

IN THE MATTER OF ARBITRATION BETWEEN

MINNESOTA STATE COLLEGE)
FACULTY,)
)
) **ARBITRATION**
) **AWARD**
)
) **Union,**)
)
and)
)
) **KALKES, KOHLS, & RICHMAN**
) **LAYOFF GRIEVANCE**
)
)
MINNESOTA STATE COLLEGES)
AND UNIVERSITIES,)
)
)
) **Employer.**)
_____)

Arbitrator: Stephen F. Befort

Hearing Date: June 16, 2009

Post-hearing briefs received: July 24, 2009

Date of decision: August 14, 2009

APPEARANCES

For the Union: Jess Anna Glover

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 laying off three unlimited part-time faculty

members from the Cosmetology program at Saint Paul College. 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 Articles 20, 21, or 22 of the parties' collective bargaining agreement when it laid off three members of the unlimited part-time faculty employed in the Cosmetology Department at Saint Paul College?

RELEVANT CONTRACT LANGUAGE

ARTICLE 20 APPOINTMENTS AND CREDENTIAL FIELDS

Section 1. Appointments. All appointments shall be made by the College via a letter of appointment which includes the type of appointment, the length of appointment (if not an unlimited position), the faculty member's address, state of Minnesota employee identification number, and the wages. . . .

Subd. 1. Types of Appointments. The following types of appointments may be made: Unlimited Full-time, Unlimited Part-time, Temporary Full-time, and Temporary Part-time, and Adjunct.

Subd. 2. Posting of Vacancies. The College President or designee shall simultaneously distribute both full-time and part-time vacancy notices to all campus/sites for posting on the official bulletin board prior to any external advertisements or postings. Copies shall also be sent to the MSCF designee. No position shall be filled until at least ten (10) days have elapsed after posting the notification.

Section 2. Unlimited Full-time. An unlimited full-time faculty member is defined as a faculty member with a full-time assignment for an academic year that carries the assumption that such employment will continue on a full-time basis in subsequent years. To qualify for unlimited full-time status, the faculty member must meet minimum qualifications for the credential field and successfully complete probationary status. . . .

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Section 3. Unlimited Part-time. An unlimited part-time faculty member is defined as a faculty member with a part-time assignment between forty percent (40%) and eighty percent (80%) for an academic year that carries the assumption

that such employment will continue on a part-time basis in subsequent years. To qualify for unlimited part-time status, the faculty member must meet minimum qualifications for the credential field and successfully complete the probationary period. . . .

Subd. 1. Level of Minimum Guarantee. The minimum percentage guaranteed of an unlimited part-time position shall be established when a position is posted or be the level of employment during the previous academic year when a temporary part-time faculty member is granted unlimited part-time status. Assignments above the minimum percentage may be made. Unlimited part-time faculty members will be offered up to eighty percent (80%) when assignments are available. Fringe benefits will be based on the minimum guaranteed appointment or actual academic year workload, whichever is greater and will be annualized.

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Section 4. Temporary Full-time. A temporary full-time faculty member is defined as a faculty member who has been hired for a full-time assignment for an academic year. A temporary full-time faculty member must meet the minimum qualifications for the credential field of the position. Such employment terminates at the end of the stated appointment. . . .

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Section 5. Temporary Part-time. A temporary part-time faculty member is defined as a faculty member with a part-time assignment for five (5) or more credits in a semester or a semester session. Such employment terminates at the end of the stated appointment period except as provided in Article 25 of this Contract. . . .

ARTICLE 22 LAYOFF AND FACULTY TRANSFERS

Section 1. Layoffs. Layoffs of unlimited faculty members may occur only when necessary for bona fide, good, and sufficient reasons.

Subd. 1. Reasons. The administration shall provide both the MSCF and the faculty member affected a written summary of the circumstances giving cause to the layoff and of the alternatives to layoff which have been considered. If layoffs are to occur, the administration shall meet with the MSCF to discuss the layoffs at a shared Governance Council meeting. Such meeting shall be scheduled prior to November 15.

Subd. 2. Layoff Notice Timelines. If a layoff is contemplated by the administration, the faculty member on the unlimited full-time seniority roster who is to be laid off shall be notified of the impending layoff no

later than November 1 to be effective on the last day of the next spring semester. Unlimited part-time faculty members shall be notified in writing of impending layoff by November 1 of an impending layoff to be effective at the end of the spring semester, and no later than April 1 of an impending layoff effective at the end of the following fall semester. The layoff is subject to the Shared Governance language contained in Article 8.

Subd. 3. Order. Layoffs shall be based on inverse seniority within the credential field. A faculty member shall not be laid off if a less senior faculty member in the college holds a position for which the first faculty member is qualified and has greater seniority at the college. No layoffs shall be made if the college continues to employ part-time faculty members who are providing bargaining unit work in the faculty member's credential field(s).

- A. Post Retirement Annuitant members in the credential field shall be terminated before a probationary faculty member is terminated.
- B. Temporary faculty members in the credential field shall be terminated before a probationary faculty member is terminated.
- C. Probationary faculty members in the credential field shall be terminated before any unlimited faculty member is laid off.
- D. Unlimited part-time faculty shall be laid off based on inverse seniority within the credential field prior to any unlimited full-time faculty member.

FACTUAL BACKGROUND

The MnSCU system consists of 32 public institutions of higher education within the State of Minnesota, including state universities, community colleges, technical colleges, and consolidated colleges. The MSCF represents approximately 5,400 faculty members employed at the 25 community and technical colleges operated by MnSCU.

The parties have long maintained a collective bargaining relationship governing the terms and conditions of employment for faculty members represented by the MSCF.

The present grievance arose under the parties' agreement effective from July 1, 2007 through June 30, 2009.

This dispute arises from the layoff of three unlimited part-time faculty members employed in the Cosmetology Department at Saint Paul College – Jean Kalkes, Charlene Kohls, and Ilene Richman (grievants). The Cosmetology curriculum at Saint Paul College (SPC) encompasses instruction in nails, hair and esthetics. Each of these instructors has taught at SPC for more than ten years and possesses appropriate credentials to teach any of the courses offered by the department.

An unlimited part-time faculty position “carries the assumption that such employment will continue on a part-time basis in subsequent years.” CBA, Article 20, Section 3. The parties' agreement provides that the Employer may lay off unlimited faculty members only when “necessary for bona fide, good, and sufficient reasons.” CBA, Article 22, Section 1.

The Employer notified each of the grievants during late March 2008 that they were being laid off. The effective date of the layoffs was December 23, 2008, the last day of the fall 2008 semester. The layoff letters stated:

. . . this action is necessary due to lack of enrollment. The college has adjusted the program offering times to boost enrollment and are continuing to develop marketing materials and a Service Career Day event at the college to attract students to the program. . . .

The Employer submitted evidence showing that declining enrollment in the Cosmetology program has been a concern for a number of years. Annual program evaluation data show a steady decline in the student/teacher ratio for the Cosmetology program as follows:

<u>Year</u>	<u>Student-Teacher Ratio</u>
2005	16.76
2006	12.99
2007	9.88
2008	8.73

According to the Employer, the desired ratio is 18 students for each teacher (i.e., 18.00).

The Union claims that these figures overstate the actual decline in enrollment, since the Employer divides the Cosmetology Department into three cost centers, and the other two cost centers experienced a smaller rate of enrollment decline. Nonetheless, the individual grievants acknowledged during the hearing that the department has experienced a noticeable decline in student enrollment.

Program review memoranda prepared between 2006 and 2008 recommended reductions in staff as a response to this decline in enrollment. In 2006, a memorandum authored by Marilyn Krasowski “recommended layoff of Del Blaeser as she is on a special retirement program and is the first in line for layoff.” After this recommendation was implemented, the faculty of the Cosmetology Department consisted of only one unlimited full-time unlimited instructor, three unlimited part-time instructors (i.e., the grievants), and some adjunct instructors. Review memoranda prepared in 2007 and 2008 further recommended the reduction of one part-time adjunct cosmetology instructor. None of the memoranda expressly recommended the layoff of any of the unlimited positions occupied by the grievants.

In December 2008, prior to the effective date of the greivants’ layoff, the Employer posted a new unlimited full-time faculty position in the Cosmetology

Department. Two of the grievants applied for the position, but they were not selected. Instead, the Employer selected Margaret Flicek, then a temporary faculty member, to fill the new position.

Each of the grievants was laid off from their unlimited part-time position on December 23, 2008. However, due to enrollment being stronger than expected, the Employer offered each of the grievants employment as a temporary part-time faculty member for the spring 2009 semester beginning in January 2009. Each grievant taught the same amount as guaranteed under their respective previous appointments, but without any right to continued employment.

The Union filed a grievance on April 30, 2008 claiming that the layoffs violated the parties' collective bargaining agreement. The Employer denied the grievance throughout the steps of the grievance procedure, and this matter proceeded to arbitration.

POSITIONS OF THE PARTIES

Union:

The Union contends that the Employer's action in laying off the grievants violates the parties' collective bargaining agreement in three respects. First, the Union maintains that the Employer did not have a "bona fide, good, and sufficient reason" to make the layoffs in question. Second, the Union argues that the Employer did not consider alternatives to the layoffs as required by the agreement. Third, the Union asserts that the Employer failed to follow the contract's order of layoff provision. As a remedy, the Union asks that the Employer be ordered to rescind the layoffs and to make the grievants whole for any lost compensation and benefits.

Employer:

The Employer claims that the layoffs did not run afoul of the parties' collective agreement. More particularly, the Employer denies each of the Union's three contentions. The Employer maintains that it had a legitimate basis for the layoffs due to the ongoing decline in student enrollment in the Cosmetology Department. The Employer also asserts that the layoff letters sufficiently addressed possible alternatives which had not proven sufficient to avert the reduction-in-force. Finally, the Employer argues that its actions complied with the agreement's order of layoff provision in that it did not employ any temporary faculty at the time the layoff became effective or during the following semester. The Employer also maintains that the grievants, as former "blue" faculty (*i.e.*, faculty previously represented under the United Technical College Educators contract), have no recall or claiming rights following a layoff.

DISCUSSION AND OPINION

The Union challenges the Employer's decision to layoff the grievants on three grounds. Since two of those grounds have merit, the third basis of the Union's challenge need not be addressed.

A. Reason for Layoff.

The parties' contract provides that the Employer may lay off members of the unlimited faculty for a "bona fide, good, and sufficient reason." The Employer points out that employers generally are afforded broad discretion to determine the number of employees needed to perform available work. See ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 781-83 (6th ed. 2003). More specifically, the Employer cites to a recent decision of Arbitrator Gil Vernon interpreting the same contract language and

concluding that a layoff decision of the Employer should be subject only to “limited review” and sustained unless “arbitrary, capricious, or discriminatory.” Minnesota State Colleges and Universities and Minnesota State College Faculty (Vernon, Feb. 9, 2009).

In this instance, the Employer asserts that it has submitted sufficient evidence of a decline in Cosmetology student enrollment to establish that the lay off the three grievants is not arbitrary, capricious, or discriminatory.

I agree with most of the Employer’s arguments, but disagree with its ultimate conclusion. Employers generally are entitled to some leeway in determining staffing levels. And, the Employer has submitted evidence showing a decline in enrollment with respect to the Cosmetology program at SPC.

The problem with the Employer’s line of reasoning is that it hired Margaret Flicek as a new unlimited faculty member only a few weeks before the effective date of the grievants’ layoffs. This hiring decision effectively undermines the Employer’s argument that it needed to carry through with the layoff of the grievants due to a lack of work.

The Employer counters that its action in hiring Ms. Flicek is irrelevant because the hiring of someone already serving as a temporary faculty member did not result in a net increase in staffing. This argument, however, misses the point. Pursuant to Article 22 of the parties’ agreement, the Employer would have been obligated to terminate Ms. Flicek’s appointment before it could layoff the grievants from their unlimited appointments. By hiring Ms. Flicek into a new unlimited appointment, the Employer effectively removed the grievants from their unlimited appointments and transferred that status to a new hire. Under the circumstances, this transfer of tenure rights constitutes an arbitrary and capricious exercise of layoff rights under the parties’ contract.

B. Order of Layoffs

The Union contends that the Employer also violated the parties' agreement because the Employer did not abide by the agreement's specified pecking order in undertaking the layoff of the grievants. This pecking order, detailed in Article 22, Section 1, Subdivision 3, provides that "no layoffs shall be made if the college continues to employ part-time faculty members who are providing bargaining unit work in the faculty member's credential field(s)."

The Employer urges several defenses to this claim. First, it asserts that it did not offend Article 22 by employing temporary faculty members in the Cosmetology Department during the interim between the late March 2008 layoff notices and the December 23, 2008 effective layoff date. Second, the Employer asserts that it did not employ any temporary or adjunct faculty other than the grievants on December 23, 2008 or during the Spring 2009 semester. Finally, the Employer asserts that the grievants, as "blue" faculty members previously represented by the United Technical College Educators (UTCE) union, do not have any recall or claiming rights under the parties' current contract.

I agree with the Employer that the contract language does not prohibit the Employer from giving notice to an unlimited faculty member of the need for a layoff even though it currently utilizes non-unlimited faculty members to perform bargaining unit work. From a policy perspective, it is not implausible that a college may perceive a legitimate need for future layoffs while still requiring the services of temporary faculty to meet current needs. I also agree that the Union has not established that the college

employed temporary faculty members in the Cosmetology Department on the date that the grievants were laid off (December 23, 2008).

The remaining issue concerns whether the Employer employed any temporary or adjunct faculty in the Cosmetology program during the spring semester. In this regard, the Employer's post-hearing brief states as follows:

Only retaining less favored employees under the Order provision during a period when more favored employees have been "laid off" and are out of work threatens the purpose of the Order provision. . . . [Here,] the Union failed to offer any proof that in spring semester 2009, no one except for the Grievants, who had accepted temporary part-time work for the spring of 2009, was working in the Cosmetology department. Not one adjunct, not one temporary, not one probationary part-time faculty member is identified as working during the spring 2009 semester except for the Grievants herein.

Employer's brief at 14.

In actuality, however, the Employer did employ temporary faculty during the spring 2009 semester, namely the three grievants. Rather than continue their unlimited appointments given spring teaching needs, the Employer laid them off and then very quickly hired them back as temporary workers to perform the same work but now without any right to expect continued employment. This action resulted in the very same harm that would have occurred had the Employer hired other temporary instructors to perform this work. That is, the Employer's hiring of the grievants as temporary employees to perform bargaining unit work in spite of laying them off for a purported lack of work, deprives the grievants of their tenure rights just as much as if the Employer had hired three new adjuncts to perform that work.

The Employer nonetheless argues that its action is proper under the parties' agreement because "blue" faculty such as the grievants have no recall or claiming rights following layoff. But, this argument, understood in the totality of this case, would lead to

the absurd result that the order of layoff provision has no effect other than on the single date that the layoffs are implemented. According to the Employer's interpretation, it can utilize temporary employees to perform bargaining unit work at any time preceding and following the layoff of unlimited faculty, so long as such workers are not employed on the date that the layoffs actually occur. I do not think that is the intent of the order of layoff provision. Instead, I think that this provision serves to prevent the contemporaneous substitution of temporary faculty to perform the unit work of unlimited faculty. That is what occurred in this case.

C. Conclusion

It is important to take a big picture view of what transpired in this matter. The Employer laid off three long-term tenured faculty members claiming a lack of work. It then hired a new full-time faculty employee shortly before the layoffs took place and hired back the three laid-off instructors as temporary workers before the start of the next semester to perform the same work they had performed in the past. The end result is not a diminution of work, but a diminution of tenure rights. This outcome is not consistent with either the language or the spirit of the parties' agreement.

AWARD

The grievance is sustained. The Employer is directed to reinstate the grievants to their positions as unlimited part-time members of the faculty and to make them whole for any loss in pay and benefits that may have resulted. The Employer also is directed to correct the grievants' personnel files to reflect this determination. Jurisdiction is retained for a period of sixty (60) days from the date of this award to address any remedial issues as may be necessary.

Dated: August 14, 2009

Stephen F. Befort
Arbitrator