

IN THE MATTER OF ARBITRATION BETWEEN

Minnesota State College Faculty,
Union,

and

State of Minnesota, Minnesota State Colleges and
Universities,
Employer.

OPINION AND AWARD

Arthur "Jay" Pivec Grievance

MSCF No. MN-13-05
MnSCU No. GR-13-0048

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

July 28, 2013

HEARING SITE:

Education Minnesota Offices

HEARING DATES:

May 28, 2013

RECORD CLOSED/BRIEFS RECEIVED:

July 3, 2013

REPRESENTING THE UNION:

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JURISDICTION

The hearing in this matter was held on May 28, 2013. The undersigned was selected to serve as arbitrator pursuant to the parties' collective bargaining agreement ("Agreement"). The parties submitted a dispute to arbitration that alleged a violation of the Agreement. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties waived the 30-day award issuance requirement found in their Agreement. The parties closed the record by submitting post-hearing briefs by email. They were duly received on or before July 3, 2013, and the matter was taken under advisement.

ISSUES

The parties stipulated to have the undersigned develop the following statement of the Issues:

1. Is the grievance procedurally arbitrable?
2. If so, did the Employer violate the Agreement when it did not approve the sabbatical plan submitted by the grievant, Jay Pivec?
3. If so, what is the appropriate remedy?

BACKGROUND SYNOPSIS

Grievant is a member of the faculty at Minneapolis Community and Technical College ("MCTC") who became eligible for a full-year (two semesters) sabbatical leave to be taken during academic year 2013-14. The Agreement describes the purpose of sabbatical leaves and establishes five criteria that must be satisfied to secure approval. Only one of the five is in dispute. Article 17, Section 4, Subdivision 1, B. reads as follows:

The faculty member has submitted a plan for a sabbatical leave that is designed to serve the purpose described above.¹

Grievant met with the dean of his department and submitted his plan by filling out the applicable forms provided by the Employer. Grievant's dean signed off on the plan and forwarded it to the MCTC president. The president has designated the Chief Academic Officer ("CAO") to

¹This criterion in dispute refers to Article 17, Section 4, which contains the negotiated language that describes the purpose of a sabbatical leave.

review plans. The CAO had concerns about Grievant's plan, as originally submitted, and expressed them to the dean by email. The dean requested more detail from Grievant by email. Grievant revised the text of his plan and re-submitted it to the dean. The dean again signed off on the plan and forwarded it to the president. The CAO next wrote a letter directly to Grievant expressing her continuing concerns about the plan but noted that it was "... conditionally approved ...". Her letter went on to describe the condition. Grievant read the letter as a rejection of his plan and filed the instant grievance, which was moved through the negotiated grievance procedure to this arbitration.

For the first time at arbitration, the Employer raised a procedural objection to the grievance on the ground that it was premature because, at the time of its filing, grievant's plan had been conditionally approved and had not been formally denied.

RELEVANT CONTRACT PROVISIONS

From 1981 until 1995, the parties' collective bargaining agreements contained the following statement of purpose for sabbatical leaves:

The purpose of sabbatical leaves is to give faculty members the opportunity to secure additional education, training, or experience which will make them better prepared for carrying out their college assignments. Such leaves shall be granted if the following criteria are met:

(Criteria omitted)²

The purpose language was changed to the following in the round of bargaining that resulted in the parties' 1995-97 agreement:

The purpose of sabbatical leaves is to give faculty members the opportunity to secure additional education, training, or experience which will make them better prepared for carrying out their college assignments, and will support the professional development of the faculty, the development needs of academic departments or areas, and the planned instructional priorities of the college/system mission.

* * *

A sabbatical leave shall be granted to unlimited full-time, temporary

²Except for some wording changes, the five criteria have remained unchanged in substance since 1981.

full-time, and unlimited part-time faculty who meet the following criteria:

(Criteria omitted)

SUMMARY OF THE EVIDENCE

Grievant is a 23-year member of the MCTC faculty in its Health/Physical Education Department. In addition, his resume reflects a long history of participation in various athletic endeavors as well as doing extensive basketball coaching work. For example, he was an Assistant Men's Basketball Coach in 1981-82 for the University of Minnesota team when they were Big Ten Conference Champions and participated in the NCAA Tournament.

Among the courses grievant taught at MCTC was a 2-credit course in coaching basketball that was offered one semester per academic year. Other courses he taught included First Aid and CPR, First Responder, Weight Training, and something titled "Supervised Activity Programs." The basketball coaching course represented approximately one-fifteenth of his teaching load. He was also the coach of the MCTC basketball team for some twenty years until it was discontinued after the 2009 season.

Grievant had two previous sabbatical leaves during his career with MCTC. His most recent such leave was approved in February of 2005 and was also a full-year/two-semester leave. The approved plan was devoted to observing various basketball coaching situations and coaching clinics at the high school, college, and professional levels and essentially reporting back to MCTC what was the "state of the art" as of that time frame; he would apply the best practices he observed to his own coaching class.

Grievant's coaching class was very popular. It usually had a 100% "saturation" level each time it was offered, which means that it was filled to capacity with students. It was also popular with students of color who comprised a significant portion of the students taking the class.

To prepare his plan for the sabbatical leave in question, grievant met face-to-face with his departmental dean. Grievant's proposal closely paralleled the sabbatical he had taken in 2005-06 and sought to use virtually the same methodology again after the passage of six years. After they discussed his plan, grievant filled out the applicable packet of forms to describe his plan and obtain the approval of his dean as well as the MCTC president or the president's designee. The CAO for

MCTC was the president's designee.

Grievant submitted his plan packet to his dean on or about November 7, 2015. The dean signed Form 3 of the packet, which is the approval form, and placed an "X" in the space on the form to make it read as follows:

 X This sabbatical plan meets the purpose and criteria for a sabbatical leave, and, therefore, I approve it.

The dean also added the following comments in the space provided on Form 3:

I have discussed this plan with Jay. His proposal to visit high school and college basketball teams for observation of coaching will contribute to the teaching of PHED 2200: Coaching Basketball. We also discussed ways that Jay will share the things he learns with colleagues in the dept.

After signing the plan and forwarding it to the MCTC president, the dean also notified the CAO by email that he had done so. The email apparently included as a PDF attachment the full plan packet that had been sent to the president.

By email dated November 8, 2012, the CAO wrote back to the dean as follows:

Chuck, as I said in our meeting earlier this week, this is an inadequate proposal. Please think of the cost that the College is incurring for him to do this in relation to a 2 credit course that in fact we should not even continue to offer. Please work with Jay to develop a proposal that is worthy of a full year (6 hours per day 5 days a week is what I recall Linda Russell suggested should be considered the amount of time that a proposal should plan for).

By email dated November 9, 2012, the dean wrote the following to grievant:

Hi Jay,

I have looked more closely over the text of your sabbatical proposal. The project is fine, as we discussed, but I would like to see more detail in the proposal.

Would you see if you could build it out a little bit.

Here are some thoughts:

* * *

3. WHAT ACTIVITIES WILL HELP YOU MEET THE ANTICIPATED ACCOMPLISHMENTS OF YOUR SABBATICAL PLAN?

Put some more specifics in here, like a list of probable or possible teams that you will be observing. You will probably tweak it as you go along, but show the kinds of things you are envisioning for the observations and what you hope to get out of them. For example, will you try to look at one activity (e.g., coaches meeting) across several teams or levels, or will you try to look at the whole string of activities (clinic, practice, coaches meetings, games) for one team to see how they contribute to the coach's vision? * * *

WHAT DO YOU PLAN TO ACCOMPLISH WITH YOUR SABBATICAL?

Get a bit more specific. Maybe three or four bullets like: observe firsthand examples of the new trends and techniques in coaching, recruiting, training, game strategy; gain insights about what is different about coaching at the high school and pro levels vs. college, or 2-year vs. 4-year colleges; compare methods and philosophies between mens and womens teams.....

* * *

Bottom line-----it doesn't have to be a huge amount of writing, but just a few sentences more in each category to show your planning.

* * *

Grievant responded by amplifying his plan as his dean requested. He signed it on November 12, 2012 and resubmitted it to his dean. The dean appears to have signed off with his approval this second time by using the same Form 3 page from the previous submission but changing the date to read "11/13/12" by writing over the previous "11/7/12".

According to his testimony at arbitration, the dean had further discussions with the CAO who

still saw grievant's proposal as the same unacceptable plan. The dean replied, "Well, I have already emailed the instructor and said that it's acceptable to me ***." At that point, the CAO said she felt the best thing would be for her to communicate directly with grievant to pursue the deficiencies.

By letter dated December 11, 2012, the CAO wrote to grievant as follows:

Dear Jay,

As is customary, I review all sabbatical plans after the deans have forwarded them. Of the sixteen sabbatical plans submitted, I found all of them except yours to be worthy of support, as yours does not provide clear evidence of alignment with the MSCF Employment Contract, Sabbatical Leave language:

The purpose of sabbatical leaves is to give faculty members the opportunity to secure additional education, training, or experience which will make them better prepared for carrying out their college assignments, and will support the professional development of the faculty, the development needs of academic departments or areas, and the planned instructional priorities of the college/system mission.

Your plan, to observe basketball related activities, does not meet the expectations for a sabbatical plan, given that we do not have a basketball team and we do not offer a coaching academic program or a coaching credential. The two credit coaching basketball course, which is offered one time each year, is not an adequate focus that addresses the needs of your academic department, nor it is an instructional priority of the college. Such a plan does not warrant a full year leave with salary and benefits.

I am recommending that your sabbatical plan be conditionally approved with the following condition:

You develop a plan that meets the purpose of a sabbatical and is worthy of a full year of time and salary to work on it. Again, the plan should:

- support your professional development as a faculty member at MCTC,
- support the development needs of your academic department, and/or
- support the planned instructional priorities of the college.

Because your teaching assignment in the past two years has been limited to first aid and first responder courses, supervised activity, and the coaching basketball course, I ask that you look at the development needs of your department as a point of reference for a worthy plan.

By way of offering support to you for strengthening your plan, I would be happy to share a couple of examples of sabbatical plans that I believe do, in fact, fully meet the purposes of a sabbatical. I can also provide a copy of a handout prepared by Linda Russell that offers advice to faculty members who are preparing their sabbatical plans. Let me know if you want me to send those documents. Also, I would be happy to meet with you to further discuss your plan. If you would like to meet, please contact my assistant *** to schedule a time. [Contact information for the assistant is intentionally omitted].

Please send me your revised sabbatical leave application and plan by December 21, 2012.

Regards,
[CAO]

Grievant read the CAO's letter as a rejection of his plan despite the "conditional approval" comments in the letter. Accordingly, the instant grievance was filed on December 12, 2012. It was denied on the merits by the Employer's Step 1 hearing officer by letter dated December 20, 2013. The Step 1 denial did not raise any procedural issue about the timing of the grievance filing.

The Union appealed the grievance to Step 2 on January 10, 2013. It appears that the Employer never heard the appeal at Step 2 or issued any decision because no Step 2 response is found in Joint Exhibit 2, which contains the history of the grievance handling. Absent a Step 2 response, it appears that the Union appealed the matter to Step 3, which is the instant arbitration, pursuant to Article 27, Section 2, Subdivision 4, which pertains to the Employer's failure to respond.

By letter dated January 15, 2013, the CAO formally denied grievant's sabbatical leave application because he failed to submit a revised plan by her deadline of December 21, 2012.

In addition to the foregoing, the Employer introduced evidence of the bargaining history leading to the 1995-97 agreement that expanded the language about the purpose of sabbatical leaves. According to that history evidence, the approval of such leaves was also de-centralized to each campus in the MnSCU system. The record contains a listing of the several Employer objectives it had for that round of bargaining. The objective for sabbatical leaves was as follows:

Eliminate sabbatical leaves, or modify substantially to establish greater relationship between the faculty member's professional

development objectives and the needs of the institution and its students.

The MCTC president, the CAO, and grievant's dean also provided testimony about the review and approval process for sabbatical leaves as well as their respective roles in the process. A considerable amount of the Union's cross-examination of the CAO dealt with her use of the terms, "substance and rigor" as well as the worthiness of a proposed plan. The MCTC Strategic Plan for 2011-2015 and the Strategic Action Plan for 2012-2013 were also introduced as joint exhibits. In addition, several policy documents pertaining to sabbatical leaves, including an excerpt from The Deans' Manual, are part of the record along with an overview of the Coaching Basketball Course.

The Union also introduced, as its Exhibit 7, the approved sabbatical plan of another faculty member that provided considerably less information in its form packet.

As previously noted, the arbitration hearing was held on May 28, 2013. Eighteen days before the hearing, the Employer announced that the Coaching Basketball Course would be removed from the course schedule for the Spring 2014 semester. Both the fact and the method of the course removal prompted a series of emails objecting to the action as well as the filing of a different grievance to challenge the propriety of the action. Those documents are also part of the record.

Finally, the parties introduced, as Joint Exhibit 7, a prior arbitration award that was issued in November of 2006 that dealt with the same sabbatical purpose language at issue in this matter.

In addition to a thorough examination of the transcript of the testimony, the undersigned has reviewed all of the exhibits that comprise the record.

OPINION AND FINDINGS

From the foregoing summary of the evidence, the respective general positions of the parties is readily apparent. The Union maintains the grievance is procedurally valid and meritorious. It seeks a remedy sustaining the grievance and, to the extent necessary, a waiver of grievant's post-sabbatical work obligation if he is not able to take his sabbatical leave during the academic year 2013-2014 as planned. To the contrary, the Employer contends the grievance is procedurally invalid and should be dismissed. On the merits, if they are reached, the grievance should be denied.

As presented, the procedural issue poses this question: Was the CAO's letter dated

December 11, 2012 really a rejection of grievant's plan under the guise of a conditional approval?

As written, the undersigned finds that it was a *de facto* disapproval of grievant's plan. The CAO's email of November 8, 2012 flatly stated that she found the plan to be "inadequate" upon her first review of it. Despite the revisions grievant made to it in response to his dean's suggestions, the CAO saw the revisions as "... the same plan." But because grievant's dean told her it was acceptable to him [the dean] and had so informed the grievant, the CAO decided to communicate directly with grievant. The CAO's December 11, 2012 letter explicitly stated that grievant's plan "... to observe basketball related activities, does not meet the expectations for a sabbatical plan ..." and went on to say that such "... a plan does not warrant a full year leave with salary and benefits." Finally, by the condition she imposed, grievant was ordered to "... develop a plan that meets the purpose of a sabbatical and is worthy of a full year of time and salary to work on it."

As written, the foregoing comments show, beyond any reasonable doubt, that grievant's plan was rejected and that he had to change it to something more acceptable to the CAO. Indeed, even the CAO acknowledged during her testimony that her December 11, 2012 letter could be read that way.

In addition, it must be remembered that the Employer's Step 1 hearing officer did not raise any procedural objection to the timing of the filing of the grievance. This is strong support for either one or both of two inferences to be drawn from that omission: First, it was known that grievant's plan had been rejected and, therefore, the Step 1 responder dealt with the merits of the grievance or, second, that the Employer waived any objection it had to the timing of the filing.

Accordingly, the grievance is found to be procedurally valid and must be addressed on its merits.

As previously noted, only the purpose criterion is in dispute among the five requirements expressed in the Agreement. Therefore, the only issue remaining for resolution is the question of whether grievant's plan satisfied the purpose requirement established by Article 17, Section 4?

The meaning of the purpose language is not one of first impression. The prior arbitration award issued in November of 2006 discussed several aspects of the requirement. There is no evidence that any of the conclusions of Arbitrator Ver Ploeg have been modified by the parties in subsequent rounds of collective bargaining. Therefore, the principles established in that prior award

remain in full force and effect to the extent the instant dispute presents substantially similar considerations.

The applicable principles from the prior award are as follows: First, the “shall be granted” language is clear. Once a proposal has been found to meet all five criteria, that sabbatical must be granted. As previously noted, only the purpose criterion is in controversy; the other four have been satisfied.

Second, quoting the prior award, “... the ‘Purpose’ criteria *{sic}* is not a mechanical factor; it requires the College president (or designee) to scrutinize a proposal’s content and evaluate its merit. Such evaluation is integral to determining whether it meets departmental and institutional needs and priorities. However, the Employer’s authority to accept or reject proposals because they do not meet the ‘purpose’ criteria *{sic}* is not without limits. * * *”

Third, the Employer cannot dictate the content of a plan. However, a plan does not fulfill the purpose criterion when the proposed activities are vague, undemanding or clearly tangential to departmental/institutional needs and mission.

Lastly, if a plan makes a *prima facie* demonstration that it satisfies the purpose criterion, that demonstration is sufficient to call for its approval unless overcome by the Employer’s evidence to the contrary. Here, *prima facie* simply means the plan is sufficient on its face; it is a threshold type of inquiry. A plan needs only to meet the purpose criterion. It is not required to exceed it by some measure. Moreover, it does not need to be the most purposeful plan nor must it be more purposeful than others to receive approval. That said, this threshold test rules out plans that are so lacking in substance and rigor that they amount to little more than a paid vacation in the guise of a sabbatical leave. Therefore, it would not be unreasonable for the approving authorities to expect an amount of work demand that compares realistically with a faculty member’s normal workload.

After careful review of the evidence, the finding is that grievant’s plan does make a *prima facie* demonstration that it fulfills the purpose criterion. There are several reasons that support this finding.

First, the most telling reason emerges from a comparison of grievant’s plan with his previous plan approved in February of 2005. His current plan is essentially a restatement of that previous plan in that the type and amount of activities he plans to do closely parallels what he did before. This will

update him on changes that have taken place during the intervening six years. According to the testimony of the Employer's bargaining history witness, the renewal and refreshment of previous training and experience is a permissible use of a sabbatical leave. Interestingly, the letter that congratulated grievant for the 2005 plan contains two noteworthy signatures. It was signed by the same MCTC President then as now. And one of the listed recipients of a copy of the letter is the same person who is now CAO, although her title then was Associate Vice President.

Upon review, it is clear that grievant's current plan includes work to develop a library of materials for MCTC as well as the associated indexing work on the materials. This library work is additional substance and rigor that was not seen in the prior plan.

It is undisputed that the prior plan in 2005 was found to fulfill the same purpose language that has not changed since 1995. That being the case, one must ask if the prior plan, with somewhat less substance and rigor than the current plan, satisfied the purpose criterion then, why is the current plan insufficient with somewhat more substance and rigor?

Moreover, the evidentiary record does not show that the MCTC environment in 2005 differs significantly from the current environment. There is no evidence that the basketball coaching course was offered more than once per academic year back then. There is no evidence that the saturation rate for the course has shown it to be less popular now than before. Although MCTC no longer has a basketball team, the Employer did not claim that fact was the basis for the prior plan's approval. There is no evidence that MCTC offered a coaching academic program or coaching credential at the time of the prior plan's approval. In addition, although the course was removed from the Spring 2014 schedule shortly before the instant arbitration, at the time grievant submitted his sabbatical plan, there was still an expectation that it would continue to be offered at the same frequency as it had been.

Without more, the foregoing factors establish a *prima facie* case that the grievant's proposal did fulfill the purpose criterion. But there is more.

The second significant reason in support of this determination is the undisputed fact that grievant's dean twice verified with his signature and comments that the plan did fulfill the requirement. These unequivocal statements of approval prevail over the dean's testimony at arbitration to the effect that he did not believe he actually had approval or rejection authority. His

signed statements on Form 3 say he did. In addition, the Dean's Manual says he did. An excerpt from the Manual reads as follows:

[After quoting the purpose of a sabbatical leave from Article 17, Section 4]

Given this purpose statement, when faculty submit an application/proposal for sabbatical leave to their supervising Dean, it is the Dean's responsibility to evaluate the proposal to see if what is contained in the proposal is well aligned with the stated purpose of this type of leave.

(Underscoring supplied)

Moreover, when asked about the role of the dean in the approval process, the MCTC President testified as follows:

Well, they are to work with their faculty to make certain that a sabbatical leave fulfills the contractual requirements.

When asked about the meaning of the dean's approval, the president said this:

It should mean that the dean has reviewed, discussed it with the faculty member if there are any questions, and made a judgment about whether it should be approved or not that goes to the vice president.

The dean in question was not new to the responsibility. He had previously done plan approvals in 2010 and 2011. Finally, who better knows whether a plan meets the development needs and instructional priorities of a given academic department than the dean for the department?

Third, the Employer's evidence does not provide a meaningful explanation of what are the applicable "... planned instructional priorities of the college/system mission." According to the president's testimony on this point, he agreed there is no one place that a faculty member could go to reference those priorities.

A review of the 2011-2015 Strategic Plan lists three priorities:

- Priority 1: engage students
- Priority 2: empower employees
- Priority 3: create capacity

The Strategic Action Plan for 2012-2013 lists ways to accomplish the goals. However, nothing in either document provides an easily recognizable basis for denying grievant's plan.

In addition, during their testimony, the president, the CAO, and the dean provided what appears to be individually subjective attempts to explain what the instructional priorities are. Their testimonies do not demonstrate there is a consistent understanding or expression of these alleged priorities for the purpose of reviewing sabbatical plans.

Given the foregoing considerations, the finding must be that the Employer violated the Agreement when it did not approve grievant's sabbatical plan as revised in accordance with the suggestions of his dean. Therefore, the grievance must be sustained.

Because of the timing of the arbitration hearing and the issuance of this Award, the remedy must be provided in the form of alternatives with grievant to have the choice if operationally feasible for MCTC to accommodate.

Alternative No. 1 The customary objective of an arbitration remedy is to place the grievant in the same position he would have been in had the violation not occurred. If grievant chooses to execute his sabbatical plan for the academic year 2013-2014 as if it had been approved originally and MCTC can accommodate his choice, then he may do so. In such case, he will be required to serve the Sabbatical Return Requirements provided in Article 17, Section 4, Subdivision 7.

Alternative No. 2 If grievant cannot or chooses not to take his sabbatical leave in accordance with the first alternative, then he may take it the following academic year 2014-2015. If grievant chooses this second alternative, then the Chancellor is directed to waive the Sabbatical Return Requirements due to special circumstances as provided in Article 17, Section 4, Subdivision 7.

One other matter warrants some comment. Any issues surrounding the propriety of the Employer's removal of the coaching course were not within the scope of the instant grievance. Accordingly, this document did not make any findings on those issues and nothing herein should be read as affecting that grievance in any manner whatsoever.

AWARD

1. The grievance is procedurally arbitrable and is sustained.
2. The Employer did violate the Agreement when it did not approve the sabbatical plan submitted by the grievant, Jay Pivec.
3. Grievant must be provided the remedy as described in the Opinion and Findings.
4. The undersigned retains jurisdiction to resolve any remedy issues.



Gerald E. Wallin, Esq., Arbitrator
July 28, 2013