

IN THE MATTER OF THE ARBITRATION BETWEEN

University Education Association,)
the Union.)
)
-and-)
)
University of Minnesota,)
the Employer.)

ARBITRATION AWARD

BMS Case No. 05-PA-1001

Arbitrator: Barbara C. Holmes

Hearing Date: December 1, 2005

Post Hearing Briefs due: December 23, 2005

Date of Decision: January 13, 2006

Appearances:

For the Association: Rebecca H. Hamblin
Attorney
Education Minnesota

For the Employer: Shelley Carthen Watson
Associate General Counsel
University of Minnesota

INTRODUCTION

The University Education Association (herein “the Association”), as the exclusive representative, brings this grievance claiming that the University of Minnesota (herein “the Employer”) has violated the parties’ collective bargaining agreement. An arbitration hearing was held at which both parties had a full opportunity to present evidence through the testimony of witnesses and the introduction of exhibits. Both parties submitted post-hearing briefs.

ISSUE

Did the Employer violate the collective bargaining agreement by failing to develop and disseminate written criteria governing how the Academic Deans of the various schools award merit pay increases?

CONTRACT LANGUAGE

104.00 Management Rights. Except as expressly limited by this Agreement or by law, the Employer and the Association agree that the Employer reserves all rights and privileges heretofore exercised by the Employer or granted to it by law including, but not limited to, the following: ...

- (h) The selection, direction, number, assignment, evaluation and promotion of Members and other faculty members;

500.200 Merit. Effective beginning each fiscal year of the contract, the Employer may increase any Member's salary for purposes of merit recognition provided that such Member was a Member during the previous academic year. The Employer shall increase such Members' individual salaries by an amount sufficient to fully use the funds specified for the purpose of Merit Adjustment in Sections 501.260, and 501.280. Determination of Merit for the adjustment for FY 2005 shall include consideration for the evaluation period consisting of calendar years 2002 and 2003. Determination of Merit for the adjustment for FY 2006 shall include consideration for the evaluation period consisting of calendar year 2004.

502.100 Procedures for Distribution of Merit Adjustment Funds. The amount of a Member's merit adjustment as provided in Section 500.200 shall be recommended by the Member's department head or other academic unit head to the Principal Administrator. The Principal Administrator shall, in turn, make a recommendation to the appropriate Vice Chancellor, who shall determine the amount of a Member's merit adjustment, if any.

801.110 Grievance. A "grievance" means a charge by a grievant that there has been a breach or improper application of a specific term(s) of this Agreement or University policies.

802.100 Employer's Right. The Chancellor and Principal Administrators or their designees, acting as agents of the Employer, shall follow past practices; they may change past practices, and establish unit work rules provided that such past practices, new practices, or unit work rules:

- a) Are consistent with this Agreement; and
- b) Are consistent with policies adopted by the Regents, provided that such policies do not conflict with this Agreement; and
- c) Are not arbitrary and capricious.

EMPLOYER POLICIES

FACULTY COMPENSATION POLICY

BACKGROUND ON COMPENSATION AT THE UNIVERSITY OF MINNESOTA

...Increases to annual base salary for faculty occur in the following ways: through annually determined merit increases ... The salary determination process must provide an objective unbiased evaluation of each faculty member following a thorough review of his/her work. ...

CRITERIA FOR ANNUAL SALARY INCREASES AND PROMOTION

... The criteria for determining salary increases must be similar to those used for promotion and tenure. The tenure and promotion regulations of the University, adopted in 1985, provide the following instructions which form the framework within which salary decisions must be made:

7.11 GENERAL CRITERIA

... The primary criteria for demonstrating this potential are effectiveness in teaching and professional distinction in research; outstanding discipline-related service contributions will also be taken into account where they are an integral part of the mission of the academic unit. The relative importance of the criteria may vary in different academic units, but each of the criteria must be considered in every decision.

7.12 DEPARTMENTAL STATEMENT

Each academic unit must have a document that articulates with reasonable specificity the indices and standards which will be used to evaluate whether candidates meet the criteria of Section 7.11.

ALLOCATION FORMAT

Each year the annual salary increase pool for meritorious performance received by the unit will be distributed based on the criteria specified in the University's Regulations Concerning Faculty Tenure and appropriate departmental faculty evaluation document

PROMOTION INCREASES

... The dean will set aside from those funds provided to his/her unit for salary increase distribution, sufficient funds to cover these promotional increments. It is understood that the dean may also set aside funds from this overall pool to address special merit or retention purposes

NOTES

For the purposes of salary discussion and determination, the relevant academic unit is the departmental or budgetary unit, whichever is smaller.

FACTUAL BACKGROUND

The Employer is a public higher education institution that maintains several campuses across the State of Minnesota. One of the campuses is located in Duluth, Minnesota. The Association represents some of the faculty members at this campus.

Since 1981 the parties' collective bargaining contract has permitted the Employer to increase a faculty member's salary through "merit recognition". Typically the money budgeted for merit pay increases is divided amongst the various academic schools – the School of Business and Economics (herein LSBE), the College of Liberal Arts (herein CLA), the College of Education and Human Service Professionals (herein CEHSP), the College of Science and Engineering (herein CSE) and the School of Fine Arts (herein SFA). An Academic Dean heads each school.

Over the years, several of the Academic Deans have divided their schools' share of the merit pay funds into two portions. One portion goes to the department heads for their recommendation as to how it should be distributed to the faculty members. The remaining portion is retained by the Academic Deans and distributed to faculty members in their respective schools according to their judgment. The percentage of the merit pay funds retained by Academic Deans has increased over the years. Currently, the Academic Deans of CLA, CEHSP, and SFA retain 20% and the Academic Dean of CSE retains 25%. However, the Academic Dean of the LSBE passes his school's entire share of merit pay funds to the department heads for their recommendation, retaining none for his own separate distribution.

At the departmental level various versions of written criteria exist that are used by the department heads to determine the amount of the merit pay increase recommended for each faculty member. The written criteria typically focus on a faculty member's basic duties of teaching, research and service. The department heads' recommendations are forwarded to their respective Academic Dean for review. At this point the Academic Deans determine how they will distribute their portion of the merit pay funds. The total amount of recommended merit increases for each faculty member is then forwarded to the Vice Chancellor of Academic Affairs for final approval. The existing Vice Chancellor of Academic Affairs testified that in each of the past five years he has followed the Academic Deans' recommendations.

At a meet-and-confer session held in April of 2004 the Association raised several issues regarding merit pay. Written minutes from that session indicate that one of the issues was as follows:

UEA asks what percentage of merit money is withheld for the Academic Dean's discretionary merit and if there is a limit to how much is withheld.

As a follow-up to the meet-and confer session the president of the Association sent a memo to the Vice Chancellor of Academic Affairs requesting specific information about merit pay. One of the requests was stated as follows:

A document that shows the portion of an Academic Dean's 'discretionary' merit dollars awarded to each bargaining unit member for teaching, the portion awarded for research, and the portion awarded for service.

On July 12, 2004, the Association filed a grievance alleging that the Employer had violated the collective bargaining agreement by failing to provide the Association with the written criteria used by the Academic Deans for making merit pay awards. During the course of the grievance process it was determined that no such written criteria exist. Vice Chancellor of Academic Affairs Vince Magnuson testified that he has never required the Academic Deans to have any specific criteria for distribution of their portions of merit pay funds, nor does he have any specific criteria that he uses during the final approval process. The grievance was modified to address the lack of written criteria. It was denied at

Steps Two and Three of the grievance process and appealed to arbitration in accordance with the provisions of the parties' collective bargaining contract.

POSITIONS OF THE PARTIES

Association: The Association does not challenge the right of the Academic Deans to retain and distribute a portion of the merit pay funds. However, it believes that objective written criteria to guide the Academic Deans' distributions are required by the collective bargaining contract and/or the Employer's policies.

The Association argues that a lack of written criteria governing the Academic Dean's distribution of merit pay funds prevents faculty members from knowing how to compete for these salary increases. It argues that without such criteria faculty members do not know how they are being judged. The Association believes that this amounts to an "arbitrary and capricious" practice.

The Association believes that the Employer's Faculty Compensation Policy requires that salary determinations be made using an "objective, unbiased evaluation" with written criteria that are similar to those used for promotion and tenure decisions. Based upon the testimony and documents provided by several of the Academic Deans, it believes that the Faculty Compensation Policy, and therefore the contract, has been violated.

Employer: The Employer argues that nothing in the parties' collective bargaining contract specifically requires that written criteria be developed for the distribution of the Academic Deans' merit pay funds. It believes that Sections 280.620(b) and 280.700(b) also support its position in that these sections qualify the phrase "written statement about criteria and procedures in merit decisions" with the phrase "(if available)," suggesting that such statements are not required. It also notes that Section 104.000 of the contract reserves the right of evaluation and promotion of faculty members to the Employer.

With regard to the Association's claim that the Faculty Compensation Policy has been violated, the Employer argues that the issue is not properly before this Arbitrator. It

states that this issue was not raised in this proceeding until the arbitration hearing and amounts to a separate contract violation that has not been subject to the grievance process. Furthermore it believes that the Faculty Compensation Policy applies only to non-unionized faculty members, not faculty members of the Association. If it is determined that this policy applies to the Association's members the Employer argues that it does not require Academic Deans to have written criteria guiding their merit pay decisions.

The Employer believes that it has a long-standing past practice in which Academic Deans have distributed their portion of merit pay funds without using written criteria. It argues that because the Association has never grieved this practice it has waived its right to file this grievance.

The Employer also argues that absent any proof that the Academic Deans' merit pay distributions are arbitrary and capricious, there is no violation of the contract.

DISCUSSION AND OPINION

Because Section 801.110 of the parties' collective bargaining agreement allows contract provisions *and* employer policies to be grieved, the particular set of facts presented at the arbitration hearing must be analyzed in terms of relevant provisions in the contract and/or applicable policies. At the outset it should be noted that the Association does not dispute the authority of the Academic Deans to retain and distribute merit pay funds. However, it believes that an Employer policy requires that written criteria governing the distribution must be developed and disseminated to the faculty members in advance of the evaluation period.

1. Has any provision in the collective bargaining contract been violated?

The contract language regarding merit pay is fairly straightforward. It states: "the Employer may increase any Member's salary for purposes of merit recognition." The contract language also references the total amount of funds that have been negotiated for merit pay increases and establishes the evaluation periods for the increases. The section entitled "Procedures for Distribution of Merit Adjustment Funds" only sets forth that the department heads make recommendations to the "Principle Administrator" who in turn

makes recommendations to the final decision maker – the Vice Chancellor. There is no reference whatsoever to any criteria - written or otherwise- that must be used at any review level in the merit pay distribution process.

The only contract provisions that make any sort of reference to the use of written criteria to award merit pay increases are Sections 280.620(b) and 280.700(b). These two sections apply to the circumstance when a faculty member is transferred to another position or recalled from a layoff list. The only phrase of import for this arbitration is included in both sections and states:

A Member who [transfers][is hired from a layoff list]
...shall receive ... the *department's* written statement about
criteria and procedures in merit pay decisions (*if available*).
(emphasis added)

As the Employer has pointed out, the phrase “if available” suggests that there is no requirement that such a written statement exist. Additionally, the provision uses the word “department’s” and therefore is not applicable to Academic Deans.

The Association also claims that the Employer has violated Section 802.100 of the contract. It believes that the Employer’s practice of allowing Academic Deans to award merit pay without following written criteria is “arbitrary and capricious.” However, the Association provided no evidence to support this position. If the individuals making these decisions did not have access to performance records and had no familiarity with the duties and responsibilities of faculty members the Association’s argument might be more persuasive. However, the Academic Deans making these decisions are well aware of the duties and responsibilities of the faculty members and relied on performance records and recommendations made by department heads. Absent specific evidence that the merit pay distributions made by the Academic Deans were arbitrary and capricious the Association’s claim is without support.

2. Is the Association’s argument that the Faculty Compensation Policy has been violated properly before the Arbitrator? The Association relies on the Faculty Compensation Policy to support its position that Academic Deans must follow written criteria in making their distributions of merit pay funds. The Employer argues that a

violation of this policy is not properly before this arbitrator because it was not raised until the arbitration hearing.

The Grievance Forms used by the parties do not help resolve the issue. The Step One Grievance Form provides a place for the Association to state which contract or policy provision has been violated. However, the Step One Grievance Form admitted into evidence is blank. The Step Two and Step Three Grievance Forms contain no specific line to indicate which contract or policy provision is at issue.

The substantive information in the grievance exhibits indicates that the Association was initially requesting that the Employer be compelled to provide information as to the amount of merit pay funds the Academic Deans distributed for each of the three categories of teaching, research and service for each member. When the Association became concerned that this information did not exist the Step Three Grievance Form noted the following:

If it is the case that the collegiate units do not have written standards for the assignment of “discretionary” merit dollars, we ask that the collegiate units be compelled to write them and distribute them to their members by not later than the end of Fall Semester 2004.

It is not unusual during the grievance process for the positions of the parties to be modified. As each party obtains more information in the various grievance hearings their positions and rationales become clarified. In this matter, because of some miscommunications during the grievance process, the Association was not sure if the written criteria existed or whether the Employer was refusing to provide the criteria. However, as indicated by the Step Three Grievance Form it became clear that the Association believed the contract had been violated because no written criteria existed. This is the precise issue in this arbitration. That the Faculty Compensation Plan was raised for the first time in this hearing does not preclude its consideration. In *Elkouri and Elkouri, How Arbitration Works*, Fifth Edition, 1997, by Martin M. Volz and Edward P. Goggin, Co-Editors, at pg. 328, it states:

An arbitrator may refuse to confine the parties rigidly to what occurred prior to the arbitration if the deviation from the prearbitral stage does not amount to the addition of new issues, but merely involves a modified line of argument, an

additional element closely related to the original issue, the refinement or correction of an ineptly stated grievance, or the introduction of new evidence.

In this case, the particular provision of the contract being violated was never made clear by either of the parties during the grievance process. Neither did the parties agree to a “Statement of the Issue” prior to the arbitration. It is the responsibility of both parties to work towards clarifying such matters. Because the underlying issue has not materially changed, I view the Association’s reliance on the Faculty Compensation Policy as a refinement of its argument in support of its claim.

3. Does the Employer’s Faculty Compensation Policy apply to the Association’s members? At the arbitration hearing the parties disagreed regarding the applicability of the Faculty Compensation Policy to the Association’s members. The Employer argues that this policy applies only to its faculty members at other facilities that are not unionized and have established a “Faculty Senate”. The Faculty Compensation Policy indicates that it was “[a]pproved by the: Faculty Senate on February 12, 1993” and “[a]ccepted and [i]mplemented by the: Administration on April 26, 1993. The Employer’s Human Resource Director testified that Faculty Senate policies do not apply to members of the Association. The Employer also takes the position that because compensation is a “term and condition of employment”, merit pay can be addressed only by the collective bargaining contract.

The Association claims that if a Faculty Senate policy is approved by the Administration it also applies to Association members unless they are specifically excluded or a provision of their contract states otherwise. To support its position the Association submitted the Employer’s *Education in the Responsible Conduct of Sponsored Research and Grants Management Policy* and *Policy on Controlled Substances*. These policies state that the “University Senate” and the “Administration” approved them. No mention is made that the Association’s members are excluded from coverage by this policy. Based upon testimony and separate exhibits, it is clear that the Association’s members are, in fact, covered by these policies. The Association also submitted the Employer’s *Academic Salary Memo 2005-2006* that expressly *excludes* Association’s members.

Normally, testimony from the Human Resources Director that Faculty Senate policies do not apply to the Association members would be persuasive. However, the Association has offered specific examples of other Employer policies that appear to apply to the Association unless it is expressly excluded. I find that the Faculty Compensation Policy applies to the Association's members because it does not expressly conflict with any contract provision nor does the policy expressly exclude the Association's members from coverage.

The Employer's argument that compensation, and therefore merit pay, can be addressed only by the contract because it is a "term and condition of employment" is not persuasive. While compensation, along with terms and conditions of employment, is certainly a mandatory subject of bargaining, the Employer is not precluded from developing a process and procedure to carry out the provisions of the contract. If the Employer was precluded from so acting, all of the exhibits submitted by the Employer that show the process and procedure used by the various department heads for distributing their portion of the merit pay funds would also be in violation of the contract. No such claim was made.

4. Has the Employer violated its Faculty Compensation Policy by allowing the Academic Deans to distributed their portion of merit pay funds without following written criteria? The Faculty Compensation Policy lists merit pay as a form of a salary increase. It then goes on to say that the "criteria for determining salary increases must be similar to those used for promotion and tenure." Sections 7.11 and 7.12 of the promotion and tenure code are then set forth with the instruction that they are to "form the framework within which salary decisions must be made." The use of the phrase "form the framework" suggests that these provisions have not been incorporated word for word, but that their basic concept must govern salary increase decisions. The basic concept of Section 7.11 is that the criteria used to award salary increases should be based upon the faculty member's contribution to the teaching, research and service goals of the University. The basic concept of Section 7.12 is that "[e]ach academic unit must have a document that articulates with reasonable specificity the indices and standards which will be used to evaluate whether candidates meet the criteria of Section 7.11." "Academic

unit” is defined in the Policy as the “the departmental or budgetary unit, whichever is smaller.” I find that the Faculty Compensation Policy” requires written criteria to govern the distribution of merit pay funds, but only at the *departmental* level, not the Academic Dean level. This interpretation is further supported by another provision in the Policy that states: “It is understood that the dean may also set aside funds from this overall pool to address special merit or retention purposes.” I find that the use of the phrase “special merit or retention purposes” suggests that there are reasons beyond “teaching, research and service” that may warrant merit increases and that those decisions are made by the Academic Deans. There is no requirement that written criteria be used to make those decisions. The Employer has been operating in this manner since the first contract between the parties in 1981.

CONCLUSION

The Association has offered many reasonable arguments as to why written criteria should govern the merit pay decisions made by Academic Deans. As stated by the Association’s president, the faculty members simply want to know what they need to do to earn a merit pay award from the Academic Dean’s portion of the funds. But an arbitrator’s decision cannot be based upon what “should” be. It must be based on the specific language in the parties’ collective bargaining contract (or in this case, the Employer’s policy). I conclude that specific language exists in the Faculty Compensation Policy that supports the actions of the Employer.

AWARD

The grievance is denied.

DATED: _____

Barbara C. Holmes
Arbitrator