

**NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION**

In the Matter of Arbitration Between:

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**UNION COUNTY COLLEGE**

“College,”

-and-

**UNION COUNTY COLLEGE CHAPTER  
OF THE AAUP**

“Union.”

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**OPINION  
AND  
AWARD**

Docket No. AR-2015-434  
(Method of Calculating Promotional Increases)

**Before  
James W. Mastriani  
Arbitrator**

Appearances:

**For the College:**

Matthew J. Giacobbe, Esq.  
Cleary Giacobbe Alfieri Jacobs, LLC

**For the Union:**

Carl Levine, Esq.  
Levy Ratner, PC

This dispute arose under a collective negotiations agreement [the "Agreement"] between Union County College [the "College"] and Union County College Chapter of the AAUP [the "Union"] effective September 1, 2012 through August 31, 2015. The Union filed a grievance alleging that the College violated the Agreement during 2014 in the manner in which it calculated promotional salary increases. The grievance remained unresolved and was submitted to binding arbitration by the Union pursuant to the terms of the Agreement and the Voluntary Labor Arbitration Rules of the Public Employment Relations Commission. Thereafter, I was designated to serve as arbitrator.

Arbitration hearings were held on October 19 and December 2, 2015 in Cranford, New Jersey. At the hearing, the College and the Union examined and cross-examined witnesses and submitted documentary evidence into the record. Testimony was received by Associate Professor Carl Cuttita, Associate Professor Ginnie Crisonino, Professor Bohdan Lukaschewski, (retired) Professor Ameritus Cynthia Singer Senior Professor Vincent Wrice, and Bernard Lenihan, Vice President for Financial Affairs. Both parties filed post-hearing briefs, the last of which was received on or about February 1, 2016.

### **ISSUE**

At the hearing, the College and the Union agreed to frame the issue to be heard and decided as that set forth in the Union's demand for arbitration:

Did the Employer violate the collective bargaining agreement, including but not limited to, Article XIX.A and XXI.B, by changing the method by which wage increases resulting from promotions are calculated, specifically by not raising faculty members' salaries to the contractual minimum for their new rank before calculating promotional increases, as was done in the past? If so, what shall be the remedy?

### CITED CONTRACT PROVISIONS

#### ARTICLE XXI – COMPENSATION (September 1, 2012 through August 31, 2015)

##### A. Instructional and Library Staff Salaries

1. Effective September 1, 2012 each full-time member of the instructional and library staffs covered by this Agreement who was a full-time member of the instructional staff (or was a full-time member of the professional library staff) during the preceding academic semester shall have their annual base salary increased by \$1200.
2. Effective September 1, 2013, each full-time member of the instructional and library staffs covered by this Agreement who was a full-time member of the instructional staff (or was a full-time member of the professional library staff) during the preceding academic semester shall have their annual base salary increased by 1.5%.
3. Effective September 1, 2014, each full-time member of the instructional and library staffs covered by this Agreement shall have their annual base salary increased by \$400. In addition, each such member of the instructional and library staffs shall have their annual base salary increased by 1.5%.

##### 4. Salary Minimums for 2012-2013 academic year:

Instructor (without Master's degree)	\$44,881-\$55,836
Instructor (with Master's degree)	\$46,024-\$57,217
Instructor (with Doctorate)	\$48,453-\$60,265
Assistant Professor	\$59,603-\$73,832

Assistant Professor (with Doctorate)	\$63,332-\$78,865
Librarian I	\$51,653-\$64,265
Assistant Librarian	\$60,679-\$75,550
Associate Professor	\$68,423
Associate Professor (with Doctorate)	\$72,294
Professor	\$84,663
Senior Professor	\$92,216
Associate Librarian	\$70,499
Librarian	\$88,249
Senior Librarian	\$95,898

5. Salary Minimums for 2013-2014 academic year:

Instructor (without Master's degree)	\$45,554-56,673
Instructor (with Master's degree)	\$46,714-\$58,075
Instructor (with Doctorate)	\$49,180-\$61,169
Assistant Professor	\$60,497-\$74,939
Assistant Professor (with Doctorate)	\$64,282-\$80,048
Librarian I	\$52,428-\$65,229
Assistant Librarian	\$61,589-\$76,683
Associate Professor	\$69,449
Associate Professor (with Doctorate)	\$73,378
Professor	\$85,933
Senior Professor	\$93,599
Associate Librarian	\$71,556
Librarian	\$89,573
Senior Librarian	\$97,336

6. Salary Minimums for 2013-2014 academic year are as set forth below:

Instructor (without Master's degree)	\$45,554-\$56,673
Instructor (with Master's degree)	\$46,714-\$58,075

Instructor (with Doctorate)	\$49,180-\$61,169
Assistant Professor	\$60,497-\$74,939
Assistant Professor (with Doctorate)	\$64,282-\$80,048
Librarian I	\$52,428-\$65,229
Assistant Librarian	\$61,589-\$76,683
Associate Professor	\$69,449
Associate Professor (with Doctorate)	\$73,378
Professor	\$85,933
Senior Professor	\$93,599
Associate Librarian	\$71,556
Librarian	\$89,573
Senior Librarian	\$97,336

7. 2014-2015 Salary Minimums

For purposes of guidance in the employment of new faculty members hired during the 2014-2015 academic year, the minimum salaries shall be:

Instructor (without Master's degree)	\$46,643-\$57,929
Instructor (with Master's degree)	\$47,821-\$59,352
Instructor (with Doctorate)	\$50,324-\$62,493
Assistant Professor	\$61,810-\$76,469
Assistant Professor (with Doctorate)	\$65,652-\$81,655
Librarian I	\$53,620-\$66,613
Assistant Librarian	\$62,919-\$78,239
Associate Professor	\$70,897
Associate Professor (with Doctorate)	\$74,885
Professor	\$87,628
Senior Professor	\$95,409
Associate Librarian	\$73,035
Librarian	\$91,323
Senior Librarian	\$99,202

B. Promotional Increases

A faculty member promoted to a new academic rank shall receive a six percent (6%) increase in his/her salary as of September 1 of the year in which the promotion is effective. This increase shall be in addition to any other salary increase provided in this Agreement and shall be computed after the addition of the increase provided in Part A of this Article. A faculty member promoted from Professor to Senior Professor is excluded from the promotional increase. A faculty member promoted from Professor to Senior Professor shall receive an increase sufficient to bring him/her to the minimum annual salary for that rank.

**ARTICLE XXI – COMPENSATION** (September 1, 2009 through August 31, 2012)

A. Instructional and Library Staff Salaries

5. 2009-2010 Salary Minimums<sup>1</sup>

Any faculty member in the employ of the College on September 1, 2009, who will not be receiving the salaries set forth below for their 2009 increase, shall receive an increase effective September 1, 2009, sufficient to bring him/her to the annual salary set forth.

**BACKGROUND**

The Association filed a grievance on September 10, 2014 alleging that the College violated the Agreement by failing to pay promoted employees the salary minimum of their new rank, followed by a six (6%) percent promotional increase followed by any increase applicable to faculty members. The grievance stated:

The Union County College Chapter of the AAUP (the "Chapter") hereby follows a grievance based on the administration's unilateral change in the manner in which promotional increases are

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<sup>1</sup> This subsection appears as #5 in the 2009-2012 Agreement. The parties stipulate that this was a typo and should have been typed as subsection #6. It will continue to be referenced here as #5.

calculated and paid. This change is in violation of the Collective Agreement ("Agreement"), including but not limited to Article XXI.A and XXI.B, as well as longstanding past practice.

According to the AAUP Collective Bargaining Agreement (the "Agreement"), Article XXI.B:

"A faculty member promoted to a new academic rank shall receive a six percent (6%) increase in his/her salary as of September 1 of the year in which the promotion is effective. This increase shall be in addition to any other salary increase provided in this Agreement and shall be computed after the addition of the increase provided in Part A of this Article....."

In accordance with the plain language of the Agreement, and longstanding practice, faculty members who are promoted are entitled to have their salaries raised to the minimum for their new rank, and *then* to receive their 6% promotional increase, followed by any increase applicable to faculty members under the Agreement. However, the administration now asserts that it is not required to raise promoted faculty members to the minimum for their new rank before applying additional applicable increases, and has, in fact, not done so.

Remedy: The salaries for those faculty members who have been promoted since the expiration of the previous Agreement should be corrected, and they should be made whole.

The grievance was filed under the Agreement that commenced on September 1, 2012 but not filed until September 2014 due to the fact that promotional increases for those promoted on September 1, 2012 and September 1, 2013 were held in abeyance and not calculated until the end of the 2013-2014 Academic Year because the new 2012-2015 Agreement was not ratified until April 16, 2014.

On September 30, 2014, the College responded to the grievance with a denial stating:

On behalf of Dr. McMEnamin, following is the response to your September 10, 2014 grievance related to compensation for faculty promotions.

In its grievance, the AAUP asserts that "in accordance with the plain language of the Agreement, and long-standing practice, faculty members who are promoted are entitled to have their salaries raised to the minimum for their new rank, and then to receive their 6% promotional increase "followed by any increase applicable to faculty members under the agreement."

Contrary to the AAUP's assertion, the applicable contractual language addressing promotional increases is contained in Article XXI B and provides as follows:

"A faculty member promoted to new academic rank shall receive a six percent (6%) increase in his/her salary as of September 1 of the year in which the promotion is effective. This increase shall be in addition to any other salary increase provided in this Agreement and shall be computed after the addition of the increase provided in Part A of this Article...."

The clear and unambiguous contractual language provides that upon promotion, a faculty member shall receive a six percent (6%) increase to his/her salary. In addition, the faculty member will also receive any annual negotiated salary increase. The collective bargaining agreement does not provide that a promoted faculty member is to be moved to the minimum of the new rank and then be provided a six percent (6%) salary increase and the negotiated salary increase. In fact, during contractual negotiations, the parties specifically agreed to increase the minimum salaries at each rank by the annual negotiated salary increases. Thus, based upon the AAUP's request, promoted faculty members would be elevated to the new minimum (which includes the annual negotiated salary increase) and would thereafter receive a six percent (6%) increase above the minimum and the annual negotiated salary minimum. Based upon the AAUP's request, promoted faculty members would receive the annual negotiated salary increase twice. The College believes that the AAUP request is contrary to the clear and unambiguous contractual language of the parties' agreement.



Nevertheless, the College is willing to meet with the AAUP in accordance with Article XXXIV(C)(2)(a) if the AAUP so desires.

Should you have any further questions, please do not hesitate to contact me.

The evidence of this proceeding is broad. It includes several prior labor agreements dating back to 1987, the 2012-2015 labor agreement under which the dispute arose, the history and practice of how promotional increases had historically been calculated prior to the change implemented by the College in 2014 retroactively to 2012, prior negotiations history reflecting language changes sought but not achieved by the College on this issue, a prior grievance filed by the Union in 2011, and the change in the contract language in the 2012-2015 agreement that the College relies upon as authority for implementing the change that prompted the grievance. The evidence includes testimony and exhibits from which the parties offer their respective arguments on whether the Union has proven its claim that the College has violated the labor agreement. Many of the relevant facts are not in dispute.

Prior to the September 1, 2012 – August 1, 2015 collective negotiations agreement under which this grievance arose, promotional increases had been calculated after faculty members were raised to the minimum salary for their new rank and also given any other applicable salary increases. At the October 19, 2015 arbitration hearing, the parties engaged in the following stipulation attesting to this fact as follows:

The parties stipulate that, prior to the September 1, 2012 – August 31, 2015 collective negotiations agreement, promotional increases were calculated after faculty members were raised to the minimum salary for their new rank and given any applicable annual salary increases.

It is also not in dispute that the language regarding promotional increases in every agreement at least from 1987-1990 through the present 2012-2015 agreement included the following language that appears at Article XXI.B:

A faculty member promoted to a new academic rank shall receive a six percent (6%) increase in his/her salary as of September 1 of the year in which the promotion is effective. This increase shall be in addition to any other salary increase provided in this Agreement and shall be computed after the addition of the increase provided in Part A of this Article.

The parties also acknowledge that prior to the change the College implemented in 2014 that prompted the grievance, the method of calculating a promotional increase included the following steps: The salaries of the employees promoted were raised to the minimum of the new salary range negotiated for their new rank. Then, any annual negotiated increase was applied to the minimum, followed by the contractual six (6%) percent promotional increase as set forth in Article XXI(B).<sup>2</sup>

The parties agree that the only exception to the practice of how promotional increases had been calculated prior to the 2012 through 2015 agreement was that concerning a promotion from the Professor rank to the rank

of Senior Professor. That exception was negotiated and is governed by language in the last sentence in Article XXI(B). Therein, it states that “[a] faculty member promoted from Professor to Senior Professor shall receive an increase to bring him/her to the minimum annual salary for that rank.” This exception is not in dispute.

The Union cites testimony from Professor Cuttita and Vice President Lenihan that explains the intent of this exception:

According to the unrebutted testimony of Professor Cuttita, and the testimony of Mr. Lenihan, this narrow exception exists because, in almost all cases Faculty Members are promoted to Senior Professor directly from the rank of Associate Professor, skipping over the rank of Professor. When Faculty Members are promoted directly from Associate Professor to Senior Professor, their promotional increases are calculated in the same manner as they have historically been calculated for everyone else, by raising them to their new minimum before other increases are calculated. Similarly, when Faculty Members are promoted from Associate Professor to Professor (rather than to Senior Professor), when they do not yet have a doctorate, their promotional increases are calculated in the same manner as for everyone else. Such Faculty Members, if and when they subsequently get their doctorate, are promoted to Senior Professor. See testimony of Professor Cuttita and Mr. Lenihan. To give such faculty members a 6% increase for each of these last two steps, would be to give them 6% more than faculty members who already had their doctorates when they were promoted directly from Associate Professor to Senior Professor. It was this anomaly that the exception was intended to address.

The evidence relied upon by the parties is interwoven into their arguments in support their respective contract interpretations. As is normally the case in a

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<sup>2</sup> A 2011 grievance [U. Ex. #2] and response by the College reflects that the College believed that the 6% promotional increase was calculated prior to any negotiated increase. [U. Ex. #3]. A response by the Union [U. Ex. #4] states that the differences in the order of the last two steps is of “no mathematical consequence.”

matter involving contract interpretation, the grieving party has the burden of proof.

The Union contends that its position on how promotional increases must be calculated is supported by contract language, longstanding practice in the application of the language, bargaining history and prior grievance resolution. It disputes the College's contention that the removal of language regarding salary minimums for 2009-2010 in the 2009-2012 Agreement from the 2012-2015 Agreement (Article XXI(A)(5)) altered the language and longstanding practice as to how salaries must be calculated upon promotion. The Union offers the following in support of its position.

The Union first cites the existence of undisputed practice prior to the 2012-2015 Agreement that promotional increases had been consistently calculated in the manner it claims must continue in the 2012-2015 Agreement. In addition, the Union cites the unrebutted testimony of Professor Crisonino that in 2006, the Employer proposed to change the practice by limiting those who were promoted to receiving their promotional and annual increases on the basis of their pre-existing salaries. Under the College's proposal, those promoted would only be increased to the minimum of their new rank if their salaries still fell below the salary minimum. According to Professor Crisonino, the College's proposal was consistent with prior proposals it had made to change the practice and was

based on the College's view that the long-standing method of calculating promotional increases amounted to "double dipping."

The Union also cites to prior instances when the College made unilateral changes in the manner in which it calculated promotional increases that deviated from the longstanding practice. The first such instance was in 2003. According to Union testimony, when it challenged the changed method, the College acknowledged that the change it made was the result of mistake and the mistake was corrected. Thereafter, in 2011, the College again changed the method of how promotional increases were calculated by not initially raising those promoted to the minimum of their new ranks. The Union cites testimony from Vice President Lenihan that the College unilaterally made the change in 2011 based on its view that the College's new Human Resources Representative at the time had not properly interpreted and applied the existing contract language. The Union emphasizes that it filed a grievance at that time challenging the change and to protect itself from any claim of waiver that the College might make. Citing the testimony from Professor Cuttita, the College's payroll department indicated to him that the 2011 change had been made in error and was then corrected. The Union stresses that the controlling language in the 2012 through 2015 agreement, Article XXI.B, is the same as that existed in the prior agreements without there having been any proposals from the College to negotiate any change.

The Union's additional contentions on the merits of its grievances are responses or rebuttals to the College's claim that a change in the 2012-2015 Agreement that eliminated contract language from the 2009-2012 Agreement authorized the changes the College made when calculating promotional increases in 2014. I next turn to the submission of the College on this point in defense of the grievance followed by arguments from the Union in response.

The College argues that the 2012 through 2015 agreement removed, Article XXI.A.5, from the prior agreement and this was a key provision that had supported the practice. As a result, this is said to have authorized the change in the method in how promotional increases were to be calculated and implemented effective September 1, 2012. Thus, it submits that the changed manner in which it now calculates the promotional increases is compelled by the contract language that remained after the removal of Article XXI.A.5. According to the College:

The contractual language which addresses promotional increases is set forth in Article XXI B. of the 2012-2015 CNA (J-1), and is contained in all Agreements between the parties since the 1987-1990 CNA (Exhibits, J-1 through J-10). It provides as follows:

A faculty member promoted to a new academic rank shall receive a six percent (6%) increase in his/her salary as of September 1 of the year in which the promotion is effective. This increase shall be in addition to any other salary increase provided in this Agreement and shall be computed after the addition of the increase provided in Part A of this Article.

The record demonstrates that every CNA between the College and the Association from 1987-1990 through 2009-2012 (Exhibits J-2

through J-10) contained the following language (adjusted for the effective dates of each Agreement), which required the College to bring faculty members to the minimum of the salary guide for the rank into which they were promoted:

2009-2010 Salary Minimums

Any faculty member in the employ of the College on September 1, 2009 who will not be receiving the salaries set forth, below before their 2009 increase, shall receive an increase effective September 1, 2009, sufficient to bring him/her to the annual salary set forth. (Exhibit J-2, from the 2009-2012 CNA at Article XXI. A. 5.)

After the conclusion of negotiations for the 2012-2015 CNA, however, the Association prepared the new Agreement and deleted the above language from the Agreement in its entirety. (Exhibit, E-1). Accordingly, the removal of the provision changed the methodology of how promotional increases are implemented.

Before the 2012-2015 Agreement, the salary of the promoted employee would be brought to the minimum of his/her new rank, then the annual negotiated salary increase was applied, and finally the six percent (6%) increase was added to the employee's salary in accordance with the contractual provisions of Article XXI B. (Exhibits J-1 through J-10).

After the deletion of Article XXI.A.5. under the 2012-2015 Agreement, however, the College now follows the provisions of the CNA and applies the annual negotiated salary increase to the old salary of the promoted employee, then applies the six percent (6%) promotional increase. If the employee's new salary and promotional increases are still below the minimum salary of the new rank after those increases are applied, the College brings the employee to the new minimum of the new rank.

Importantly, the parties have previously agreed in the 2012-2015 Agreement that the minimum salaries of each rank are; increased each year by the annual salary increase. If the Association prevails in this grievance, it would result in the illogical result of double increases - an increase to the minimum salary of the rank which includes the annual negotiated salary increase and another annual salary increase thereafter. In addition, the newly-promoted employee would be entitled to receive the agreed-upon six-percent (6%) promotional increase. (See J-11). Such a result would be

contrary to the intent of the contractual terms negotiated by the parties.

The College contends that the Union's case is without merit because the relevant language is now clear and unambiguous and that under well settled contract interpretation standards and case law, an arbitrator is not permitted to look beyond the four corners of a contract and alter clear and unambiguous language. Here, the College submits that reliance upon past practices would ignore the specific terms of the 2012-2015 Agreement. The College also cites Article XXXIV(E.3.c), Grievance and Arbitration – which states that “[i]n no event shall the arbitrator have the authority to add to, subtract from, modify or amend the terms of this agreement.” To grant the grievance would, in its view, violate this admonition.

Based upon the analysis urged by the College, it offers additional explanation in support of its position that because of the deletion of Article XXI.A.5 from the 2009-2012 Agreement, the grievance must be denied:

In the instant matter, during the drafting of the 2012-2015 CNA between the parties, the Association removed the contractual provision that had previously required the College to adjust the salaries of promoted employees to the minimum salary of the new rank before the addition of the other contractual salary increases. (See E-1). The deleted provision follows:

2009-2010 Salary Minimums

Any faculty member in the employ of the College on September 1, 2009, who will not be receiving the salaries set forth below before their 2009 increase, shall receive an increase effective September 1,



2009, sufficient to bring him/her to the annual salary set forth.  
(Exhibit J-2, from the 2009-2012 CNA at Article XXI.A.5)

This provision appeared in each CNA between the College and the Association from 1987-1990 through 2009-2012 (Exhibits J-2 through J-10). The presence of this contractual clause was the essential factor for the practice of advancing employees to the minimum salary of the new rank as the first step in calculating promotional salary increases in the years prior to the 2012-2015 CNA.

This clause explains the College's position when a similar grievance was brought by the Association in 2011. (See U-2). In that matter, the Association filed a grievance asserting that the promotional increases were not calculated in accordance with the practice in effect at that time. The Association cited Article XXI B. of the CNA, which remains as written in the agreement today:

A faculty member promoted to a new academic rank shall receive a six percent (6%) increase in his/her salary as of September 1 of the year in which the promotion is effective. This increase shall be in addition to any other salary increase provided in this Agreement and shall be computed after the addition of the increase provided in Part A of this Article (See J-1, Article XXI B of the current CNA).

The application of these contractual provisions resulted in the past methodology of calculating salary increases for faculty members who are promoted: the salary was raised to the minimum of the new salary range associated with their new rank, then, the annual negotiated increase was applied; and thereafter, the contractual six percent (6%.) promotional increase was applied. Accordingly, the College honored the past methodology of calculating salary increases upon promotion, and the 2011 grievance was resolved. (See U-4).

However, the aforementioned language in Article XXI A.5 was deleted by the Association when the 2012-2015 agreement was drafted. (See E-1). Indeed, at the October 19, 2015 hearing, the parties stipulated that prior to September 1, 2012-August 30, 2015 collective negotiations agreement, promotional increases were calculated after faculty members were raised to the minimum salary for their new rank and given any applicable annual salary

increases. Significantly, the parties recognize that the longstanding practice of calculating salary increases for employees upon promotion remained intact until the parties negotiated the 2012-2015 CNA. The Association's removal of Article XXI A.5. was agreed to by the College and the Agreement was executed by both parties. (See J-1).

In essence, the major difference in the 2012-2015 CNA is that Article XXI A. 5. has now been deleted from the agreement by mutual consent of the parties. Accordingly, there is no longer a basis upon which to conclude that the salary increases upon promotion must be calculated as they were before the 2012-2015 collective negotiations agreement. Therefore, in accordance with the provisions of the current CNA, the proper methodology for calculating salary increases upon promotion is to apply the annual negotiated salary increase to the old salary of the promoted employee, then apply the six percent (6%) promotional increase. If the employee's new salary is still below the minimum salary of the new rank after those increases are applied, the College then elevates the promoted employee to the new minimum of the new rank.

For the foregoing reasons, the College requests the denial of the instant grievance because the College has not violated the express terms of the collective negotiations agreement. In fact, the College is correctly calculating the salary increases upon promotion of Association members in accordance with the terms of the 2012-2015 agreement between the parties.

The Union urges the denial of the College's contract defense set forth above. Specifically, it contends that the College's argument that the removal of Article XXI.A.5 from the 2012-2015 Agreement eliminated the longstanding method for calculating promotional increases is without merit. Citing record testimony, the Union points out that neither party ever offered any proposal during negotiations for the 2012-2015 Agreement to change the underlying method of how promotional increases had been calculated in the past, nor were there any proposals to remove Article XXI.A.5. It submits that there is no

evidence to support the College's claim that an employee's rise to the new minimum salary before calculating promotional increases was no longer required. In contrast, the Union seeks reliance on the testimony from Professors Cuttita and Singer that the College did make a proposal concerning promotional increases but that the proposal was limited solely to deferring doctoral increases for a year that they would otherwise have been effective. According to the testimony, the College's proposal to make this change to promotional increases was specifically proposed and extensively discussed. In contrast, there was no proposal nor any discussion from either party to change the manner in which promotional increases had been calculated in the past. The Union also notes that despite extensive negotiations on the doctoral degree deferrals, the cost savings to the College was only \$8,895.78 whereas the savings the College has reaped from its unilateral change on calculating general promotional increases was substantial and would not have been accomplished in the absence of any proposals or negotiations on the issue.

The Union's arguments summarizing its rejection of the College's contractual claim are as follows:

While the Employer never proposed changing the method of calculating promotional increases, it points to two provisions of Article XXI.A of the 2012-2015 Agreement to support the change which it nonetheless implemented. First, the Employer cites the fact that, unlike the previous two agreements each of which provided for increases to the minimum for all employees in the first year of the agreement (2006 and 2009), though not in their second or third years (2007, 2008, 2010 and 2011), the 2012-2015

Agreement did not contain equivalent language providing for an increase to minimums on September 1, 2012.

Mr. Lenihan testified that when Article XXI.B of the 2009-2012 Agreement (Promotional Increases) referred to "increases provided in Part A," it was referring to the language in XXI.A.5 of that Agreement, which said that those not at the minimum for their rank on September 1, 2009, should be increased to the minimum on that date. Thus, the Employer seems to claim, the removal of equivalent language referencing September 1, 2012 in the 2012-2015 Agreement, means that a rise to the new minimum before promotional increases are calculated is no longer required. Mr. Lenihan, who was not a part of the Employer's team for the 2012 negotiations, appears to take this position notwithstanding the fact that the Employer has conceded that the 2006 and 2009 agreements provided for faculty members to be brought up to the minimum for their rank, before promotional increases were calculated, *in all of the six years* covered by those agreements. The Employer has failed to articulate any argument to explain how this position is consistent with the recognized practice of raising promoted faculty members to their new minima in 2010 and 2011, notwithstanding the lack of any equivalent language in Article XXI.A.6 and 7 of that Agreement or his testimony, that Mr. Weakly acted in error when he failed to apply the Agreement in this manner.

The other provision (or provisions) that the Employer appears to rely on is Article XXI.A.4-7. Specifically, it appears to claim that the Employer agreed to raise the minima listed in these sections, for each year of the Agreement, by the same amount as the negotiated annual increases, as an alternative to raising promoted Faculty Members to their new minima before calculating promotional increases. It claims that allowing promoted Faculty Members to be raised to these new minima, and then receive annual and promotional increases, would amount to "double dipping." However, a review of the CNAs in the record (J-1 through J-10), dating from 1987, shows that it is not unusual for the parties to agree to increase the minima by the same amount, or more, than the negotiating annual increases included in the relevant agreements. Thus, for 14 of the 22 years, prior to 2012, for which data is available in the record, the minima increased at or above the rate of negotiated annual increases. This data is summarized in Exhibit B, attached hereto. Nonetheless, throughout this time it is conceded that promoted Faculty Members were increased to the minima for their new ranks before promotional and increases were calculated.

The Ground Rules, agreed to by the parties at the commencement of the 2012 negotiations, provided that: "all formal proposals shall be presented in writing." UX-5 at ¶18. Once again, it is uncontested that no proposal to change the method of calculating promotional increases, other than the proposal to defer doctoral increases, was ever presented in writing, or in any other manner, by the Employer.

The Ground Rules also provided that "[a]ll agreements reached at the bargaining table are tentative and subject to ratification of a complete integrated agreement by the full membership of the respective parties." UX-5 at ¶14. The Employer's sole exhibit at the hearing was a copy of an email accompanied by a portion of an early draft of a consolidated agreement sent to the Employer's counsel by the Chapter's counsel. EX-1. The portion attached covers only changes to Article XXI. While the evidence fails to show the extent to which changes in the complete draft consolidated agreement were subsequently negotiated by the parties, it must be noted that this email shows that the consolidated agreement was negotiated between the parties' counsels. It is evident that representatives of both parties, for purposes of negotiating a final agreement, the sender of the email, Carl Levine (counsel for the Chapter), and the email's recipient Matthew Giacobbe (counsel for the Employer), were experienced negotiators.

## DISCUSSION

I have thoroughly reviewed and carefully considered the arguments and evidence submitted into the record by the College and the Union in support of their respective positions. The Union has the burden to prove, by a preponderance of the evidence, that the College violated the collective bargaining agreement, including but not limited to, Article XIX.A and XXI.B, by changing the method by which wage increases resulting from promotions are calculated, specifically by not raising faculty members' salaries to the contractual minimum for their new rank before calculating promotional increases, as was

done in the past. The disposition of the merits of the grievance must be rendered on the credible evidence set forth in the record of this proceeding.

This dispute is one of contract interpretation and centers on the contractual rights and obligations of the parties relating to the method by which wage increases resulting from promotions are calculated.

The starting point for analysis is the language and practice of the parties on the issue prior to the 2012-2015 Agreement. The record on this point clearly reflects three significant facts. First is that the method of calculation, for a significant period of time prior to the change in 2014, consistently raised faculty members to the minimum salary for their new rank prior to being given any applicable annual salary increases. Second, the College challenged or proposed to change this method of calculation at various points in time without success, the last of which was grieved in December 2011. [U. Ex. #2]. This resulted, by mutual agreement, in recognizing and maintaining the longstanding status quo as to the manner in which promotional increases had been granted in the past. [U. Ex. #3]. Third, the specific language governing promotions, at least since 1987 through the present, has been mutually recognized as that which appears at Article XXI.B:

A faculty member promoted to a new academic rank shall receive a six percent (6%) increase in his/her salary as of September 1 of the year in which the promotion is effective. This increase shall be in addition to any other salary increase provided in this Agreement and shall be computed after the addition of the increase provided in

Part A of this Article. A faculty member promoted from Professor to Senior Professor is excluded from the promotional increase. A faculty member promoted from Professor to Senior Professor shall receive an increase sufficient to bring him/her to the minimum annual salary for that rank.

The aforementioned December 2011 grievance and the College's response thereto confirmed the existence of the calculation practice asserted by the Union based upon how Article XXI.B had been applied, as well as the College's representation to continue to implement the practice. Although the College asserts that the elimination of language in the 2012-2015 Agreement provides it the right to make the change that the Union grieves, the fact that the parties acknowledged the language and practice of how to apply Article XXI.B prior to the 2014 change confirms that there was a contractual arrangement in place prior to the change implemented by the College in 2014. The record abundantly establishes that the prior calculation method had been the parties' normal and proper response to calculating salary increases upon promotion and, on the occasions in which the College raised questions about the practice, the question was resolved in favor of the continuation of the longstanding method.

The language in Article XXI.B is not clear and unambiguous on the precise method of calculating promotional increases except for the requirement to provide a "6% increase as of September 1 of the year in which the promotion is effective." As the provision states, the 6% increase is "in addition to any other salary increase provided in this Agreement and shall be computed after the addition of the increase provided in Part A of this Article." Although there is no

further clarity to the "in addition to" language, the parties mutually recognize that the practice had been to raise a promoted faculty member to the minimum of the new salary range associated with the new rank and to then apply the negotiated salary increase stated in Part A. Thus, the prior method of calculating promotional increases was rooted both in the contract language itself and the clear and practical construction of the language through its consistent application.

The College's principal defense to the grievance is that the calculation method that existed in the prior contracts was voided by the 2012-2015 Agreement because Article XXI.A.5 was deleted. This is said to undermine the Union's reliance on the practice under Article XXI.B. Article XXI.A.5 in the 2009-2012 Agreement was titled "2009-2010 Salary Minimums." It stated:

A. Instructional and Library Staff Salaries

5. 2009-2010 Salary Minimums

Any faculty member in the employ of the College on September 1, 2009, who will not be receiving the salaries set forth below for their 2009 increase, shall receive an increase effective September 1, 2009, sufficient to bring him/her to the annual salary set forth.

Section A.5 contained no reference to 2010-2011 or to 2011-2012. The reliance of the College on the absence of this language in the 2012-2015 Agreement as its primary defense has been carefully reviewed but it is not persuasive for several reasons. First, Article XXI.A.5 speaks solely to bringing



faculty to salary minimums in general without any reference to promotions. It stands separate and apart from Article XXI.B that specifically addresses promotional increases. The specificity of category in Section B, and the parties' mutual recognition that its application served as the guide for calculating promotional increases in the past, requires significant weight to be given to Article XXI.B as it has been applied over the general reference to salary minimums in Article XXI.A.5.

Second, there is no record evidence that the calculation of promotional increases had ever been linked to the language in Article XII.A.5 that spoke in general of bringing faculty members who were not at salary minimums up to salary minimums. If the College's obligations on how to calculate promotional increases was in fact tied to Article XXI.A.5 and not on the longstanding application and implementation of Article XXI.B, there would have been no basis for the College to calculate promotional increases as it did during the several years (2007-2008, 2008-2009, 2009-2010 and 2010-2011) in which there was no contractual mention of salary minimums for those years.

Third, the record clearly reflects the complete absence of any proposals by either party and any negotiations seeking to change either the language regarding promotional increases or the practice that implemented the manner in which promotional increases had been calculated. In the absence of any activity on the part of either party during the negotiations process in this instance or any

objection by either party orally or in writing to the continuance of promotional increase calculation methods, it cannot be inferred that there was any mutual intent to effectuate the change made by the College.

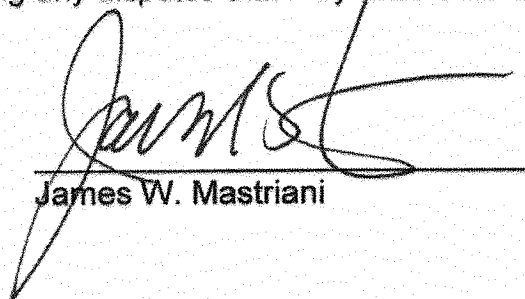
Fourth, it cannot be concluded that the Union's contract draft that deleted the Article XXI.A.5 reference to salary minimums in 2009-2010 was intended by the Union to repudiate the very method of promotional increase calculation that it now seeks to enforce and the parties have consistently applied in the past.

Accordingly, and based upon all of the above, and I conclude that the Union has established, by a preponderance of the evidence, that the Employer violated the collective bargaining agreement, including but not limited to, Article XIX.A and XXI.B, by changing the method by which wage increases resulting from promotions are calculated and, specifically, by not raising faculty members' salaries to the contractual minimum for their new rank before calculating promotional increases. As a remedy, the College shall calculate promotional increases for faculty who were promoted with an effective date of September 1, 2012 and thereafter consistent with the manner in which the promotional increases had been applied prior to the 2014 change and to make all such faculty whole retroactive to the effective dates of their promotions.

AWARD

The Employer violated the collective bargaining agreement, including but not limited to, Article XIX.A and XXI.B, by changing the method by which wage increases resulting from promotions are calculated and, specifically, by not raising faculty members' salaries to the contractual minimum for their new rank before calculating promotional increases. The College shall calculate promotional increases for faculty who were promoted with an effective date of September 1, 2012 and thereafter consistent with the manner in which the promotional increases had been applied prior to the 2014 change and to make all such faculty whole retroactive to the effective dates of their promotions. I retain jurisdiction for the sole purpose of resolving any disputes that may arise over the implementation of the remedy.

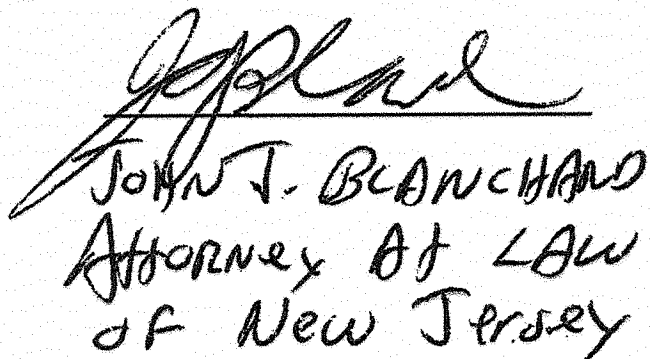
Dated: April 20, 2017  
Sea Girt, New Jersey



James W. Mastriani

State of New Jersey        }  
County of Monmouth       } ss:

On this 20<sup>th</sup> day of April, 2017, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.



JOHN J. BLANCHARD  
Attorney At Law  
of New Jersey