

IN THE MATTER OF THE ARBITRATION BETWEEN

THE INTER FACULTY ORGANIZATION,)	UNION'S CASE NO. 10BE01
)	EMPLOYER'S CASE NO. 10-043
)	
)	
)	
Union,)	
)	
and)	
)	
MINNESOTA STATE COLLEGES AND UNIVERSITIES,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

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On July 26 and 27, 2012, and on August 29 and 30, 2012, in St. Paul, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor

agreement between the parties by refusing to assign the grievant, Susan J. Scrivner, to teach a class as an overload assignment. Post-hearing briefs were received by the arbitrator on November 18, 2012.

FACTS

The Minnesota State Colleges and Universities (hereafter, the "Employer" or "MnSCU") is an agency of the government of the State of Minnesota. The Employer operates a system of technical colleges, community colleges and state universities that offer programs in post-secondary education. The seven universities in the system offer four-year and post-graduate programs. The Minnesota State University Bemidji, located at Bemidji, Minnesota, is one of those seven universities.

The Inter Faculty Organization (the "IFO" or the "Union") is the collective bargaining representative of faculty members who teach in the seven universities in the MnSCU system, including those who teach at the Minnesota State University Bemidji. At each of the seven universities, the IFO has established a local affiliate, the members of which are faculty members employed at that university. The parties refer to these local affiliates as "Faculty Associations."

The grievant began teaching at the Minnesota State University Bemidji (hereafter, "MSUB" or the "University") in 1975 as an Assistant Professor in the English Department. Since then, she has attained the rank of full Professor, and she has continued to teach in the MSUB English Department. In 2012, she began a phased retirement, reducing her teaching load to half-

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time. At the start of her phased retirement, the grievant became eligible to receive pension payments paid by the Minnesota Teachers Retirement Association (the "TRA").

A retiring teacher's TRA pension is calculated 1) by determining total years of teaching service, 2) by crediting a statutorily fixed percentage for each such year of service, 3) by finding the total of such yearly percentages (for example, thirty years of service multiplied by 1.9% per year equals 57%), and 4) by applying that total percentage to the retiring teacher's highest average earnings during five consecutive years (as the parties refer to those years, the "high-five").

Almost always, a teacher's five consecutive highest paid years are the last five years before retirement. It is common practice for teachers who are approaching retirement to try to increase the total number of credits they teach during the last five years before retirement -- thus to raise high-five earnings, with a consequent increase in the pension paid after retirement.

This grievance was first presented as a "Step II" grievance on July 20, 2009, during the term of the parties' 2009-2011 labor agreement. It alleges that the Employer violated that agreement by refusing to assign the grievant to teach a three-credit class in entry-level English Composition as an "overload" assignment during the fall semester of 2009, and, instead, hiring an adjunct teacher to teach the class.

The provision of the labor agreement that is primarily at issue is Article 21, Section E, Subdivision 3(a), which establishes the parties' agreement about the use of adjunct teachers.

I set that provision out below, followed by other provisions of the agreement that define language relevant to the grievance:

Article 21. Appointment of Faculty

Section E. Appointment. Appointments shall be one of the following seven (7) types:

Subdivision 3. Adjunct Appointments.

a. The Administration and the IFO recognize that circumstances may dictate that faculty tasks cannot be accomplished within the workload of permanent faculty, including overload. When the President/designee determines that such conditions exist he/she may authorize adjunct appointments in accordance with the following principles:

1. To meet temporary staffing needs due to enrollment increases for which normal full funding is not provided.
2. To meet temporary staffing needs when faculty are reassigned to other duties or who are on sabbatical or on other leaves of absence.
3. To teach courses requiring special expertise and/or to meet special programmatic needs of departments where such expertise and needs cannot otherwise be provided by the faculty within the department.

Hereafter, I may refer to Article 21, Section E, Subdivision 3(a), merely as "Subdivision 3(a)"; I may refer to the three numbered "principles" it lists as "Principle 1," "Principle 2" and "Principle 3"; and I may refer to the language that precedes the listing of Principles as the "Threshold Language."

The following provisions of the labor agreement define "workload" and "overload":

Article 10. Workload

Section A. Faculty Workload. . . .

Subdivision 1. A faculty member's teaching load shall not exceed fourteen (14) undergraduate credit hours per semester nor twenty-four (24) undergraduate credit hours per academic year.

Article 13. Summer Sessions

Section A. Workload. A full-time summer session workload shall consist of no more than six (6) credit hours. The total workload over summer session shall not exceed sixteen (16) credits.

Article 12. Overload Pay and Non-Instructional Activities

Section A. Definition. An overload shall be defined as a specific assignment, acceptable to the faculty member and approved by the President/designee, occurring within a faculty member's period of appointment, which is in excess of the faculty member's workload as defined in Article 10 and in Article 13, Section A. . .

Section D. Limitation. Normally, total workload including overload shall not exceed sixteen (16) credits per semester and total overload shall not exceed five (5) credits per academic year.

The parties' arguments about the meaning of Subdivision 3(a) also make relevant the meaning of the word "reassigned" in Principle 2. In Article 5, Section Y, the agreement gives a relevant definition of "reassigned time," thus:

. . . Reassigned time shall mean an alternative assignment other than classroom teaching for one or more credit hours during the academic year or summer. . . .

The agreement also includes provisions, not directly relevant, that establish rights and limitations relating to reassigned time taken by department chairs.

A series of emails, sent in May and June of 2009, between the grievant and Susan C. Hauser, Chair of the MSUB English Department, led eventually to the grievance. On May 18, 2009, at 1:40 p.m., Hauser sent the grievant the following email:

Hello, Susan - Rose said you would like an overload College Writing class [during fall semester, 2009, as the parties agree]. I have sections at 8:00 a.m. TH and 12:00 TH. Would you like me [to] put you in the schedule for one of those (I'm guessing the noon section, which works just fine).

The grievant responded to Hauser's email eight minutes later, "Yes, the noon one would be better." Hauser replied to the grievant three minutes after that, "Okay - Thank YOU!"

On June 10, 2009, Hauser sent the grievant the following email:

Hello Susan -- Our college cannot afford overload for reassigned college writing sections. This means we will be hiring an adjunct for the section I had hoped would be assigned to you. The contract allows this for sections that are "reassigned" when faculty take other duties. The contract item is Article 21, Section E, Subdivision 3.a.2 in the new contract. . . .

The MSUB English Department is a part of the College of Arts and Sciences (the "College"). During 2009, Elizabeth E. Dunn was the Interim Dean of the College. As Dean, she was responsible for many of the decisions about spending funds allocated to the College by the University. After the May 18, 2009, exchange of emails between Hauser and the grievant, set out above, Dunn told Hauser that, because of budget constraints, the English Composition class at issue would not be taught by a permanent faculty member as an overload assignment, but that, instead, it would be taught by an adjunct teacher.

Dunn testified that, because of the poor economy resulting from the recession that began in 2008, state funding in support of MnSCU and the University had been reduced. For 2009-2010, MSUB allocated \$240,200 of the consequent reduction in funding to the College, a reduction that was repeated during the 2010-2011 fiscal year.

The parties agree that the labor agreement sets the compensation of an adjunct teacher for teaching the three-credit

class at issue at \$3,600, whereas, if the grievant had taught the class as an overload assignment, she would have been paid \$6,701.61 for that teaching.

On June 11, 2009, Dunn sent the following email to the grievant and Hauser:

Dear Susans: Yes, in this case the task cannot be accomplished with overload because we are in subcategory #2 -- meeting a temporary staffing need when faculty are reassigned to other duties. The College has not been backfilled for this reassignment at the overload rate but rather at the adjunct rate -- so the task can't be accomplished in regular faculty load due to reassignment and it can't be accomplished at the overload rate because there is not enough money, therefore we can assign adjuncts.

Dunn testified that Hauser had been assigned in 2008 to the task of coordinating the preparation of a self-study that the University was required to present to the Higher Learning Commission ("HLC"), in order to obtain renewal of the University's accreditation. The HLC requires presentation of such a self-study every ten years. Dunn asked Hauser to coordinate the work because she had written the previous self-study.

The Employer presented in evidence a memorandum dated November 4, 2008, from Nancy C. Erickson, Interim Vice President for Academic Affairs, to Jon Quistgaard, President of the University, in which Erickson described the arrangement made with Hauser to compensate her for coordinating the self-study. The memorandum describes work to be done by Hauser in 2008, 2009 and 2010 and the compensation she would receive for that work. Because the description of the work is in the first

person, it appears that at least part of it was written by Hauser and transposed into Erickson's memorandum, thus:

. . .
Summer 2009 (Between May 13 and August 13):

Receive 20 extra duty days

No backfill needed

Begin coordinating notes from committees; begin writing text; conduct interviews as needed

Fall 2009:

Receive 6 credits reassigned time

Backfill needed: 6 credits overload or adjunct (For College Writing sections, to free other department faculty to teach my courses)

Write and otherwise prepare the bulk of the document using notes from committees, interview notes, documents

Spring 2010:

Receive 3 credits reassigned time

Backfill needed: 3 credits overload or adjunct (some of these tasks may take place during the summer break, depending on the deadline for delivering the documents to HLC)

Prepare final document for submission to HLC; be available during the site visit

Dunn testified that Hauser was originally scheduled to teach two classes of three credits each of entry level English Composition in the fall semester of 2009 and to teach another such three-credit class in the spring semester of 2010. Hauser was relieved of that work and "reassigned" to do the work of coordinating the self-study for presentation to the HLC. Because Hauser was reassigned to other work, Dunn had to "backfill" the teaching of those classes -- i.e., have Hauser replaced as the teacher of the classes, either by a regular faculty member as an overload assignment or by an adjunct teacher under an adjunct appointment.

Dunn testified that, as she interpreted Subdivision 3(a), she, as the President's designee, had the option of backfilling

for the classes Hauser could not teach by either method -- by an overload assignment or by an adjunct appointment. She testified that she had almost no funds -- about \$10,000 to \$12,000 for the 2009-2010 fiscal year -- with which to backfill classes and that she backfilled for Hauser's classes with adjunct appointments in order to reduce the cost of backfilling. By using an adjunct teacher to backfill for the three-credit class that was the subject of the grievance as originally presented in June of 2009, Dunn saved \$3,101.61, the difference between the \$3,600 cost of an adjunct appointment and the \$6,701.61 cost of an overload assignment to the grievant.

The grievant again requested overload assignments in similar three-credit classes, to be taught during spring semester of 2010, during fall semester of 2010 and during spring semester of 2012. The Employer refused each of these requests for overload assignment, all of which were made to backfill for the reassigned time of regular faculty. Instead, the Employer, appointed adjunct teachers to teach those classes, to reduce the cost of backfilling for them. During grievance processing, the Union notified the Employer that the original grievance presented in June of 2009 should be considered amended to include the allegation that the Employer violated the labor agreement by refusing to assign overload classes to the grievant for spring semester of 2010, for fall semester of 2010 and for spring semester of 2012. The Employer does not oppose inclusion of these claims in the original grievance. The parties agree that the grievance, as thus amended, should be decided under the

2009-2011 labor agreement; I may sometimes refer to that agreement simply as the "labor agreement" or as the "current labor agreement."

DECISION

Each of the parties argues that the language of Subdivision 3(a), properly read, is clear and supports its position, and they both make the corresponding argument that, because the language is clear, extrinsic evidence is not needed for its interpretation. Nevertheless, almost all of four hearing days was used by the parties in the presentation of such extrinsic evidence -- about bargaining history and about past administration of the language.

Accordingly, I organize this Decision by making a preliminary interpretation of Subdivision 3(a), unassisted by extrinsic evidence, and I follow that preliminary interpretation with an analysis of the evidence about bargaining history and past contract administration -- to determine how, if at all, that interpretation should be modified because of bargaining history or contract administration.

First. Interpretation of the Language.

What follows is my preliminary interpretation of Subdivision 3(a), derived from its language alone -- but with the aid of definitions given elsewhere in the labor agreement.

The purpose of Subdivision 3(a), apparent on its face, is to limit the use of adjunct teachers. The provision does so by requiring the Employer to use "permanent faculty" for teaching

unless there occur certain pre-conditions, which, if they are present, allow the use of adjuncts.

Subdivision 3(a) has two sentences, the first of which is a declarative statement that, of itself, makes no proscriptive requirement, thus:

The Administration and the IFO recognize that circumstances may dictate that faculty tasks cannot be accomplished within the workload of permanent faculty, including overload.

The second sentence of Subdivision 3(a) is all of its remaining text, including the three numbered "Principles" that state alternative, but primary, pre-conditions to the use of adjuncts, thus completing the second sentence:

When the President/designee determines that such conditions exist he/she may authorize adjunct appointments in accordance with the following principles:

1. To meet temporary staffing needs due to enrollment increases for which normal full funding is not provided.
2. To meet temporary staffing needs when faculty are reassigned to other duties or who are on sabbatical or on other leaves of absence.
3. To teach courses requiring special expertise and/or to meet special programmatic needs of departments where such expertise and needs cannot otherwise be provided by the faculty within the department.

Existence of one of the staffing needs described in the three Principles is a primary pre-condition to the use of adjuncts. There can be no adjunct appointment unless the determination to appoint an adjunct teacher is made "in accordance with" a need described in one of the three Principles.

What I have called the Threshold Language consists of the first sentence of Subdivision 3(a) and part of the second

sentence -- the part that precedes listing of the three Principles. As I describe below, the Threshold Language in its present form was first adopted in bargaining for the 1995-97 labor agreement, and it has not been changed since then (though there have been changes since then in the language of the three Principles).

The 1995-97 addition of the Threshold Language established a new pre-condition to the use of an adjunct appointment in the following manner. The second sentence of Subdivision 3(a) authorizes the Employer to use adjuncts "when the President/designee determines that such conditions exist." The antecedent of "such conditions" appears in the first sentence -- when "circumstances may dictate that faculty tasks cannot be accomplished within the workload of permanent faculty, including overload." The determination that "such conditions exist" must, of course, be made in good faith, i.e., it must accord with the meaning of Subdivision 3(a).

Thus, Subdivision 3(a) allows the use of adjuncts only when 1) an adjunct is needed to fill one of the staffing needs described in the three Principles and 2) the President or designee makes a good faith determination that "circumstances" dictate that the "faculty tasks" described in that Principle "cannot be accomplished within the workload of permanent faculty, including overload."

In the present case, the parties agree that Hauser's reassignment in the fall semester of 2009 satisfied one of the pre-conditions to the use of an adjunct appointment -- that her

reassignment created the staffing need described in Principle 2. The parties disagree, however, whether the other pre-condition to the use of an adjunct was present -- the one described in the first sentence of the Threshold Language. They differ whether, within the contract's meaning, "circumstances" dictated that the teaching of Hauser's three-credit English Composition class could not be accomplished by having the grievant teach the class as an overload assignment.

The Union interprets the first-sentence pre-condition as requiring the use of an overload assignment to a member of the permanent faculty if that faculty member 1) has sufficient workload capacity or overload capacity to teach the class to be backfilled, 2) is qualified to teach the particular class to be backfilled and 3) is willing to teach the class as an overload assignment.

Article 10 of the labor agreement, set out above, sets the maximum workload of a faculty member at fourteen undergraduate credit hours per semester and twenty-four undergraduate credit hours per academic year. Article 12, Section A, of the labor agreement, also set out above, defines an "overload" as an assignment "in excess of the faculty member's workload," and Article 12, Section D, entitled, "Limitation," provides that "[n]ormally, total workload including overload shall not exceed sixteen (16) credits per semester and total overload shall not exceed five (5) credits per academic year."

The grievant had regular workload assignments in the 2009-2010 academic year totaling twenty-four credits, and thus

she was at the maximum workload capacity set by Article 10 of the labor agreement. She received no other overload assignment in either semester of the 2009-2010 academic year, and thus, if she had been assigned to backfill for Hauser in either semester of that year, she could have accepted the assignment as an overload assignment without infringing the maximum overload capacity set by Article 12, Section D. The grievant had taught the particular English Composition class that was to be backfilled many times and was qualified to teach it.

The grievant's regularly assigned workload in each of the semesters for which the amended grievance alleges a violation was at the maximum workload, but, if she had been assigned the overload credits at issue in each such semester, she would not have exceeded the limit set by Article 12, Section D. In each of the semesters for which the amended grievance alleges a violation, the need to backfill arose under Principle 2, the Reassigned Time Principle. With respect to each of the additional claims made by the amended grievance, the Employer argues that financial constraint was the "circumstance" that prevented the teaching of the classes at issue within the grievant's workload, including overload, and that the Employer was not obligated to backfill with an overload assignment rather than an adjunct appointment.

The Employer argues that Subdivision 3(a) should be interpreted as Dunn interpreted it. It urges that the first-sentence pre-condition allowed refusal of the grievant's request to teach Hauser's English Composition class as an

overload assignment because, properly interpreted, the University's financial constraint could be considered a "circumstance" that justified the decision that such overload teaching "cannot be accomplished within the workload of permanent faculty, including overload." In addition, as I discuss below, the Employer argues that, when the parties first adopted the Threshold Language in their bargaining for the 1995-97 labor agreement, the Employer's bargaining team did not intend that the first-sentence pre-condition be considered as stating a preference for overload assignment over adjunct appointment -- what the Employer has referred to as an "offer-overload-first" interpretation..

In summary, the parties' arguments about the first-sentence pre-condition are the following. For the Union, the "circumstances" that may indicate that a faculty task "cannot be accomplished within the workload of a permanent faculty member, including overload," are three. First, there must be a lack of capacity within the total teaching load limits of permanent faculty, i.e., both workload and overload limits, as set by the labor agreement. Second, even if a permanent faculty member has overload capacity to teach a class, the member must be qualified to do the teaching. Third, the faculty member must be willing to teach the class. The Employer argues for a broader interpretation -- that the "circumstances" allowing a determination that a faculty task "cannot be accomplished within the workload of a permanent faculty member, including overload," may also include financial constraint that justifies appointment of an

adjunct teacher at less cost. In addition, the Employer argues that its negotiators have never intended that Subdivision 3(a) required it to offer overload first.

Second. Bargaining History.

The primary witnesses who testified about the bargaining history of Subdivision 3(a) were David L. Simpson and Anne F. Weyandt. Simpson was President of the IFO from 1979 through 1984. He participated in contract negotiations for the Union during his tenure in that office, and he continued to do so through the bargaining that led to the adoption of the 1999-2001 labor agreement. Weyandt was employed by MnSCU and its predecessor, the Minnesota State University Board, for about twenty-six years, much of that time spent working in labor relations. The following is a summary of evidence about the history of bargaining about the use of adjunct teachers, taken mostly from their testimony.

The 1983-85 Labor Agreement. The Union has attempted to limit the use of adjunct teachers at least since the 1983-85 labor agreement. The record does not include exact text of the provision from the 1983-85 agreement relating to adjunct appointments. It appears that it was the same as the text from Article 21, Section D, Subdivision 3, of the 1985-87 agreement, parts of which are set out below:

Adjunct appointments. An adjunct faculty member shall not teach more than eight (8) credits in any one (1) academic quarter nor more than twelve (12) credits in any one (1) academic year. . . . The President or his/her designee shall consult with the department concerning the need for hiring adjuncts. The department shall be

responsible for evaluating the academic credentials of candidates and making recommendations to the President for such appointments.

The 1987-89 Labor Agreement. This agreement adopted for the first time versions of the three "Principles" that are still referred to as such in Subdivision 3(a) of the current labor agreement. Article 21, Section D, Subdivision 3(a), of the 1987-89 labor agreement is set out below:

- a. Adjunct appointments may be used in accordance with the following principles:
 1. To meet temporary staffing needs due to enrollment increases for which normal full funding is not provided.
 2. To replace faculty who are on leaves of absence of less than one year.
 3. To teach courses requiring special expertise and/or to meet special programmatic needs of departments where such expertise and needs cannot otherwise be provided for within the resources of the department. . .

The Labor Agreements of 1989-91, 1991-93 and 1993-95.

The parties made no change in Subdivision 3(a) in their next three labor agreements, except for the redesignation of the section of Article 21 in which Subdivision 3(a) appeared as "Section E" rather than as "Section D." Thus, from the 1987-89 agreement through the 1993-95 agreement, Subdivision 3(a) permitted the Employer to use adjunct appointments "in accordance with" three Principles, i.e., to fill three staffing needs, which I describe as a staffing need temporarily caused by Enrollment Increase (Principle 1), a staffing need temporarily caused by the leave (later, to include Reassigned Time) of permanent faculty (Principle 2) and a staffing need caused by the lack of resources in a department to provide Special Expertise or to meet special programmatic needs (Principle 3).

In those four labor agreements, Subdivision 3(a) was an express statement of authority to use adjunct appointments -- but an authority limiting their use to the purposes described in the three Principles. The Threshold Language that preceded the statement of the three Principles was perfunctory then, lacking in the new pre-condition that was to be adopted in the 1995-97 labor agreement. Those four labor agreements did not address expressly whether those uses of adjuncts would be permitted or prohibited if such use would cause a permanent faculty member to lose overload work.

The 1995-97 Labor Agreement. In June of 1995, as bargaining began for the 1995-97 labor agreement, the Union presented a "concept statement," indicating that it wanted a numerical limit on adjunct appointments at each university.

In July of 1995, the Employer proposed the following language, amending Subdivision 3(a):

An adjunct appointment is for a specified period and percentage of time and may be used for the following purposes:

- (1) To meet temporary staffing needs.
- (2) To replace faculty who are reassigned to other duties or who are on leaves of absence.
- (3) To teach courses requiring special expertise or to meet programmatic needs.

On November 16, 1995, the Union proposed the following language, to amend Subdivision 3(a):

When qualified department faculty are not available, adjunct appointments may be used in accordance with the following principles:

- (1) To meet temporary staffing needs due to enrollment increases for which normal full funding is not provided.

- (2) To replace faculty who are reassigned to other duties or who are on leaves of absence of less than one year.
- (3) To teach courses requiring special expertise and/or to meet special programmatic needs of departments where such expertise and needs cannot otherwise be provided for within the resources of the department.

Thus, after the parties' first exchange of language proposals to amend Subdivision 3(a), the Employer had proposed that it have authority under Principle 1 to use adjuncts "to meet temporary staffing needs," a substantial broadening of authority, eliminating the requirements of a temporary enrollment increase and of the lack of "normal full funding." In addition, the Employer's proposal for Principle 2 would have added express authority to use adjunct appointments to replace faculty "reassigned to other duties" as well as faculty on leave of absence. The proposal would have continued the language of Principle 3 without change.

The Union's first proposed language change would have made a substantial change in the Threshold Language that precedes the three Principles. For the first time, the Union made an express proposal that adjunct appointments could be used only when "qualified department faculty are not available," even if the adjuncts were to be used "in accordance with" one of the three Principles. This proposal of the Union retained the previous language of Principles 1 and 3, but it conceded adding to Principle 2 the use of adjuncts to replace faculty reassigned to other duties.

Bargaining notes taken by Reede Webster, a member of the Employer's bargaining team, show that the parties understood that the Union's proposal would require management to use

overload assignments of "available" qualified department faculty before appointing an adjunct teacher to fill the staffing needs described in any of the three Principles. Weyandt testified that she so understood the Union's proposal and that the Employer opposed that requirement. At a bargaining meeting the following day, November 17, 1995, Weyandt told the Union negotiators that the Employer did not agree with what the Union had proposed the previous day and that the Employer "couldn't and wouldn't guarantee overload."

On November 22, 1995, the Employer presented the following proposal to the Union:

Adjunct appointments may be used in accordance with the following principles:

- (1) To meet temporary staffing needs due to enrollment increases for which normal full funding is not provided.
- (2) To replace faculty who are reassigned to other duties or who are on sabbatical or other leaves of absence.
- (3) To teach courses requiring special expertise and/or to meet special programmatic needs of departments where such expertise and needs cannot otherwise be provided for within the resources of the department.

This proposal returns to the 1993-95 language of Principle 1, it continues the language of Principle 3, and for Principle 2, it continues the addition of a staffing need caused by reassigned time and adds sabbatical leave replacement as one of the leaves for which adjunct teachers may be used. The proposal does not, however, accept the Union's previous proposal of Threshold Language that would allow the use of adjunct appointments only when qualified faculty were "not available."

Instead, it returns to the perfunctory Threshold Language of the 1993-95 labor agreement, stating no new pre-condition to the use of adjuncts.

On November 30, 1995, the Union presented a proposal that retained the Threshold Language of its previous proposal, i.e., that adjunct appointments could be used only when qualified department faculty were "not available." This proposal did, however, accept the Employer's last proposal to add sabbatical leave replacement to Principle 2.

During the first several days of December, 1995, the parties met several times discussing Subdivision 3(a). The Union continued its proposal that the Threshold Language require that adjunct appointments be used only when qualified department faculty were "not available," and the parties continued to understand that this proposal was intended to require the assignment of qualified department faculty who had overload capacity before an adjunct appointment.

The Employer's bargaining notes show this discussion on December 1, 1995, between Jeffrey Frumkin, chief negotiator for the Employer, and Edward Twedt, the Union's President:

Frumkin: Subdivision 3(a) -- Union's position that this language says that before adjunct can be hired there must be determination that there is not a faculty member available to teach an overload course.

Twedt: That has always been our interpretation of the contract. Understand that you disagree with that.

The Employer's notes show that on the next day, December 2, 1995, Frumkin told the Union negotiators that management "had

heard the Union's concerns about having some control" over the use of adjuncts, that he would continue to look at Subdivision 3(a) "to strike some sort of balance" and that management "won't negotiate "type of staffing level and what type of faculty will get assignment." Twedt said that "management had already submitted some issues in negotiation." Frumkin responded "we're not going to expand that." A Union negotiator said, "you'd like us to expand what is in contract," and Frumkin said, "recognize that this has to be addressed with respect to abuse of discretion."

On December 9, 1995, the Employer proposed the following language for Subdivision 3(a):

When qualified faculty are not available to provide instruction as part of a normal teaching load, adjunct appointments may be used in accordance with the following principles:

- (1) To meet temporary staffing needs due to enrollment increases when full funding is not provided.
- (2) To replace faculty who are reassigned to other duties or who are on sabbatical or other leaves of absence.
- (3) To teach courses requiring special expertise and/or to meet special programmatic needs of departments where such expertise and needs cannot otherwise be provided for within the resources of the department.

During discussions on December 9, 1995, the parties reached agreement about the language of Principle 2, set out below, but they continued to bargain about the Threshold Language:

When less than full time replacement is provided to a department for faculty who are on reassignment to other duties or who are on sabbatical or other leaves of absence.

Simpson testified that the Union rejected the Threshold Language the Employer proposed on December 9, 1995, because the Union interpreted the word "normal" in that proposal as a reference only to the normal workload of faculty, thus implying that the proposal would allow adjunct appointments ahead of overload assignments. The Union continued to propose that adjunct appointments should not be used ahead of overload assignments of qualified permanent faculty, and it argued that the cost difference between an overload assignment and an adjunct appointment was not significant.

Weyandt testified that her notes of the bargaining on December 9, 1995, show that the Union argued that if the parties could not agree on changes to Subdivision 3(a), they should "return to current contract language" and that the Employer rejected that suggestion.

Frumkin took a new job in late December, 1995, and Weyandt became the chief negotiator for the Employer. It appears that the parties met briefly on January 13, 1996, without progress. The next bargaining about Subdivision 3(a) occurred on February 23, 1996, when the parties met in mediation. At that meeting, the Union proposed what it had last proposed in December of 1995, except that its proposal included the statement, "the following or return to current language."

On March 9, 1996, the Employer again proposed Threshold Language that would have returned to the Threshold Language of the previous labor agreement: "Adjunct appointments may be used in accordance with the following principles." The proposal

would have retained the previous language of Principles 1 and 3, and it would have adopted the changes in Principle 2 that the parties agreed to on December 9, 1995. The Union did not accept this proposal.

On April 19, 1996, the Union proposed the following language when the parties began their meeting:

- a. The Administration and the IFO recognize that circumstances may dictate that faculty tasks cannot be accomplished within the workload of permanent faculty, including overload. When the President/designee determines that such conditions exist he/she may authorize adjunct appointments in accordance with the following principles:
 - (1) To meet temporary staffing needs due to enrollment increases for which normal full funding is not provided.
 - (2) When less than full-time replacement is provided to a department for faculty who are reassigned to other duties or who are on sabbatical or other leaves of absence.
 - (3) To teach courses requiring special expertise and/or to meet special programmatic needs of departments where such expertise and needs cannot otherwise be provided for within the resources of the department.

Normally, adjunct appointments are used only when qualified department faculty are not available.

Weyandt testified that, when Union negotiators presented this new language to the Employer, they indicated that the last sentence -- "Normally, adjunct appointments are used only when qualified department faculty are not available" -- should not have been included as part of the proposal. Matthew Hyle, a Union negotiator, testified that the sentence had been mistakenly included in the Union's typed presentation and that it was to be disregarded. Simpson testified that "we simply felt that there was no reason" to include this sentence because

"it was taken care of" with the new Threshold Language "and we didn't need it in there."

On April 20, 1996, the Employer's negotiators accepted the language of Subdivision 3(a) as proposed by the Union the previous day, excluding the sentence that began, "Normally, adjunct appointments" -- the sentence the Union had deleted from the language it first presented on April 19, 1996. This acceptance by the Employer ended the parties' bargaining about Subdivision 3(a) during their 1995-97 negotiations, and the Threshold Language has not been changed since then -- though, as I note below, the parties did make later changes in the language of Principles 2 and 3

Simpson testified that when the Union's negotiators proposed the new Threshold Language on April 19, 1996, they thought that it might settle the dispute about Subdivision 3(a). He testified that both sides would gain something from the new Threshold Language. According to Simpson, the Union would gain what it had sought throughout bargaining, a clear statement of the right of qualified permanent faculty to be preferred over adjuncts for teaching work described in the three Principles -- if the work was "within the workload of permanent faculty, including overload."

Simpson testified that the new Threshold Language also answered an objection the Employer's negotiators had voiced during bargaining -- that, even if permanent faculty with overload capacity had preference over adjuncts for the teaching work described in the three Principles, there might be times when

a faculty member claiming the work, though qualified, was not best qualified for the teaching. Simpson testified that the new Threshold Language gave the President or designee some discretion to determine that a faculty member with overload capacity was less suitable for the teaching work being considered than an available adjunct teacher. He testified, however, that, in such a case, the determination that "circumstances" dictated the use of an adjunct would be subject to grievance.

Weyandt testified that the Employer's negotiators did not interpret the new Threshold Language as requiring the use of overload assignments before the use of adjunct appointments. She also testified that, with the Union's deletion the previous day of the sentence beginning "Normally, adjunct appointments," she thought the Threshold Language remaining did not require overload assignments before adjunct appointments.

Neither Simpson nor Weyandt testified that the parties had any overt discussion about the primary issue now before me -- whether the new Threshold Language required the use of overload assignments before the use of adjuncts. No evidence was presented that either party mentioned financial constraint as a possible "circumstance" within the meaning of the phrase, "circumstances may dictate that faculty tasks cannot be accomplished within the workload of permanent faculty, including overload."

The Union presented in evidence notes that were taken on April 20, 1996, by the person on its bargaining team who was

assigned to take notes. The notes show the following entry about Article 21:

CO [Chancellor's Office, i.e., the Employer's negotiators]: Article 21, highlight areas where we're having differences. Page 3, adjunct appointments. We agree with the adjunct issues, you've addressed and we agree with the language you proposed yesterday.

The Boyer Grievance. On November 7, 1995, the Union served on the Employer a Step III grievance, which, it appears, had been initiated at Step I in March of 1994. That Step III grievance was presented for decision to Arbitrator John W. Boyer without testimony, on a record consisting of affidavits, documents and written argument. The record was closed on January 14, 1997, and Arbitrator Boyer issued his Award on March 21, 1997. (I refer to this grievance and to the resulting Award, using Arbitrator Boyer's name to identify it.)

The Boyer grievance alleged that the Employer had violated Subdivision 3(a) of the parties' 1993-95 labor agreement by using adjunct appointments to meet Special Expertise staffing needs described in Principle 3. Relevant parts of the 1993-95 version of Subdivision 3(a) are set out below:

- a. Adjunct appointments may be used in accordance with the following principles:
 - (1) . . .
 - (2) . . .
 - (3) To teach courses requiring special expertise and/or to meet special programmatic needs of departments where such expertise and needs cannot otherwise be provided for within the resources of the department.

The language of Principle 3 in the 1993-95 labor agreement was the same as the language of Principle 3 in the 1995-1997 labor agreement. The Threshold Language, however, was different. In the 1993-95 labor agreement, the Threshold Language ("Adjunct appointments may be used in accordance with the following principles:") did not limit the Employer's authority to use adjuncts to meet any of the three staffing needs described in the three Principles, whereas, in the 1995-97 labor agreement, as I have described in detail above, the parties made a substantial revision of the Threshold Language, adding a new pre-condition to the use of an adjunct appointment -- that, in addition to a staffing need described in one of the three Principles, there must exist "circumstances" that "dictate" "that faculty tasks cannot be accomplished within the workload of permanent faculty, including overload."

The parties entered into a pre-hearing stipulation in the Boyer Grievance, agreeing that Arbitrator Boyer should decide the following primary issue:*

Whether Subdivision 3(a), Principle 3, . . . of the [1993-95 labor] Agreement (Adjunct Appointments) requires the Employer to offer overload to faculty members in the department, pursuant to the language of Article 12 (Overload Pay and Non-Instructional Activities) who have the needed Special Expertise or who are capable of satisfying the special programmatic needs of the department prior to hiring adjuncts under Principles 1, 2 and 3.

* I transpose contract references to the style used in the present case.

Arbitrator Boyer's discussion of this issue centered on the text of Principle 3 and, particularly, on the phrase "within the resources of the department." He decided that the "resources" of the department did not include the unused overload capacity of a qualified faculty member, even if that member had the needed Special Expertise or could satisfy special programmatic needs of his or her department. Arbitrator Boyer also decided that, as used in Principle 3, the "resources of the department" should be read to include financial resources so that, in the proper case, the lack of financial resources would provide the Employer with authority to use an adjunct appointment to provide Special Expertise or to satisfy special programmatic needs.

The parties concluded their bargaining about the 1995-97 version of Subdivision 3(a) in April of 1996, and they executed that labor agreement in July of 1996, months before the December, 1996, presentation of written argument in the Boyer Grievance and before Arbitrator Boyer's Award of March 21, 1997. Neither the parties' arguments nor Arbitrator Boyer's Award alluded to the change made in the Threshold Language in the 1995-97 labor agreement. Because Arbitrator Boyer was interpreting the 1993-95 version of Subdivision 3(a), with its merely perfunctory Threshold Language, his Award has little, if any, relevance in interpreting the new and still extant Threshold Language added during 1995-97 bargaining (though, as I note below, the Employer argues that the Union's response to the Boyer Award in later bargaining should be viewed as a concession

here that the Union's interpretation of Subdivision 3(a) is not correct).

The 1997-99 Labor Agreement. In bargaining for the 1997-99 labor agreement, each of the parties made proposals for change in Subdivision 3(a), but neither side was successful. The Employer argues, however, that the Union's proposals, though unsuccessful, should serve as an admission that the new Threshold Language, which was added with the 1995-97 labor agreement, does not require the Employer to give overload assignments priority over adjunct appointments when staffing to meet a need described in one of the three Principles.

When bargaining began for the 1997-99 labor agreement, in June of 1997, the Union made no proposal for change in Subdivision 3(a). By early 1998, however, as bargaining continued, both parties had proposed changes in Subdivision 3(a). The Employer proposed changing the language of Principles 1 and 2 to the following:

- (1) To meet temporary staffing needs due to enrollment changes.
- (b) To meet temporary staffing needs when faculty are reassigned to other duties or are on sabbatical or on other leaves of absence.

The change in Principle 1, proposed by the Employer, eliminated the requirement that "normal full funding" not have been provided if the Employer wanted to use an adjunct appointment to meet a staffing need caused by an enrollment increase.

The change in Principle 2, also proposed by the Employer, is a re-phrasing of the language that was changed in bargaining

for the 1995-97 labor agreement, which expressly states that temporary staffing needs caused by reassignment of faculty or by absence of faculty taking sabbatical or other leaves are eligible for backfilling by adjunct appointment.

The Union proposed changing the language of Principle 3 to the following:

- (3) To teach courses requiring special expertise and/or to meet special programmatic needs of departments where such expertise and needs cannot otherwise be provided within the department.

The change proposed by the Union in the language of Principle 3 would have deleted the words, "the resources of," thus eliminating the words upon which Arbitrator Boyer based his decision 1) that the concept of department "resources" was so broad as to include "physical and/or financial resources, including the availability of staff or classroom space, the utilization of alternative staffing options such as graduate teaching assistants, etc.," but 2) that this breadth of the "resources" concept implied exclusion of the use of overload assignments as within the "resources" of the department.

The Employer argues here that, even though the Union's 1997-99 proposal to change the language of Principle 3 was not successful, the making of that proposal indicates that the Union considered the Threshold Language adopted in 1995-97 bargaining to be insufficient to give overload assignments priority ahead of adjunct appointments.

To this argument, the Union responds that, in proposing the elimination of the concept of "resources" of the department

from Principle 3, it was merely responding to what it believed was Arbitrator Boyer's misinterpretation of that phrase in Principle 3.

I do not consider the Union's 1997-99 proposal to change the language of Principle 3, as conceding that the new Threshold Language gives no priority to overload assignments over adjunct appointments. Arbitrator Boyer's interpretation of "resources," as used in Principle 3, can be read as allowing the Employer, independent of the new Threshold Language, to consider finances and other attributes he identified as "resources" when deciding about the use of adjuncts to meet Principle 3 staffing needs. If the "resources" concept, as described by Arbitrator Boyer, remained a part of Principle 3, it would be possible in a future dispute that, at least for Special Expertise staffing needs, financial considerations might be held relevant, even if the Threshold Language is interpreted as the Union urges. For this reason, I do not consider the Union's effort to eliminate the "resources" concept from Principle 3 as implying a concession that the Employer's interpretation of the Threshold Language is correct.**

The 1999-2001 Labor Agreement. This agreement made no change in the Threshold Language of Subdivision 3(a), but it did

** Similarly, Principle 1 also includes language that, independent of the Threshold Language (and, therefore, with possible superseding effect, whatever interpretation is given to the Threshold Language), would make funding relevant to the authority to use adjunct teachers -- when "normal full funding is not provided" to accommodate a staffing need resulting from enrollment increases.

make changes in the language of Principles 2 and 3. The parties agreed to the Employer's proposal to amend Principle 2 to the following:

- (2) To meet temporary staffing needs when faculty are reassigned to other duties or who are on sabbatical or on other leaves of absence.

This change eliminated the condition, "when less than full time replacement is provided to a department," but it continued unchanged the staffing need addressed: to replace faculty "who are reassigned to other duties or who are on sabbatical or on other leaves of absence."

The parties also agreed to the Union's proposal to amend Principle 3 to the following:

- (3) To teach courses requiring special expertise and/or to meet special programmatic needs of departments where such expertise and needs cannot otherwise be provided by faculty within the department.

Thus, in bargaining for the 1999-2001 labor agreement, the Union gained what it had sought in 1997-99 bargaining -- the elimination of the "resources" concept from Principle 3.

The Employer presented the testimony of James G. Jorstad, a member of its bargaining team for the 1999-2001 labor agreement. He testified that, in proposing the ultimately successful change in the language of Principle 3, the Union negotiators did not indicate that they wanted to eliminate the "resources" concept in Principle 3 because they thought it might be interpreted as an authorization to use adjuncts for Special Expertise needs, independent of the priority given, in their view, to overload assignments by the 1995-97 Threshold Language.

The Employer makes an argument similar to the one described above in my discussion of the Union's unsuccessful proposal to eliminate the "resources" concept from Principle 3 during 1997-99 bargaining -- that the Union's making of the proposal implies an interpretation of the Threshold Language consistent with the one the Employer advocates here.

Again, because Arbitrator Boyer's Award can be interpreted as giving the "resources" concept of Principle 3 a superseding and independent effect over whatever interpretation is given to the Threshold Language, I do not consider the Union's interest in eliminating the "resources" concept from Principle 3 as implying doubt about its view that Threshold Language "circumstances" do not include financial considerations.

Third. Contract Administration (Practice).

The parties presented evidence about administration of Subdivision 3(a) at several of the seven universities in the university system since the 1995-97 Threshold Language was adopted. That evidence describes occurrences at some universities in the seven-university system. At some universities, in some years, the use of adjunct faculty went unchallenged by local Faculty Associations, despite the existence of overload capacity among qualified permanent faculty. At other universities, in other years, there was successful resistance to such use of adjunct teachers. This evidence does not show uniformity of practice.

In addition, this evidence shows only how particular universities and their local Faculty Associations administered

Subdivision 3(a). It does not show how those who have authority to contract for the parties -- the representatives of MnSCU and the IFO -- administered Subdivision 3(a). It would subvert that authority to permit local representatives of labor and management to create permanent amendments of the parties' labor agreement -- whether by practice or by express agreement.

I find, therefore, that the evidence shows neither a consistency of practice throughout the seven-university system nor the requisite mutual acceptance of the practice, *i e.*, awareness and acceptance of it by representatives responsible for contract negotiation and administration.

Subdivision 3(a) Interpreted, with Bargaining History.

As I have written above, my preliminary interpretation of Subdivision 3(a) is that it gives the Employer authority to use adjunct teachers only if two pre-conditions exist. First, there must be a staffing need described in one of the three Principles, and second, there must be "circumstances that dictate that faculty tasks cannot be accomplished within the workload of permanent faculty, including overload." The parties agree that in the present case the staffing need described in Principle 2 was present, thus meeting the first pre-condition.

As the Employer points out, the word "circumstances," standing alone, has a broad definition, one that in its general sense is the equivalent of "conditions." Here, however, such a broad meaning of "circumstances" is narrowed by the restrictive clause that follows it: "circumstances" that "may dictate that faculty tasks cannot be accomplished within the workload of

permanent faculty, including overload." The express focus of this defining clause is the total teaching load limits of permanent faculty -- not only the "workload" limits, but the "overload" limits as well. If the words of the restrictive clause are translated into definitions appropriate here, its meaning becomes more apparent. Thus parsed, the whole of the pre-condition created by the Threshold Language adopted in 1995-97 bargaining is the following. To use an adjunct teacher, the President/designee must determine (in good faith) that circumstances exist that make the needed teaching (as described in one of the three Principles) impossible to do (i.e., that it "cannot be accomplished") within the total teaching load limits of permanent faculty.

The Employer argues that the Threshold Language should not be interpreted as an "offer-overload-first" requirement. I agree that the provision does not overtly state the order in which the Employer must choose between overload assignment and adjunct appointment when backfilling for a staffing need. Nevertheless, it is clear that the function of the Threshold Language is to state a pre-condition to the use of an adjunct appointment. The language clearly means that unless one of the "circumstances" described in the defining clause is present, the Employer may not use an adjunct appointment to backfill for the staffing needs described in the three Principles. The effect of the provision, as written, is to preclude the use of an adjunct appointment unless there is present a "circumstance" described in the defining clause that follows. Thus understood, the

Threshold Language can be described, not as an "offer-overload-first" requirement, but, to use a similar succinct phrase, as an "offer-overload-unless" requirement. Unless this pre-condition to the use of an adjunct appointment is present, the needed teaching must be done by assignment of qualified permanent faculty who have not exhausted total teaching load limits and who are willing and available to do the needed teaching.

The interpretation described just above is clearly stated. Nevertheless, it does not resolve the parties' disagreement about what "circumstances" they intended to include as those that "dictate that faculty tasks cannot be accomplished" within the total workload of permanent faculty. It is plausible to interpret the word "circumstances" as fully defined by the defining clause that follows the word: that authority to use an adjunct teacher arises only if the accomplishment of the needed teaching is made impossible by exhaustion of the total load limits of qualified permanent faculty. That interpretation limits the meaning of "circumstances" to the conditions that may cause exhaustion of the total teaching load limits of permanent faculty -- such conditions as 1) the lack of any additional load capacity, 2) the lack of qualifications of those who may have additional load capacity or 3) the lack of availability of those who are qualified and have additional load capacity. This interpretation treats inclusion of the clause that follows "circumstances" as showing an intention to limit the meaning of that word to those conditions.

Indeed, the Union argues for this interpretation, but it concedes that this interpretation of "circumstances" should be expanded slightly to allow determination by the President/designee that less than entirely suitable qualifications of available permanent faculty may be considered as a "circumstance" indicating that "faculty tasks cannot be accomplished." The Union argues that such an interpretation, expanding the definition of "circumstances" beyond what is expressed in its defining clause, is justified because, during 1995-97 bargaining, the parties discussed the subject of possible doubt about suitable qualifications. According to the Union, this slightly broadened interpretation, would provide the President/designee the right to make a grievable comparison of qualifications when determining whether to use an adjunct appointment or an overload assignment.

The Union argues, however, that in that bargaining about the Threshold Language, the parties did not refer to financial constraint as a circumstance that would justify a determination that needed teaching could not be accomplished within the total load limits of permanent faculty.

The Employer argues that "circumstances" should be interpreted as Dunn did in the present case. As noted above, in her email of June 11, 2009, she wrote to the grievant and Hauser:

. . . The College has not been backfilled for [Hauser's] reassignment at the overload rate but rather at the adjunct rate -- so the task can't be accomplished in regular faculty load due to reassignment and it can't be accomplished at the overload rate because there is not enough money, therefore we can assign adjuncts.

Thus, Dunn interpreted the pre-condition to the use of adjunct appointment described in the Threshold Language as meaning that low funding of the College for needed backfilling would qualify as a "circumstance" dictating that "faculty tasks cannot be accomplished within the workload of permanent faculty, including overload." More particularly, she testified that the approval by the University's President of Hauser's reassigned time for performance of her HLC coordination authorized backfilling for that time only at the cost of an adjunct appointment.

The evidence shows that, because of the recession that began in 2008, funds available to the University were reduced by about \$2 million for the biennium beginning July 1, 2009, and ending June 30, 2011. The University allocated \$676,000 of the reduction for the first year, 2009-2010, to the Department of Academic Affairs, and, of that reduction, \$240,200 was allocated to the College. Of the College's budget reduction, \$72,600 was achieved by elimination of a vacant position in Geology, \$40,000, by elimination of a fixed-term position in English and \$127,600, by "Salary Savings/Adjunct, Turnover, Overload." In the following fiscal year, 2010-2011, the budget reductions for the College were in the same amounts.

Dunn testified that she had sources of funding other than Academic Affairs and that some of that funding was available for overload assignment or adjunct appointment. She testified that when she completed her projected staffing for the fiscal year 2009-2010, out of a total budget of \$1.17 million, she had a

"razor thin margin" -- about \$10,000 to \$12,000 -- with which to pay for unexpected staffing needs to be filled by overload assignment or adjunct appointment.

For the following reasons, I sustain the claim made by the original grievance -- that the Employer violated Subdivision 3(a) by denying the grievant's request for an overload assignment to backfill for Hauser's reassigned time in the fall semester of 2009. First, the most reasonable reading of the Threshold Language is that the word "circumstances" is fully defined in the defining clause that follows that word. Thus read, the language means that the Employer has authority to use an adjunct teacher to meet one of the staffing needs described in the three Principles only in circumstances defined in that clause -- when the needed teaching is made impossible by exhaustion of the total load limits of qualified and available permanent faculty. Conditions that cause a lack of total teaching load capacity of permanent faculty who are qualified and available to do the needed teaching are the intended "circumstances" that may prevent accomplishment of that teaching -- thus meeting the pre-condition to the use of an adjunct appointment.

Second, the Employer argues that the University President's decision to authorize the less expensive adjunct appointment as a backfill for Hauser's reassigned time in the fall of 2009 was a reasonable business decision, made because of financial constraint, and that, as such, it should be considered a "circumstance" that made backfilling with an overload assignment of permanent faculty impossible. Nothing in the

bargaining that led to adoption of the Threshold Language in 1995-97 negotiations indicates that the parties intended financial constraint to operate as a circumstance that would indicate the impossibility of doing the needed teaching -- or that the parties intended that funding decisions made by the President/designee should control whether permanent faculty would be considered unable to accomplish needed teaching within their total teaching load limits.

Third, when the parties have intended insufficient funding to be a factor in determining whether use of an adjunct appointment is authorized, they have expressed that intention clearly -- as in Principle 1, which states one of the three staffing needs that may be met with an adjunct appointment:

To meet temporary staffing needs due to enrollment increases for which normal full funding is not provided.

Fourth, even if, arguendo, the Threshold Language were interpreted to include financial constraint as an intended "circumstance" dictating that faculty tasks cannot be accomplished within the total load limits of permanent faculty, the evidence here shows that the overload teaching the grievant asked to backfill during fall semester of 2009 could have been accomplished within the limited funding Dunn had available. Dunn testified that she used an adjunct appointment for that backfill because she was directed to do so by the University's President and because she wanted to reduce its cost. At the start of the 2009-2010 academic year, she made budget plans for the entire year. Those plans included a substantial number of

adjunct appointments, some of them to backfill for twenty-seven credits of reassigned time in the English Department in spring semester of 2010. Dunn testified that, after her planning, she had only \$10,000 to \$12,000 remaining for all of the 2009-2010 fiscal year, with which to backfill classes. She wanted to retain that amount so that, if an emergency arose requiring her to backfill for additional reassigned time during the year, she would have funds to do so.

This evidence, however, shows that Dunn had sufficient funds available to approve the grievant's request for an overload assignment in the fall semester of 2009. The additional cost of doing so would have been \$3,101.61, leaving her a balance of about \$7,000 to \$9,000 to meet any additional need to backfill during the year. In Dunn's email to the grievant and Hauser of June 11, 2009, she made the determination, as the President's designee, that the task to be backfilled for Hauser's reassigned time "can't be accomplished at the overload rate because there is not enough money, therefore we can assign adjuncts."

Even if the Threshold Language is read as broadly as the Employer proposes -- to include considerations of financial constraint -- the clause defining "circumstances" requires that any such circumstance dictate that the task at issue "cannot be accomplished" because of that circumstance. It is understandable that Dunn wanted to husband her remaining financial resources, but her determination was not accurate that she could not pay to have the grievant accomplish the teaching task at issue as an

overload assignment. For the reasons stated above, I rule that denial of the grievant's request for an overload assignment during fall semester of 2009 violated Subdivision 3(a).

Remedy.

The Union seeks damages in behalf of the grievant in the following amounts:

For loss of the pay the grievant would have received for teaching three credits of overload in each of three academic years, 2009-2010, 2010-2011 and 2011-2012, an amount as shown by the evidence, to be \$6,701.61 per year, or a total of \$20,104.83.

For the loss caused by reduction in the grievant's retirement annuity "directly attributable to the denial of overload assignments," which the Union calculates to be \$31,070.21.

Priority in Selection for Overload. Among the arguments the Employer makes about remedy is the following. In each academic year for which the grievant alleges the right to teach an overload class, the grievant was only one of ten or eleven permanent faculty members in the English Department who could have taught the class as an overload assignment. The Employer points out that there is no selection system established, either by the labor agreement or otherwise, that would give the grievant priority among all permanent faculty to teach an overload class in place of an adjunct teacher. The Employer argues that, because of the lack of such a selection system, the grievant had only a chance of about 9% to 10% that she would be selected to teach a class that was allegedly misassigned to an adjunct teacher. The Employer argues, therefore, that the

Union's claims for damages arising from violation of Subdivision 3(a) should not be awarded because they are speculative.

I accept the Union's response to this argument, as follows. In each of the three academic years for which the grievant alleges denial of her Subdivision 3(a) right to an overload assignment, she requested the assignment and grieved the denial. The evidence does not show that other permanent faculty of the English Department suffered similar denials of overload requests for those classes. In the absence of such evidence, the argument suggesting a possible selection contest for the overload assignments requested by the grievant lacks a needed premise.

The 2009-2010 Academic Year. Aside from substantive arguments relating to interpretation of Subdivision 3(a), discussed above, the Employer makes no additional argument opposing the recovery of the pay the grievant would have received for three credits of overload in the 2009-2010 academic year. Accordingly, I rule that she is entitled to recover \$6,701.61 for loss of the pay she would have received for teaching three credits of overload in the 2009-2010 academic year.

The 2010-2011 Academic Year. The Employer makes the following argument. During the fall semester of 2010, there were three English Department classes of three credits each that were taught by adjunct teachers, each of them to fill a Principle 2 teaching need. The grievant declined an overload assignment to teach one of them, English 2925 (Writing about Nature), because she thought she was not sufficiently qualified

to teach about nature. The evidence shows that she was not qualified to teach one of the other two classes taught by adjuncts, English 2150 (Technical Writing), because she had no experience teaching in that specialty.

Although the grievant was qualified to teach the only other class assigned to an adjunct teacher in the fall semester of 2010, English 1151 (English Composition), that class was scheduled for a time (hereafter, for ease of reference, "Class Period X") when the grievant was previously scheduled to teach a class that was part of her regular workload. The Employer argues that, because the grievant was previously scheduled to teach during Class Period X, she was not available to teach the English 1151 class that was assigned to an adjunct teacher and that, therefore, there was no violation of Subdivision 3(a) in the fall semester of 2010 for which the grievant should recover damages.

The Union argues that the Employer could have rearranged teaching schedules to accommodate the grievant's request to teach an overload class of English 1151 in the following manner. It could have assigned a graduate assistant -- one of many who had been scheduled to teach a class in English 1151 at a different time -- to teach English 1151 during Class Period X. Then it could have granted the grievant's request to teach English 1151 in a class period that was open on her schedule, thus eliminating the adjunct appointment.

I make the following ruling. Nothing in the Threshold Language requires the Employer to rearrange teaching schedules

to accommodate a request for an overload assignment by a particular teacher. The grievance makes its claim for a remedy in behalf of a particular teacher, the grievant. The evidence shows that, because of a conflict in her schedule, she was not available to teach during Class Period X. I rule that her unavailability was a "circumstance" that, for her particular claim, dictated that the needed Principle 2 teaching (a class of English 1151 during Class Period X) "cannot be accomplished" within the grievant's total teaching workload. I conclude that, for fall semester of 2010, the Employer did not violate Subdivision 3(a) in a manner that damaged the grievant. I also conclude that, because there were no relevant adjunct appointments made during spring semester of 2011, the grievant suffered no damages for violation of Subdivision 3(a) during the 2010-2011 academic year.

The 2011-2012 Academic Year. The grievant was on sabbatical leave during fall semester of 2011, and the Union makes no damage claim for that semester. During the spring semester of 2012, adjunct teachers taught three classes of three credits each for which the grievant was qualified and available to teach overload. The Employer argues that, as discussed above, because the grievant was one of eleven English Department permanent faculty who might have claimed overload assignments to teach those three classes, she had only about a 27% chance of being selected to teach one of them. I rule as I did above. Because the Employer denied the grievant's request to teach one of those classes as an overload assignment, and because there is no showing that

other permanent faculty made and were denied similar requests, the suggestion of a possible selection contest for the overload assignments requested by the grievant lacks a needed premise. I conclude that the grievant is entitled to recover \$6,701.61 for loss of the pay she would have received for teaching three credits of overload in the 2011-2012 academic year.

Mitigation. The Employer presented evidence that it provided the grievant with other opportunities to increase her high-five income, and it argues that any damages she suffered should be considered mitigated by the Employer's action.

In the summer session of 2009, which is part of the 2009-2010 fiscal year, the grievant received an extra \$6,701.60 for teaching a summer session class. In fiscal year 2011-2012, the grievant again received an extra \$6,701.60 for teaching a summer session class in the summer of 2011, and in spring semester of 2012, she received an extra \$6,555 for development and teaching two correspondence courses. In the summer of 2012, part of fiscal year 2012-2013, just before her retirement became effective, the grievant received an extra \$13,403.21 for teaching two summer session classes.

I make the following ruling. Even though I assume that the Employer had no obligation to offer the grievant these extra opportunities to earn income, the Employer's having done so does not serve to mitigate the damages caused by the denial of her requests for overload assignments in the 2009-2010 and 2011-12 academic years. The grievant suffered a loss of income from the denial of those overload requests, in violation of Subdivision

3(a). Because her performance of extra work, as described above, was unrelated to the damages she suffered by denial of her overload requests, reduction of her damages is not justified.

Reduction in Retirement Annuity. The Union argues that the denial of the grievant's requests for overload assignments reduced her high-five income and thereby reduced her future retirement annuity. The Union seeks inclusion in the award of an amount that will compensate the grievant for the present value of that reduction in her annuity. The Union presented evidence 1) that, by statute, TRA is prohibited from making a post-retirement adjustment in the total of high-five income of a retiring faculty member, 2) that if the grievant had been permitted to teach three credits of overload in each of three academic years, 2009-2010, 2010-2011 and 2011-2012, the increase in her high-five income would have entitled her to an additional \$210 per month in her retirement annuity, and 3) that the present value of an income stream of \$210 per month is \$31,070.21, assuming adjustment of that income stream by 2% per year for inflation and assuming a 6% discount rate.

The Employer argues that the present value of the reduction in the grievant's retirement annuity is not recoverable in this arbitration proceeding because the retirement-annuity benefit is created and controlled by statute and does not arise from the labor agreement. The Employer argues that arbitrators follow a common law principle that damages "are not recoverable unless they arise naturally from the breach or were contemplated by the parties as a probable result of the breach at the time

the contract was made," citing Hill and Sinicropi, Remedies in Arbitration, 493 (BNA, 2d Ed. 1991).

The Union argues that damages for the reduction in the grievant's retirement annuity are recoverable under Minn. Stat., Section 572B.21(c) (2012), a provision of the Minnesota Uniform Arbitration Act, which provides that "an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. . . ." The Union argues that the grievant is entitled to a "make-whole" remedy -- that she should be placed in the position she would have been in if she had received the overload assignments she was entitled to receive.

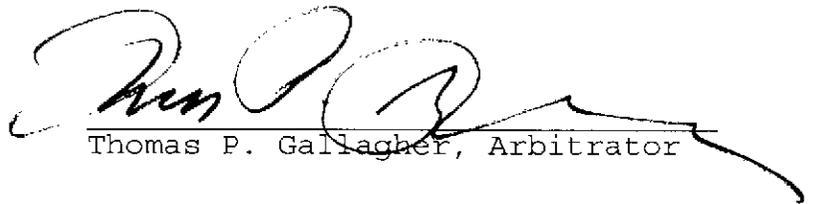
I rule that the grievant is entitled to an award that compensates her for the reduction in her retirement annuity. That reduction is a loss that flows directly from the violation of Subdivision 3(a). Though the retirement annuity is created by statute, the record shows that both parties are aware of its provisions and that they are aware that an increase in high-five income will increase the retirement annuity of a retiring faculty member. A denial of recovery for this loss would refuse the grievant damages that are clearly consequential to the violation of Subdivision 3(a).

AWARD

The grievance is sustained in part. The Employer shall pay the grievant \$13,403.22 as compensation for refusing her request for an overload assignment in academic years 2009-2010 and 2011-2012.

In addition, the Employer shall pay the grievant the present value of an amount sufficient to compensate her for the reduction in her retirement annuity that resulted from the diminution of her total high-five income by \$13,401.22. I retain jurisdiction to determine that amount in the event that the parties cannot do so by agreement.

May 31, 2013



Thomas P. Gallagher, Arbitrator