STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
Waubonsee College Adjunct Faculty Association, IEA-NEA,	)	
	)	
Petitioner,	)	
	)	
and	)	Case No. 2006-RC-0015-C
	)	
Waubonsee Community College,	)	
	)	
Employer.	)	

OPINION AND ORDER

On February 23, 2006, Waubonsee College Adjunct Faculty Association, IEA-NEA ("Association") filed a majority interest petition with the Illinois Educational Labor Relations Board ("IELRB"). The Association sought to represent the following unit:

> Included: All instructors at Waubonsee Community College who have provided a total of at least 45 contact hours of instruction in ESL or ABE/GED courses in each of the following semesters: Spring 2005, Fall 2005 and Spring 2006.
>
> Excluded: All confidential, supervisory and managerial employees as defined by the Act.

On September 6, 2006, an IELRB Administrative Law Judge ("ALJ") issued a Recommended Decision and Order. The ALJ found that the Employer, Waubonsee Community College ("College"), had not met its burden of proving that the petitioned-for employees were excluded from the protections of the Act as "part-time academic employees of community colleges," that they were not short-term employees, and that the College had sufficient control over the terms and conditions of employment of the petitioned-for employees to enable it to bargain with the Association. Accordingly, she recommended that the Association be certified as the exclusive representative of the petitioned-for unit.

The College filed timely exceptions to the ALJ's Recommended Decision and Order. In its exceptions, the College incorporated its position statement regarding the majority interest petition, its reply memorandum in support of its position statement, its pre-hearing memorandum, and its post-hearing memorandum. The Association filed a timely response to the exceptions.

We have considered the ALJ's Recommended Decision and Order, the College's exceptions and the documents incorporated therein and the Association's response. We have also considered the record and applicable precedents. For the reasons in this Opinion and Order, we affirm the ALJ's Recommended Decision and Order.

I.

We adopt the ALJ's findings of fact as modified in this Opinion and Order. In order to assist the reader, we summarize the facts as follows.

The College is an educational employer within the meaning of Section 2(a) of the Illinois Educational Labor Relations Act, 115 ILCS 5/1 et seq. ("Act"). The Association is an employee organization within the meaning of Section 2(c) of the Act.

The petitioned-for employees are part-time adjunct faculty who teach non-credit courses in the College's adult education programs, including Adult Basic Education ("ABE"), General Education Development ("GED"), and English as a Second Language ("ESL"). They teach 16 weeks per semester, but their courses are divided into two eight-week blocks of time, called "quads." Most of the petitioned-for employees taught for a six-month period during the period under consideration if brief breaks such as the breaks between semesters are not considered to constitute a break in service for the purpose of calculating the six-month period. (PTX 8).[1]

The bulk of the funding for the College's adult education programs comes from grants awarded annually by the Illinois Community College Board ("ICCB"). As an administrative agency, the ICCB establishes standards for adult education courses, contracts with eligible providers to establish the courses, and contracts with other State and local agencies to "accept and expend appropriations for educational purposes to reimburse local eligible providers for the cost of these programs…." 110 ILCS 805/2-12(p). The College has been certified by the ICCB as an eligible provider of adult education programs and services, and, as such, receives grant funds from the ICCB to reimburse it for the cost of the programs. The College has received funding for its non-credit adult education courses for at least 10 years, in varying amounts.

There are five basic sources of ICCB grant funding (the "core grants"). All are "restricted purposes funds" and have different rules regarding the percent of the grant that may be spent on instruction and administration. For example, the ICCB mandates that, for the state basic grant, a minimum of 45 percent be spent on instruction and a maximum of 9 percent be spent on general administration. The College uses most of the ICCB grant funds it

[1] In this Opinion and Order, we cite the Association's exhibits as "PTX __", the College's exhibits as "ERX __", and the hearing transcript as "Tr. ___".

receives to pay the salaries of instructors in the ABE/GED and ESL programs. Because the amount that may be spent on administration under any of the grants is minimal, the College supplements funds for the adult education programs with funds from other sources, including the Education Fund, a College operating fund that does not include any restricted purposes grant funds.

Nothing in the ICCB rules prohibits the College from contributing its own funds toward the adult education programs. If ICCB funds were not available, the College would have to reevaluate the programs and determine whether other funds were available to support them. (Tr. 108). The College would reduce the size of the programs. (*Id.*).

The amount of grant funding that the College receives fluctuates from year to year. The College receives notice of funding from the ICCB after July 1, and sometimes as late as September, for the academic year that begins in August.

Because of uncertainty about the level of funding, adjunct faculty members who teach non-credit courses are required, when hired, to sign a form entitled "Statement of Understanding for Grant Funded Positions Temporary Employment." The form states:

> I understand I am being employed at Waubonsee Community College in a grant funded position. The funds for this position may be terminated at any time. I understand that my employment at Waubonsee Community College will terminate when grant funds are no longer available. Therefore, I accept employment at Waubonsee Community College with the understanding that I can only expect to be employed while grant funds are available from the funding source that supports the program under which I am employed.

However, a substantial number of the adjunct faculty members teaching in the adult education programs have been employed by the College since the 1990's. (Tr. 223; ERX 223). Executive Vice President of Educational Affairs and Chief Learning Officer Dr. Deborah Lovingood testified that it is generally the intent of the College to rehire instructors that it is happy with. (Tr. 96).

The College hires the instructors for the adult education programs, determines their wages, and pays them. (Tr. 75-76, 81, 91, 93). The College also supervises and evaluates the instructors. It determines the time and location of the adult education classes, and provides the facilities and technical support for the classes.

II.

The College argues that the petitioned-for employees are excluded from representation as part-time academic employees of community colleges. The College asserts that these employees teach non-credit courses, and that, therefore, they teach less than three credit hours. The College also argues that the petitioned-for employees are

excluded from representation as short-term employees. The College contends that the employees do not work for six consecutive months, and that they do not have a "reasonable expectation" of future employment by the College. The College contends that the IELRB does not have jurisdiction because the College is not the governing body that controls the adult educational services provided by the petitioned-for employees. The College argues that it does not control the funds that are used and does not have sufficient control for meaningful collective bargaining. The College argues that similar employees are excluded at other community colleges.

The Association argues that the petitioned-for employees are not "part-time academic employees of community colleges." The Association asserts that the College's interpretation is absurd. The Association also argues that the petitioned-for employees are not short-term employees. The Association contends that they have worked for "two plus" consecutive semesters and have a reasonable expectation of continued employment by the College. In addition, the Association argues that the College is the real employer of the petitioned-for employees.

III.

The College's first argument for dismissing the petition is that the petitioned-for employees are "part-time academic employees of [a] community college[]." We determine that the petitioned-for employees are not "part-time academic employees of [a] community college[]." Accordingly, we shall not dismiss the petition on this basis.

Section 2(b) of the Act provides that "part-time academic employees of community colleges" are not educational employees and, thus, are excluded from the protections of the Act. Section 2(b) defines "part-time academic employees of community colleges" as "those employees who provide less than 3 credit hours of instruction per academic semester."

The College argues that, because the petitioned-for employees do not teach credit courses, they provide less than three credit hours of instruction per academic semester. The College states that the best indication of the legislature's intent is the statute's language, given its plain and ordinary meaning, citing *Harshman v. DePhillips*, 218 Ill.2d 482, 844 N.E.2d 941 (2006); *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill.2d 399, 844 N.E.2d 1 (2006). The College argues that the literal language of Section 2(b) requires the interpretation that it presents.

However, given its plain and ordinary meaning, the language of Section 2(b) addresses only academic employees who teach credit hours, and not those who teach contact hours. Section 2(b) does not set any minimum

number of contact hours academic employees of community colleges must teach. Therefore, the petitioned-for employees are not excluded from the definition of "educational employee" on this basis.

In addition, the Court also stated in *Southern Illinoisan* that, in construing a statute, it is presumed that "the legislature, in its enactment of legislation, did not intend absurdity, inconvenience or injustice." The Court determined that a prohibition against revealing to the public facts that "tend to lead to the identity of a person" was not to be interpreted to create a per se bar to revealing information. Similarly, the Court stated in *Harshman* that it is presumed, in interpreting a statute, that the legislature did not intend an absurd or unjust result. Here, if the language of Section 2(b) were applied to exclude faculty who teach contact hours, rather than credit hours, it would lead to the absurd and unjust result that faculty who teach a full load of non-credit classes would be excluded from the definition of "educational employee," while faculty who teach one three-credit course would be included.

The College cites *Elgin Community College District 509*, 9 PERI 1079, Case Nos. 92-RS-0003-C, 92-RS-0009-C (IELRB, April 23, 1993). However, in *Elgin*, the IELRB determined that there was no evidence that part-time faculty who met the contact hour definition did not also meet the credit hour definition. Therefore, the IELRB did not resolve the issue of whether faculty who teach only non-credit courses should be excluded from the definition of "educational employee" on the basis that they are "part-time academic employees of [a] community college[]."

Statutory exclusions from the definition of "educational employee" are narrowly interpreted because they preclude the employee from exercising of rights provided by the Act. *One Equal Voice v. IELRB*, 333 Ill.App.3d 1036, 777 N.E.2d 648 (1st Dist. 2002); *Black Hawk College Quad Cities*, 21 PERI 90, Case No. 2004-UC-0001-S (IELRB, May 20, 2005), *aff'd*, No. 4-05-0519 (Ill. App. 4th Dist. Apr. 13, 2006) (unpublished order). Moreover, the party asserting that individuals are excluded from the protection of the Act has the burden of proving that exclusion. *Southern Illinois University Board of Trustees*, 5 PERI 1197, Case Nos. 85-RC-0022-S et al. (IELRB, September 30, 1988); *see Crest Mark Packing Co.*, 283 NLRB 999 (1987). The College has not met that burden here.

IV.

The College's second argument for dismissing the petition is that the petitioned-for employees are "short-term employees." We determine that the petitioned-for employees are not short-term employees. Accordingly, we do not dismiss the petition on this basis.

"Short-term employee" is defined in Section 2(q) of the Act as:

> an employee who is employed for less than 2 consecutive calendar quarters during a calendar year and who does not have a reasonable expectation that he or she will be rehired by the same employer for the same service in a subsequent calendar year.

An employee must meet both prongs of Section 2(q) to be classified as a short-term employee. *See William Rainey Harper Community College v. IELRB*, 273 Ill.App.3d 648, 653 N.E.2d 411 (4th Dist. 1995).

In *Harper College*, the Appellate Court approved the IELRB's interpretation of the first prong of Section 2(q). The IELRB had interpreted the term "calendar" to mean "educational calendar." Thus, only those employees who worked less than six consecutive months during an educational calendar year could be "short-term employees." The IELRB had also determined that brief breaks between semesters did not constitute a break in service when calculating the six consecutive months.

Under this interpretation, most of the employees in the petitioned-for unit are not short-term employees. The evidence shows that most of the petitioned-for employees taught for a six-month period during the period under consideration if brief breaks such as the breaks between semesters are not considered to constitute a break in service for the purpose of calculating the six-month period.

The College attempts to meet its burden under the second prong of Section 2(q) by showing that the petitioned-for employees' classes are funded by grants and that the petitioned-for employees are required to sign a form stating that:

> ….I understand that my employment at Waubonsee Community College will terminate when grant funds are no longer available. Therefore, I accept employment at Waubonsee Community College with the understanding that I can only expect to be employed while grant funds are available from the funding source that supports the program under which I am employed.

These facts are insufficient to demonstrate that the petitioned-for employees do not have a reasonable expectation that they will be rehired by the College in a subsequent educational calendar year.

In *University of San Francisco*, 265 NLRB 1221, 1223 (1982), the National Labor Relations Board stated:

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

(Emphasis in original). *See Commonwealth College of Philadelphia v. PLRB*, 60 Pa.Commw. 629, 432 A.2d 637 (1981), *aff'd per curiam*, 496 Pa. 415, 437 A.2d 942 (1981) (adjunct faculty had a reasonable expectation of

continued employment despite the fact that their contracts and correspondence from their employer emphasized that the employer was not bound to hire anyone for an additional term).

The same considerations are present here. There is no evidence that the petitioned-for employees are restricted from applying for reappointment or that they are told that their positions will not exist in subsequent semesters. The form that they are required to sign does not state that they will not be able to obtain future employment, but only that their continued employment is dependent on grant funding. The College has made no effort to prove that the petitioned-for employees are not, in fact, offered reappointment. The evidence that was presented established, rather, that a substantial number of the petitioned-for employees have been employed by the College since the 1990's, and that it is generally the intent of the College to rehire instructors that it is happy with.

In *Harper College*, the court distinguished *University of San Francisco* and other cases on the basis that they concerned whether an employee could reasonably expect to be rehired, rather than whether the employer had assured the employee that he/she would be rehired. However, Section 2(q) has since been amended to provide that a "reasonable expectation" of rehiring, rather than a "reasonable assurance," is required to show that an employee is not a short-term employee under the second prong. The "reasonable expectation" addressed in *University of San Francisco* and *Commonwealth College* is now what is relevant, rather than the "reasonable assurance" addressed in *Harper College*.[2]

The fact that the continued employment of the petitioned-for employees is dependent on grant funding does not establish that their positions will cease to exist. The College has received funding for its non-credit adult education courses for at least 10 years. It has not been shown that the programs would cease to exist if ICCB funds were not available, but only that the College would reevaluate the programs, determine whether other funds were available for them, and reduce the size of the programs.

While it is the College's burden to establish that the petitioned-for employees do not have a reasonable expectation that they will be rehired by the College for the same service in a subsequent educational calendar year,

[2] For this reason, the holding of *Harper College* that repeated rehiring did not create a "reasonable assurance" of being rehired is no longer relevant. The court also stated in *Harper College* that the IELRB had collapsed the two tests in Section 2(q) into one test, and that it was inconsistent with the language of Section 2(q) to allow an adjunct faculty member who does not meet the length of employment test in the first prong to qualify for representation under the second prong on the basis of less than six consecutive months of employment. However, this statement is dicta, and is inconsistent with the court's distinction of other cases. Moreover, it is the College's burden to establish that the petitioned-for employees do not have a reasonable expectation of being rehired by the College for the same service in subsequent calendar years, rather than the Association's burden to establish that they do have a reasonable expectation.

rather than the Association's burden to establish that they do have such an expectation, the evidence supports a finding that they have such an expectation. The petitioned-for employees have, by definition, taught in two consecutive educational calendar years, and, in fact, have taught three consecutive semesters (exclusive of the summer term). In *C.W. Post Center*, 198 NLRB 453, 454 (1972), the National Labor Relations Board that adjunct faculty who signed contracts in at least two of three consecutive academic years and actually taught three or more credit hours in each of two such years had an employment history sufficient to create "a reasonable expectancy of reemployment." Similarly, in *Macomb Community College*, 16 MPER ¶ 35 (Michigan Employment Relations Commission 2003), the Michigan Employment Relations Commission concluded that adjuncts who taught a minimum of 3.5 equated hours per semester in any two semesters in the past two years were eligible for inclusion in the bargaining unit. Here, similarly, the fact that the petitioned-for employees have, by definition, taught during two consecutive educational calendar years is sufficient to create a reasonable expectation that they will be rehired by the College for the same service in a subsequent educational calendar year.

Consistent with *One Equal Voice, supra,* and *Black Hawk College, supra,* the "short-term" exclusion is to be narrowly interpreted. The College has not met its burden of demonstrating that the petitioned-for employees are short-term employees within the meaning of Section 2(q) of the Act.

V.

The College's next argument is that the IELRB does not have jurisdiction because the College is not the governing body that controls the adult educational services provided by the petitioned-for employees. The College argues that it does not control the funds that are used and does not have sufficient control for meaningful collective bargaining. We determine that, despite the role of the ICCB, the College has sufficient control for meaningful collective bargaining.

The fact that employees' employment is funded through grants from another entity does not demonstrate that the employer is unable to function in that capacity. In *SEDOL Teachers Union v. IELRB*, 276 Ill.App.3d 872, 658 N.E.2d 1364 (1st Dist. 1995), the Appellate Court did not question the fact that a special education district was the employer of certain employees who were paid through a federal grant which subjected them to a reduction in force each year until the federal funds were reallocated. Similarly, in *Michigan Technological University*, 3 MPER ¶ 21074 (Michigan Employment Relations Commission 1990), the Michigan Employment Relations Commission included in a bargaining unit employees who were paid through grants. In *Hillsborough County Board of County*

Commissioners, 5 FPER ¶ 10019, 19 (Florida Public Employees Relations Commission 1979), the Florida Public Employees Relations Commission stated:

> The employment relations [sic] is defined by an employer's payment of wages to an employee in return for services performed at the employer's direction. The fact that the ultimate source of the employee's wages is federal rather than state or local funds is irrelevant if the employing agency, such as the Board herein, possesses the independent authority to condition the payment of wages upon satisfactory performance by an employee.

Rather, whether an entity functions as an employer is based on its role in "hiring and firing, promotions and demotions; setting wages, work hours, and other terms and conditions of employment; discipline; and actual day-to-day supervision and direction of employees on the job," *Orenic v. ISLRB*, 127 Ill.2d 453, 475, 537 N.E.2d 784, 794-95 (1989), *citing* Jansonius, *Use and Misuse of Employee Leasing*, Lab.L.J. 35, 36 (Jan. 1, 1985). Here, the evidence demonstrates that the College has sufficient control to function as the employer of the petitioned-for employees. The College hires the employees, determines their wages, and pays them. The College also supervises and evaluates them. In addition, it determines the times and locations where they teach.

The fact that the employment of the petitioned-for employees is funded through ICCB grants does not demonstrate that meaningful collective bargaining is not possible. In *SEDOL, supra* and *Michigan Technological University, supra*, the contingent nature of grant funding was not perceived as an obstacle to collective bargaining. As the ALJ noted, the evidence demonstrates that the College has sufficient flexibility in allocating ICCB grant funds to make possible meaningful collective bargaining, and that the College is able to supplement the grant funds received from the ICCB with non-grant funds.

The College argues that the College would not be able to identify available funds in a timely fashion to bargain annually, and would not be able to commit to multi-year contracts. This may also have been the case in *SEDOL, supra*, but the employees were not deprived of their right to bargain on that basis. The same result should apply here. Moreover, nothing prohibits the College and the Association from reaching an agreement contingent on ICCB funding.

We conclude that the role of the ICCB does not prevent the College from functioning as the employer of the petitioned-for employees or from meaningful collective bargaining with their representative. The petition will not be dismissed on that basis.[3]

[3] The College also argues that similar employees are excluded at other community colleges. However, the College cites only agreements that community colleges have entered into with the representatives of their employees and does not cite any decisions by the IELRB or the courts. Those agreements have no precedential effect here.

VI.

The Rules provide that the IELRB shall certify the petitioning employee organization as the exclusive representative of the proposed bargaining unit immediately upon issuance of the IELRB's opinion and order where:

1. the bargaining unit found to be appropriate by the Board is sufficiently similar to the petitioned for bargaining unit that the showing of majority interest remains sufficient;
2. the employee organization agrees to represent the unit found to be appropriate;
3. the Board concludes that the employee organization represents a majority of the employees in the bargaining unit;
4. there is not clear and convincing evidence of fraud or coercion in obtaining the showing of interest; and
5. the petition is otherwise consistent with the Act and this Part.

80 Ill. Adm. Code 1110.105(o).

Accordingly, the Executive Director is directed to certify Waubonsee College Adjunct Faculty Association, IEA-NEA as the exclusive representative of the following unit:

> Included: All instructors at Waubonsee Community College who have provided a total of at least 45 contact hours of instruction in ESL or ABE/GED courses in each of the following semesters: Spring 2005, Fall 2005 and Spring 2006.
>
> Excluded: All confidential, supervisory and managerial employees as defined by the Act.

VII.

This Opinion and Order is not a final order of the Illinois Educational Labor Relations Board subject to appeal. Under Section 7(d) of the Act, "[a]n order of the Board dismissing a representation petition, determining and certifying that a labor organization has been fairly and freely chosen by a majority of employees in an appropriate bargaining unit, determining and certifying that a labor organization has not been fairly and freely chosen by a majority of employees in the bargaining unit or certifying a labor organization as the exclusive representative of employees in an appropriate bargaining unit because of a determination by the Board that the labor organization is the historical bargaining representative of employees in the bargaining unit, is a final order." Pursuant Section 7(d) of the Act, aggrieved parties may seek judicial review of this Opinion and Order in accordance with the provisions of the Administrative Review Law upon the issuance of the Board's certification order through the Executive Director. Section 7(d) also provides that such review must be taken directly to the

Appellate Court of a judicial district in which the Board maintains an office (Chicago or Springfield), and that "[a]ny direct appeal to the Appellate Court shall be filed within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision."

Decided: December 12, 2006
Issued: December 12, 2006
Chicago, Illinois

/s/ Lynne O. Sered
Lynne O. Sered, Chairman

/s/ Ronald F. Ettinger
Ronald F. Ettinger, Member

/s/ Bridget L. Lamont
Bridget L. Lamont, Member

/s/ Michael H. Prueter
Michael H. Prueter, Member

/s/ Jimmie E. Robinson
Jimmie E. Robinson, Member

Illinois Educational Labor Relations Board
160 North LaSalle Street, Suite N-400
Chicago, Illinois 60601
Telephone: (312) 793-3170