



**State Employees' Association of New Hampshire,
SEIU Local 1984**

and

Plymouth State University

**Case No. E-0141-1
Decision No. 2013-133**

Appearances:

John Krupski, Esq., Molan Milner Krupski, Concord, New Hampshire for the State Employees' Association of New Hampshire, SEIU Local 1984

Nicholas DiGiovanni, Jr., Esq., Morgan, Brown & Joy, Boston, Massachusetts and Ronald F. Rodgers, Esq., General Counsel and Secretary, University System of New Hampshire, for Plymouth State University

Background:

The State Employees' Association of New Hampshire, SEIU Local 1984 (Union) filed a petition for certification under the Public Employee Labor Relations Act, RSA 273-A, on March 4, 2013. The Union has requested approval of the following proposed bargaining unit:

Unit: All tenure track faculty and tenured faculty, including Department Chairs.

Exclusions: Contract faculty, Clinical faculty, Research faculty, Assistant Directors, Directors.

Plymouth State University (PSU) objects to the petition. PSU asserts that: 1) contract faculty, clinical faculty, and research faculty should be included in the proposed bargaining unit; 2) Department Chairs should be excluded from the proposed unit because they confidential employees under RSA 273-A:1, IX (c) or supervisory employees under RSA 273-A:8, II; and 3)

the inclusion of s is improper under Pub 302.02 (c)(2) because of the “potential for employees within the proposed bargaining unit experiencing a division of loyalties between the public employer and the employees' exclusive representative.

The undersigned conducted a hearing on April 19, 2013 at the Public Employee Labor Relations Board (PELRB) offices in Concord. Both parties have filed post-hearing briefs. After reviewing the parties' briefs as well as the record established at hearing the decision in this case is as follows.

Findings of Fact

Parties and Background:

1. Plymouth State University (PSU) is a public employer within the meaning of RSA 273-A:1, IX and is one of four universities that make up the University System of New Hampshire (USNH). The USNH Board of Trustees is the governing board of all four universities.

2. The State Employees' Association of New Hampshire, SEIU Local 1984 (Union) is an employee organization seeking to be certified as the exclusive representative of a bargaining unit consisting of the PSU tenure track and tenured faculty. PELRB bargaining unit certification records reflect that PSU currently has an undergraduate adjunct faculty unit (PELRB Decision No. 2012-066, January 5, 2012). There are no other PSU certified units and the current case is the only pending request for certification of a new PSU bargaining unit. Clinical, research, and contract faculty have not expressed any interest in organizing or in representation by the SEA.

3. The administration at PSU includes Sara Jayne Steen, President, and Julie N. Bernier, Provost and Vice President for Academic Affairs. Provost Bernier reports directly to President

Steen. President Steen reports to the Board of Trustees of the University System of New Hampshire.

Faculty, Colleges, and Departments:

4. The full time faculty at PSU consists of approximately 143 tenured faculty, 32 tenure track faculty, and 35 research, contract, and clinical faculty. Research and contract faculty can be assistant, associate, or full professors.

5. PSU faculty is spread throughout a number of different departments in the College of Arts & Science, the College of Business Administration, the College of Education, Health, & Human Services, the Library, the Center for Rural Partnerships, and the Center for the Environment.

6. Faculty member professional responsibilities include teaching, scholarship, and service. Tenured and tenure track faculty work in all three areas. Clinical faculty have teaching and service responsibilities. Research faculty have scholarship and service responsibilities, and teaching responsibilities when specified in their appointment (hiring) letter. Contract faculty are responsible for teaching and service. Adjunct faculty have teaching responsibility only.

7. The Faculty Handbook (Employer Exhibit 3) addresses in detail matters such as the Mission, Organization, and Governance of PSU, Faculty Personnel Policies, Academic Policies, Administrative and Financial Policies, and Student Affairs Policies. The Faculty Handbook is subject to changes approved by the Faculty and revisions “emanating from the University System of New Hampshire Board of Trustees or System Office, the USNH Human Resource Office, or the Plymouth State University President or VPAA.” *See* Faculty Handbook, Section 1.9 (Employer Exhibit 3). The Faculty recently approved modifications to the Faculty Handbook

(Sections 2.3 and 2.4, Roles and Responsibilities and Evaluation of Faculty)(Employer Exhibit 4).

Shared Governance:

8. The principle of shared governance is addressed in Article II (Faculty Role in University Shared Governance) of the Faculty Bylaws (Employer Exhibit 5). The Bylaws recognize that as an “academic institution” PSU is a “‘joint effort,’ requiring communication and consultation among all constituencies, and addresses the distinctive responsibilities of trustees, administration, faculty, staff, and students in university governance.” The Bylaws further provide that:

The distinctive responsibility of the faculty is the academic mission of the university. In particular, the *Statement*¹ asserts in Section V. The Academic Institution: The Faculty that, “*The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances and for reasons communicated to the faculty.*” (emphasis in original)

The faculty governance system is a “faculty of the whole” consisting of all full time faculty (tenured, tenure track, clinical, contract, and research). The faculty of the whole meets monthly to carry out its business, including review and voting on proposed Faculty Handbook modifications like those contained in Employer Exhibit 4.

Faculty Speaker:

9. Each year the faculty elects the Faculty Speaker, who has a myriad of responsibilities as described in Article IV of the Faculty Bylaws (Employer Exhibit 5). The Faculty Speaker “shall have responsibility for moderating regular faculty meetings or Faculty Forums as well as consulting with the Administration and the Steering Committee to appoint faculty members to task forces, advisory groups, and other ad hoc groups.”

¹ The 1966 *Statement on Government of Colleges and Universities*.

Selection and General Duties of Department Chairs:

10. The College of Arts and Sciences has 13 Department Chairs, and the College of Education, Health, and Human Services has Department Chairs. The College of Business Administration does not have Department Chairs but instead has 2 directors. The Library has neither Department Chairs or Directors and the Library faculty report directly to the Dean of Library and Academic Support Services. The Center for Rural Partnerships and the Center for the Environment have directors, and not Department Chairs.

11. Department Chairs are selected through a process that begins with the department faculty, who nominate a department faculty member. According to the Faculty Handbook (Employer Exhibit 3), "a set of candidates for the office shall be developed by the department by means of a method and in accordance with criteria determined by departmental vote. The list of candidates shall be presented by the Vice President of Academic Affairs to the President of the University." The Faculty Handbook further provides that the President² shall make the "final appointment from the departmental list" and that the Chair "is primarily a faculty member. However, to fulfill the duties of the Chair position, the necessary administrative authority and clerical support must exist." Although there are a number of formal steps in the Department Chair selection process, the process begins within the Department, is collaborative, and is designed to ultimately ensure the appointment of a Chair who is supported by Department Faculty.

12. Department Chairs serve a 3 year term and report to the Provost and the Vice President for Academic Affairs. The duties and responsibilities of Department Chairs are detailed in the Faculty Handbook (Employer Exhibit 3)(Section 1.5 Administrative Structure, A.

² Provost Bernier testified that chairs are appointed by the Provost based upon the faculty's recommendation.

Academic Department Chair) and in the Department Chair's Handbook (Employer Exhibit 6) which was compiled by the 2010-11 Department Chairs and edited May 31, 2012.

13. The duties of Department Chairs are described in the Faculty Handbook (Employer Exhibit 3) as follows:

Working with faculty colleagues and with the University administration, the Department Chair assumes leadership for:

a. Departmental Affairs

- (1) Providing professional leadership and example in teaching, research, and community service.
- (2) Developing departmental goals, missions, and objectives consistent with those of the University.
- (3) Establishing departmental policy.
- (4) Scheduling department meetings and coordinating agenda.
- (5) Involving faculty members in departmental decision-making activities.
- (6) Establishing and maintaining internal communications.
- (7) Determining departmental awards and scholarships
- (8) Representing the department in the University and with external agencies; conveying University policy and actions to the department

b. Academic Affairs

- (1) Establishing departmental degree programs and curricula
- (2) Evaluating and improving programs, curricula, and the quality of instruction
- (3) Enforcing academic standards
- (4) Preparing schedules of courses and room assignments for the regular semesters and designing Continuing Education program possibilities
- (5) Providing guest speakers and coordinating departmental activities with other academic departments

c. Faculty Affairs

- (1) Recruiting and orienting new faculty members
- (2) Supporting and encouraging faculty growth and high performance in teaching, research, and other professional activities; controlling faculty workload to accomplish these ends and to carry out the missions and policies of the department
- (3) Recommending all appointments of contract and adjunct faculty, overload instructors, continuing education faculty, and instructors for departmental off-campus workshops and courses
- (4) Defining faculty responsibilities and protecting faculty rights
- (5) Evaluating faculty members following procedures outlined in the Faculty Handbook

d. Student Affairs

- (1) Delegating responsibility for the screening, assigning, and supervising of student workers, graduate assistants and teaching fellows
- (2) Responding to student grievances and mediating disputes between students and faculty members according to established departmental policy recognized by the Vice President for Academic Affairs and the President
- (3) Providing appropriate channels for students to express opinions about academic matters
- (4) Communicating departmental programs and activities to students

e. Budgetary Affairs

- (1) Preparing annual and biennial departmental budgets in concert with the administration
- (2) Administering budgetary allocations by preparing requests for and authorizing all departmental expenditures
- (3) Guiding the department in defining departmental policies on cost effectiveness
- (4) Approving allocation of departmental faculty travel and development funds

f. Office Management

- (1) Supervising assigned support personnel and applying appropriate personnel policies regarding salary administration and evaluation
- (2) Administering departmental facilities and requisitioning supplies unless assigned to others by mutual consent
- (3) Making certain that adequate departmental files and record systems are maintained
- (4) Coordinating textbook orders

14. Per the Department Chair's Handbook (Employer Exhibit 6), a Department Chair's administrative responsibilities include:

- a) preparation of work plans with department faculty with modifications as needed;
- b) annual evaluation of the prior year's work plan and the faculty's progress toward stated goals;
- c) review of student course evaluations, and classroom observations;
- d) department faculty pay increase recommendations (general pay increase or recognition pay increase);
- e) annual teaching observations/evaluations of tenure track and non-tenure track faculty as well as a specified observation of those tenured faculty eligible for promotion with copies of the observation/evaluation to the faculty member and the Dean where it becomes part of the permanent record;

f) annual re-appointment recommendations to the Dean for all department tenure and non-tenure track faculty based on performance evaluation in the areas of Teaching, Service, and Scholarship;

g) hiring and evaluation of adjunct faculty;

h) recommendation of sabbaticals – this involves forming a judgment about the proposed sabbatical plan, completing a section of the application form, and providing the Department's coverage plan during the faculty member's absence;

i) assignment of graduate and undergraduate courses and schedules, approval of all courses offered and approval of faculty workloads;

j) determination of use of \$400 per faculty professional development fund included in annual department operating budget;

15. Department Chairs are eligible for promotion at PSU, just like other faculty members. The Provost is a former Chair, as are the current Deans and the Associate Vice President for Undergraduate Studies. Service as a Chair is not necessarily a path to another administrative position, as Chairs may return to their former status as a department faculty member following the completion of their term. Chairs receive an annual stipend of \$3,000 and have their teaching responsibilities reduced by fifty percent in order to provide them with sufficient time to perform their administrative duties.

16. All PSU Department Chairs meet collectively as the University Council of Chairs. They also meet within each college as the College Council of Chairs. Both Councils meet at least monthly. The University Council of Chairs meets with all the academic leadership and the Provost, and the College Council of Chairs meets with their respective Deans. There is also a January and August Department Chair retreat during which campus issues, budget issues, workshops and training on personnel and legal issues may be discussed and/or conducted. Attendance is encouraged but is not mandatory.

17. Chairs hold monthly department meetings, and all full time faculty are expected to attend.

18. A primary Department Chair function or responsibility is the assigning/scheduling/coordination of work to determine what courses will be offered, who will teach on site or on line, and the actual class schedule. This is usually accomplished by collaboration with other department faculty but the Department Chair makes final decisions as necessary.

Tenure Track Faculty:

19. Tenure, and the relationship between tenure and academic pursuits, is addressed and explained in the 1940 Statement of Principles on Academic Freedom and Tenure:

...Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free expression.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

See Union Exhibit 5 (footnotes omitted).

20. The hiring process for tenure track faculty is primarily the responsibility of a Search Committee, which is comprised of department faculty and, per the Department Chair's Handbook (Employer Exhibit 6), "at least one member external to the department." Department Chairs approve the posted job description/ad for the position and like the Search Committee conduct candidate interviews. The Search Committee informs the Chair of its selection, and the

Chair then makes a recommendation to the Dean. If the Search Committee and the Chair do not agree, the Chair, Search Committee and Dean meet to discuss the matter and the Dean then makes the hiring decision. It is more challenging and difficult to be hired into a tenure track position than to be hired into a clinical, research, or contract faculty position.

21. The tenure track is six years long, and the formal application process begins in the fifth year, when a candidate must declare his/her intent to seek tenure and begin building a Promotion and Tenure portfolio.

22. While tenure track and tenured faculty are interested in forming a bargaining unit and participating in collective bargaining, there is no evidence that research, contract, and clinical faculty have any interest in becoming part of a bargaining unit (either with or without tenure track and tenured faculty). Tenure track/tenured faculty also perceive research, contract, and clinical faculty as a rising threat to the continuation of the tenure system or, at the very least, an erosion of the tenure system. In general, tenure track/tenured faculty believe tenure is the arrangement that best ensures academic freedom among faculty which in turn is essential to PSU's mission to provide undergraduates with a high quality education.

Promotion and Tenure Committee:

23. Each department has a Promotion and Tenure Committee comprised of at least five tenured faculty. If a department does not have at least five tenured faculty then tenured faculty from another department will join the Committee. The department's Promotion and Tenure Committee reviews and makes recommendations on promotion applications, such as Instructors who are seeking promotion to Assistant Professor, or tenure applications of eligible tenure track faculty. Both promotion and tenure applications proceed through five levels of review, starting with the Department Promotion and Tenure Committee, and then proceeding to Department

Chair, Dean of the College, Provost & Vice President for Academic Affairs, and President. The ultimate tenure decision is made by the University System Board of Trustees. Unsuccessful tenure applicants are not reappointed.

Discipline:

24. Neither the Department Chair Handbook nor the Faculty Handbook expressly grants to Chairs any authority to discipline tenure track or tenured faculty.

25. The two Chair letters to tenured faculty reflected in the first three pages of Employer Exhibit 9³ express concerns about tenured faculty, but neither expressly imposes discipline. One of these letters documents a Chair's frustration with a tenured faculty member who attended a weeklong conference. The letter was placed in the faculty member's personnel file.

26. The third letter contained in Employer Exhibit 9 was written by a Director, and not a Department Chair. The letter itself is clearly identified as a written warning, and includes a reference to the "Employee Assistance Program." However, the parties stipulated during the hearing that the two Directors (College of Business Administration) are excluded from the proposed bargaining unit.

27. Department Chairs issued two written reprimands to staff (not tenure track/tenured faculty) as reflected in Employer Exhibit 13. The format of these two letters is similar to the Director letter (Employer Exhibit 9) in that both letters expressly state they are written warnings and include "Employee Assistance Program" information. One letter includes an excerpt from "USNH Policy USY.V.C.8.2 Disciplinary Actions other than Probation & Termination." This excerpt reflects a progressive discipline policy which was not otherwise submitted into evidence. There is no language in Employer Exhibit 13 or any other exhibit describing or establishing the role, if any, of Department Chairs in the administration of USNH Policy USY.V.C.8.2.

³ The handwritten explanatory notes on this and other exhibits were provided by Provost Bernier.

Personnel Files:

28. Personnel files are kept and maintained by the Human Resources department. Department Chairs have access to such files, as do Faculty serving on a department's Promotion and Tenure Committee.

Work Plans, Evaluations, Pay Increases:

29. Department Faculty prepare work plans and meet "with the Department Chair to discuss accomplishments from the current year and plans for the following year." The work plan is a tool prepared annually by new hires and returning faculty. The Chair provides the completed work plan to the Dean. *See* Faculty Handbook (Employer Exhibit 6) and the Work Plan (Union Exhibit 4).

30. Work plans, and evaluations which are done based upon the work plans, are intended to be both collegial and collaborative. Per the current version of the work plan (Union Exhibit 4) the "Purpose of the Work Plan" is:

- To replace the current annual faculty report process, which many feels is cumbersome and onerous
- Workload/differentiation of load
- To create an opportunity for "conscious planning" by developing annual goals for teaching, scholarship and service
- To promote conversation between the Chair and the faculty member
 - to identify resources required for achieving professional goals,
 - to consider how individual professional goals align with the needs of the department and the mission of the university,
 - to plan a sustainable work load
- To evaluate the outcome of professional goals on a yearly basis by determining evidence of success or progress toward goals
- To promote reflection regarding accomplishments and needed revisions of professional goals
- To enhance individual and institutional accountability

31. Each spring the Chair meets with department faculty to "discuss and evaluate the previous year's (work) plan and the faculty's progress on their stated goals." *See* Department Chair's Handbook (Employer Exhibit 6). Chairs "provide an evaluation for each section

(Teaching, Service, and Scholarship) followed by a final summation of the faculty member's overall performance referencing sections 2.3, 2.5 through 2.8 of the Faculty Handbook." The Faculty Handbook also provides that:

Every non-tenured faculty member shall be evaluated by the Department Chair through the Work Plan. The evaluation shall be signed by the faculty member with a statement acknowledging receipt but stipulating that the faculty member does not necessarily agree with the contents. The faculty member may append to the Chair's letter any comments desired. These comments also become part of the permanent file. A copy of the Chair's evaluation and any comments appended by the faculty member shall be sent to the Dean.

32. According to the faculty approved modification (Employer Exhibit 4) to the Faculty Handbook (Employer Exhibit 3), the purpose of the annual evaluation is:

...to ensure that faculty members' efforts align with the university mission in their varied roles and activities in teaching, scholarship and service. All faculty members are expected to meet basic professional expectations as a citizen in the department/institution and expectations of professional development as relevant to their respective positions. All faculty members shall be evaluated annually using the criteria as appropriate to the faculty appointment type. Evaluations are made as a basis for personnel actions such as renewal of appointment, promotion and tenure decisions, and annual salary adjustments.

According to the USNH policy, performance evaluation is: (a) a means of constructively analyzing the efforts of the individuals, (b) a means of determining where improvement is necessary, and (c) a procedure by which communication is enhanced, thus providing a forum for the guidance, and counseling to promote the growth of faculty members, and (d) the opportunity for recognition of achievement.

33. As part of the evaluation process the Department Chair includes a recommendation on a general pay increase and a recognition pay increase. The Faculty Handbook (Employer Exhibits 3 and 4) defines the salary recommendation options as follows:

Pay Increase Recommendations:

No Increase: Has not met minimum duties and expectations.

General Pay Increase: Has performed at an acceptable level and has fulfilled his/her responsibilities for the year.

Recognition Pay Increase: Has exceeded normal responsibilities and expectations and has demonstrated a commitment to PSU that has moved the institution forward in accordance with its mission and strategic plan.

The Department Chair Handbook also includes sample language:

General Pay Increase: “I recommend professor x be considered for the institutional general pay increase.” “Based on.....I am recommending that professor x receive the general increase.”

Recognition Pay Increase: “I am pleased to recommend Professor X for the general increase and recognition pay based on....” or “Because of professor x’s work in the area ofI am pleased to recommend (a) recognition pay increase.”

A General Pay Increase is an amount set forth in an established schedule. Recognition pay is a percentage of the faculty member’s compensation, and currently is typically \$500.00 or less.

34. Tenured faculty are, in effect, evaluated by other department faculty. The evaluation of tenured faculty is conducted through a set of procedures adopted by the department faculty as per the Faculty Handbook (Employer Exhibit 3). “All individuals (tenured faculty) shall be informed of the results of their evaluation. The department shall have the prerogative to make the process as simple or complex as it chooses, as long as the procedure is applied consistently.” Department procedures for evaluation of tenured faculty are subject to USNH guidelines and policies.

35. Department Chairs are evaluated through the following process, as set forth in the Department Chair’s Handbook (Employer Exhibit 6):

Evaluation of Chair

Chairs will prepare an annual Workplan that will be sent to the Dean and reviewed with the Dean following the same procedures as Faculty Workplans with the Chair.

Departments will complete an anonymous online chair evaluation that will be implemented annually. Results will go to the Dean to help inform the Workplan review and annual evaluation. (Evaluation to be developed)

At some point during the second year of the Chair’s term, the Dean will meet with the department full time faculty (Chair will not be present) for additional feedback regarding the chair’s performance and to identify resources and support to assist with the chair’s success.

Appointments:

36. Chairs write a recommendation to the Dean addressing annual reappointment of faculty members, including tenure track and non-tenure track faculty. The basis for the Chair’s

recommendation is the work plan, class observations, and course evaluations prepared by students.

Grievances:

37. Department Chairs do not act on grievances at any level or step. Instead, as set forth in Article XI. F. 11 of the Faculty Bylaws, faculty grievances are heard by a Grievance Resolution Committee comprised of five tenured faculty, four of whom are elected by ballot of the faculty and a fifth who is the Chair of the Faculty Welfare Committee⁴, ex officio.

38. The Grievance Resolution Committee hears all manner of grievances, including those challenging the “fairness of the application of a departmental (promotion and tenure) committee’s procedures.” If informal efforts to resolve a grievance are unsuccessful, the grievance is formally addressed through a pre-hearing and hearing process. The Grievance Resolution Committee reports its findings and recommendations in writing to the parties and the President. The President may decline to implement the Grievance Resolution Committee’s recommendations upon the President’s determination that implementation is “impossible or would cause grave harm to the University...” Grievance Resolution Committee recommendations may be appealed to the President, who shall decide whether the appeal has merit and who may call for a rehearing of the case. *See Faculty Handbook, Section 2.18 (Employer Exhibit 3).*

Separation:

39. Tenure track faculty are not subject to the annual appointment process but their employment, and the employment of other faculty, may end due to programmatic displacement,

⁴ The Faculty Welfare Committee “represents the interests of the faculty as a group of professional persons....and will advocate for the welfare of the faculty...” in areas such as “academic freedom; promotion and tenure; compensation and benefits; workload; personnel policies; professional ethics; and ‘quality of life’ issues related to working conditions.” *See Faculty Bylaws, Article XI. F. 7 (Employer Exhibit 5).*

financial exigency, or dismissal for cause. See Faculty Handbook, Employer Exhibit 3. A dismissal action for cause may be instituted by the President “by charging the faculty member with deliberate and flagrant neglect of duty or moral delinquency of a grave order tending to injure the reputation of the University.” Alternatively, a majority of the department’s tenured faculty may petition the President to terminate a faculty member by “charging a fellow department member with gross incompetence, deliberate refusal to meet professional responsibilities, or violations of professional ethics.”

Decision and Order

Decision Summary

The Union’s petition for approval of a bargaining unit consisting of all tenure track faculty and tenured faculty is granted. PSU’s request to place contract, clinical, and research faculty into the unit is denied. The addition of these positions to the unit is not justified on community of interest grounds or for other reasons. Department Chairs are not supervisory employees within the meaning of RSA 273-A:8, II who must be excluded from the unit, nor are they confidential employees within the meaning of RSA 273-A:IX, (c). This matter shall proceed to election.

Jurisdiction

The PELRB has jurisdiction over all petitions to determine bargaining units and certify the exclusive representative of an approved bargaining unit through the process of a representation election pursuant to RSA 273-A:8, 273-A:10, and Pub 300.

Discussion:

1. Determination of Bargaining Units

“The principal consideration in determining an appropriate bargaining unit is whether there exists a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly.” *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995) (quoting *Appeal of the University System of New Hampshire*, 120 N.H. 853, 855 (1980)). The PELRB determines bargaining units in accordance with the provisions of RSA 273-A:8 and Pub 302.02

(b). RSA 273-A:8, I provides that:

I. The board or its designee shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10. In making its determination the board should take into consideration the principle of community of interest. The community of interest may be exhibited by one or more of the following criteria, although it is not limited to such:

- (a) Employees with the same conditions of employment;
- (b) Employees with a history of workable and acceptable collective negotiations;
- (c) Employees in the same historic craft or profession;
- (d) Employees functioning within the same organizational unit.

See also Pub 302.02 (b)(Additional Criteria for Determining Appropriate Bargaining Units).

2. Clinical, Research and Contract Faculty

According to PSU, the unit should consist of tenure track/tenured and clinical, contract and research faculty, or what PSU refers to as non-tenure track full time faculty.⁵ PSU contends this outcome is necessary given community of interest considerations and the provisions of Pub 302.02 (c)(1), under which the board takes into account “the effect of forming this unit on the efficiency of government operations as contemplated in RSA 273-A:1, XI.”⁶ PSU cites possible

⁵ The SEA’s argument that PSU’s request to include additional positions is procedurally improper and should not be considered is not persuasive given the PELRB’s review of a similar request in the 1990 UNH proceedings and the PELRB’s general authority to determine the appropriate bargaining unit.

⁶ RSA 273-A:1, XI provides: "Terms and conditions of employment" means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided

difficulty in integrating a bargaining unit restricted to tenure track/tenured faculty with systems and arrangements that will apply to non-bargaining unit employees like clinical, research, and contract faculty. PSU is also concerned that if clinical, contract, and research faculty are not placed in the unit another bargaining unit could emerge which will create undue and additional administrative burdens.⁷

The Union argues that PSU's request to have clinical, research, and contract faculty placed in the unit should be denied. According to the Union it is not seeking to organize or represent employees holding these positions and it should not be compelled to represent employees who do not hold positions in its proposed unit. The Union further argues that these employees have no interest in organizing or representation, and the composition of the proposed unit is otherwise appropriate and should be restricted to tenure track/tenured faculty, including Department Chairs.

To the extent the Union is requesting that no consideration be given to PSU's argument that clinical, research, and contract faculty be included in the unit that request is denied. However, the points the Union has raised are relevant to the determination of the bargaining unit and will be taken into account.

As PSU acknowledges in its brief, at this time there are two tenure track/tenured faculty units in the State University System, both of which include Department Chairs. The Keene unit dates to 1976, and was established along with units for Durham and Plymouth following

exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions

⁷ PSU also argues the petition may have to be dismissed if clinical, research and contract faculty are placed in the unit if there is an insufficient showing of interest (30%) under Pub 301. Of course, the expansion of the proposed unit to include these positions could also affect the result of an election since the record indicates a lack of support among clinical, research, and contract faculty in organizing and/or representation by the SEA.

proceedings at the PELRB and an appeal to the court. *See University System of New Hampshire v. State of New Hampshire, et al.*, 117 N.H. 96 (1977)(The PELRB case file reflects that the Durham and Plymouth units ultimately voted for “no representative” and therefore those units did not proceed with collective bargaining). The UNH unit dates to 1990. *See American Association of University Professors (AAUP) and University of New Hampshire Chapter and The University System of New Hampshire (USNH)*, PELRB Decision No. 90-93 (September 14, 1990)(research faculty, faculty in residence, part-time faculty and lecturers excluded by agreement, Plymouth Faculty excluded per PELRB order). In the 1990 UNH case the PELRB stated the following about the USNH proposal to include Plymouth Faculty in the unit:

Significantly, the faculty at Plymouth State College have not petitioned for an election and to adopt the System’s scope of unit would require an election of employees who have not asked for it. The fact that there is no self-felt community of interest, while not determinative, is an influential factor and the unanimity of opinion from both administrators and faculty on that subject was instructive...

See PELRB Decision No. 90-93.

PSU argues that the existing Keene and UNH units have no precedential value because the parties did not litigate the issue of whether the units should be expanded to include non-tenure track/tenured faculty like the clinical, contract, and research faculty at issue in these proceedings. PSU also cites to a number of decisions from other jurisdictions involving public sector University system units that include both tenure track and non-tenure track full time faculty, and argues that the PELRB should determine the Union’s proposed unit in a similar way. However, despite PSU’s arguments to the contrary, the New Hampshire cases involving the Keene and UNH tenure track/tenured faculty units, which include Department Chairs, are clearly relevant. Both units were established under the provisions of RSA 273-A. The units have engaged in collective bargaining 37 years and 23 years, respectively. They have withstood the

test of time and certainly provide evidence that a unit comprised of tenure track/tenured faculty (including Department Chairs) is appropriate and functional under the parameters of the Act.

One of the difficulties with PSU's request to include the additional positions of clinical, contract and research faculty is that PSU is seeking to expand the unit to include positions and employees who appear disinterested in the collective bargaining process and/or representation by the SEA. There was no evidence of a self-felt community of interest between tenure track/tenured faculty and clinical, research and contract faculty and the SEA is not seeking to represent this full-time faculty. There is also a level of professional friction between tenure track/tenured faculty and clinical, research and contract faculty because tenure track/tenured faculty to some extent view clinical, research and contract faculty as an undesirable encroachment on the integrity and value of the tenure system and, in turn, the academic mission of PSU. These are all factors which weigh against inclusion.

The tenure system itself is probably the most fundamental difference between tenure track/tenured faculty and clinical, research and contract faculty. Tenure track hires face a unique and challenging career path because of the possibility of tenure, or permanent, employment and the associated effort and performance incidental to the pursuit of a tenured position. The rigors, pressures, and expectations tenure track faculty face in their pursuit of tenure are not shared by clinical, research, and contract faculty. Tenure track faculty endure what is, in effect, a six year probationary period, the last two of which involve a more intense focus on the tenure application and evaluation process. Tenure applicants are ultimately subjected to the scrutiny of the Promotion and Tenure committee, usually comprised of department tenured faculty. Tenure is the culmination of six years of effort at PSU as well as the education, training and employment necessary to be hired into a tenure track position. The PSU career of the unsuccessful tenure

applicant effectively ends at the end of six year probationary period. The distinction between clinical, research and contract faculty and tenured faculty is even greater, as the tenured faculty have attained the pinnacle of their profession in the undergraduate system. More than any other faculty, they are free to conduct their professional careers consistent with the ideals expressed in the 1940 Statement of Principles on Academic Freedom and Tenure. Tenured faculty have earned and attained the status of permanent faculty members and are subject to involuntary termination in very limited circumstances.

Another important distinction between tenure track/tenured faculty and clinical, research, and contract faculty relates to workload and scope of responsibility. Tenure track/tenured faculty have responsibilities in the areas of teaching, scholarship, and service. In contrast, and with exceptions too few to note, clinical, contract, and research faculty have at most responsibilities in two of these three areas.

This is not to say that tenure track/tenured faculty have nothing in common with clinical, research, and contract faculty. They share many of the same experiences as full time members of the PSU faculty. They work together as faculty members in the same departments, their professional responsibilities overlap to some extent, and tenure track faculty, like clinical, contract, and research faculty, are subject to an annual appointment process during their six year probationary period. However, the apathy of clinical, research, and contract faculty toward organizing and participating in collective bargaining, their lack of interest in representation by the SEA, and the clear professional differences between the two groups, all as discussed, lead to the conclusion that there is an insufficient community of interest and the addition of clinical, research, and contract faculty to the proposed unit over the SEA's objection is not justified. There is scant evidence that PSU faces a proliferation of bargaining units in the event clinical,

research, and contract faculty are excluded, or that the impact of the proposed unit "...on the efficiency of government operations..." per Pub 302.02 (c) (1) is such that the proposed unit should either be rejected or only approved if it includes clinical, research and contract faculty. PSU's request to have clinical, contract, and research faculty included in the unit is denied.

3. PSU's Request to Exclude Department Chairs under RSA 273-A:8, II

The next issue is whether Department Chairs should be excluded from the unit because of RSA 273-A:8, II's provision that "[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." The term "supervisory" employee has special meaning under RSA 273-A:8, II. It does not refer to or encompass employees who have any level of supervisory authority. It means "[p]ersons exercising supervisory authority *involving the significant exercise of discretion...*" (emphasis added). The assessment of whether a person has statutory supervisory authority includes consideration of an "employee's authority to evaluate other employees, the employee's supervisory role, and the employee's disciplinary authority." *Appeal of Town of Stratham*, 144 N.H. 429, 432 (1999) (citing *Appeal of East Derry Fire Precinct*, 137 N.H. 610 (1993). "The mere fact that they (putative supervisory positions) have such authority, regardless of whether it is presently exercised, is sufficient for us to hold that they are supervisors under the statute." *Appeal of Univ. System of New Hampshire*, 131 N.H. 368, 376 (1988)(captains excluded as supervisors from bargaining unit that contained firefighters). Supervisory employees are generally separated from rank and file employees because there is "a strong potential for a conflict of interest to arise between the two groups." *Id.* However, "[s]ome employees performing supervisory functions in accordance with professional norms will not be vested with the 'supervisory authority involving the significant exercise of discretion' described by RSA

273-A:8, II." *Appeal of East Derry Fire Precinct*, 137 N.H. at 611. The PELRB examines the degree of significance of the exercise of discretion as well as the propensity to create conflict within the bargaining unit because of the differing duties and relationships. See *Londonderry Executive Employee Association v. Town of Londonderry*, PELRB Decision No. 2001-118.

The PELRB's conclusion that Department Chairs were not supervisory employees in the case involving the Keene, Plymouth, and Durham units was upheld on appeal:

The PELRB also found that '(s)upervisory responsibility of Department Chairmen is limited and minimal at best;' that 'chairmen, in reality, act as liaison between the faculty and the Dean and Administrative Officers; make recommendations as to performance, tenure, and to a degree, hiring and firing, but do not possess any final authority in this area;' and that '(t)he community of interest of the Chairmen appear (sic) clearly with the faculty rather than the administrative authorities.'

These findings are supported by the evidence. There was testimony that chairmen consider it their role to represent the interests of the faculty and not the interests of the administration. Department chairmen continue to teach and to research, although their teaching load may be reduced. After their term as chairmen, usually about three years, they return full time to their regular duties as faculty members. Decisions and recommendations of a chairman regarding budget allocation, scheduling, promotion, and tenure are made on a collegial basis with other members of their department. The chairmen have no final authority in most of these matters.

While recognizing that each case turns on its own facts, the National Labor Relations Board has established that department chairmen do not 'generally have or exercise supervisory authority,' and places the burden on the employer to show supervisory status requiring exclusion from a faculty bargaining unit. *Rosary Hill College*, 202 N.L.R.B. 1137 (1973) (emphasis in original). In a number of decisions the Board has found department chairmen to be nonsupervisory and has included them in faculty bargaining units. See, e.g., *Fairleigh Dickinson University*, 227 N.L.R.B. No. 40 (December 10, 1976); *Northeastern University*, 218 N.L.R.B. 247 (1975); *Fordham University*, 214 N.L.R.B. 971 (1974). The same conclusion has also been reached in the public sector. See, e.g., *University of Massachusetts, Mass. Labor Rel. Comm'n*, Case Nos. [117 N.H. 103] SCR-2079 and SCR-2082 (October 15, 1976); *State University of New York*, 2 N.Y. Public Employees Relations Board 4010 (August 12, 1969); *University of Rhode Island*, State Labor Rel. Bd., Case No. EE-1961 (October 19, 1971).

The PELRB's determination that department chairmen are not supervisors is therefore supported by the record and in accordance with applicable principles of law. See Comment, *The Bargaining Unit Status of Academic Department Chairmen*, 40 U.Chi.L.Rev. 442 (1973). We cannot accept the university's third argument against the inclusion of

department chairmen in the bargaining unit. We hold that the university has not met the burden of proof required by RSA 541:13 to set aside the PELRB's determination that department chairmen be included in the full-time academic faculty units.

See University System of New Hampshire v. State of New Hampshire, et al., 117 N.H. 96 (1977).

In a subsequent decision, the PELRB discussed its analysis of supervisory authority and the Department Chairs in the three University System units:

The case indicated...that department chairmen did not have final authority to hire and fire or perform other functions. This was cited as one of the reasons why they were not found to be excluded as supervisors. That case should not be read and does not mean that final authority to hire or fire is required before a person is considered a supervisor. It held that the *lack* of such authority was a factor in *not* classifying department chairmen as supervisors. That finding supports the principle enunciated above that it is the *real* power or influence to effect such decisions and not formal or incidental participation in the process which must be present to be a supervisor.

See Keene State College PAT Staff Association, Affiliated with NHEA/NEA and University of New Hampshire, Keene State College, PELRB Decision No. 780007 (February 23, 1978)
(emphasis in original).

The PELRB also evaluated the purported supervisory status of Department Chairs in the 1990 UNH unit proceedings:

Evidence established that among the administrative roles served by the department chairpersons are scheduling classes, scheduling hours, scheduling classrooms, administering department budgets, administering and supervising staff personnel serving the department, assigning space for offices, insuring that College policies are observed, explaining College policies to other department faculty, and attending College-wide meetings to advise deans. Also, evidence established that some department chairs have been in office for extended periods of time and some chairs rotate frequently.

Significantly, the evidence establishes that faculty in general also perform the roles which faculty chairpersons perform, since the role of a faculty member involves significant responsibility to implement the policies of the institution and since the University operates through committees which advise the chairs of the departments on various matters. In some departments, all faculty act as a committee of the whole and the chairperson is the coordinator and first among equals to see to the implementation of decisions collectively made.

Committee chairpersons remain full-time teaching faculty. They receive a lesser teaching load in recognition of their additional duties as chairpersons. In addition, they receive summer stipends which vary in amount but which do not change their base salary. Promotion and tenure recommendations within departments are coordinated through the department chairperson but are not made by that person. Rather, they are made by a promotion and tenure committee.

...In essence, the job of a department chairperson is to coordinate the activities of the department, act as internal department spokesman, administer internal departmental activities and serve as the spokesman of the department to the University and the spokesman of the University to the department. Faculty are unique. The job of every faculty member is to implement policy, supervise his or her own teaching, conduct research, advise students and operate independently within the traditional roles of a university.

At PSU, a Faculty member's service as Department Chair is fleeting and temporal. After a three year term Chairs default to their former status as full time Faculty unless they are selected for another term or have obtained a different position at PSU. If interested in continued service, they are again subject to the Faculty nomination process. Obtaining a different position with PSU through promotion is always a possibility, and there is evidence that several administration officials are former Chairs. However, the evidence does not support a finding that promotion of Chairs out of their Department into an administrative position is either the norm or the general expectation.

The selection process for Department Chairs⁸, the duration of their appointment, their likely return to their former status as full time faculty, and the institutional emphasis on the fact that their function is to lead their Department but act primarily as Faculty all help to ensure that Department Chairs remain integrated with and loyal to their Department. These are circumstances which protect against the transformation of a Department Chair into an antagonistic agent of the administration and which weigh against a finding that Department

⁸ While ultimately Department Chairs must be approved at the administrative level, the selection process is clearly biased in favor of faculty self-determination and faculty self-governance.

Chairs are statutory supervisors within the meaning of RSA 273-A:8, II, notwithstanding the duties they are sometimes called upon to perform.

As to discipline, there is a dearth of material in the Faculty Handbook and the Department Chair's Handbook expressly granting to Department Chairs the authority to discipline tenure track/tenured faculty at any level. The Department Chair letters included in PSU's exhibits (Employer Exhibit 9) do chastise some Faculty members, but they do not purport to impose any form of discipline as, for example, is clearly done in the Department Director letter (Employer Exhibit 9) and the Department Chair letters to staff employees (Employer Exhibit 13). There is also no general grant of "supervisory" authority in the Faculty Handbook or the Department Chair's Handbook to Department Chairs over tenure track/tenured faculty from which some disciplinary authority might derive. To the contrary, Department Chairs are designated as primarily Faculty who are colleagues of Tenure Track/Tenured Faculty and who have agreed to assume, temporarily, certain administrative burdens. When they act as Department Chair they act as a Department leader, not as the Department Supervisor, and they have a very specific and prescribed set of responsibilities and duties, all as recounted in the findings of fact.

Further, a careful consideration of the Department Chair's duties and those of other Department Faculty also supports a finding that Department Chair's should not be excluded from the unit under RSA 273-A:8, II. The Chair's duties include matters such as work plan development, consultation, and review, inclusive of the annual self-evaluation and Chair evaluation (all of which is driven and structured by the work plan, and which is conducted and completed in a consultative and collaborative manner.) As part of the annual evaluation process, Chairs provide pay increase recommendations as well as a recommendation on annual

appointment for tenure track faculty, among others. With respect to the pay increase recommendations, the options available to the Department Chair are limited, and the findings necessary to recommend a general pay increase do not involve substantial discretion or judgment. Indeed, there is only a "no increase" recommendation if the Department Chair finds that the Faculty member "has not met minimum duties and expectations." The Department Chair exercises more discretion with respect to making findings that support a recommendation that recognition pay be awarded, but given the actual monetary value of this nominal pay increase, it cannot fairly be identified as a source of possible friction or tension. The Chair's annual appointment recommendation is submitted to the Dean and is based upon annual performance evaluation in the areas of Teaching, Service and Scholarship.

Department Faculty duties include evaluation of Department Chairs (online chair evaluation, Department Faculty conference with Dean regarding Chair's performance). Department Faculty also have authority, and participate to a meaningful degree, in areas such as hiring (Search Committee), tenure and promotion (Tenure and Promotion Committee⁹), and even termination (by petition of a majority of tenured Department Faculty requesting termination of fellow Department member). There is also the matter of the Grievance Resolution Committee and the fact that the Department Chair has no particular role or assignment in the processing of grievances. Instead, the Grievance Resolution Committee, comprised of five tenured faculty (four selected by faculty ballot and the chair of the Faculty Welfare Committee, ex officio) hears grievances, conducts hearings as necessary, and reports directly to the President.

⁹ Additionally, it is fair to say that with respect to tenure, the Promotion and Tenure Committee's influence on the ultimate outcome is the same as or greater than the Chair's recommendation. The Promotion and Tenure Committee is the first, and perhaps most important, level in the process. The Committee's recommendation reflects the views of a number of Department Faculty who serve on a committee dedicated to assessing applicants for tenure and promotion. While a strong recommendation from the Promotion and Tenure Committee may not guarantee tenure (the final decision rests with the Board of Trustees), a lack of Department support via the Promotion and Tenure Committee likely presents a serious obstacle to the applicant.

The respective duties of Department Chairs and other Department Faculty in these administrative areas reflect a diffusion of responsibility in the Department in a somewhat atypical workplace arrangement. In a more conventional, or traditional, workplace such responsibilities are usually concentrated in a Human Resources Department, or in one or just a few positions in a chain of command or hierarchical workplace structure. Perhaps the greater point is that by retaining these and other duties inside the Department via the position of Department Chair and other Department Faculty the Faculty are, in effect, managing themselves. The following excerpt from the PELRB's decision in the 1990 UNH certification proceedings is somewhat apropos:

Faculty are unique. The job of every faculty member is to implement policy, supervise his or her own teaching, conduct research, advise students and operate independently within the traditional roles of a university. This is different from "line" employees in the traditional sense. All of these responsibilities and activities might argue against any faculty members being unionized. (*See, for example, NLRB v. Yeshiva University*, 444 U.S. 672 (1980)). However, there is no such distinction in our law. The Board will not exclude committee (department) chairpersons because they may have a higher degree of these activities common to all faculty or on account of additional responsibilities they have. While not discounting the importance of faculty chairpersons, the Board cannot find that they are supervisors or confidential employees to the degree required to exclude them from the bargaining unit.

See PELRB Decision No. 90-93. These observations are a fair characterization of the PSU faculty as well.

The underlying purpose of the RSA 273-A:8, II supervisory exclusion is the avoidance of conflicts of interest within the bargaining unit. This objective is not threatened by the inclusion of Department Chairs in the PSU tenure track/tenured faculty unit. Inclusion of Department Chairs in a unit of tenure track/tenured faculty is consistent with the institutional emphasis on their status as primarily faculty and a department leader; exclusion may very well erode the unity of department faculty and adversely impact the Chair's relationship with and ability to represent

and lead department faculty. Department Chairs have been part of the Keene State bargaining unit for 37 years, and in the UNH bargaining unit for approximately 23 years. While these prior unit decisions are not determinative of the outcome in this case, they still serve as examples of two fairly long lived faculty units in the USNH.

In accordance with the foregoing, and with due consideration for the manner in which Department Faculty share administrative responsibilities in a variety of areas relating to Department operations, as well the general independence of tenure track/tenured faculty in the discharge of their Faculty responsibilities, Department Chairs are not “persons exercising supervisory authority involving the significant exercise of discretion” as to the other positions in the proposed unit.

4. PSU’s Request to Exclude Department Chairs under RSA 273-A:IX (c)

The final issue is whether Department Chairs are confidential employees and should be excluded from the unit on that basis. The exclusion of confidential employees is mandated by the definition of public employee set forth in RSA 273-A:1, IX (c), which provides that public employees do not include “[p]ersons whose duties imply a confidential relationship to the public employer.”

Confidential employees are those who have access to confidential information *with respect to labor relations*, negotiations, significant personnel decisions and the like. The Board further finds that the number of such employees in any department or other unit of government must be large enough to enable the labor relations activities of the Department and the personnel activities of the Department to be carried on, but must not be so numerous as to deny employees who are entitled to the rights and benefits of RSA 273-A those rights merely on the assertion that they might somehow be connected with activities related to labor relations.

State of New Hampshire, Dept. of Rev. Administration v. State Employees’ Ass’n, Decision No. 78001 at 5 (PELRB Jan. 1978)(emphasis in original). See also *State Employees Association of New Hampshire Local 1984 SEIU v. State of New Hampshire*, PELRB Decision No. 2002-045 (April 5, 2002). There “is no set minimum or maximum number

of employees who may be deemed confidential.” *Appeal of Laconia*, 135 N.H. 421, 424 (1992).

See Teamsters Local 633 of NH/Newmarket Public Works Employees and Town of Newmarket, PELRB Decision No. 2008-127 (June 18, 2008).

With respect to the alleged confidential employee status of Department Chairs, the court has stated that “[t]he National Labor Relations Board has defined confidential employees as employees ‘who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.’” *University System of New Hampshire* at 101. As to personnel files, the court pointed out that “access to personnel files is not limited to Department Chairs but extends to members of the department’s promotion and tenure committee, such access would not alone require a finding that Department Chairs are confidential employees.” *Id.* (citations omitted). In upholding the PELRB’s determination that Department Chairs are not confidential employees the court also cited to the fact that “recommendations to the administration by department chairmen regarding promotions and tenure are made after discussions with other members of the department. This does not constitute confidential interaction between the department chairmen and the administration on labor relations matters.” *Id.* at 102.

The administrative duties carried out by PSU Department Chairs also do not involve the kind of access to confidential information or “confidential interaction” with the administration in areas such as labor relations, personnel matters, and negotiations which justifies their categorization as confidential employees for the purposes of RSA 273-A. As was true in the *University System of New Hampshire* case, tenured faculty who serve on the Promotion and Tenure Committee also have access to personnel files. Department Chairs as well as other

Department Faculty are involved and play a role in personnel matters like hiring, promotions, tenure, as discussed. In short, PSU Department Chairs are not "in such a confidential relationship to their employer as to require their exclusion." See PELRB Decision No. 90-93 (UNH Durham/Manchester faculty units).

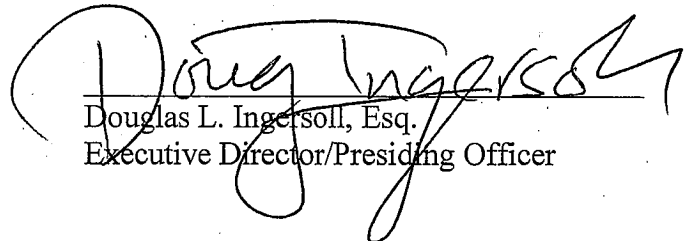
Accordingly, an Order of Election shall issue and an election will be conducted pursuant to the provisions of RSA 273-A:10 and Pub 303 to determine the exclusive representative, if any, of the following unit:

Unit: All tenure track faculty and tenured faculty, including Department Chairs.

Exclusions: Contract faculty, Clinical faculty, Research Faculty, Assistant Directors, Directors.

So ordered.

August 2, 2013



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