoff is to occur... the University shall notify the Local UFF Chapter and the UFF State Office no less than thirty (30) days prior to taking such action. The UFF may request a consultation with the President or his representatives pursuant to Article 2 during this period to discuss the layoff."

The UFF does not dispute the fact that it was provided the requisite thirty days advance notice in December, 2008 and in May, 2009, that there would be layoffs. It argues that the notice was deficient and inconsistent with what the CBA requires because it did not identify who would be laid off, the layoff units or other specifics of the layoff decision. In my judgment, this argument is without merit because it is not

supported by the applicable language of the agreement. The plain meaning of Article 13.I(a) is that it simply requires that the University notify UFF thirty days prior to taking layoff action. If the negotiators had intended to impose a requirement that the UFF be provided the specifics of the layoff decision at the time the notice was issued, they could have easily inserted language to that effect into the contract. Since they failed to do so, the Arbitrator has no choice but to apply the clear and unambiguous language of Article 13.I(a), which only requires that the UFF be given thirty days notice prior to when "a layoff is to occur". To do otherwise the Arbitrator would have to read new language into Article 13.I(a) under the guise of interpretation and by so doing I would be in violation of Article 20, Section 3(a), which prohibits an arbitrator from modifying the terms or provisions of the Agreement.

In further support of its position that FSU failed to give proper notice, the UFF argues that the consultation opportunity required by Article 13.I(a) is meaningless if the UFF does not know both the layoff unit and who is to be laid off. According to the UFF, it can have no meaningful input and cannot hope to influence the decision or how it is implemented without this critical information.

While this argument has some semantic appeal, it is not compelling because it overlooks or ignores the fact that the UFF ultimately has access to the information it needs concerning the specifics of the layoff and has

the opportunity to confer with University officials and provide input via the consultation process that is provided for in Article 2.

In this case the evidence showed that the University provided notice to the Union more than thirty days prior to the notices of layoff being issued to the faculty and more than eleven months before any layoff action was expected to occur. The plain language of Article 13.1(a) requires notice thirty days prior to when "a layoff is to occur". Here, a "layoff" was not expected "to occur" until at least May, 2010 and, to date, no layoff has in fact occurred. In the meantime, the UFF has had ample opportunity to invoke its right to consultations regarding the impending layoffs with the University President or his designee pursuant to Article 2 of the Agreement.

Finally, the fact that the May, 2009 layoff notice was entirely consistent with the earlier December, 2008 layoff notice to which the UFF never objected, tends to belie the UFF's assertion that the second notice is deficient. More importantly, as FSU has aptly noted, any alleged error is harmless since the UFF was notified of the impacted individuals, as well as the layoff units, shortly after the notice was issued and, by the time the layoffs occur, it will have had more than two years in which to consult with the administration over the layoffs.

2. DID THE UNIVERSITY FAIL TO PROPERLY SPECIFY THE LAYOFF UNIT?

Article 13.1(b), which governs the layoff unit provides discretion to the University within certain parameters as follows:

LAYOFF UNIT. The layoff unit may be at an organizational level of the University, such as a campus, division, college/unit, school, department/unit, area, program, or other level of organization as the University deems appropriate.

The University contends that although it was not limited to the organizational levels specifically enumerated in Article 13.1(b) and could have identified other existing organizational units, the University nevertheless used only those organizational levels particularly contemplated by that provision when it selected programs as layoff units. This contention is without merit, however, because the "programs" the University selected as layoff units do not constitute organizational levels as contemplated by Article 13.1(b).

As I explained in the matter of University of Florida and UFF (Dr. Andrea Pham, March 13, 2009) the identification of so many possible layoff units reflects the reality that at the time Article 13.1 was negotiated, the Agreement covered all ten state universities that had different organizational structures and/or used different terminology to describe their organizational structures. Consequently, a "program" might be an organizational level at one University, but not at another, depending upon whether it has such an organizational level so named. Thus, in resolving

this issue, the key inquiry is what constitutes an "organizational level" of the University involved.

As I recognized in the *Pham* case, this inquiry starts with a determination as to how a University defines its own structure. In the Faculty Handbook (UFF Exhibit 2) FSU describes its administrative structure as follows:

"Florida State University is administered through the collaborative efforts of statewide entities, including the Board of Governors of the State University system and the Florida Department of Education, University-based entities, including the FSU Board of Trustees, the University administration, and within the University, the Schools, Colleges, Departments, Centers and Institutes that carry out the University's educational, research and public service missions.

Department Chair: Each of the Departments of the Colleges is headed by a Department Chair, (for some Colleges, by a Program Director), and each Program by a Program Director..... "

Notably, the FSU Handbook does not even mention "Program" as one of its organizational levels that carries out the missions of the University. The term is mentioned only in the context of describing the administrative head that is the equivalent of a Department Chair. It says nothing about the numerous purely academic programs in the University. The reason is that purely academic designations such as those indicated in FSU Degree Program Inventory have nothing to do with the administrative organization of the University. Instead, they only reflect what academic programs are available. In addition, the fact that a Program may be assigned a Classification of Instructional Program (CIP) code does not

elevate it to an organizational level. These codes are simply a means for uniformly evaluating instructional programs across the country:

"The purpose of a Classification of Instructional Programs (CIP) is to provide a taxonomic scheme that will support the accurate tracking, assessment, and reporting of fields of study and program completions activity. CIP was originally developed by the U.S. Department of Education's National Center for Education, Statistics (NTES) in 1980, with revisions occurring in 1985 and 1990. The 2000 Edition (CIP-2000) is the third revision of the taxonomy and presents an updated taxonomy of instructional program classifications and descriptions."

The fact that Article 13.1(b) contemplates an administrative rather than a purely academic, organizational component was explained in my decision in the matter of arbitration between Florida International University and UFF (Dr. Kia Makki, January 4, 2010) in which I determined that an "Academic Masters Degree" in Engineering Management was "not a Unit for purposes of a layoff pursuant to Article 8.1(b)" the pertinent language of which is identical to Article 13.1(b).

While I have recognized there can be some overlap between an academic degree program and an organizational unit, in my decision I made it clear that there must be distinct administrative components that create a functionally separate entity that can stand alone organizationally. For example, in the matter of arbitration between The University of Central Florida and UFF (Lewis T. Worrell, April 12, 2010), I concluded that Cardio Pulmonary Science was a Program as contemplated by Article 13.1(b) in significant part because there were three Directors and the

Program Director Co-signed the annual evaluations of all the Cardio Pulmonary Science Faculty, along with the Department Chair; the Program had its own financial designation, unique to that Program, and a separate salary budget; and faculty were identified as being in that Program on their annual employment documents. None of these is true for any of the Programs designated by FSU as layoff units.

This conclusion is also consistent with the University's own description of its administrative structure set out in the Faculty Handbook quoted above. An entity that is smaller than a Department is an organizational level only where its structure is equivalent to a Department: a Program Director with authority to evaluate faculty in the Program and a separate budget. The "Programs" designated by FSU as layoff units are different because they are academic programs leading to a degree or majors.

Appendix A to the Agreement sets forth the administrative titles the University uses to designate the assignment of administrative responsibilities and one of them is "Program Director (GI)". None of the grievants claimed to be in a program qualifying as an organizational level as this designation in the space for such on their annual employment documents, nor is there any evidence that any other faculty member in those programs have one either. The same is true of the title "Coordinator (NI)". Appendix A does not mention "Program

Coordinator", "Area Head" or "Program Head". Math education and Science Education in the School of Teacher Education (STE) within the Department of Education are not stand-alone subdivisions of STE but are purely academic entities reflecting the specific degree programs and the faculty primarily teaching each area. There is no Program Director or other administrative head below the Assistant Dean of STE. There is a Rotating Program Coordinator for each area who serves as the primary contact person for students seeking entry, or other information about Math or Science Education, but this person is a facilitator with no supervisory or administrative authority. The annual employment documents of these faculty members reflect their assignment in STE, not Math or Science Education and there is no evidence that there is a separate budget for either area.

Although there are some indicia of organizational status which I recognized in previous cases the ones critical to distinguishing an academic program from an organizational level are missing.

Similarly, the Physical Education "Program" in the Department of Sports Management, Recreation Management and Physical Education, consisting of three self-identified academic programs in these areas lacks these critical factors. In fact, that Department has a multi-tiered structure with a Faculty Council, Administrative Council and Department Chair, all above the Program Coordinator for each of the three academic programs.

The coordinator position is a service position, with no supervisory authority or other indicia of authority anywhere approaching that of a department chair or program director. There is no separate budget and the employment documents reflect the department, not the program.

Likewise, the School of Theater in the School of Visual Arts, Theater and Dance has a multi-tiered organization starting with the Director, the equivalent of a Department Chair. Administrative matters are handled by the Administrative/Operations Council, consisting of the Director and several other management and supervisory positions. The Faculty Council is responsible for developing and evaluating matters relating to curriculum and program development and is composed of two faculty members from each "area", which are Performance, Theater Studies, Design/Production/Management and the FSU/Asolo Conservatory. Membership in an area is based upon primary teaching responsibility and the function of these areas is to coordinate and implement the School's instructional programs. Each Tallahassee Area elects an area head who is responsible for the general coordination and dissemination of administrative and curriculum matters associated with that area. At the bottom are Program Heads who act as the principal curriculum manager for the program, recommend curriculum or programmatic changes and prepare annual reports. They also act as the principal advisor to students in the Program and are responsible for recruiting students.

Thus, in the School of Theater, the Program Head is a facilitator and contact person, not a supervisor possessing authority like that of a Department Chair or Program Director. Just as Dr. Jordan testified, the "Scenic Design Program" is just a subdivision of an area, not even a separate entity under the School's own structure. There is no separate degree in Scenic Design, no separate budget and the annual employment documents reflect the School of Theater. Scenic Design has even less indicia recognized by this Arbitrator in prior decisions than the ones previously discussed.

Accordingly, it is evident that the University failed to select the appropriate layoff unit for grievants, Jakubowski, Aspinwall, Davis, Gallard, Linn and Jordan.

Turning next to the Environmental Sciences Department, I find that the proper unit for the layoffs is the combined Department. It is clear from the record that the layoff decision of the Dean of the College of Arts and Sciences, Joseph Travis, with respect to the Departments of Oceanography and Geological Sciences, was made not on the existing situation in those Departments but on the assumption of the imminent creation of a new Department combining those two Departments with the Department of Meteorology. As he explained in his Step 1 grievance response:

"As I advised during the Step 1 meeting, plans are underway to combine Geological Science, Oceanography and Meteorology. My

analysis convinced me that in order to maintain these disciplines, they would need to be merged into a single Department. Moreover, since Environmental Science Degree Programs have drawn a lot of students nationwide in recent years, it is a logical decision to develop an Environmental Science Department and retain those faculty members who could best contribute to the mission of the new Department."

Although FSU has made it clear in its defense, as well as in the layoff letters to each grievant, that adverse financial circumstances and the resulting budget cuts was the sole basis for the layoffs, there is no evidence that merging the Departments has anything to do with saving money *per se*. On the contrary, Dr. Joe Donohue testified that the merger had been under consideration for seven years. Dean Travis seized the opportunity presented by the budget crisis to do so, but admitted at hearing that he would have done it even if there had been no crisis because he believes it is the right thing to do. Therefore, the real basis for these layoffs was reorganization, which is one of the reasons for layoff under Article 13.1(a) but one that was not stated in the layoff letters or in any document purporting to provide UFF notice of these layoffs. Therefore, these layoffs must be invalidated on the basis that they were predicated on an arbitrary and unreasonable interpretation of the Agreement.

In previous cases I found that language identical to Article 13.1 vests broad authority in the University in determining the manner in which layoffs are conducted. It is equally clear, however, that there are some

limitations on this authority, particularly with respect in determining the appropriate layoff unit, foremost of which the fact that the Employer may not use that discretion arbitrarily or unreasonably. Given Dean Travis' assumption of the combined Department, it is reasonable to consider that as a layoff unit but leaving Meteorology out of the mix thereby protecting the numerous non-tenured faculty members in that Department, is clearly arbitrary and unreasonable. In my view Article 13.1 simply does not contemplate this type of blatant manipulation of a layoff unit.

It is clear the Dean Travis abandoned the plan he submitted on May 11, 2009 to meet the budget reductions in part by closing all three Departments, laying off all faculty in each and then "selectively" recalling those faculty best suited for the new combined Department after it was formed. This plan was fair and consistent with standard labor practice and Article 13, but he was worried that by doing so, he would lose too many quality faculty members. As he explained in an email dated May 14, 2009, to Ann Blankenship, Provost Abeles Assistant:

"The reason I would like another shot at recommendations is that what I submitted is one extreme idea that achieves the budget reduction with the minimum possible loss in enrollment and a maximum loss in academic quality. Honestly, I can't stomach it. We could make a plan with maximum loss in enrollment and minimum loss in quality, but that's out of the question."

To find middle ground we are going line by line through some faculty rosters to find ways to recapture more funds so that we have a plan that a) finds \$8.3 M now in recurring dollars but that b) loses no more than 4 percent or so enrollment in the long term - that is, by 2-3 years down the line (we obviously won't lose

enrollment in 1 year because the programs we'd be cutting would remain extant and, c) doesn't represent such a drastic loss in quality and, d) would be likely to withstand a court challenge.

I can't stand the idea of allowing so much mediocrity to triumph as would be the case were we to do what was outlined."

As the UFF has aptly noted, by "mediocrity" he was clearly referring, at least in part, to some tenured faculty in Oceanography and Geological Sciences. As a result, the revised plan submitted on May 29, 2009 had two options relating to the Geosciences. Both exempted Meteorology altogether. The first exempted Oceanography and the alternative plan included closing both Oceanography and Geological Sciences. With respect to the latter proposal, Dean Travis stated:

"Another possible path to additional reductions emerges through a different vision of how to create an Earth and Atmospheric Sciences Unit. In this vision, we could close both Geological Science and Oceanography immediately producing a gross reduction of \$4.44 M. We could made a restricted reinvestment into an Earth and Atmospheric Sciences Department by recalling seven faculty members from Geological Science and providing some additional staffing (\$890K) and recalling only the Physical and Chemical Oceanographers into this new Department. The disadvantage of this approach is that at the risk of losing strong faculty members we need to initiate a viable Earth and Atmospheric Science Department. The risk emerges from two sources.. First, the lag between closing one set of units and opening a new unit 3-6 months later will create disaffection. Second, the restricted building of the new unit may create disaffection among Chemical and Physical Oceanographers who resent the loss of their erstwhile colleagues. Disaffected *faculty* members *will* seek positions elsewhere and the strongest individuals will find new positions elsewhere."

Based on the foregoing, it is obvious that Dean Travis concluded that Meteorology had the non-tenured faculty that he most wanted to

protect, followed by Oceanography. Ultimately, he chose not to close but only to "suspend" both Oceanography and Geological Sciences permitting him to target the tenured faculty in those Departments and protect the non-tenured faculty in Meteorology.

In my judgment the methodology that was utilized in this instance does not constitute the use of "reasonably objective criteria" to select the layoff unit. On the contrary, it is unreasonably selective under the guise of cost savings. The only reasons these departments were "suspended" was to allow the effective layoff of all faculty and the selective recall of favored faculty, without actually doing so. The whole process appears to have been a subterfuge to avoid having to comply with Article 13.2(a), which requires that tenured faculty be laid off last. This is impermissible under any reasonable interpretation of Article 13. Therefore, because FSU selected the wrong layoff unit, grievants Thistle, Donoghue, Kish, Parker and Arnold must be reinstated.

3. DID THE UNIVERSITY FAIL TO PROPERLY APPLY THE LAYOFF CRITERIA?

Oceanography

The layoff criteria are set out in Article 13.2(e) which provides as follows:

(e) Where employees are equally qualified under (a) or (b) above, those employees will be retained too, in the judgment of the Board or the University, will best contribute to the mission and purpose of the institution and the state university system. **In making such judgment, the Board or the University shall consider**

employees length of continuous service, and shall take into account other appropriate factors, including but not limited to performance evaluations by students, peers, and supervisors and the employee's academic training, professional reputation, teaching effectiveness, research record or quality of the creative activity in which the employee may be engaged and service to the profession, community and public. (Emphasis added)

The record established that Dr. David Thistle, a faculty member with thirty-two years of service was laid off in violation of Article 13.2 (a) and (e), because there was no consideration of his length of service as evidenced by the fact that he was replaced by a faculty member who had not yet even started to work. The language of Article 13.2 (e) makes it clear that consideration of an employee's length of service is **required** by the Agreement. It may not be determinative but it is not optional either. The parties clearly intended that length of continuous service be a significant consideration, as evidence by the fact that they used the mandatory term "shall" and set this criteria out separately from the remaining factors, which must only be "taken into account". It is evident that Dean Travis completely ignored this criteria.

Dean Travis testified that he decided who to retain from Oceanography, not based on different qualifications but based upon "who could best contribute to the mission of the new department". He made no mention in his Step 1 response about length of continuous service. He stated only that in Oceanography he "used research productivity and future prospects". Nor did he mention that criterion in his testimony.

Thus, there is absolutely no evidence that length of continuous service was considered at all, much less carefully considered, as the Agreement explicitly requires.

This conclusion is reinforced by the fact that Dr. Thistle had greater length of continuous service than any other tenured faculty member in Oceanography. Moreover, Dean Travis retained Dr. Ian MacDonald over Dr. Thistle, even though he had not even started to work. Dr. MacDonald had zero continuous service at the time of the layoff, even if it is assumed that he could even be considered an employee at that time. A clear violation of this language may not be imagined. Indeed, to sustain the layoff under these facts, one would have to completely ignore this provision of the Agreement.

In addition, Article 13 simply cannot be read to permit an employee who has not yet begun his employment to have any priority whatsoever over any current employee, regardless of the criteria used. The notion is absurd and in conflict with the very purpose of the layoff provision, not to mention the fact that hiring a replacement at an even higher salary than the person he is replacing makes absolutely no sense where the lay off is allegedly for financial reasons. It does, however, demonstrate that the University had no interest in a fair and objective application of Article 13.

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Math and Science Education

Another example of extremely poor judgment on behalf of the University lies in its attempt to lay off four tenured faculty and retain two non-tenured faculty in the same layoff unit it designated itself. The reason given - i.e., that the non-tenured faculty were assigned to another program also - does not appear anywhere in Article 13 or anywhere else. It also belies logic and common sense.

The University's own documents conclusively demonstrate that both Dr. Kathleen Clark and Dr. Victor Sampson were at all times members of both the STE and Math and Science Education Programs respectively. Nothing in the Agreement even suggest that because a faculty member is assigned to teach in more than one program they are exempt from layoff if one of the programs is designated as a layoff unit, particularly where as here, that is their primary home assignment.

In fact, this Arbitrator ruled to the contrary in the *Worrell/decision*. In that case the UFF argued that Dr. Worrell should not have been included in the Cardiopulmonary Sciences Program layoff unit because his assignment spanned several programs throughout the Department. I rejected that contention based on a finding that teaching courses outside of an assigned program "does not mean that the grievant is not a member of that program". Here there is no dispute that both Clark and Sampson are fully functioning members of the Math and Science Education Programs, despite their participation in FSU Teach as well. In fact, the

grant funding FSU Teach requires them to remain members of STE and they are listed on the STE website as members of those programs. FSU Teach is an extension of their duties in the Math and Science Education Programs, not a substitute.

Moreover, the University's own records show that Dr. Clark has taught more in the Math Education Program than in FSU Teach. In the fall of 2008 Dr. Clark had only a 5% research assignment in FSU Teach. All of her instructional and research assignment was in STE and Math Education. In the Spring and Fall of 2009 she was on unpaid leave not teaching anything. Thus, she did not teach a single course in FSU Teach prior to the layoffs. When she finally did teach one FSU Teach course in the Spring of 2010, she also taught two math courses in Math Education.

Similarly, Dr. Sampson taught no courses in FSU Teach in the Fall of 2008 and one in the spring of 2009, immediately prior to the layoffs. Even when, as a result of not being laid *off*, he began to get more involved with FSU Teach assisting in two such courses in the Fall of 2009, he still taught three courses in Science Education in that term and in Spring of 2010.

Given these facts it is evident that Provost Abele highly values FSU Teach and was determined to preserve the faculty already involved in that program rather than having to start over with others, such as the grievants, even though they were fully qualified to do so. That is why he

"suggested" to Dean Driscoll that she consider laying off the four grievants to give her more options for FSU Teach when she had already proposed plans to meet her budget targets without laying off any tenured faculty, at least twice. That is also why her next recommendation reflected movement of the two FSU Teach faculty from Math and Science Education to the Secondary Education Program.

It is also important to note that, while admitting that they were all qualified to teach in FSU Teach, Dean Driscoll never even offered any of the grievants, each of whom have significantly more length of continuous service than either of those retained, the opportunity to move to FSU Teach. Explaining in her Step 1 response why none of the grievants was retained, Dean Driscoll stated:

"Moreover, it was determined that those faculty in Math and Science Education who received layoff notices had not showed any intent in making contributions to the reform aspect of an integrated curriculum as will be required to attain the future goals of the College."

However, Dean Driscoll admitted at the hearing that she never asked any of them if they were willing to move into FSU Teach rather than being laid off. Thus, to use their supposed lack of interest to justify the retention of non-tenured faculty further demonstrates the University's lack of respect for the basic fairness and good faith that is presumed to be a part of Article 13.

This Arbitrator's decision in *Makkiis* also applicable to this aspect of the dispute. In that case the grievant contended that he was tenured in the Engineering Management Degree Program, not the ISE Department, which was the designated layoff unit. I rejected that contention on the following basis:

"It is also noteworthy that other faculty members in the ISE Department besides the grievant taught several courses and participated in unique research, centers, programs or institutes but were still on the layoff unit of the ISE Department. The reason for this is because all faculty, even administrative appointees, have a primary appointment in one of the University's departments."

The same holds true in STE. The primary appointment of all Math and Science Education faculty is in the STE, which is the equivalent of a Department, both before and after the layoff notification. Teaching in FSU Teach is an assignment, not an appointment. There is no joint appointment. If there were, the University would surely introduce a document so stating in arbitration. The appointment is in STE because the FSU Teach grant requires that it be staffed by faculty from both the College of Education and the College of Arts and Sciences. There is no dispute concerning the fact that Dr. Clark and Dr. Sampson are the representatives from the former. They were therefore in the layoff unit selected by the University itself, but were retained in direct violation of Article 13.2 (a).

In addition, no consideration was given to length of continuous service with respect to the retention of Dr. Sherry Southerland over the grievants. The reason given was that she, like Dr. Clark and Dr. Sampson, was also assigned to FSU Teach. This reason must be rejected for her as well as the other as a stand-alone basis for retaining her. If the layoff unit is considered the Science Education Program to which she was assigned, she had less years of continuous service (7) than either Dr. Davis (21) or Dr. Gallard (19), indicating that failure to give the careful consideration of this factor as Article 13.2 (e) requires, was a material error that harmed these grievants. If STE is considered the layoff unit, both Dr. Jakubowski (22) and Dr. Aspinwall (9) have greater length of service.

Geological Science

Dean Travis stated in his Step 1 response and reiterated at hearing that in deciding who to retain in Geological Science, "I considered research productivity". As was the case of Dr. Thistle in Oceanography, grievants Dr. Joseph Donoghue, Dr. Steven Kisch, Dr. Anthony Arnold, and Dr. William Parker, were selected for layoff without any consideration of their lengths of continuous service in violation of Article 13.2 (e). Each of these grievants had more continuous service than nearly all of those who were retained.

Dean Travis said all of these grievants were qualified for the new Environmental Services Department, but that he felt that he just could not

retain all of the Geological Science faculty. That being the case he was therefore required to "carefully consider" length of continuous service as a primary factor. It is evident from the record that he chose not to do so.

In addition, there is a substantial question as to whether recent research activity was the real reason Dean Travis chose these grievants for layoff. They all testified that they were told on multiple occasions that the reason was "programmatic needs". This is consistent with his stated rationale at hearing and in his Step 1 response that his decision was based on retaining "those faculty members who could best contribute to the mission of the new department". Nothing was said about research productivity in the initial meetings delivering the news about the layoffs, even when each grievant asked for a more specific explanation. In fact, Dr. Donoghue asked Assistant Dean Sam Huckabe in a meeting the Monday following notification the reason for his selection and was assured that it had nothing to do with productivity. This was later confirmed by Dean Davis, who again emphasized "programmatic needs". Huckabe was not called to rebut this testimony, nor was Dean Travis asked specifically about this conversation. If he actually meant research productivity, why did he not just say so. This explanation did not surface until his Step 1 response in November, 2009, five months after the layoffs were announced.

It is also important to note that Dr. Donoghue completely refuted the claim that the layoffs were based on "recent research productivity" in his memo to Dean Travis dated July 24, 2009. In that memo he pointed out that he had written ten external funding proposals over the previous five-year period, of which two were funded. He noted that he currently is the principal investigator on a three-year federal grant for \$1.02 million, one of the largest grants in the department in recent years. His memo also pointed out that he had served as principal advisor for approximately one quarter of the Department's graduate degrees over the previous ten years (six MS graduates and 3 PhD graduates) in a Department of fourteen full time faculty. The above facts were also reiterated in Dr. Donoghue's testimony, none of which were questioned or refuted by the administration.

In addition, the programmatic needs had not yet been determined. Dr. Arnold testified that he asked Department Chair, Dr. Leroy Odom, in a meeting after being informed of his layoff if he was consulted or if the programmatic needs of the new department had been determined. Dr. Odom answered, "no" to both questions, stating that a committee had just been formed to determine the nature of the new program. In fact, it was not until July 17, 2009, over two weeks after the layoffs were announced that Dean Travis wrote to the faculty of all three departments formally announcing the formation of the new combined department. In that

document he created an organizing committee consisting of the Chairs of the three departments to oversee the "synthesis" of the existing departments. Their charge was to:

"[C]oordinate the many aspects of the synthesis, from meeting with every individual faculty member and leading town hall meetings of all departmental personnel to guiding faculty sub-committees working on various aspects of the synthesis process from curricula to finances. The committee will lead the faculty in creating structure, by-laws and policies for the new department that will enable the delivery of its academics programs, new and continuing, and foster an environment conducive to excellent research and scholarship."

In other words, to determine the programmatic needs of the department. It is shown to have been arbitrary, capricious and unreasonable.

Judging by the sequence of events it is also clear that Dean Travis changed his justification from "programmatic needs" to "research productivity" after he realized that the programmatic needs of the new merged department would be better met by precisely the faculty he intended to terminate as shown by the following.

To begin with, the grievants do fit well with the actual programmatic needs. Dean Travis admitted on cross-examination that all of the faculty noticed for layoff fit within the environmental services area but that is not true of all those retained. For example, Dr. Humayun's specialty is the Geochemistry and

Meteorites and Dean Travis did not even know if he had taught any Environmental Science courses, which he does not. Likewise, he admitted that Dr. Seiters, whose specialty was identified as Geochemistry of Mid-Ocean Basalts, does not do any environmental sciences research, supposedly a factor that he relied on in making his decision.

In contrast, the grievants all teach courses and do research in environmental areas. Dr. Donoghue's work has always had an environmental focus. He testified that he was stunned to learn that he was considered not to fit well into the new department because all of his work over the last two years has been in the environmental area. In his memorandum to Dean Travis after being notified of the layoff, Dr. Donoghue stated the following regarding programmatic needs for the anticipated new department:

"If in fact the layoff criteria for programming were programmatic needs for a new interdisciplinary program, it can easily be established that my research work is the most interdisciplinary that is occurring in the department, and is the most closely related to environmental issues. This is particularly true for those environmental concerns that are most critical for the State of Florida, including sea-level rise, climate change, coastal erosion, and environmental contaminants. My research, and that of my students, incorporates all of these topics/'

Dr. Donoghue also related that he and several colleagues (Doctors Parker, Arnold, Kisch, Wise and Yang) have worked

intensively for months to fully develop a bachelor's degree program in Environmental Geology that had not yet been adopted, but they had nevertheless developed three environmental Geology courses, two of which he regularly teaches. Dean Travis testified that he was unaware of the effort to develop an Environmental curriculum, but Donoghue testified at hearing that the Environmental courses were still being taught regularly. Dean Travis' formal proposal for the Department states:

"The Department will also serve as the home for two undergraduate degrees now under development. Faculty members from Geological Science and Oceanography have been developing an Environmental Science curriculum.

At hearing Dean Travis testified that he was aware that Dr. Donoghue had developed courses in Environmental Sciences but he appeared otherwise unaware of his specialty in Environmental and Coastal Geology and was not aware that Dr. Donoghue was one of those promoting an undergraduate environmental degree in Geology. Given the importance of his decision, it is difficult to understand why he would not have better informed himself by either asking his Department Chair or even reviewing Donoghue's extensive twenty-three page resume, which is quite explicit. In any event Dr. Donoghue, suspecting his lack of awareness, informed him in detail by letter dated July 24, 2009.

Dr. Arnold specializes in Micropaleontology involving environmentally sensitive protozoans that serve as environmental indicators. They are as he described them, "canaries in a coal mine" equivalents for the ocean. This is obviously directly related to the environmental science mission of the new Department and clearly a more direct connection than studying meteorites. Dr. Arnold has served as the Co-Editor of the Journal of Environmental Micro-Paleontology, Micro-Biology and Meiobenthology and has numerous environmentally focused publications. He can teach any part of the Geology curriculum for the new Department. In fact, a course he regularly teaches for undergraduate majors will be combined with another course in the Department.

Similarly, Dr. Parker specializes in Environmental Micro-Paleontology, also having co-authored numerous publications with Dr. Arnold reflected in each of their vita. Specifically his focus is Paleo Climate and Paleo Ecology using multivariate analysis. He is also a Co-Editor of the Journal of Environmental Micro-Paleontology, Micro-Biology and Meiobenthology, has consulted with the Florida Department of Environmental Protection and received contracts from FDEP on geo statistical evaluation of EDD contamination and for environmental analysis of coastal habitats in the Florida Panhandle. That he fits well in the new department

which was made clear by Dean Travis himself in a Town Hall meeting of faculty of all three Departments planning for the combined department in the fall of 2009, where he used the courses developed by Dr. Parker on Geo Statistics as an example of the type of the inner-disciplinary courses that they needed more of.

Dr. Kisch specializes in remote sensing and GIS studies in the Earth and Environmental Sciences, which involves mapping, land forms and environments through cutting-edge remote sensing technology. This is obviously a critical area in modern environmental research and, in recognition, the course he developed and has taught for years is a required part of the curriculum for the new department. Dr. Kisch is the only faculty member who can teach it. He describes the course as follows in his vita:

"GLY 5757 Fundamentals of Remote Sensing and GIS The Earth Sciences.

Recent developments for the Department of Geosciences Undergraduate and Graduate Programs: Development of a set of courses that integrate Remote Sensing methods and Geographic Information Systems - Students are assigned practical, field oriented problems as part of the course curriculum. Students must complete both written reports in addition to the main GIS project. The course assignments are similar to project reports that may be required as part of a job in the Geologic and Environmental professions. In addition, the following courses that he teaches are being

continued in the new Department:

GLY 1000 Dynamic Earth

GLY 1042 Planetary Geology

GLY 2000 Physical Geology

Dr. Kisch testified at hearing that he pointed out to Dean Travis in July, 2009, the lack of environmental focus and expertise of many of the faculty who were retained. The evidence also showed that each of the laid off faculty members can teach courses from other departments, thus demonstrating their satisfaction of the "interdisciplinary" aspect of Dean Travis' "vision".

In sum, the evidence showed that the University failed to properly follow or apply the criteria in Article 13.2(e) in Geological Science. The primary, required consideration of length of continuous service of the grievants was ignored, their environmental focus was unreasonably minimized with respect to other faculty retained and their supposed lack of recent research productivities was a result of a misreading of the readily available record and was artificially and arbitrarily maximized. Therefore, the University's exercise of the discretion afforded it by this provision was arbitrary, capricious and unreasonable.

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Anthropology

Dean Travis testified and stated in his Step 1 response that in the Department of Anthropology he used teaching breadth,

meaning who could teach the widest range of courses, as the primary factor in deciding who to retain. Again, as before, he failed to even mention length of continuous service in violation of Article 13.2 (e). That alone would warrant upholding Dr. Elizabeth Peters' grievance.

Dr. Peters had thirty-eight years of continuous service having started as a Lecturer in 1981. Two of those retained, Dr. Frank Marlow and Dr. Lynn Schepartz, started in 2006, a difference of twenty years. In explaining why they were retained over Dr. Peters Dean Travis referred only to teaching breadth.

I find that the evidence does not credibly support a finding that these faculty, or any other Anthropology, had any greater teaching breadth than Dr. Peters. She testified that she has taught more different courses in the history of the Department, which was never refuted. Her vita reflects that she has taught numerous courses in Anthropology over the years, which span three of the four fields of Anthropology, which are physical (biological), archeology, cultural and linguistics, and she is the only faculty member to have taught the four field course Introduction to Anthropology, every semester since it was first offered in the Spring of 2007. It should also be noted that Introduction to Anthropology, Childhood Around the World, Peoples of the World

and Introductory to Physical Anthropology and Pre-History, are mass section liberal studies courses which appeal to large numbers of students from diverse disciplinary backgrounds. These courses will continue to generate substantial tuition revenue, even after completion of the spring 2011 Teach-Out of remaining Anthropology majors. No other Anthropology faculty member has taught more than one mass section liberal studies course but Dr. Peters has experience teaching four such courses.

UFF Exhibit 52 demonstrates that Dr. Peters has taught eleven courses in three sub-fields, plus two four-field Anthropology courses. Dr. Marlowe and Dr. Schepartz have taught only two courses each in one sub-field, Physical Anthropology, in which Dr. Peters is particularly strong. Retention of the three faculty with the most length of service, as well as the most courses taught (Doren, Marrinin, Pohl and Peters) covers all four fields, Dean Travis' stated goal. Therefore, it simply does not make sense that if Dean Travis was truly relying on teaching breadth, that he would have picked both Marlow and Schepartz over Dr. Peters.

In addition, Dean Travis admitted in his direct testimony that the teaching quality of all of these faculty members was basically the same and he further admitted on cross-examination that he had no problem recalling Dr. Peters, should the opportunity arise.

In addition, Dr. Peters testified without contradiction in her initial testimony that the mostly large courses she primarily teaches are very popular, filling up rapidly and generating a high number of student credit hours that produce revenue for the University. At its December, 2008 meeting, the Board of Trustees announced that the first guiding principle of budget reduction should be to avoid hurting enrollments. All of these facts point to keeping, rather than laying off Dr. Peters, a faculty member who has generated more anthropology credit hours than any faculty member in FSU history.

UFF Exhibit 35 challenges Dean Travis' economic rationale for eliminating or suspending Anthropology and speaks for itself. In addition to low costs and resulting surplus, Anthropology ranks the third out of thirty departments in Arts and Sciences in undergraduate degrees awarded in 2008-09, when the four largest departments by far, are separated. This includes all of the Science, except Biology. Clearly degree production is the primary mission of the University.

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AT \$33,343 per degree, Anthropology produces these degrees at cost less than thirteen out of the seventeen departments in the College of Arts and Sciences, including Meteorology (\$50,775), which wasn't touched. As to efficiency, "net tuition earned," Anthropology ranks higher than fourteen of

the seventeen departments at \$1.124, with Meteorology being last at \$3.245. Although Anthropology's absolute credit hour productivity is less than much bigger departments with many more faculty and much greater budgets, it ranks only slightly below Philosophy and Classics, but has the second lowest cost per credit hour in the College at \$114. Meteorology produces just over half as many student credit hours at a cost of \$471 per hour, over four times greater.

As recognized by both Scott Tram, the Arts and Sciences Budget Chief and the Budget Crisis Committee, it made no sense to eliminate Anthropology from a budgetary standpoint. Rather, it would have made much more sense to follow through with the plan to close or at least "suspend" Meteorology, whose "non-tenured" faculty cost \$1.146,721, slightly less than the \$1.2 million savings from completely closing Anthropology, which was Dean Travis' plan. The potential savings from Meteorology surely exceeds the cost of retaining a skeleton Anthropology Department, so Dean Travis' calculations relied on at the hearing were no longer relevant when he was forced to change his plans.

It is also important to note that Dean Travis was not forced to "go back to the drawing board" as a result of the BCC's action on June 11, 2009, as he claimed. The BCC voted to restore

Anthropology from oblivion because they were told that the money to fund this restoration was available. It did not recommend restoration of all of the faculty. All Dean Travis had to do was to decide how many faculty he needed to retain to teach the service courses (basic undergraduate courses), something he had already contemplated as a part of his May 29, 2009 budget plan. His anger at the BCC's action was not related to any new budget work. His reaction does, however, signal how determined he was to lay off faculty in Anthropology, even though it made no economic sense.

If Dean Travis was confused or upset by BCC actions which required more work from him, it would have been reasonable for him to seek clarification and guidance before taking further actions. Instead, he notified Anthropology Department Glen Doran, about the layoff of three Anthropology tenured faculty on June 11, 2009, the *same* day that the Budget Crisis Committee voted to "restore" Anthropology. Doran called Elizabeth Peters that same day and told her to contact Travis' Assistant, Cheryl Grossman, for further details about her layoff. At the July hearing, Susannah Miller testified that it would have been inappropriate to notify faculty before approval of the plan by the Board of Trustees on June 17, 2009, since nothing was official until the Board of Trustees voted. Also notifying the faculty before the BOT vote could generate

lobbying in advance of the vote. Thus, Travis' June 11 notification to the Anthropology Department Chair (and tacit approval of notifying affected Anthropology faculty) suggests that *Travis* was anxious to get the deed accomplished before any other voices, including the BOT, undermined his layoff plan.

This objective evidence contradicting Dean Travis' rationale in deciding who to retain deserves great weight. The issue is not whether he can use numbers to justify what he did but rather whether that is really the reason he did it. His approach was not objective, it was based on who was retained, as demonstrated by his email of May 30, 2009, to Provost Adele:

"Two things I did not want to put in my cover note during the recommendation. The recommendation to retain the Anthro service courses was a concession to Scott. He loves Anthro for the low cost and the hours they generate and he **likes some of the faculty also.**" (With emphasis supplied)

The last sentence of this email clearly demonstrates that at least part of the reason Dean Travis relented from eliminating Anthropology completely was to retain some faculty member who were "liked". Apparently Dr. Peters was not one of them even though she had a hundred percent teaching assignment and taught more of the retained courses than anyone else.

In sum and in short, based on the foregoing, it is evident that Dean Travis used the discretion afforded him by Article 13 to manipulate the

layoff units to allow him to arbitrarily select who got laid off, based on his personal judgments and relationships, and not the criteria set out in Article 13.2 (e). That constitutes an abuse of discretion and must therefore be disallowed.

Physical Education

Dean Marcie Driscoll failed to give any reason for selecting Dr. Susan Lynn for her layoff in her Step 1 answer, stating only that, "declining enrollment in the Physical Education Department over the last five years was a major factor in the decision to eliminate the program....."

At hearing Dean Driscoll testified only that she thought she retained the other tenured faculty member in that program, Dr. Thomas Ratliff, because he was better suited to the Elementary Education Program. At a meeting with the affected faculty, Dean Driscoll said she didn't know yet what Ratliff would be doing in the STE; -once STE was reorganized "we would know. This hardly constitutes the sober deliberation about which faculty members "will best contribute to the mission and purpose of the institution", as set out in Article 13.2 (d).

The evidence shows that Dr. Lynn has superior qualifications to Ratliff, as measured against the factors the University is required to consider under Article 13.2 (e). She has continuously served FSU for longer than Ratliff (20 years to his 19),; her research record is impressive with the publication of 26 referred articles and a textbook; her record of

service to the profession, community and public is significant, as the Co-Editor in Chief of Physical Activity Today (AAHPERD Research Consortium) and guest reviewer on six referred journals, among others.

In so far as her fit with the Elementary Education Program, most of Dr. Lynn's research has involved elementary schools and she has taught courses across all levels, including Elementary Education. Most of the teachers she has worked with in her career have been Elementary teachers. Dr. Lynn explained at hearing that Ratliff only taught the Elementary Education Practicum because he did not like the Middle School or High School Practicum. Dean Driscoll admitted that Dr. Lynn was qualified to teach Elementary Education but displayed little actual knowledge of the extent of her experience in this area. Thus, the mere assertion that Dr. Ratliff was "better suited" for a role that is yet to be determined, is arbitrary, capricious and unreasonable, even under the discretion afforded by Article 13.2 (e).

4. DID THE UNIVERSITY IMPROPERLY ENACT LAYOFFS AS NON-REAPPOINTMENTS?

Although the UFF submitted an UFF Exhibit 4C containing the names of approximately twenty-eight non-tenured faculty who were not reappointed due to financial reasons, the parties are in agreement that the only remaining grievant with respect to this issue is John Raulerson, a non-tenured track Associate in Art, within the Department of Art. The UFF argues that the layoff considerations contained in Article 13.2 (a) should

have been applied, rather than the provisions of Article 12 governing non-reappointment, because the University eliminated Raulerson's position due to adverse financial circumstances. It further contends that by application of Article 13.2 (a), other non-tenured track faculty with fewer years of service would have been non-reappointed before Raulerson. However, it has failed to offer any evidence to establish that other non-tenured track faculty members with fewer years of service were retained over Raulerson in the unit.

Even assuming for the sake of argument that there were evidence that junior faculty members were retained over Raulerson in the unit, the UFF has nonetheless failed to meet its burden of establishing a violation of Article 12.4 pertaining to non-reappointment considerations. It provides in pertinent part:

"If the decision not to reappoint was based solely upon adverse financial circumstances, reallocation of resources, reorganization of degree or curriculum, offerings or requirements... the University shall take the following actions:

- (a) Make a reasonable effort to locate appropriate alternative or equivalent employment first within the University; and,
- (b) Offer such faculty member who is not otherwise employed in an equivalent full-time position, re-employment in the same or similar position at the University for a period of two years following the initial notice of non-reappointment should an opportunity for such reappointment arise. For this purpose it shall be the faculty members' responsibility to keep the University advised of the faculty members' current address. Any offer of reemployment pursuant to this section must be accepted within fifteen (15) days after the date of the

offer, acceptance to take effect not later than the beginning of the semester immediately following the date the offer was made. In the event such offer of reemployment is not accepted, the faculty member shall receive no further consideration pursuant to this Article."

In this case the utilization of non-reappointment of Article 12 to separate the employment of non-tenured track faculty members due to adverse financial circumstances, was clearly an appropriate use of Article 12. The plain language of Article 12.4 contemplates non-reappointment due to adverse financial circumstances. Further, Article 12.4(a) contains an alternative/equivalent employment search obligation and Article 12.4(b) contains a recall provision that controls when a non-reappointment is due to adverse financial circumstances. The use of non-reappointment of non-tenured faculty, such as Raulerson, is clearly contemplated by Article 12.

The UFF argues that Article 12.4 contemplates that faculty members non-reappointed for one of the reasons listed therein are effectively laid off and should be treated as such by affording them the benefits of the layoff and recall provisions set out in Article 13. This argument is without merit because there is nothing in the language of Article 12, which either expressly or by reasonable implication incorporates Article 13.2(b). Instead, as previously explained, Article 12 simply contains a search obligation and recall provision that control when the non-reappointment is due to adverse financial circumstances. If it had

been the intent of the parties to incorporate Article 13.2 (b) into Article 12, they could have easily inserted language to that effect. Since they failed to do so, an Arbitrator has no authority to read into the language words that do not exist. Therefore, the claim on behalf of John Raulerson is rejected.


S. REMEDY

As a remedy for the violations found to have occurred under issues 2 and 3, the University is directed to rescind the layoffs of all tenured grievants and permit them to continue in their positions as if no layoff occurred. Since no faculty member has been laid off as of this date, there is no back pay at issue. The Raulerson grievance is without merit and must be denied.

Should any grievant still part of this case as of the closing of the record accept alternative employment in contemplation of the layoff becoming effective prior to the issuance of a decision, that grievant will have the choice of resuming employment at FSU at the next appropriate time, such as the next term or academic year.

V.AWARD

In accordance with the foregoing opinion and to the extent set forth therein, the grievance is sustained.



Stanley H. Sergent
Arbitrator

Sarasota, Florida
November 3, 2010