

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHIPPEWA VALLEY TECHNICAL COLLEGE TEACHERS' UNION, WEAC, NEA

and

CHIPPEWA VALLEY TECHNICAL COLLEGE DISTRICT BOARD

Case 188

No. 56716

MA-10390

Appearances:

Ms. Leigh Barker, WTCS Consultant, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, for Chippewa Valley Technical College Teachers' Union, WEAC, NEA, referred to below as the Union.

Weld, Riley, Prens & Ricci, S.C., by **Attorney Stevens L. Riley**, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for Chippewa Valley Technical College District Board, referred to below as the Board.

ARBITRATION AWARD

The Union and the Board are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute filed on behalf of Robert Helgemo, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on October 21, 1998, in Eau Claire, Wisconsin. A transcript of the hearing was filed with the Commission on November 16, 1998, and the parties filed briefs and reply briefs by January 20, 1999.

ISSUES

The parties were not able to stipulate the issues for decision. I have determined the record poses the following issues:

Did the Board violate the collective bargaining agreement when it did not allow the Grievant to teach three Business Law classes as part of a full-time load for the Fall semester of 1997-98?

Did the Board violate the collective bargaining agreement when it did not offer Business Law or other courses to the Grievant for the Spring semester of 1997-98?

If so, what remedy is appropriate?

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

Section A

The Board shall have the right to direct all teachers in the performance of necessary work functions. This power shall not be exercised in a manner which will defeat the specific provisions or basic purposes of this agreement. The powers or authority which the Board has not officially abridged, delegated, or modified by this agreement are retained by the Board. . . .

. . .

Section C – Layoffs

1. The Board reserves the right to lay off for lack of work or funds or the occurrence of conditions beyond the control of the Board or where the continuation of work would, in the Board's opinion, be wasteful and unproductive. When work and/or funds have been restored within two calendar years from date of layoff, contractual employees shall be hired back within their major instructional areas in reverse order of layoff and their seniority rights shall be restored as of the date they left service. Layoff due to lack of work or lack of funds shall be determined by seniority among those in the same area in which the layoff is necessary and for which the employees qualify. The question of order of layoff may be submitted to the Grievance Procedure for determination of its reasonable application.

. . .

ARTICLE V – WORKING CONDITIONS

Section A – Seniority

1. Job seniority shall be the length of continuous service of a teacher in the school system.

a. Full-time job seniority shall be the length of continuous full-time service of a teacher in the school system.

b. A full-time teacher is defined as a person who is employed full-time for a school year.

c. A part-time teacher (50 percent or more but less than full-time) is defined as a person working at least 50 percent of a full schedule for the school year. . . .

7. In making assignments pursuant to Article V, Section J, the Board agrees to identify part-time assignments as soon as possible after all full-time contractual teacher assignments are completed. Part-time employees shall be accorded, as between themselves only, the same rights accorded full-time employees in Section J, Teaching Assignments and Duties, paragraphs 1 and 2, except for the time limitations set forth therein, which are not applicable to part-time employment.

. . .

10. The parties recognize that part-time vacancies are extremely difficult to anticipate and that, therefore, Section B, Transfer Procedure, and Section C, Promotion Procedure, of this article cannot be applied to vacancies or promotions where part-time positions are involved. However, the Board agrees to keep part-time employees apprised of part-time vacancies in their respective areas and to accord to part-time employees, as among themselves only, rights similar to those given full-time employees in Sections B and C.

11. Except as expressly provided in this Section (A), part-time employees are not covered under the following: Article V, Section J, Teaching Assignments and Duties; Article VIII, Section F, Sabbatical Leave; and Article VIII, Section K, Industrial Leave. . . .

Section B – Transfer Procedure . . .

Section C – Promotion Procedure . . .

Section J – Teaching Assignments and Duties

1. It is agreed that all teachers shall teach in their certified teaching area. In assigning teaching duties, the administration shall give first consideration to the primary or secondary professional competence of the teacher and to his/her experience in other fields as a teacher. Exception may be made to this in the interest of the teacher, the students, or for emergency reasons. . . .

4. The parties recognize that in order to meet the changing demands of the District, it is necessary for the Board to employ part-time teachers and that the need for such teachers varies from department to department. However, it is not the intention of the Board to utilize these employees for the purpose of minimizing the number of full-time teachers on the staff or to capriciously deprive a teacher from obtaining either a 50 percent load or full-time status.

5. Part-time teaching opportunities shall be reviewed during the 45 days immediately preceding the commencement of each semester for the purpose of determining how many less-than-full-time positions are available in each department for the succeeding semester. If there exists in any department for two consecutive semesters part-time assignments in excess of a full-time position which can be reasonably consolidated, the administration will post a full-time vacancy, provided that the projected enrollment indicates sufficient classes for a full-time assignment.

. . .

APPENDIX C

CHIPPEWA VALLEY TECHNICAL COLLEGE SENIORITY OVERVIEW DECEMBER 7, 1994

Seniority for CVTC Teachers' Union bargaining unit members is defined by our collective bargaining agreement with the board under the heading of Working Conditions. It is also defined by past agreements, rulings and practices. As such, seniority is divided into two categories based upon full-time or part-time employment. . . .

Area of assignment is the more difficult aspect of seniority. Past rulings and practices have established that bargaining unit members do not have school-wide seniority. This means that seniority rights only apply within each area of assignment. Therefore, members do not have bumping rights across divisions or departments except over part-time members in case of layoff.

In layoff situations, a full-time member who does not have sufficient work load to maintain full-time status (90% or greater) has access to courses from the "part-time listing" which the member is certifiable to teach. This means a full-time member can take part-time work as long as it does not effect (sic) the full-time load of any other current member. . . .

Much work has been done to determine seniority dates. However, additional work needs to be done regarding the application of areas of assignment to seniority rights.

APPENDIX D

CHIPPEWA VALLEY TECHNICAL COLLEGE INSTRUCTOR SCHEDULING BY DEPARTMENT

Goal:

To develop instructor schedules which meet student needs and are mutually acceptable to all department members.

Guidelines:

1. Instructor loads must be at least 90%, with 100% being the desired objective.
2. The hours (sic) and Loads policy and procedures regarding overloads and underloads must be followed.
3. Senior instructor wishes cannot result in the layoff or load reduction for less senior teachers who are not certified to teach the remaining courses.

...

APPENDIX E

CHIPPEWA VALLEY TECHNICAL COLLEGE AGREEMENT ON CONTRACT LAYOFF LANGUAGE GUIDELINES

In the event that sufficient work does not exist in the instructional area for which an instructor is employed, the following will occur:

- a. Part-time courses from the "part-time listing", for which the person is certifiable, will be available. (This will include only courses not impacting on the full-time load of any current staff.)
- b. If sufficient course work is not available from the "part-time listing", layoff will occur according to Article II, Section C. If the layoff occurs at the beginning of an enrollment period, the layoff is effective immediately and the 30-day clause does not apply.

- c. The instructor will serve a two-year probationary period in any new instructional area, identified in "a" above.
- d. Once the probationary period has been completed, the new instructional area is added as an official instructional area in which the instructor is employed.
- e. If the person becomes full time in the new instructional area, then their official instructional area will be changed and the old classification deleted.

...

APPENDIX J

CHIPPEWA VALLEY TECHNICAL COLLEGE HOURS AND LOAD POLICY November 1997

...

C. Procedures

1. Load Determination

Full-time teaching loads will be between 90 and 105 percent per semester.

...

BACKGROUND

The Grievant filed a grievance dated August 30, 1997, which alleges that he was "(r)efused work from the part time class listing," and more specifically that the Board "(u)sed classes I requested to add to Paralegal to develop a posting from two areas." Brenda Finn, the Board's Vice President-Academic, responded to the grievance in a letter dated November 24, 1997, which states:

...

It is the position of the college that Business Law was intended to be part of the load of the full-time legal assistant position in paralegal, which was posted before the start of fall semester of 1997, and that the bargaining unit does not have the right to take work from this full-time position to assign to (the Grievant) in an attempt to build load.

Business Law was listed as a potential teaching position on two part-time postings which were released prior to the decision that the workload in paralegal justified

an additional full-time position and before the ensuing decision to recruit for a full-time paralegal instructor. On lay-off since March of 1997, (the Grievant) has rights for two years once all full-time staff positions are filled and before any other adjunct faculty are called back. He is not entitled to take work from a full-time position. It is critical that, in the interests of hiring the strongest possible candidates and maintaining academic rigor in programs, the college maintain the right to preserve the integrity of full-time positions. Moreover, it is a practice of the college to create a full-time position where work justifies it.

Past practice also indicates Business Law has traditionally been taught by an instructor in the paralegal area. For over a decade, the course has been taught by a paralegal instructor, an adjunct lawyer, or an instructor having a law degree. Though students in both the accounting and paralegal programs take the Business Law class, the content of the course is geared to the paralegal area. . . .

These documents set the themes explored at hearing.

The Board originally hired the Grievant in December of 1988 to serve as the Teacher/Supervisor of its Business and Entrepreneurship Center, which is referred to below as the Center. The Center operated as a business help operation, offering courses, outreach programs and telephone assistance to people attempting to start their own business. By the 1996-97 school year, however, funding and other issues threatened the Grievant's maintenance of a full-time teaching load.

The parties had confronted layoff issues before this, and had executed a settlement agreement in May of 1992 to establish a procedure governing the layoff process. Part of that agreement, originally known as the Schmidt agreement, was refined by the parties' and eventually incorporated into the agreement as Appendix E. Roughly speaking, the procedure put into place through the Schmidt agreement called for a teacher facing layoff to meet with the Human Resources Manager to determine instructional areas in which the teacher was either certified or certifiable. After this, the teacher could request courses within the areas identified with the Human Resources Manager to "build load." Teachers subject to layoff would make such requests after full-time instructors received their assignments, but prior to the courses being offered to part-time or adjunct faculty. The procedure has been applied in at least eleven cases since May of 1995, and has been applied to build load prior to and after the formal layoff of a full-time instructor.

As a function of this procedure, the Grievant met on November 4, 1996, with then-incumbent Union President Sue Johnston, Supervisor Jack O'Connell, Human Resources Manager Helen Blumer and Secretary Cheryl Stage to determine the instructional areas in which the Grievant was certified or certifiable. Ultimately, the parties determined the Grievant was certified or certifiable in the following instructional areas: 101 Accounting; 102 Business

Administration; 104 Marketing and Merchandising Management; 196 Supervision and Leadership Development; and 809 Social Sciences-Economics. As a result of the meeting O'Connell issued a memo, dated December 18, 1996, to course scheduling personnel. O'Connell's memo advised schedulers of the instructional areas in which the Grievant could teach so that they could "assist me in assigning more load for (the Grievant) so that he will retain his full time teaching assignment for next semester."

The Grievant was unable to build a full-time load for the second semester of the 1996-97 school year. In the following letter to the Grievant dated February 21, 1997, William Ihlenfeldt, the Board's President, notified the Grievant that he would be laid off:

Due to lack of program enrollments, the position in which you are employed is being eliminated. This is notification, pursuant to your individual contract and to the master contract . . . of your layoff.

Layoff will be effective March 21, 1997 . . .

This layoff does not reflect in any way on your teaching ability. The above action was taken due to lack of program enrollments.

During the Spring semester of the 1996-97 school year, the Board determined that it would offer a course titled Small Business Entrepreneur and a course titled Small Business Accounting for the following Fall semester. In addition to these courses, an instructor's request for Family Leave opened up certain courses. These courses, when combined, afforded the Grievant a roughly 74% full-time equivalent (FTE) position for the Fall semester of the 1997-98 school year. To be full time under the labor agreement, a position must be at least 90% FTE.

Sometime in late Spring or early summer of 1997, the Grievant received a notice from the Board which listed courses which, if sufficient student interest existed, would be offered in the Fall semester of the 1997-98 school year. This notice is known as the Part-Time Listing, and advertises part-time openings to interested applicants. Among the listed courses were three sections of Business Law. The Grievant phoned the Board office and asked to be assigned to those courses so that he could return to full-time status. Gerry Gamroth informed him that they would be assigned to him. Very shortly after so informing him, Gamroth phoned the Grievant and advised him that the Business Law courses had mistakenly been included in the Part-Time Listing and would be assigned to another teacher. The Grievant ultimately learned that the Business Law courses had been combined with other courses to create a full-time position of Paralegal Instructor in the Paralegal Program.

The Paralegal Program is part of a distinct instructional area, Legal Assistant, which is listed as Instructional Area 110 by the Wisconsin Board of Vocational, Technical and Adult Education. Business Law, in the Board's Course Guide for the Fall semester of 1997 was listed

as 102-160. Instructional Area 102 is Business Administration. Roughly speaking, the 102-160 designation indicates that Business Law is a core course in the Business Administration program. It is a related course in the Paralegal and Accounting Programs. Roughly speaking, this means the course is relevant to the Paralegal and Accounting Programs, but not necessarily a required course.

The Board posted the full-time Paralegal Instructor position in early August. The position was filled before the start of the Fall semester. Although the Grievant was certified to teach the Business Law courses, he was not certified to teach other courses required of a Paralegal Instructor, and thus did not apply for the position.

Union and Board representatives met on August 29, 1997, to attempt to resolve the grievance. The parties were unable to resolve the grievance, but their discussion highlighted the themes underlying the grievance. Blumer, Marv Franson, the Board's Dean of Instruction, Finn, Blumer and Johnston attended the meeting. The Grievant was consulted by telephone as the meeting progressed. Finn's written summary of the meeting reads thus:

. . .

2. At issue was the Business Law course. The District posted a paralegal full-time position which included a 102 course (Business Law). Leadership reiterated in the meeting that we believe we have both the right and the responsibility to hire a full-time person for the position. It is critical to preserve the full-time nature of the paralegal hire. To do so, the new hire had to teach at least one of the Business Law courses.

3. John Frank stated that the Business Law course has been taught by a paralegal or a lawyer since the mid-1980's. John also stated that, though students in both accounting and paralegal take the Business Law class, the content of the course is geared to the paralegal area. He believes that the course should continue to be taught by instructors in the paralegal area or by a lawyer, as has been recent past practice.

4. (The Grievant) is not currently scheduled at 100 percent and has been looking to pick up additional load. He communicated to Sue Johnston that he had taught a business law course for many years at another campus years ago.

5. The proposed schedule for the Grievant for Semester 1 of 1997-98 included the following: Supervision of Personnel (2 sections or 28.8 percent), Marketing Information Management (18.2 percent), and Continuing Education courses (23.3 percent). If a Business Law course were to be added, the load would increase by 14.4 percent.

...

7. To effect a solution, Marv and Brenda worked with John Frank to try to reconfigure the schedules of the three paralegal instructors so that one of the Business Law courses could be moved to (the Grievant). We were successful in juggling loads so that all instructors had loads in the 90 to 100 percent range. It should be noted that the solution arrived at here was not the first choice of Marv, Brenda, or John, since a non-paralegal person would be teaching Business Law and all three instructors would be teaching at under 100 percent load, a situation which would not have occurred if both Business Law courses stayed within paralegal. . . .

8. Marv, Helen, and Brenda also spoke with Jack O'Connell to see if there was a possibility for (the Grievant) to work with the Eau Claire Co. Jobs contract program. . . . (T)his did not work out.

9. Sue, Helen, Marv, and Brenda reviewed a number of options to explore getting (the Grievant) up to 100 percent; Sue had indicated that she would only accept (the Grievant's) teaching one section of Business Law if we could find a 100 percent load for (the Grievant). . . .

10. . . . The schedule for the posted position was restored to the original schedule, which included two Business Law courses. . . . The person to be recommended for the paralegal position was contacted, offered the position and accepted. (The Grievant) was scheduled at a 70 percent contract.

The Board offered the Grievant an individual teaching contract, dated September 19, 1997, which made his position 73.2% FTE. In a letter to the Grievant dated October 6, 1997, the Board adjusted this to 74.1% FTE. The Paralegal Instructor position filled by the Board for the first semester of the 1997-98 school year carried the following load:

Instructor	Course Schedule	Load Value	Total Load
J. Moldenhauer	1 Debtor/Creditor	14.4	109.0
	1 Admin. Estates	14.4	
	1 Corp. Law	14.4	
	1 Family Law	14.4	
	1 Bus. Law	14.4	
	1 Bus. Law	22.0	
	5 Prep	10.0	
	Mentee	5.0	

John Frank taught the remaining section of Business Law. That section had a load value of 18.9, and Frank carried a total load of 116.0 for the first semester of the 1997-98 school year. Frank is the Program Director for the Paralegal Program and is a member of the bargaining unit. He testified that the Business Law course had been taught, at least since December of 1989, by an attorney or a paralegal with law office experience.

As noted above, to be considered full-time, a position must carry 90% FTE. Full-time instructors can carry loads above a full-time load. Such loads are called overloads, and are sometimes voluntarily sought by full-time teachers. An overload can, for example, raise a teacher's salary in the final years of his career, which has a direct impact on the formula applied to determine retirement benefits. Scheduling overloads was, in part, the subject of an e-mail memo from Franson to the "faculty union" dated November 7, 1997. That memo states:

When you choose courses for next semester, please continue to use the scheduling guidelines that you have used in the past. A copy is attached to this memo.

. . .

Finally, you can choose to be over 105 percent and up to 120 percent, provided the overload does not adversely affect another instructor. . . .

The memo attached to the e-mail is headed "Instructor Scheduling By Department" and states:

Goal:

To develop instructor schedules across the week in a broad spectrum of times that effectively meet student and program needs and are mutually acceptable to all department members.

Guidelines:

First consideration in selecting classes should be given to the primary or secondary professional competence of the teacher and to his/her experience in other fields as a teacher.

Instructor loads must be at least 90%, with 100% and three preps being the desired objective. . . .

Qualifications being equal, seniority shall prevail:

Senior instructor wishes cannot result in the layoff or load reduction for less senior teachers who are not certified to teach the remaining courses.

. . .

Senior instructors cannot choose courses in ways that could adversely affect other loads; i.e., choosing time of day/week over course content.

. . .

Courses available to adjunct faculty must be consolidated where reasonably possible. . . .

The Grievant's teaching load fell in the second semester of the 1997-98 school year. He signed an individual teaching contract in late January of 1998 which set his load at 26.1% FTE. In a letter dated February 6, 1998, he was assigned an Accounting 1A class which brought his load to 35.1% FTE.

During the second semester of the 1997-98 school year, the Board posted a part-time position for Quality and Leadership, Supervisory Management Instructor. Supervision and Leadership falls within Instructional Area 196, which is an area the Grievant is certified to teach. Duane Severson questioned this posting in an e-mail sent to Finn on April 12, 1998, which states:

The job posting for the position: ***Quality and Leadership, Supervisory Management Instructor*** appears to consist partially of work (the Grievant) was formerly teaching. This work should be offered to him first before it is posted on the Adjunct faculty list. I hope this oversight will immediately be rectified and a corrected job posting will follow.

The Board did not respond to this e-mail. It did not, however, fill the posted position referred to by Severson.

During the course of the second semester, the Grievant became aware that certain full-time Accounting instructors were teaching an overload schedule which included courses for which he is certified. Those loads can be summarized thus (courses for which the Grievant is certified or certifiable appear in bold typeface):

INSTRUCTOR	COURSE SCHEDULE	LOAD VALUE PER COURSE	TOTAL LOAD
J. Anderson	1 Acctg. Sys. 1 Acctg. SW Sys 1 Peachtree CF Acctg. Lab RF Acctg. Lab 4 Prep Travel	19.2 14.4 9.6 38.4 24.0 5.0 10.7	121.3
S. Hanson	1 Acctg. SW Apps. 2 Mgr. Acctg. 1 Acctg. IV (ITV) 1 st time ITV 1 Acctg. III EC Acctg. Lab 5 Prep	14.4 28.8 35.0 2.5 24.0 9.6 10.0	124.3
A. Harvey	1 Acctg. IV 1 General Acctg. 1 SS-Bus. Apps. 1 Peachtree 1 Survey of Acctg. 5 Prep	24.0 24.0 14.4 9.6 14.4 10.0	96.4
T. Kite	2 Cost Acctg. 1 Gov. Acctg. 1 Payroll Acctg. EC Acctg. Lab 4 Prep ConEd Class	38.4 9.6 19.2 52.8 5.0 4.8	129.8
G. Nelson	3 Acctg. I 2 Acctg. II	72.0 48.0	120.0
G. Wendt	1 Income Tax I 1 Income Tax II 1 Acctg. SW Apps. 1 SS-Bus. Apps. Menomonie Acctg. Lab 5 Prep	24.0 19.2 14.4 14.4 43.2 10.0	125.2

The Grievant did not specifically apply for any course in the Accounting area, but felt that his layoff obligated the Board to survey its course offerings to determine if overload courses could be allocated within the department to permit him to build load, without adverse consequences to the full-time status of any of the instructors carrying an overload. The Board disputes any such obligation, and contends that the obligation conflicts with its scheduling practices. Work is

available for part-time or adjunct faculty only after it has been offered to full-time faculty. The scheduling process is such that courses available for selection by part-time faculty may not be known until several days into a semester. In the Board's view, courses are offered to laid off, part-time faculty before being offered to adjunct faculty, but only after being offered to full-time instructors.

Sometime in late July of 1998, the Board posted a full-time position of Quality and Leadership Instructor. The position combined duties in the Instructional Area 196 Supervision and Leadership Development, and in Instructional Area 185 Quality. The Grievant is certified to teach courses in Instructional Area 196.

It is undisputed that the Grievant's work performance was satisfactory or better while he worked as an instructor in the Center. The Board, contrary to the Union, asserts that a series of teaching difficulties began when the Grievant began to teach courses outside of the Center. It is also undisputed that the parties addressed a grievance involving the layoff of Roger Dale in the Spring of 1998. The parties ultimately executed, by late April of 1998, an extensive settlement agreement which was to be incorporated into the labor agreement to supercede the provisions of Appendix E. That agreement states:

. . .

In the event that sufficient work does not exist in the instructional area/s for which an instructor is employed, the following will occur:

I. Pre-Layoff

- A. Before the layoff of a bargaining unit member, the instructor will have first right to contractual work for which the instructor is certifiable and qualified that is being performed by anyone other than full-time bargaining unit members.
- B. A determination that an employee is qualified for courses/work in another instructional area will be made by the Vice President-Academic based upon the following:
 1. Certification or certifiability for the work . . .
 2. Evidence of mastery of teaching . . .
 3. Submission of individual professional development plan designed to acquire knowledge and mastery of the new area/s.
- C. If sufficient course work is available to keep the instructor at a full-time workload, no layoff will occur and a continuing contract continues in force.

- D. If sufficient course work is not available to keep the instructor at a full-time workload, layoff will occur according to Article II, Section C. . . .
- E. If sufficient course work is available to give the instructor only a partial load, he/she will retain first right to a partial load for the period of his/her recall, with the mutual goal of building the position into full-time. . . .

II. Post Layoff

- A. If work becomes available in areas for which the employee was certifiable and qualified (as described in I A&B) at the time of layoff, the employee on layoff status will have the first right, by seniority, to create up to a full load each semester before such work is made available to the remaining staff and/or before such work is used to create a new position in that area. This does not pertain to related courses originating from a different instructional area.
- B. If an employee who was laid off builds load to full-time and such work is likely to continue, a contract will be re-issued. . . .

III. Status in New Instructional Area/s

- A. An instructor entering a new instructional area/s through I. or II. above will serve a two-year (400% of work) probationary period in any new instructional area/s. . . .
- D. New bargaining unit positions will not be posted externally during the time that there are laid off instructors who are certifiable, qualified and available for the work, unless those instructors decline the assignments.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union states the issues for decision thus:

Did the Board violate the collective bargaining agreement when it did not allow the Grievant to teach three Business Law classes from the Part-Time Listing as part of his load for the Fall semester of 1997-98?

Did the Board violate the collective bargaining agreement when it did not offer the Business Law or other courses to the Grievant for the Spring semester of 1997-98 and for the Fall semester of 1998-99?

If so, what remedy is appropriate?

After a review of the evidence, the Union argues that the Board should not have posted the full-time Paralegal position for the Fall semester of 1997. Acknowledging that the Union “supports the consolidation of part-time work whenever possible and appropriate” under the labor agreement, the Union argues that the Board was under no contractual requirement to post the Paralegal position. More specifically, the Union contends that “(t)he Paralegal Department did not have part-time assignments in excess of a full-time position for the . . . two consecutive semesters” prior to the Fall semester of the 1997-98 school year. Beyond this, the Union asserts that the work consolidated into the Paralegal position “could not reasonably be consolidated into one full-time position” because doing so combined work from two different instructional areas, and because the Grievant could have claimed work in one of those areas to retain full-time status. More specifically, the Union notes that the Business Law course pulled into the Paralegal position falls within “the grievant’s major instructional area, 102, Business Administration.” Business Law is a related course in the Paralegal Program, but is a required related course in the Accounting Program. This underscores, according to the Union, that placing the course in the Paralegal Program afforded no benefit to the Board, but did work to deny the Grievant a claim for work in his major instructional area. That the Board may have assigned the course to the Paralegal Program in the past falls short of establishing a basis to defeat the Grievant’s contractual claim to the work.

Beyond this, the Union contends that the Grievant had a clear contractual claim to the Business Law course under either or both of Article II, Section C or under Appendix E-a. Even if the Business Law course is not considered within the Grievant’s major instructional area, he should have been permitted to claim the work since he is certifiable in the area. Since the Paralegal instructor had not been hired at the time the Grievant would have claimed the work, that employe cannot be considered “current staff” protected by the parenthetical reference of Appendix E-a. The Grievant’s claim on the work is, then, not bumping a current staff member, but the exercise of a contractually superior claim for the work.

Since the Grievant “has remained a full-time instructor on layoff status throughout the entire period since this grievance was initiated,” the Union contends that “the remedy in this case

should extend through April 25, 1999.” The denial of the Business Law classes essentially denied the Grievant full-time status. Thus, the Grievant’s “future employment status is at stake here” and thus any remedy must reflect the continuing impact of the Board’s actions.

Even if the Business Law classes could not be claimed by the Grievant, Accounting instructors in instructional area 101 had contractually excessive overloads in the Spring semester of 1997-98. Overload classes within the Grievant’s certification should have been assigned to him. Beyond this, the Board combined classes in the 185 and the 196 instructional areas to post a full-time position in the Summer of 1998. Since the Grievant is certified to teach the 196 instructional area, he should have been permitted to claim that work before it was made available to a new-hire.

The Union states the remedy appropriate to the Board’s violation of the labor agreement thus:

(W)e respectfully request that the arbitrator sustain the instant grievance, and direct the College to pay (the Grievant) the amount he would have been paid had he taught the three sections of Business Law, including salary and insurance benefits for Fall Semester, 1997-98.

Further, we request that the College be directed to pay (the Grievant) full salary and benefits for subsequent semesters in lieu of courses that were not made available to him because they were assigned to a less senior instructor not on layoff status and/or to other full-time instructors as overload or to part-time instructors.

Finally, we request that the College be directed to provide work to (the Grievant) in his areas of certification at the next earliest opportunity.

The Board’s Initial Brief

The Board states the issues for decision thus:

Did the Employer violate the Collective Bargaining Agreement by failing to give the Grievant a full teaching load for the Fall, 1997 semester? If so, what is the appropriate remedy?

The Board further addressed the Union’s statement of the issues thus:

At the hearing, the Union posed a much broader issue, alleging that the Employer also violated the Collective Bargaining Agreement by failing to give the Grievant additional classes for the Spring and Fall, 1998 semesters. The Employer does not believe these issues are properly before the Arbitrator but is willing to abide by the Arbitrator's decision on these issues, subject to any legal right of appeal which might arise, should the Arbitrator conclude that there is sufficient evidence in the record to support a decision thereon.

The Board contends that the Union "is attempting to 'have its cake and eat it, too,'" since the Grievant lost "any contractual right he might have had to teach business law classes during the Fall, 1997 semester when those classes were incorporated into a full time teaching position which the Grievant was not qualified to fill." Noting that the labor agreement proscribes Board use of part-time positions to minimize full-time positions and that the agreement requires it "under certain circumstances . . . to consolidate part time positions into a full time position," the Board concludes the grievance undercuts the agreement. In fact, Board failure to create the full-time position could be considered a contract violation.

More specifically, the Board argues that it cannot have violated Article V, Section 7, A since that section refers to Article V, Section J, which, under Subsection 11 of Article V, Section A does not apply to part-time employees such as the Grievant. Beyond this, Subsection 7 only requires the Board to identify part-time assignments available to a laid off employee. Since the Board acted within its rights to consolidate the Business Law classes into a Paralegal position, the Grievant lost any claim to them once they were consolidated into a full-time position. Because permitting the Grievant to claim those classes would have adversely impacted the full-time Paralegal position created by the Board, Appendices C and E afford no support for the grievance.

Nor has the Union proven any viable claim by the Grievant "to overload courses selected by regular, full time instructors for the 1997-98 school year or thereafter." The Roger Dale settlement agreement has no bearing on this issue, and the Grievant's claim is belied by the terms of Part II of that agreement. That the Grievant never applied for any of these courses further underscores the weakness of the Union's claim. Beyond this, the fact that the Grievant could have been considered for the Business Law classes falls short of establishing he should be awarded them. Since the Board requires experience the Grievant lacks for the position which includes Business Law, the Board was well within its rights to offer those classes to another employee.

The "Quality and Leadership, Supervisory Management Instructor" position sought by the Union cannot be awarded to the Grievant because "the course never started." As touched upon above, the Grievant lacked the skills and experience required to be a Paralegal instructor. The "Quality and Leadership Instructor" position sought by the Grievant resulted from the resignation of a full-time teacher and thus afforded no components available to part-time employees.

Even if it is assumed that the Grievant was certified or certifiable for certain duties, the

record will not support a conclusion that the Grievant was qualified to perform them. The Board argues that “the Grievant’s qualifications to teach any subject other than in the Business and Entrepreneur Center are at best suspect.” A review of the evidence on this point establishes, according to the Board, that the Grievant’s work performance has not met Board requirements when the Grievant has performed outside of the Center.

A review of the evidence requires, the Board concludes, that “the grievance in question be dismissed.”

The Union’s Reply Brief

The Union notes that the Grievant was once offered and declined one of the Business Law classes. His rejection of the offer shows no more than his unwillingness to accept less than a full-time load.

The Union then challenges the Board’s characterization of the Grievant as a part-time employe. Rather, “he was and remains a full-time contractual employe on Layoff status.” Thus, his claim to the Business Law classes are well-rooted in Article II, Section C. The impact of the Board’s position should not be minimized: “To deny the Grievant the opportunity to return from layoff in his own instructional area violates one of the most fundamental and important of all contractual rights.” Nor can the applicability of Appendix E to the Grievant be lightly dismissed. By a practice codified into a settlement agreement, the parties apply Appendix E “both prior to a layoff and after the layoff.” The Appendix applies to the Grievant because he was a full-time instructor, who lost work in the instructional area for which he had been employed.

Even if the Grievant could be considered a part-time employe, the Board violated Article V, Section A, 7. That subsection specifically grants part-time employes rights “as between themselves only.” Those rights “include the right to teach in their certified teaching area.” More significantly, the Union contends that the Board failed to identify part-time assignments available to the Grievant by creating “the new posting in the Paralegal Program.”

The Union contends that the Board’s reading of “current staff” renders Appendix E meaningless. The Board’s interpretation turns protection for current staff into protection for future staff. This sacrifices the rights of the Grievant or any other laid off employe. The issue is not whether the Paralegal position should be cut back. Rather, the issue is whether that position should have been created with the use of Business Law classes.

The Union argues that the grievance does not question the Roger Dale settlement agreement. Rather, the grievance questions the applicability of Board directives regarding the selection of overload. Such selection, by the Board’s own policies, should “not adversely affect another instructor” and should not exceed 120%.

That the Grievant did not apply for overload work cannot obscure that the Board failed to identify this work as available for him. Nor can it obscure that he “did not have to apply for any

of the courses that made up his 74.1 percent fall load.”

Board questions regarding the Grievant’s “abilities, conduct and attitude” cannot obscure that he was certified or certifiable for the courses he claims through the grievance. The Board’s performance concerns arose “only after this grievance was initiated,” and reveal more about Board attitudes toward the Grievant than about the Grievant’s performance as an instructor. The Board’s performance based concerns can play no role in the determination of the merits of the grievance and the implementation of an appropriate remedy.

The Board’s Reply Brief

The Board notes one issue from the Union’s brief meriting a response. That issue concerns the interpretation of Article V, Section J, 5. The Board addresses that issue thus:

The Union appears to suggest that there must be two consecutive semesters with part-time assignments in excess of a full time position before a full time position can be created. This was clearly not the intent of the parties. The language in question spells out the limited circumstances under which the College must create a full time position. It does not proscribe, prohibit or limit the College in any manner from creating a full time position at any time it deems such a position is warranted, which is what happened in the instant case.

DISCUSSION

The issues I have adopted as appropriate to the record reflect, with two modifications, the issues posed by the Union. The first modification concerns the first issue. I have deleted explicit reference to the Part-Time Listing from the issue. The Union’s inclusion of the reference to the Listing appears to state a disputed point as fact. The parties dispute whether the courses should properly have been included on the Listing. This point must be addressed to resolve the first issue, and deleting the reference highlights the underlying dispute. The second modification concerns the second issue and reflects that the parties’ conflicting statements of the issues preface a potentially fundamental dispute regarding the second issue. The Board notes that the second issue may not be properly posed for decision. The parties, however, addressed course assignments beyond the 1997-98 school year at hearing, adduced evidence on the issue, and have argued its merit in their post-hearing briefs. The issue of surprise was discussed at hearing, and neither party has requested further hearing. From this, I have concluded the second issue, with one exception, must be addressed on its merit. That exception is the potential impact of the

settlement in the Roger Dale grievance on the grievance posed here. Such a dispute poses potential scheduling issues arising after the Spring semester of the 1997-98 school year. The Dale settlement may have altered Appendix E, and I am not confident enough of the factual and contractual impact of that settlement on this grievance to venture any opinion on it. Thus, the second issue drops the Union's reference to semesters following the Spring semester of the 1997-98 school year.

The two issues on the grievance's merit focus initially on the Board's refusal to assign the Grievant three Business Law classes. This highlights the Union's contention that the underlying contract violation poses a continuing wrong, but does not mean that the contractual merit of the assignment varied from the 1997-98 to the 1998-99 school year.

As preface to addressing the first issue, it is necessary to clarify the role of Article V, Section J, 5. That provision plays an indirect role in addressing the first issue. The Board's reply brief stresses that the provision cannot be considered the exclusive means by which the Board may create a full-time position. The Union does not necessarily dispute this. Rather, it argues that the provision cannot be used as a defense for denying the Grievant the Business Law classes. This is appropriate, since the provision addresses a single set of circumstances in which the Board must post a full-time position. The preceding subsection clarifies that this portion of Article V, Section J, is concerned with the relationship of full-time to part-time employment and with the agreed-upon preference for protecting full-time positions. From this context, it would be unpersuasive to conclude the provision addressed the creation of full-time positions generally. More significantly, granting the Union's point does not pose the dilemma asserted by the Board. To note the Board was not required, under Article V, Section J, 5, to create a full-time Paralegal Instructor position including Business Law classes does not resolve whether the Board could create the position under other agreement provisions. Nor does it resolve whether the Grievant can exercise a superior claim under other agreement provisions to those classes than another current or prospective employe. Article V, Section J, 5 thus can play only an indirect role in the resolution of the first issue.

Article II, Section C ultimately governs the grievance. The difficulty posed by the grievance is that it poses facts which do not fit squarely within the general provisions of this section. Thus, each party calls other agreement provisions into play, and the relationship of those provisions is troublesome. Article II, Section C grants the Grievant recall rights for a two-year period, and the events questioned here fall within that period. It does not, however, unambiguously govern his rights concerning the Business Law classes. The Union notes that he has recall rights within his "major instructional areas," but this reference does not stand alone. The first portion of the sentence containing this reference notes that he must be "hired back" within his "major instructional area . . . (w)hen work and/or funds have been restored." The Center's operation was eliminated, and there has been no restoration of funds. If funding had been restored, he would unambiguously be entitled to rehire. The issue here is not whether his position can be restored, but whether he can build load through the Business Law courses he has not previously taught for the Board.

Each party cites a number of agreement provisions to bolster its view, but the strength of the Union's case rests on Appendix E, while the strength of the Board's case rests on Article II, Section A. The Union cites Article V, Section J, 1, as support for its case. This provision states that an "(e)xception" to assigning teachers based on their "primary or secondary professional competence . . . and . . . experience in other fields" can be made "in the interest of the teacher." This underscores that the Grievant has taught business law classes in the past, and could be assigned the Business Law courses. However, it cannot obscure that the fundamental contractual focus of the grievance is whether Appendix C and Appendix E make those courses available to the Grievant through the Part-Time Listing, and, more fundamentally, whether Appendix E mandates their assignment to the Grievant.

The strength of the Union's case should not be understated. Its reading of Appendix E is more persuasive than the Board's. The Board's assertion that the recipient of the Paralegal Instructor posting can exercise superior rights against the Grievant under Appendix E is unpersuasive. It is arguable that the Paralegal Instructor could be considered "current staff" if the reference is taken to mean an authorized FTE position. The reference, however, is to "current staff" carrying a "full-time load." This connotes incumbent teachers rather than an impersonal reference to positions. Nor can the fact that the Grievant was part time when he claimed the Business Law courses be considered determinative. Appendix E, prior to the Dale settlement, presumed a not-yet laid off full-time instructor is attempting to build load to avoid layoff. It is not, however, apparent that the timing of the Part-Time Listing should be determinative regarding the priority of a laid off teacher's claim to build load. If it was, the terms of Appendix E could be rendered meaningless by delaying the issuance of the Part-Time Listing. If Appendix E stood alone, the Union would prevail on the grievance.

Appendix E does not, however, stand alone. The strength of the Board's case turns on its management right to create and fill full-time positions. The existence of this right is not disputed, as noted above. Nor should the strength of the right be understated. The labor agreement sounds a consistent theme of encouraging the creation and preservation of full-time positions. Article V, Section A, Subsections 7, 10 and 11 underscore this. Article V, Section J, Subsections 4 and 5 further underscore this point. Just as Appendices C and E underscore the contractual foundation of the Union's attempt to restore the Grievant's full-time status, they underscore the strength of the Board's attempt to create a full-time position from part-time duties. The Board can cite Article V, Section J, 1 to support its case, since the decision to have Business Law taught by an instructor with legal experience falls squarely within both the second and the third sentences of that provision.

The interpretive dilemma is, then, whether the Union or the Board makes a contractually superior claim to the Business Law courses under those provisions which specify the scope of Article II, Section C. On the facts posed here, the Board's case is more persuasive. As preface to examining this, it is necessary to underscore that the issue posed is whether the Board could prevent the Business Law courses from being included on the Part-Time Listing. This issue is

complicated by the fact that the courses were briefly put on the Listing, then pulled off. If this action violated the contract, the Union has the superior contractual claim to the courses under the terms of Appendix E.

The Board's action in pulling the courses from the Part-Time Listing did not, however, violate the labor agreement because that action has been shown to be a reasonable exercise of the Board's authority to assign teaching duties. As preface to this, it should be emphasized that the evidence does not indicate the Board acted to deny the courses to the Grievant as an individual. Rather, the removal of the Business Law courses permitted the Board to create a full-time position in the Paralegal Department. This means, as a matter of contract, both the Union and the Board can point to an attempt to preserve a full-time position. The superiority of the Board's claim is that the courses at issue have historically been performed by an instructor with legal or paralegal experience. The Board, then, preserved existing assignment preferences and combined duties into a full-time position. This action falls within the contractual "bias" in favor of full-time positions. Beyond this, the Board's action rests on an established educational policy choice to teach Business Law through a practitioner in the field.

Against this, the Union seeks to overturn an established assignment practice. Inevitably, the Union must rest the strength of its case on Article II, Section C and Appendix E. As noted above, however, neither party can persuasively claim Article II, Section C directly governs the point. Thus, the strength of the Union's case is that the Grievant, under Appendix E, exercises a superior claim to the Business Law courses as a means to build load than the Board can claim to assign duties to full-time positions. If the decisional process which preceded the pulling of those courses from the Part-Time Listing could be considered flawed, then the Union's case would be persuasive. That process, however, was a reasonable exercise of the Board's right to assign duties. The Union seeks something more than the Grievant's right to claim courses from the Part-Time Listing under Appendix E. That something more is the ability to set aside established assignment preferences to permit the Grievant to build load. Accepting this assertion, however, strains the meaning of Article V, Section J, Section 1. That the Board can accommodate a teacher's individual interest in preserving employment can be granted. The grievance, however, seeks to compel such an accommodation when it overturns reasonably made and established assignment preferences.

In sum, the Board did not violate the labor agreement by pulling the Business Law courses from the Part-Time Listing in order to create the full-time position of Paralegal Instructor. The Grievant's claim to those courses flows from Appendix E, which presumes the courses were made available on the Part-Time Listing. Because those courses need not have been included on the Listing, the Grievant cannot make a claim to those courses which is contractually superior to the Board's authority to use them to create a full-time position. It should be stressed that this conclusion rests on the facts posed by this grievance and should not be read to authorize the Board to pull courses from the Part-Time Listing for any or for no reason. The propriety of the Board's action must be determined on the facts of each case, and in this case it acted reasonably, based on established course assignment practices.

This conclusion addresses part of the second issue, since the Board was under no contractual obligation to make the Business Law courses available to the Grievant for semesters beyond the Fall Semester of 1997-98. The remaining potential assignments available to the Grievant include a part-time position posted as Quality and Leadership, Supervisory Management Instructor. The evidence indicates that the Board did not fill this position, which thus poses no issue here. In July of 1998, the Board posted a position for Quality and Leadership Instructor. The Grievant was certified to perform part of the duties encompassed in that position. The evidence establishes that this position was created by the resignation of a full-time instructor.

Against this background, the Grievant could claim duties under that position only if the Board is contractually required to split up a full-time position to permit him to build load. The contractual dilemma is similar to that involving the Business Law courses. The Union seeks not to establish the Grievant's right to courses included on the Part-Time Listing under Appendix E, but to compel the inclusion of courses on it. This is not necessarily improper. However, it is necessary that the assertion of this individual right be contractually superior to the Board's authority to create and maintain full-time positions. There is no persuasive evidence that the Board constructed the Quality and Leadership Instructor position to defeat the Grievant's rights under Appendix E. Rather, the Board acted only to maintain the educational policy decisions which prompted the creation of the full-time position of Quality and Leadership Instructor. It is not necessary to conclude that the Grievant can exercise no greater right than a part-time employe to conclude that his individual right to build load as a formerly full-time employe is not contractually superior to the Board's authority to assign duties to full-time positions for educationally valid reasons. The Grievant's claim to course work is rooted in Appendix E. Thus, his claim presumes available work on the Part-Time Listing. The Board was under no contractual obligation to deconstruct the full-time position of Quality and Leadership Instructor to increase the offerings available to the Grievant on the Part-Time Listing.

This leaves the nettlesome issue of the Grievant's claim to courses for which he is certified, but which have been claimed by full-time instructors as overload. As preface to the examination of this issue, it is necessary to set forth a rough overview of the contractual background to load assignment. The Board establishes full-time teaching loads as the first step of the scheduling process. That this is the first step is established by Article V, Section A, 7. The considerations governing the assignment of load are specified in Article V, Section J. After full-time instructor loads are established, the Board identifies part-time courses available for assignment, as noted in Article V, Section A, 7. After this is done, the Board will create the Part-Time Listing covered by Appendices C and E. Absent layoff issues, full-time instructors select from the Part-Time Listing prior to part-time instructors. Unit employes select from the Part-Time Listing prior to adjunct faculty.

The second issue posed by the grievance questions at what point in the process sketched above the Grievant can claim coursework. The Union argues that he should have been able to pick no later than immediately upon the creation of the Part-Time Listing, which should include overload courses for which he is certified. Under this view, he would select prior to full-time

instructors not on layoff and prior to any part-time instructor. Beyond this, the Union's contentions indicate that he should have been considered part of the original course assignment process under Article V, Section A, 7. Under this view, the Grievant could have been assigned overload courses for which he is certified prior to the identification of part-time assignments under Article V, Section A, 7 and prior to the creation of the Part-Time Listing noted in Appendices C and E.

The Union's case has persuasive force, but lacks solid contractual support. Appendices C and E presume the creation of a Part-Time Listing. This makes it difficult to conclude the Grievant can select courses under Article V, Section A, 7, prior to the identification of part-time assignments. Beyond this, the definition of full-time load, under Article V, Section A, 1, b and under Appendices C, D and J, does not separate overload from full-time load. Other than Appendix J, the only limit noted for full-time status is 90% or greater. Appendix D notes "100% as the desired objective" and Appendix J specifies "(f)ull-time teaching loads will be between 90 and 105 percent per semester." Against this background, overloads under Article V, Section A, 7, appear to be a function of the creation of full-time load, with courses falling to part-time status only after the completion of the assignment process among full-time teachers. The evidence establishes that teachers sometimes seek overloads and that the Board will seek to assign overload to enhance full-time positions.

Against this background, it is unpersuasive to conclude that the Grievant can claim overload assignments prior to the creation of the Part-Time Listing. This does not mean the Grievant lost all full-time rights after his layoff. As the Union puts it, he became a full-time employe on layoff status. Rather, this underscores that his rights are not superior to those of the Board in creating full-time positions. If the Grievant could claim work prior to the identification of part-time assignments to be included on the Part-Time Listing, it would appear the Grievant had bumping rights against other full-time staff. This would appear to fly in the face of the terms of Appendix C. It is arguable that overload assignments should be made part of the Part-Time Listing. However, the issue posed by the grievance is not whether such assignments should be available to a laid off employe. Rather, the issue is whether the Grievant can compel this action. Contractual support for this position is not apparent. The contract appears to make overload assignment a function of the creation of full-time load, making less than full-time coursework available only with the creation of the Part-Time Listing. That the Grievant has priority in claiming work from the Listing has been noted above. Here, again, however, the difficulty with the grievance is the absence of contractual authority giving a laid off employe a superior claim to build load than the Board's claim to construct full-time positions.

Before closing, it is necessary to tie this conclusion more closely to the parties' arguments. That overload could be allocated to build load is apparent. The issue here is less whether this should be done than whether the parties have previously agreed to do so. As noted above, the contract language and what evidence there is of practice supports the Board's view that overload is a function of full-time load. The Grievant's claim to instructor overloads does

not precede, but follows the creation of the Part-Time Listing. There is no persuasive evidence that instructor selection of overload precipitated the Grievant's layoff or that the Board assigned overload or other coursework to prevent the Grievant from building load (see Article V, Section J, 4).

The conclusion that the Grievant cannot claim the overload courses in Accounting during the Spring semester of the 1997-98 school year reflects, then, not that such a result is unreasonable, but that it is a policy judgment the parties must address in bargaining before it can be awarded in arbitration.

The limit of this conclusion must be emphasized. The parties executed an agreement on the Roger Dale grievance in April of 1998. The courses covered by this grievance, even under the second issue, precede the execution of that agreement. Thus, the Dale agreement can play no role here. Whether this means the Grievant has acquired, under any revision of Appendix E, rights to part-time or overload courses following the Spring semester of 1997-98 must be left to the parties to bargain or to litigate on an appropriate record.

The validity, if any, of the Board's concerns with the Grievant's teaching outside of the Center need not be addressed to resolve the merits of the grievance. Franson's November 7, 1997 memo does support the Union's position that a laid off employe should be able to claim arguably excessive overload work. A supervisory memo cannot, however, establish the contractual basis necessary to make the Union's forceful argument persuasive.

AWARD

The Board did not violate the collective bargaining agreement when it did not allow the Grievant to teach three Business Law classes as part of a full-time load for the Fall semester of 1997-98.

The Board did not violate the collective bargaining agreement when it did not offer Business Law or other courses to the Grievant for the Spring semester of 1997-98.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 24th day of February, 1999.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator