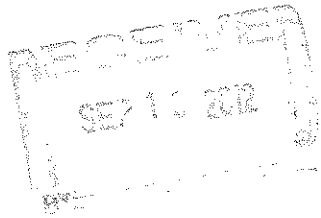
KENNETH HAMPTON
Arbitration & Mediation
PMB 220 34 Shunpike Road, Suite 3
Cromwell CT 06416



September 12, 2012

Attorney Richard Voigt,
McCarter & English
City Place 1
185 Asylum Street
Hartford CT 06103-3495

Attorney Eric Chester,
Ferguson, Doyle & Chester
35 Marshall Rd.,
Rocky Hill CT 06067

RE: Connecticut Board of Regents for Higher Education
-and-
The Federation of Technical College Teachers, Local 1943 AFT

Gentlemen:

Enclosed is the decision in the above arbitration case.

Sincerely,

Kenneth Hampton,
Arbitrator

In the matter of the Arbitration between:

Connecticut Board of Regents
for Higher Education

-and-

The Federation of Technical College
Teachers, Local 1943 AFT

Date of Award: September 12, 2012

Date of Hearing: April 26, 2012

Location of Hearing: 35 Marshall Rd.
Rocky Hill CT

APPEARANCES

For the Employer: Atty. Richard Voigt
For the Employer, Board of Regents

For the Grievant: Atty. Eric Chester
For the Federation of Technical College Teachers,
Local 1943 AFT

ISSUE

At the hearing the parties agreed to the following statement of the issue:

> Did the Board of Regents for Higher Education violate the 2007-2010 collective bargaining agreement with the Federation of Technical College Teachers AFT Local 1942, as extended to 2016 and including supporting addendum when it failed to offer Professor Pamela St Clair a contract for full time employment, and if so what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article VII. RIGHTS OF THE BOARD OF TRUSTEES (EXHIBIT J1)

"Except to the extent that there is contained in this agreement an express and specific provision to the contrary, all the authority, power, rights, jurisdiction and responsibility of the Board are retained by and reserved exclusively to the Board, including, but not limited to, the right: to determine the mission of the System and the method and means necessary to fulfill that mission, including the discontinuation of service, positions or programs in whole or in part ; to determine the content of job classifications; to establish and enforce standards of efficient performance; to maintain discipline, order and efficiency; to determine educational policy, programs, and courses; to direct employees and to determine their duties and professional assignments; to determine the days and hours of the operation of the colleges; to determine the academic calendar and to schedule work; to determine the quality, quantity and types of equipment to be used; to determine the composition of committees; to introduce new methods and procedures and facilities; to determine staffing requirements; to determine expansion or reduction of operations; to select and hire employees; to

determine qualifications ; to reward and to promote unit members; to suspend, discipline, or discharge a unit member for just cause; to transfer and assign unit members; to lay off unit members for lack of work or other legitimate reasons; to recall unit members; to determine that unit members shall or shall not perform certain functions; to take all necessary actions to carry out its mission in emergencies; to promulgate rules and regulations, provided that such rules and regulations shall not be exercised so as to violate any of the specific provisions of this Agreement."

ARTICLE XII. APPOINTMENT AND REAPPOINTMENT (Exhibit J1 Excerpt)

12.1 **TYPES OF APPOINTMENT**

12.1.1 Special Appointment "A Special Appointment is an appointment issued in order to meet the temporary needs of the System or to signify an explicitly temporary assignment. Special Appointments are for a fixed term of up to one year, renewable for up to one additional year, with no legitimate expectation of renewal of appointment thereafter. Special appointments are not tenure track appointments. A bargaining unit member shall not be employed on a special appointment for more than two (2) years, except by agreement of the parties. An exception to this two year limitation shall be special appointments which are funded with grant monies or through public sector or private sector contracts."...

12.3. **NOTICE OF NONREAPPOINTMENT**

12.3.1 Special Appointment
Notice of non reappointment is not required

ARTICLE XIII DISCIPLINE AND DISMISSAL (Exhibit J1 Excerpt)

13.1 **DISCIPLINE OR DISMISSAL**
No faculty member shall be disciplined or dismissed except for just cause.

13.2 **JUST CAUSE** Discipline or dismissal of a Faculty Member for just cause shall include but shall not be limited to the following:

a. Incompetence or inadequate performance
b. Repeated neglect of the responsibilities of his/her position
c. Insubordination
d. The use of fraud, collusion, or misrepresentation of a fact material to obtain employment with the college or material to promotion.

13.3 **DUE PROCESS**

Any discipline or dismissal shall be accompanied by the reason(s) and rationale for such decisions, and a timely opportunity for the affected Faculty member to be heard in connection with such proposed disciplinary action

MEMORANDUM OF AGREEMENT (Exhibit J2 Excerpt 2009)

Except as modified herein, the Collective Bargaining Agreement between the Federation of Technical College Teachers, AFT, Local 1942 (hereinafter "the AFT") and the Board of Trustees of Community Technical Colleges, (hereinafter "the Board"), effective July 1, 2007 through June 30, 2010 will continue in full force and effect. This agreement is made and entered into this 11 day of May 2009 by and between the AFT and the Board and is a result of the joint efforts of the parties to respond to the fiscal conditions of the State of Connecticut and is made pursuant to the discussions held between the State of Connecticut and the State Employees Bargaining Coalition (SEBAC).

The existing Collective Bargaining Agreement shall be modified as follows:

1 **Article XXX: Term and Duration of Agreement.** The term of the Agreement is extended to June 30, 2012...

5. **Article XXII: Layoffs (Job Security):** Between the date of this agreement and June 30, 2011, there will be no loss of employment, including loss of employment, due to programmatic changes, subject to the following conditions:

- Applicable only to those hired prior to July 1, 2009;

- Applicable only through June 30, 2011;
- Protection from loss of employment is for permanent employees and does not apply to:
  - Expiration of a temporary or special appointments except as provided below:
  - Non renewal of a non tenured employee provided such decision is for performance related reasons;
  - Termination of grant or other outside funding specified for a particular position ; and,
  - Part time employees who are not eligible for health insurance benefits.

- Employees in the principal bargaining unit in the second or subsequent special appointment year shall be covered by this Job Security provision. Existing limitations on renewal of special appointments shall be waived.

MEMORANDUM OF AGREEMENT (Exhibit J3 excerpt 2011)

On June 8, 2011, the Federation of Technical College Teachers, AFT, Local 1942 (hereinafter "the AFT") and the Board of Trustees of Community-Technical Colleges (hereinafter "the Board") entered into an agreement covering wages, wage-related matters and job security, as required by Attachment A to an agreement between the State of Connecticut and the State Employees Bargaining Agent Coalition (SEBAC) (hereinafter referred to as the "unit agreement"). Though ratified by the AFT membership, the unit agreement was not submitted for legislative approval due to the failure of the SEBAC Agreement to be ratified.

In anticipation of ratification and legislative approval of a clarified SEBAC agreement, the parties hereby modify their June 8, 2011 agreement as necessary to conform to the clarified SEBAC framework. This agreement supplants and replaces in its entirety the unit agreement signed by the parties on June 8, 2011.

The existing Collective Bargaining Agreement shall be modified as follows:

ARTICLE XXX: TERM AND DURATION OF AGREEMENT. The term of the Agreement, including any provisions that would otherwise sunset on June 30, 2012, is extended to June 30, 2016.

ARTICLE XXII: LAYOFFS (JOB SECURITY): Between the date of this Agreement and June 30, 2015, there will be no loss of employment for permanent employees, subject to the following conditions:

- Applicable only those hired prior to July 1, 2011;
- Applicable only through June 30, 2015;
- Protection from loss of employment does not apply to:
  - Expiration of a temporary or special appointment;
  - Non renewal of a non-tenured employee for performance-related reasons;
  - Termination of grant or other outside funding specified for a particular position; and,
  - Less than 20-hour per week part-time employees

- Notwithstanding the above, employees in the principal bargaining unit in their second or subsequent special appointment year as of June 30, 2011 shall be covered by this job security provision. However, service on special appointment between July 1, 2011 and June 30, 2015 shall not count toward the two-year limitation on special appointments referenced in Article XII, Section 12.1.1 of the contract.

FACTS

During the course of the fall semester of the 2007-2008 school year at Three Rivers Community College it became apparent that a member of the faculty would not be able to teach during the upcoming spring semester to began in January 2008 due to an ongoing illness. As a result of this, the employer began a search for someone qualified to act as a replacement until the permanent faculty member was able to return. (Ex. J6) As a result of that search, the employer found, and extended a hiring offer to hire, Pamela St. Clair. St. Clair on or about January 22, 2008 was given a special

appointment under the terms of the collective bargaining agreement as a full time instructor in English Composition for the semester running from January to June 2008. (Ex J7, E3) During the course of her employment that semester Sinclair was a member of AFT Local 1943, the Union's principal bargaining unit.

Inasmuch as the permanent faculty member was not able to return, St Clair was offered and accepted a second special appointment for the full 2008-2009 school year. (Ex J8, E4) In or about the end of the fall 2008 semester student evaluations of courses were conducted including those taught by Professor St Clair. During the latter half of the Spring semester, specifically in or about April 2009, the results of these evaluations were compiled and became available for review by the employer's officials.

As a result of projected budget shortfalls during the time period correlating with the Spring 2009 semester, the State of Connecticut Executive Branch requested and Unionized State employees through their SEBAC coalition bargaining representative agreed to enter into negotiations aimed at achieving concessions from the Unions that would help the State deal with its budget problems. Subsequently, AFT Local 1942 and the Board of Regents predecessor employer agreed to take part in this process by conducting negotiations to modify their contract to produce salary and other concessions in return for job security language commensurate with the statewide SEBAC framework. Local 1942 President Dennis Bogusky was a principal actor for Local 1942 in the negotiations. On May 11, 2009 the employer and Local 1942 reached and executed a Memorandum of Agreement to extend the existing 2007-2010 collective bargaining agreement until June 30, 2012. (Ex J2) Two days after execution of the Memorandum of Agreement, on May 13, 2009 Three Rivers Community College English Department Chairperson Christine J. Hammond sent Professor St Clair an email with the subject "Student Evals" and requested that she and St Clair talk about same. (Ex E6) Hammond and St Clair exchanged additional e-mails on May 14, 2009 in an effort to set up an opportunity to discuss the evaluations which St Clair had physically received earlier on that date. (Ex E5, E6) This was the first time St Clair had knowledge that the employer had any concerns about her performance.

Although St Clair was subsequently hired to teach literature and composition courses part time during the 2009 summer school session, she was not been offered any additional special appointments to date. (Ex J9) On September 18, 2009 Local 1942 filed a grievance at step 3 alleging, in relevant part, that the collective bargaining agreement as modified and extended by the May 11, 2009 Memorandum of Agreement had been violated due to the employer's failure to offer St Clair's employment in the 2009-2010 school year, which was the first school year following the execution of the agreement. (Ex J4) The grievance was not resolved and accordingly was processed to Step 4 on or about December 14, 2009. (Ex J5)

As a result of worsening state and national economic conditions, the State of Connecticut Executive Branch and SEBAC once again entered into negotiations for concessions in return for job security guarantees in the winter of 2011. Local 1942 and the Employer again agreed to participate and reached an agreement on August 19,

2011 once again modifying and extending the 2007-2012 collective bargaining agreement to 2016. (Ex J3) The St Clair grievance was eventually filed for arbitration, and subsequently heard at arbitration on April 26, 2012. Briefs were filed June 18, 2012 and reply briefs were filed July 17, 2012.

POSITION OF THE PARTIES

The Union in the present case takes the position that Pamela St Clair as of May 2009 was a member of its principal bargaining unit, hired prior to July 1, 2009, and in her second special teaching appointment. As such they assert that when the Union and the Employer executed the 2009 SEBAC agreement Professor St Clair was covered by the section of that agreement that modified Article 22 of the party's 2007 -2010 collective bargaining agreement relating to job security. Their position is that as of the signing of that agreement, St Clair by virtue of her being in the bargaining unit, and in her second appointment was barred by the agreement from losing her employment for the duration of the job security provision, i.e. June 30, 2011. It is additionally claimed that the employer has never formally asserted or been able to prove, any exception to the job security protections of the agreement that would apply to St Clair including inadequate performance. It is finally asserted by the Union that since St. Clair should have had continuing employment under the terms of the 2009 agreement she should continue to be covered pursuant to the job security provisions of the 2011 SEBAC agreement.

The Employer initially takes the position that the SEBAC agreement does not and cannot have been meant to apply to the grievant because it was never contemplated by the negotiators of that document that it would apply to an employee hired on a temporary basis to cover the absence of a permanent employee. Additionally, they argue in the alternative that if St Clair was covered by the agreement, that coverage could be, and was voided by the employer when they determined not to reappoint her due to inadequate performance. They further assert that the issue of her performance was raised in the pre arbitration grievance proceedings. Thus the employer ultimately claims that it had the right not to renew the grievant's special appointment at the beginning of the 2009-2010 school year, or thereafter.

DISCUSSION

I

The determination of the outcome of the case we are presented with here is largely dependent on contract interpretation in the widest sense of the term. Unlike cases in which there are many versions of the facts, the basic facts here are, for the most part, uncontested by the parties. Moreover, there are no great issues of credibility presented from the testimony. The determination of the case depends on coming to the best possible realization of what the parties meant, or must be charged with have agreeing to when they executed the relevant contract and supporting documents.

Upon review of the evidence and testimony it must be concluded that the 2009 SEBAC Memorandum of Agreement does indeed apply to the grievant Pamela St. Clair. This conclusion is mandated by the language that the parties used in drafting the agreement. Numbered paragraph 5 of the agreement containing the general job security language, and which amends Article XXII of the existing contract is key since it details the heart of the system that the parties are creating. Unlike many labor relations agreements that simply provide existing employees with protection from being laid off, i.e. separated from the employment relationship due to lack of work, or economic shortfall, for some period of time, the language of the SEBAC agreement is much broader. The document does not just say that it bars layoffs, but rather states that there will be, "no loss of employment including loss of employment due to programmatic changes subject to the following conditions." The effect of this unusually expansive language must be seen as creating something more like a freeze on the level of employment that existed on its effective date. Otherwise stated, what the parties have done is agreed to a document that creates something like a snapshot of the level of employment for the classes covered by it from which there is to be no loss/ diminishment during its term. The document repeats this language in the third bulleted section of paragraph 5 and introduces the only exceptions to its coverage which are non permanent employees such as those that are temporary and on special appointment.

If the document stopped here, the employer's view of the non applicability of the agreement to Prof. St. Clair could be accepted but there is further and dispositive language which requires a determination that employees such as her are covered. Numbered paragraph 5, bullet four of the 2009 SEBAC Memorandum of Agreement expressly and to our mind uncategorically opts the grievant, and her class of employees back into coverage when it states that, "Employees in the principal bargaining unit in their second or subsequent special appointment year shall be covered by this Job Security provision." Thus employees who meet this definition cannot under the agreement suffer loss of employment for the duration unless they fall within a condition subsequent regarding performance. We do not see any viable claim or argument that the grievant was not in the principal bargaining unit during here employment.(Ex. E2) Likewise, we do not see any viable claim that the grievant did not work an initial special appointment in the Spring semester of the 2007-2008 school year, and a second special appointment for the entirety 2008-2009 school year.(Ex. E2) As such she meets the criteria provide by the agreement and is subject to the job security protections it provides.

The employer argues that the agreement "could not" apply to a employee such as the grievant because both parties and the collective bargaining agreement recognize that special appointees are not and have never been permanent, tenured employees, and that Prof. St Clair in particular was hired for one limited thing; to replace a faculty member out on extended sick leave. Common sense it is asserted requires a finding that such a person, with so limited grasp on a position cannot have been meant to be provided the vast job security protection contained in the SEBAC agreement.

This claim by the employer however is founded more in a sense of equity which though understandable from it's point of view, is not supported by the language of the party's duly negotiated agreement, or the testimony in the record. An arbitration award must be anchored in the language of the agreement, as supported by the testimony and evidence, and an arbitrator cannot simply decide to make a policy decision adrift from this central tenet, no matter what equitable appeals it might have. In the current case, we have seen that the aforementioned section of the SEBAC agreement modifying the 2007-2010 collective bargaining agreement does not make any distinction between types of 'special appointments.' Instead, what the agreement does in its numbered paragraph 5 bullet 4 is expressly add all special appointees back into the overall job security language from which they as non permanent employees had initially been excluded. This express language does not say that special appointees hired for one purpose get the job security protection, while special appointees hired for another purpose do not. The language makes no differentiation and instead merely allows for application of the general job security language to anyone who is a special appointee, hired after July 1, 2009, and "in their second or subsequent appointment year. For better or for worse, the language that the parties negotiated creates a unitary class for which we can find no contractual means of making a distinction, and that class is afforded the full job security protections of the agreement. Additional proof of this may be seen in the uncontradicted testimony of Local President Dennis Bogusky, the only principal actor for the two parties to testify and who stated towards the beginning of his direct examination, that getting broad job security protection was one of the items the Union was looking for in order to justify the considerable financial concessions that it had to make to the employer in the agreements. Since absent the SEBAC agreement, all special appointees are temporary and time limited in their tenure, we cannot see how a distinction of the type proposed by the employer can exist, absent clear proof of its existence which is not apparent here.

It should be remembered that the 2009 and 2011 SEBAC agreements do not represent labor relations between the parties in normal times, but are rather an accommodation to times of fiscal emergency. We can take arbitral notice that the economic conditions that existed in the State and the Nation immediately following the fall of 2008 and leading up to the negotiations in the winter of 2009 were on the verge of being catastrophic and were clearly the worst that had existed since start of the Great Depression in the 1930. In order to continue providing existing levels of services and maintain employment both parties negotiated an agreement which contains concessions and accommodations by both. Whatever the original conditions or understandings about grievant's employment, they were essentially overtaken and superseded by much bigger events, and language which while it may have provided greater protections than originally planned is nonetheless the necessary result of the parties newly negotiated language. The rule of unintended consequences, though it may give us all pause at some times is a reality in labor relations also.

II

Paragraph 5 bullet three of the parties 2009 SEBAC agreement modifying and extending the 2007-2010 collective bargaining agreement to 2012 states that,

> "Protection from loss of employment...does not apply to...Non renewal of a non tenured employee provided such decision is for performance related reasons;"

This language forms the sole condition subsequent that we can see by which means special appointees otherwise covered by the broad job security provisions contained in the SEBAC agreement, may lose them. The employer takes the position that St Clair was not terminated for cause within the traditional meaning of such proceedings, but rather she was just not reappointed due to performance deficiencies that all parties had been put on notice about during the grievance process. The third step grievance answer does show that at least at that level of the proceedings the employer expressly cited performance issues as a second reason for her non renewal. Available evidence about how the case was argued by the employer during the pre arbitration proceedings however is quite limited and the issue of performance was not addressed in the only record evidence that is available concerning discussions between Union President Bogusky and the employer's then Director of Labor Relations Marge London. (Ex J6 E2) It must be determined that ultimately whether or to what extent performance was raised in the proceedings is not determinative of the outcome.

In the pre May 2009 world, there was a clear distinction between the employers ability to terminate, or not re hire special appointees who were essentially temporary employees with no expectation of ongoing employment, and the much higher requirements imposed on them with respect to any detrimental change in employment status for permanent employees for which it had to go through the process of termination or non renewal and all the of notice and adjudication that entailed. In the world that existed prior to the first SEBAC agreement, employees hired as special appointees could clearly be denied reappointment for any reason.

However, the broad pre-existing rights of the employer with respect to the tenure of special appointees were substantially eliminated by the 2009 agreement. Because the SEBAC agreement was a response by both parties to emergency conditions it created extra-ordinary terms. Additional language in numbered paragraph 5 bullet four of the agreement does what would have probably been unthinkable in regular times, when after expressly granting special appointees coverage under the job security language, it also adds language that can only be read as granting special appointees an additional level of protection by stating that, "Existing limitations on renewal of special appointments shall be waived." This new language refers back to Article 12.1.1 of the original contract and must be seen as 1) eliminating the two year cap on special appointments, and much more importantly for this case, eliminating the language in article 12.1.1 stating that [special appointees] have "no legitimate expectation of renewal". Otherwise stated the agreement must be interpreted given the elimination of the no legitimate expectations language as creating a new, positive, expectation of reappointment for the duration of the job security protections and so long as performance is satisfactory. Indeed the elimination of the "lack of a legitimate

expectation of renewal language" operationally must be seen as the "sine qua non" of the enhanced job security that the Union undoubtedly sought to provide by the agreement.

This elevation in status of the special appointees must be seen as the reason why numbered paragraph 5 bullet three does not just say that non tenured employees with performance problems may be terminated, or other such simple language, but instead uses the phrase "non renewal" provided such decision is for performance related issues. Thus the agreement makes "non-renewal" after a "decision" of inadequate performance as the employer's means of cutting off the employment of a special appointee.

Words such as these have meaning in a labor relations context. They must be seen as very substantially raising the requirements to be met before an employee on special appointment, protected by the agreement can lose their employment. In context we see the new language as requiring the employer to have made a final decision of unsatisfactory performance on the part of special appointee, and then to have taken some definitive action to execute a non-renewal of that employee's employment. As such, and consistent with the granting of binding protection in return for the concessions, this language, for the term of the agreement's job security provisions, would appear to make the requirements for elimination of a special appointee very similar to those for elimination of a regular employee.

There is insufficient evidence to show that the employer by the end of Professor St Clair's second appointment in June 2009 had, within the language and context created by the agreement, made either a sufficient case, or decision to non-renew her. The record shows that St Clair after almost two years of employment had only received initial notification from her department head in April 2009, that there might be some problems with her performance. (Ex. E5) That notification was simply a raw compilation of student evaluations from some of her courses showing that some students were unhappy with various aspects of the course or her method of instruction. Within that compilation are also some comments by students who were satisfied with St. Clair and the courses. As of June 2009, there is no evidence that the employer had done any observation, or professional evaluation of her performance or that she had been given the opportunity to correct same. At such a preliminary level we do not see that the employer could have made any final "decision" on St. Clair's fitness, or lack thereof to continue her employment. Indeed, this situation was so preliminary that it cannot be said that grievant was even at a point analogous to an employee who receives an oral warning of an infraction or deficiency. At worst, grievant was perhaps at the point right before some form of action was to be taken. Had grievant continued into the following school year as required by the agreement, it may be that there would have been sufficient reasons to warrant a decision to non-renew or terminate her or further review of her work might have show that there was no problem. There is however no proof that the employer had or could have made that decision, given the available evidence by May/June 2009. Indeed, although as the employer infers, there may be different reasons for hiring a summer school teacher as opposed to one with a continuing

relationship, we nonetheless must take into favorable consideration the fact that St. Clair was offered and accepted employment during the 2009 summer session. It does not seem plausible that an employee with deficiencies sufficient to make them unfit to teach would have been continued in the system even in such a limited manner. Thus since no reasoned final decision had, or could have yet been taken on her performance, we do not see that a non renewal for performance, within the meaning of the agreement could have taken place and she remained covered by the full protections of the job security language. The 2011 SEBAC agreement like the 2009 agreement allows the employer to non-renew a special appointee for performance related reasons once that decision has been appropriately reached, and the employer may certainly avail itself of that right if necessary in the future.

AWARD

Accordingly, the grievance is sustained and it is directed that the employer shall:

> Cease and desist from violating the terms of the 2007-2010 Collective bargaining agreement as extended and modified by the 2009 and 2011 SEBAC agreements.
>
> Make grievant Patricia St. Clair whole for such time as it failed to offer her a full time employment contract lecturer in English Composition or equal position, during the pendency of the 2007-2010 Collective bargaining agreement as extended and modified by the 2009 and 2011 SEBAC agreement.

Kenneth Hampton, Arbitrator September 12, 2012