

IN THE MATTER OF ARBITRATION BETWEEN

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MINNESOTA STATE COLLEGE)	
FACULTY,)	
)	ARBITRATION
Union,)	AWARD
)	
and)	
)	KRESKY CLAIMING
)	GRIEVANCE
)	
MINNESOTA STATE COLLEGES)	
AND UNIVERSITIES,)	
)	
Employer.)	
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Arbitrator: Stephen F. Befort

Hearing Date: November 21, 2008

Post-hearing briefs received: January 12, 2009

Date of decision: February 5, 2009

APPEARANCES

For the Union: Anne F. Krisnik

For the Employer: George E. Warner

INTRODUCTION

The Minnesota State College Faculty (MSCF or Union) is the exclusive representative of a unit of professional faculty instructors employed by Minnesota State Colleges and Universities at its technical and community colleges (MnSCU or Employer). The Union brings this grievance claiming that the Employer violated the parties' collective bargaining agreement by declining to permit an employee on the recall

list to claim the work of teaching a three-credit course which the Employer instead assigned as overload to an unlimited full-time faculty member. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the Employer violate the parties' collective bargaining agreement when it offered a three-credit course to an unlimited full-time faculty member as an overload assignment, instead of offering it to a faculty member on the recall list?

RELEVANT CONTRACT LANGUAGE

ARTICLE 13

WAGES

Section 19. Overload Assignments and Overload Salary Maximum.

- A. An overload assignment shall be defined as any assignment to a faculty member that exceeds the workload assignment limitations in the contract. Overload assignments must be mutually agreed upon by the faculty member and the College President or designee.

- C. When offered to a full-time unlimited instructor, Overload shall first be offered to full-time unlimited instructors within the credentialed field, except where provisions of a grant require an exception to this provision.

ARTICLE 22

LAYOFF AND FACULTY TRANSFERS

Section 6. Layoff Benefits for Faculty with License Credentials

Subd. 2. Layoff Benefits Options.

Option A.

- A. Faculty members with Five (5) Years of Service. Options A and B below apply to faculty members with five (5) or more years of service.

Claiming or Recall Rights. The faculty shall hold claiming or recall rights to any unlimited full time, temporary full time, or unlimited part time bargaining unit vacancy for which s/he meets the minimum qualifications of the credential field and has met the recency requirement by updating his/her knowledge/skills or held an assignment(s) in that additional field within the last four (4) academic years, for a period of four (4) years.

The faculty member shall hold claiming rights to part time work only on his/her campus. To exercise these claiming rights, the faculty member must either hold the license for the work or meet minimum qualifications for the appropriate credentialed field and has met the recency requirement by updating his/her knowledge/skills or held an assignments(s) in that additional field within the last four (4) academic years.

Option B.

Lump Sum Payment. A faculty member selecting this option shall receive a lump sum payment of twelve thousand (\$12,000).

A faculty member who selects this option shall, at the time of actual lay off, sever all employee rights including recall, claiming, and reservation rights.

STIPULATION OF LIMITED FACTS

The parties have stipulated to the following facts:

1. The Minnesota State Colleges and Universities (MnSCU or Employer) and the Minnesota State Faculty Association (MSCF or Union) are parties to a collective bargaining agreement which is effective by its terms through June 30, 2009. The instant grievance arose under the collective bargaining agreement which was effective through June 30, 2007 (Agreement).
2. The arbitrator has jurisdiction to hear the above-referenced matter pursuant to Article 27, Grievance Procedure, of the Agreement.
3. The grievance was filed on January 23, 2007 and alleged that the Employer violated Article 22, Section 5 of the Agreement when Richard Kresky was denied assignment of credits he was qualified to teach.
4. Richard Kresky was laid off from his position as an unlimited full time state college instructor [at Lake Superior College] on May 23, 2006.

5. Mr. Kresky is currently listed on the recall list with claiming rights until May 23, 2010.
6. Mr. Kresky meets the minimum qualifications required for the Architectural Drafting course.
7. In fall 2006, the College offered part-time work to Mr. Kresky in Integrated Manufacturing. Mr. Kresky has continued to teach at the college part time.
8. In spring 2007, Lake Superior College (College) offered full-time unlimited instructor Jon Lintula the opportunity to teach a three (3) credit course in Architectural Drafting as an overload assignment. The instructor accepted the offer of overload pursuant to the Agreement.
9. Mr. Kresky contacted the College to claim the 3 credit course in Architectural Drafting. The College did not offer the opportunity to teach the three (3) credit course in Architectural Drafting to Mr. Kresky.
10. The College contends that it has the right to offer the course to an existing unlimited full-time faculty member rather than recalling an instructor who is on the recall list to a part-time temporary position.
11. MSCF believes the College had an obligation to offer the three credits of drafting to Mr. Kresky.

POSITIONS OF THE PARTIES

Union:

The Union contends that faculty on layoff status with recall rights have an absolute right to claim newly created part-time work on his or her campus pursuant to Article 22 of the parties' collective bargaining agreement. In this instance, the Union maintains that such part-time work existed once the College added a three-credit course that did not fit within the credit load of any existing instructor. Moreover, it is undisputed that Mr. Kresky is credentialed to teach the Architectural Drafting course. The Union argues that the Employer's reliance to the contrary on Article 13's overload language is misplaced since that provision merely sets forth the procedure to be followed

in offering overload work, but does not entitle the Employer to trump claiming rights through the use of an overload assignment. Indeed, the Union argues that the Employer's overload argument, if taken to its logical end, would have the effect of totally eliminating the concepts of part-time work and claiming rights. Finally, the Union asserts that the Employer has not established a past practice of using overload assignments in lieu of permitting laid off faculty to claim available part-time work and that the Employer also has not shown that the Union leadership acquiesced in such an interpretation of the parties' agreement.

Employer:

The Employer submits that part-time work and overload assignments are two entirely separate employment actions. In this case, the Employer offered an overload teaching assignment to a full-time unlimited instructor in a manner consistent with the provisions of Article 13 of the parties' agreement. The Employer points out that this article contains no requirement that such an assignment must first be offered to an instructor on lay-off status. The Employer acknowledges that the claiming rights afforded by Article 22 apply to work that would otherwise entail the hiring of an adjunct or new part-time faculty employee. In contrast, however, the Employer contends that it has the inherent management right to assign work as may be appropriate among current unit employees. Finally, the Employer argues that its interpretation of the agreement is supported by past practice and that the Union leadership has been aware and not objected to such practice.

DISCUSSION AND OPINION

A. The Contract Language

The parties rely on different portions of the collective bargaining agreement to support their respective positions. The Union relies on Article 22 which grants claiming rights to employees on lay-off status to new part-time work that they are qualified to perform. The Employer relies on Article 13 which authorizes the Employer to offer an overload assignment to a qualified full-time unlimited instructor. Neither provision expressly refers to or conditions the operation of the other provision.

The central question in this case is whether the College's decision to offer a new three-credit course in Architectural Drafting constituted "part-time work" within the meaning of Article 22. If so, Mr. Kresky, as a qualified instructor on lay-off status, had the right to claim that work. If not, the Employer had the right to offer that work as an overload assignment pursuant to Article 13.

The Union contends that the Employer's creation of a new course that does not fit within the credit load of an existing instructor constitutes part-time work for purposes of Article 22. The Employer, in contrast, maintains that the assignment of work to a newly-created position (either adjunct or permanent) is part-time work per Article 22, but that the assignment of overload work to a current instructor is not.

As a general matter, a public employer in Minnesota has the inherent managerial right to make work assignments unless restricted by the terms of a collective bargaining agreement. Minn. Stat § 179A.07, subd. 1. In this regard, many agreements establish limits on an employer's right to assign unit work to non-unit employees. On the other hand, it is not common for an agreement to limit an employer's right to assign overtime

work or to compel an employer to recall a laid-off employee to perform what otherwise would be designated as overtime work. The more common limitations, accordingly, serve to protect unit positions rather than overload work.

The most natural reading of the parties' contract is in a manner consistent with this general practice and understanding. The contract's provision for claiming rights protects a laid-off employee's rights in the event that the Employer seeks to create a new position to perform bargaining unit work. That provision, however, does not diminish the Employer's right to assign work, including overload work, within the unit positions that already exist.

B. Past Practice

The parties additionally debate as to whether a past practice exists that might influence the interpretation of these contractual provisions. As a general matter, a clear and well-established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A "past practice" arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 623-26 (6th ed. 2003).

The Employer claims that it long has taken the position that claiming rights do not apply to overload work. The Employer introduced the testimony of Jeffrey Wade, System Director for Labor Relations, who stated that he advised a number of past and current Union officials of this position, and that the Union has never filed a grievance

challenging this position. Toni Munos, System Director for Personnel, also testified that she has provided similar advice to college administrators over the past two decades.

The Union, in contrast, argues that the Employer has not identified any actual instances in which it had previously implemented its position by bypassing an instructor on layoff status by offering overload assignments to a full-time instructor. In addition, the Union offered the testimony of Greg Mulcahy, MSCF's current President, who testified that he informed Mr. Wade of the Union's disagreement with the Employer's position on this issue.

In the end, I do not think that past practice analysis alters the natural construction of the parties' agreement. While the Employer has established that it has taken a long-term view that it may make overload assignments without acceding to claiming rights, it does not appear that the Employer has established the existence of a long-term *practice* of making such assignments and, in any event, it does not appear that the Union has acquiesced in the permissibility of such a practice. As such, I conclude that no binding past practice controls the outcome of this dispute.

C. Conclusion

In spite of the Employer's failure to establish a past practice in this matter, I believe that the most natural reading of the parties' contract nonetheless supports the Employer's position. The Employer may assign overload work under Article 13 to current full-time instructors within the bargaining unit without first allowing instructors on layoff status to exercise claiming rights to such work. On the other hand, instructors on layoff status have the right under Article 22 to claim new part-time work in the event that the Employer proposes to create a new permanent or adjunct position for the purpose

of performing such part-time work. In the context of the current grievance, this means that Mr. Kresky did not have the right to claim the three-credit Architectural Drafting course that the College added in 2007.

AWARD

The grievance is denied.

Dated: February 5, 2009

Stephen F. Befort
Arbitrator