BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NICOLET AREA TECHNICAL COLLEGE

and

NICOLET AREA TECHNICAL COLLEGE FACULTY ASSOCIATION

Case 16
No. 56592
MA-10341

Appearances:

Michael, Best & Friedrich, L.L.P, by **Attorney Robert W. Mulcahy**, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of Nicolet Area Technical College.

Mr. Gene Degner, Director Northern Tier Uniserv Central, 1901 W. River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501, appearing on behalf of the Nicolet Area Technical College Faculty Association.

ARBITRATION AWARD

Nicolet Area Technical College, hereinafter referred to as the Employer or the College, and the Nicolet Area Technical College Faculty Association, hereinafter referred to as the Association, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances arising thereunder. The Association made a request, with the College concurring, that the Wisconsin Employment Relations Commission designate a Commissioner or member of its staff to hear and decide a grievance filed by the Association. The undersigned was so designated. The hearing was transcribed, the parties filed post-hearing briefs, and the record was closed on January 19, 1999.

BACKGROUND

Time Frame for Filing the Grievance

This grievance was filed on April 20, 1998. The Association claims to have first become involved in the matter during the winter break in the 1997-98 school year. The

Association's Chief Negotiator, Bob Kanyusik, and his immediate supervisor were both in London, England to co-teach. In casual conversation the matter of the grievant's bargaining unit status arose.

The Association further investigated the matter upon the return of its Chief Negotiator to Rhinelander and discussed it with Ms. Bass. On March 4, and March 11, 1998 by its President, Ethan Cummings, the Association sent memos of inquiry to Bob Pound, Director of Human Resources. Each memo suggested that the grievant "is bargaining unit."

Mr. Pound responded by memo dated March 24, 1998. In his memo, Mr. Pound asserted that Gloria Bass ". . . has been occupying two separate and distinct part time positions . . .," one as a librarian, the other as an ADVANCE instructor. Mr. Pound further alleged the existence of ". . . an understanding with the faculty union for approximately five years that people performing in multiple positions (each) less than half time doing different types of duties would not be subject to the 'three semester rule' found in the labor agreement." The parties apparently had no further contact on this matter until the Association filed the instant grievance a little less than a month later.

The CBA of the parties provides that grievances be discussed with the immediate supervisor of the grievant within ten days following the date the grievant knew or should have known of the alleged grievance. Based on this provision the Employer asserts that the grievance in this matter was untimely filed.

Factual Background

Nicolet Area Technical College is a two-year institution that provides vocational, adult education and college parallel courses at two campuses: Lakeland in Minocqua and Lake Julia in Rhinelander. The campuses are approximately thirty miles apart.

The Association represents "all regular full-time and regular part-time professional staff employed 50% or more, whether under contract, on leave, or employed at Nicolet Area Technical College, excluding managerial, supervisory, confidential, and all other employees."

In addition to the professional staff represented by the Association, the College employs other instructional and non-instructional staff persons who work less than 50 percent of the time. These staff members are designated as "community" or "adjunct" faculty, and their positions are not included in the faculty bargaining unit. Community or adjunct faculty members have their own pay schedule and are not eligible for the benefits package available to members of the faculty bargaining unit.

The grievant, Gloria Bass, is an adjunct faculty member of the college, working at the Lakeland Campus as a librarian and in the Advance Program as an instructor. She has a Bachelor's degree with a double major in history and speech, as well as a Master's degree in secondary education with an emphasis in library media. Ms. Bass additionally holds dual

certifications from the State of Wisconsin Technical College Board as a "Librarian" and as a teacher in "Communication Skills, History, Speech and Goal/Basic Skills."

Ms. Bass is married to Sam Bass, currently the Dean of the Center of Teaching and Learning. Dean Bass was originally hired by the College in 1993 as its Dean of Instruction and later became the Dean of Arts and Sciences. He reports directly to Nita Fisher, Vice-President of Instruction.

Ms. Bass also began her employment history with the College in the fall of 1993. As her part of a joint husband-wife employment package that was granted to the Basses by the College, Ms. Bass received a one-year appointment (1993-94) as a temporary hire. Her duties required 18 hours per week and included both working in the college library and doing GED testing.

Subsequently, Ms. Bass has received separate letters of appointment to the following positions for the school terms listed below. (ADVANCE is a state-mandated program that provides at-risk high school students with special instruction to assist them in obtaining a high school diploma.)

Position	Academic Year	Dates	Total hours
ADVANCE Instruct. (306/semester)	1994-95	(not listed)	612
Spec. Needs Instruct.	1994-95	Nov. 1-June 30, 1995	480
ADVANCE Instruct.	1995 fall semester	Aug. 21-Dec. 21, 1995	306
Librarian (306/semester)	1995-96	Aug. 21-May 14, 1996	612
ADVANCE Instruct.	1996 spr. semester	Jan. 8-May 14, 1996	306
Librarian	1996 summer	June 3-July 31, 1996	153
ADVANCE Instruct.	1996 fall semester	Aug. 19-Dec. 20, 1996	306
Librarian (324/semester)	1996-97	(not listed)	648
ADVANCE Instruct.	1997 spr. semester	Jan. 20-May 30, 1997	306
Librarian	1997 summer	June 16-Aug. 21, 1997	180
ADVANCE Instruct.	1997 fall	Aug. 18-Dec. 19, 1997	306
Librarian (324/semester)	1997-98	(not listed)	648
ADVANCE Instruct.	1998 spr. semester	(not listed)	306
Fund. Spch (overload)	1998 spr. Semester	(not listed)	54
Librarian	1998 summer	June 8-Aug. 14, 1998	180
ADVANCE Instruct.	1998 fall	Aug. 24-Dec. 18, 1998	272
Librarian	1998-99	(not listed)	612

Ms. Bass additionally functioned as a Special Needs Instructor at the Rhinelander campus between November 1, 1994 and June 30, 1995. In the spring of 1995 she taught a three-hour speech course (54 total hours).

Summary of Testimony at Hearing

Gloria Bass

The grievant, Gloria Bass, testified to her employment history with the College. She testified that she didn't know if she'd ever been a member of a union, had not received a copy of the CBA until quite recently, and had had no conversations with her husband about her job/bargaining status until after Association Chief Negotiator Bob Kanyusik had talked with her after he returned from London in January 1998.

Ms. Bass had no knowledge of whether her husband was involved in making faculty appointments or whether he ever functioned as the Dean of Arts and Sciences at the college. Ms. Bass thought that perhaps her husband had once advised her that he was sitting in at collective bargaining sessions on behalf of the college.

Bob Kanyusik

The Association called Chief Negotiator Bob Kanyusik as a witness. Mr. Kanyusik indicated he had been president of the Association from 1989 to 1991 and Association Chief Negotiator since 1990. Mr. Kanyusik testified he knew nothing of the "understanding" referred to in the Pound memo until he saw the memo. Mr. Kaynusik went on to say that at the request of then current Association president Ethan Cummings he contacted other Association past presidents, including Gerry Cadotte, John Margitan, and Pat Folgert to learn if any of them had reached an "understanding" with Mr. Pound.

Under cross-examination by the Employer's attorney, Mr. Kanyusik further asserted that as a past Association president he is entitled to attend Association Executive Board meetings and had no recollection of the "understanding" ever being discussed in his presence. Under continued cross-examination, Mr. Kanyusik testified that Pat Folgert, a past Association president who succeeded him, denied the existence of any such understanding.

Mr. Kanyusik responded to further cross-examination with the additional information that Association past-president Pat Folgert had further acknowledged that he (Folgert) had had a discussion and "understanding" with Bob Pound, but this concerned cross-union situations. According to Mr. Kanyusik, Mr. Folgert described that discussion/understanding as pertaining only to situations where an employee might be performing bargaining unit work of different bargaining units (e.g., faculty association and support staff, or faculty and maintenance).

Under Mr. Folgert's version (relayed by Mr. Kanyusik) Mr. Folgert agreed only that part-time bargaining unit work emanating from different bargaining units but individually amounting to a less than 50 percent position could not be added together to create a bargaining unit position.

Nita Fisher

College Vice-President of Instruction Nita Fisher testified on behalf of the College. Ms. Fisher stated that to her knowledge the College has never combined two separate, distinct positions to determine a 50 percent threshold under Article XX, N. 1. b. Ms. Fisher believes that the positions of librarian and instructor/teacher to which Gloria Bass was appointed represent two very different functions, requiring two different sets of skills. Furthermore, according to Ms. Fisher, the ADVANCE teaching program to which Ms. Bass was assigned is a special program mandated by the State and funded directly by revenue generated from the high schools of the students enrolled in the program.

Ms. Fisher said that all of the instructors in the ADVANCE program are adjunct faculty members. Ms. Fisher also stated that the college pays close attention to keeping workloads under 50 percent because of cost considerations.

Ms. Fisher described the process for creating a permanent full-time position in the bargaining unit. It begins with a request for a new position from a Dean or Director. First the instructional governance unit in the area reviews the request. Thereafter the request is reviewed by the college governance unit. On recommendation of the college governance unit, the position is next presented to the Board of Trustees for approval. The position is then posted, a successful applicant hired and an appointment letter sent to the new hire indicating he or she is now a resident bargaining unit faculty member.

Ms. Fisher testified that she is the immediate supervisor of Sam Bass, currently Dean of Teaching and Learning and husband of the grievant. She asserted that she believes Dean Bass is very aware of the importance of the 50 percent workload issue and the fiscal motivation (for the College) that no adjunct faculty member have a workload that exceeds 50 percent for three semesters.

Bob Pound

Human Relations Director Bob Pound also testified at hearing. Mr. Pound has held his present position with the College since January 1991. He continued to maintain the existence of an "understanding" with the Association that he had referred to in his memo of March 24. Mr. Pound claimed his "understanding" had been reached with either past Association President Pat Folgert or John Margitan. Mr. Pound went on to say that the "understanding" had never been reduced to writing because ". . . this was not perceived as a change in the labor agreement, but rather a clarification of what this particular provision meant, and we did

not view it as a change." Mr. Pound did not believe the subject-matter of the Folgert version testified to by Mr. Kanyusik had ever been an issue at the college.

Mr. Pound acknowledged that although permanent positions need to be approved by the College's Board of Trustees, under the CBA they could be created by default (i.e., application of the three-semester rule), regardless of the Board's failure to act. According to Mr. Pound this has not happened since he came to his current position at the College in January 1991. Mr. Pound echoed the earlier testimony of College Vice-President of Instruction Nita Fisher that the librarian position and the teacher/instructor (ADVANCE) position represent two very different functions requiring two different sets of skills.

ISSUE

The parties do not agree as to the wording of the issue(s).

The College suggests that there are three issues presented:

1. Was the grievance timely filed under Article VII Grievance Procedure, C. 1. Initiation and Processing, Level One, of the parties' Collective Bargaining Agreement (CBA)?

2. Did the College violate Article XX Workload and Workday, Paragraph N, of the CBA by not including the grievant in the bargaining unit?

3. If so, what is the remedy?

The Association sees only two issues:

(h)as the college violated the collective bargaining agreement between the Nicolet Area Technical College Faculty Association (NATCFA) and the Nicolet Area Technical College by not treating Gloria Bass as a full-fledged bargaining unit employee? If so, what is the appropriate remedy?

I word the issues as follows:

Was the Gloria Bass grievance filed in a timely manner under Article VII, C. 1 of the parties' Collective Bargaining Agreement?

If so, did the College violate Article XX, Paragraph N of the CBA by not including Gloria Bass in the bargaining unit?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

I. RECOGNITION

A. The Board acting for Nicolet Area Technical College hereby recognizes the Nicolet Area Technical College Faculty Association as the sole and exclusive bargaining representative for all regular full-time and regular part-time professional staff employed fifty percent (50%) or more, whether under contract , on leave, or employed by Nicolet Area Technical College, excluding managerial, supervisory, confidential, and all other employees.

. . .

C. As used herein, "bargaining unit work" shall consist of:

1. all those duties, assignments, tasks or responsibilities which are fairly within the scope of responsibilities applicable to the kind of work performed by bargaining unit employees; and

2. all those non educational duties, assignments, tasks, or responsibilities which have been historically or customarily performed by bargaining unit employees in job classifications or positions included in the bargaining unit.

. . .

II. NEGOTIATIONS PROCEDURE

. . .

B. This agreement shall not be modified in whole or in part except by an instrument in writing duly executed by both parties.

III. MANAGEMENT RIGHTS

A. Management, on its own behalf and on behalf of the District, hereby retains and reserves unto itself all powers, rights, authority, duties, and

responsibilities conferred upon and vested in it by the law and constitutions of the State of Wisconsin and United States except as modified by the specific terms and provisions of this agreement.

These rights include, but are not limited to:

1. Determining the mission of the College and the methods and means necessary to fulfill that mission.

2. Determining the size and composition of the workforce.

3. Utilizing personnel, methods, and means in the most appropriate manner, as determined by Management.

4. Transferring, assigning, or retaining employees.

5. Suspending, demoting, discharging, or taking other appropriate disciplinary action for just cause.

. . .

VII. GRIEVANCE PROCEDURE

A. Definitions

1. A "grievance" shall be a claim based upon an alleged violation, interpretation, meaning or application of provisions of this agreement.

2. A "grievant" may be an individual, a group, or the Association.

3. The term "days" when used in this Article shall, except where otherwise indicated, mean regular working days.

B. Purpose. The purpose of this procedure is to secure, at the lowest possible administrative level, equitable resolution to the problems which may from time to time arise affecting the welfare or working conditions of bargaining unit employees.

C. Initiation and Processing.

1..Level One. The grievant will first discuss his/her grievance with the grievant's administrative supervisor within the ten (10) days following the date the grievant knew or should have known of the alleged grievances.

. . .

6. If the grievant is not satisfied with the disposition of the grievance at Level Five, the grievant may submit it to the Wisconsin Employment Relations Commission (WERC) for final and binding arbitration. The arbitrator shall have no authority to amend, modify, nullify, ignore, add to, or subtract from the specific provisions of this agreement.

. . .

XX. Workload and Workday

A. A full teaching load is defined as a load range of 93-107%.

. . .

B. Management has the right to assign a workload up to 100% at any time. Management has the right to assign up to 107% workload without overload compensation until fourteen calendar days after the first day of the start of a semester, after which any assignment over 100% will be overload compensation.

C. Full-time bargaining unit employees who are not required to be on campus thirty-five (35) hours per week are expected to work a thirty-eight and three-quarter (38.75) hour week. Part-time bargaining unit employees shall be required to work a prorated thirty-eight and three-quarter (38.75) hour week. As part of a bargaining unit employee's professional responsibility, he/she shall meet with his/her administrative supervisor at least once per year and mutually work out a schedule which shall provide for divisional meetings, professional responsibilities, and professional committee assignments. If the bargaining unit employee and his/her administrative supervisor are unable to work out a schedule which is mutually agreeable, the administrative supervisor shall establish a schedule which will be implemented and followed by the bargaining unit employee, subject to the right of the bargaining unit employee to file a grievance as to such schedule.

D. Load

1. Instructional: The workload of instructional assignments shall be based on the periods and types of instruction specified in the state approved master course index.

Contact Hours Assigned per Semester for 100% Load

a. Lecture	270
b. Transfer & General Lecture/Lab and Nursing Clinical	324
c. Vocational Lecture/Lab	432
d. Aidable Continuing Education	504

2. Non-Instructional. The workload value of non-instructional assignments shall be determined by the number of contact hours (60 minutes each) of professional duties assigned. These include library services, counseling services, coordination responsibilities, and any other specific non-teaching, professional related duty designated by the appropriate dean or administrative supervisor. A total of 630 hours per semester constitutes a 100% load in this category.

3. Each teacher shall maintain at least five and one-half (5.5) office hours per week except those teachers who are assigned 35 or more contact hours per week. No more than two (2) office hours shall be scheduled in any one day. Vocational lab personnel may use office hours for other professional activities with approval of the administrative supervisor.

E. Definitions

1. Course: A course is defined as an aidable credit offering.
2. Lecture: Instruction is given in lecture setting; state-approved Type A instruction.
3. Transfer and General Lecture Lab: Combination of group and individual attention in a group setting that includes both state-approved Type A, Type B, and Type C instruction at the transfer or associate degree level.
4. Vocational Lecture Lab: Combination of group and individual attention in a group setting that includes both state-approved Type A, Type B, and Type C instruction at the vocational diploma.
5. Aidable Continuing Education: Educational offerings with a definite vocational objective, designed to either provide future employment or upgrade individuals in their present occupations; applies aid codes 42, 47, and 50. May be used in the calculation of loaded responsibilities only with prior approval of the Vice-President of Instruction.
6. Contact Hours (Teaching): The number of “potential periods of instruction (PPD)” listed on the state approved master course index; each period represents 50 minutes of instruction, except where sixty-minute periods are required by the State.

7. TABLE OF PERCENT WORKLOAD

Total Contact Hours Assigned	Lecture	Trans & Gen Lect/Lab & Nurs Clin	Vocational Lect/Lab	Contin'g Educ	Non-Instructional
100%	270	324	432	504	630
18	6.7^	5.6%	4.2%	3.6%	2.9%
36	13.3%	11.1%	8.3%	7.1%	5.7%
54	20.0%	16.7%	12.5%	10.7%	8.6%
72	26.7%	22.2%	16.7%	14.3%	11.4%
90	33.3%	27.8%	20.8%	17.9%	14.3%
108	40.0%	33.3%	25.0%	21.4%	17.1%
126	46.7%	38.9%	29.2%	25.0%	20.0%
144	53.3%	44.4%	33.3%	28.6%	22.9%
162	60.0%	50.0%	37.5%	32.1%	25.7%
180	66.7%	55.6%	41.7%	35.7%	28.6%
198	73.3%	61.1%	45.8%	39.3%	31.4%
216	80.0%	66.7%	50.0%	42.9%	34.3%
234	86.7%	72.2%	54.2%	46.4%	37.1%
252	93.3%	77.8%	58.3%	50.0%	40.0%
270	100.0%	83.3%	62.5%	53.6%	42.9%
288	106.7%	88.9%	66.7%	57.1%	45.7%
306	113.3%	94.4%	70.8%	60.7%	48.6%
324	120.0%	100.0%	75.0%	64.3%	51.4%
342		105.6%	79.2%	67.9%	54.3%
360		111.1%	83.3%	71.4%	57.1%
378		116.7%	84.5%	75.0%	60.0%
396		122.2%	91.7%	78.6%	62.9%
414			95.8%	82.1%	65.7%
432			100.0%	85.7%	68.6%
450			104.2%	89.3^	71.4%
468			108.3%	92.9%	74.3%
486			112.5%	96.4%	77.1%
504			116.7%	100.0%	80.0%
522			120.8%	103.6%	82.9%
540				107.1%	85.7^
558				110.7%	88.6%
576				114.3%	91.4%
594				117.9%	94.3%
612				121.4%	97.1%
630					100.0%

. . .

J. Non-instructional bargaining unit employees such as librarians, counselors, financial aid staff, outreach coordinators, and other non-management faculty hired after January 1, 1987, shall be scheduled to work no more than seven (7) hours within the eight (8) consecutive hour period, per day, as designated for that job between the hours of 7:00 a.m. and 10:00 p.m. within five (5) consecutive days (Monday through Saturday), except by mutual agreement.

Non-instructional bargaining unit employees such as librarians, counselors, financial aid staff, outreach coordinators, and other non-management faculty hired after January 1, 1987, shall be grandfathered with respect to their professional hours of assignment and shall continue to operate as they have historically, unless otherwise modified by this agreement except for reduction per Article XVII.

Bargaining unit employees assigned to work more than thirty-five (35) hours a week, or work beyond the regular workday shall receive pro rata pay unless mutual agreement can be reached with regard to compensatory time between the administrative supervisor and the bargaining unit employee.

. . .

N. Miscellaneous

1. Workload, as the determinant of 50 percent requirement for bargaining unit status of an employee, shall be governed as follows:

a. Bargaining unit employees must have two consecutive semesters below the 50% full-time workload and be assigned the third semester before being dropped from the bargaining unit.

b. Employees doing bargaining unit work, but not a bargaining unit employee, must have two consecutive semesters above the 50 percent full-time workload and be assigned the third semester before being considered in the bargaining unit.

c. This does not preclude any of the rights granted employees under Article XVII.

POSITIONS OF THE PARTIES

Association:

The Association believes the grievance herein was timely filed and asserts that the action complained of is a continuing violation. The Association cites arbitral authority that such a situation constitutes a "continuing grievance." The Association concedes that the date of the grievance filing may affect any arbitral remedy that addresses appropriate pay.

The Association's involvement in the matter began in London, England, the Association explains, when Association Chief Negotiator Bob Kanyusik and his immediate

supervisor were co-teaching a class in London during the winter break in the 1997-98 school year, and the grievant's status came up in a casual conversation. Upon the Chief Negotiator's return to Nicolet, the Association continues, he further investigated, talking with both the grievant and the Association President. On March 11, the Association relates that its President sent a memo of inquiry on the matter to Bob Pound, Employer's Director of Human Services, to which Mr. Pound responded with a memo dated March 24, 1998. The Association characterizes Mr. Pound's response as "threatening" in that the memo raises the possibility of reducing the workload of Ms. Bass.

The Association filed the grievance on April 20, 1998.

Moving from this threshold issue to the merits, the Association argues that the contract speaks for itself as to workloads of more than 50 percent and cites Article XX, N. 1.b. in support of its view.

The Association believes that Article XX (Workload and Workday), D & E, clearly define "workday." The Association emphasizes its view that the relevant contract language speaks to *employees,* not *positions,* and believes this distinction is important. The language was designed to allow the sum of different bargaining unit work assignments to be added up and, if more than a 50 percent workload, enable the employee to become a member of the bargaining unit, says the Association. The Association argues the concept is significant where, as here, the Association does not represent part-time employees.

The Association does not believe the Employer's interpretation is plausible. Under that interpretation, the Association says, there could be several persons working full-time, doing bargaining unit work, yet excluded from the bargaining unit.

The Association finds the provisions of XX, N.1.b to be clear and concise in their references to "employees," "bargaining unit work" and "workload."

There can be little doubt that the grievant is an "employee" of the College, posits the Association. Neither does the Association believe there is any question that the grievant has been performing "bargaining unit work," as the term is defined in Article I (Recognition) of the CBA. In fact, the Association contends, the grievant has been working full-time at her assignment as an ADVANCE instructor and her work as a librarian, both of which constitute bargaining unit work.

The Association finds the record to have clearly established the grievant's performance of full-time bargaining unit work since 1994. Thus, the Association concludes, the grievant should have been recognized as belonging in the bargaining unit beginning with the fall of the 1994-95 school year.

The Association finds support for its view that the grievant is in the bargaining unit in Article XX, E of the CBA. According to the Association, XX, E lays out clearly that a workload can cover several different assignments to add up to 100 percent. The Association

again emphasizes its view that the language of this subsection refers to the *employee*, not the *position*.

The Association believes that viewing Article XX in its entirety also supports its contention. Paragraph D speaks to "workload;" paragraph E defines "workload" and the contact time necessary for a full-time workload; paragraph J refers to bargaining unit employees assigned to work more than 35 hours instead of referencing positions greater than 35 hours.

The Association agrees that the Nicolet Board creates bargaining unit positions. That, says the Association, is what happened when the Board and the Association agreed to contract language that an employee becomes a bargaining unit member when assigned bargaining unit work of more than 50 percent for a third semester.

The Association does not believe the Employer established its contention that the Association and the Employer had reached a verbal agreement several years ago that an employee could do two 50 percent bargaining unit positions without becoming a bargaining unit member. Moreover, the Association points to the language of Article II, B of the CBA that provides that any modification of the agreement in whole or in part must be in writing. Based on what the Association finds to be clear and concise contract language, the Association asserts that any such alleged agreement is more than an "interpretation," but is in fact a modification.

The Association notes that the Employer granted the grievant "overload" pay in the spring of 1998 for her additional work in teaching a "Fundamentals in Speech" course. The Association doubts the Employer would have granted this additional pay if it had been following its theory of separate assignments.

In summary, the Association contends that what it describes as the "clear and concise" contract language of the CBA should prevail as to the merits of this grievance. Specifically, as to remedy, the Association urges a finding that the grievant has been a full-time bargaining unit employee since the 1994-95 school year, that she be granted seniority retroactive to that time, and that she further be made whole monetarily.

College:

The College believes the Association filed the grievance in an untimely manner. Pointing to the grievance procedure contained in Article VII of the CBA, the College contends that the Association knew or should have known of the alleged grievance in January or early February 1998 (and probably earlier).

The College cites arbitral authority that when the parties agree to grievance time limits in the CBA and the time limits are not waived, the failure to adhere to those time limits renders the grievance defective and non-arbitrable. The College finds no evidence that indicates it waived any time limits.

Furthermore, the College believes the record is clear that the Grievant should have known of the events giving rise to the grievance much earlier than January 1998. The College does not find credible the grievant's testimony that she neither discussed her employment status with her husband nor understood the issue until Mr. Kanyusik discussed it with her, pointing out that her husband, a college Dean, was responsible for insuring that other adjunct faculty did not inadvertently achieve bargaining unit status.

The College believes the grievant's underlying fear in raising this issue is that her hours will be reduced. The College confirms that that fear is a real one, noting that both Nita Fisher and Bob Pound testified grievant's positions would not have been combined to create one full-time position. The College believes this is the reason grievant did not raise this issue previously.

According to the College, the latest date the grievant should have become aware of the facts underlying her grievance was March 24, 1998. The grievance was not filed until April 20, 1998 or almost one month later. Thus, says the College, the grievance should be dismissed.

Speaking to the merits of the disagreement, the College asserts that arbitrators are supposed to interpret the "clear agreement" of the parties or construe the intent of ambiguous contract language. Arbitrators, says the College, should not make new contracts.

The College believes the term "workload" found in the CBA is ambiguous as to whether parties must aggregate hours of distinct positions held under separate appointments to determine status within the bargaining unit. According to the College the CBA does not discuss aggregation and the language indicates the parties did not contemplate more than one appointment during a semester.

Although the College finds the language in the CBA ambiguous, it believes the intent of the parties was clarified in later discussions. The College contends that the Association failed to refute Human Relations Director Bob Pound's testimony about the agreement between the Association and the College not to aggregate positions for the purpose of determining bargaining unit status. The College sees the Association as having admitted that some type of agreement existed, but offering no testimony refuting or confirming its content. The College finds "notable" that neither Pat Folgert nor John Margitan testified.

The College states it offered undisputed testimony that the parties never intended to aggregate two distinct positions to determine bargaining unit status and notes distinct positions include some positions that require different sets of skills and for which separate letters of appointment are issued. According to the College, Human Relations Director Pound asked the then Association president, either Pat Folgert or John Margitan, for an interpretation of Article XX, N of the CBA: "(s)pecifically, Pound asked the Union President to clarify that if persons served in two separate distinct positions, each of which is less than half time would the three-semester rule mentioned in Article XX, Paragraph N be applicable."

The College contends that "(t)he agreement or clarification between Pound and the Union President was that if a person occupied two separate and distinct positions, Article XX, Paragraph N would not be applicable. . ." The College points out that "(t)he clarification was sought by Pound in the exact time frame when Gloria Bass would have been offered separate letters of appointment for two part-time less than 50 percent positions . . ." The College believes it has consistently interpreted and administered Article XX, Paragraph N.

The College argues, moreover, that the two positions of instructor and librarian held by the grievant are not only dissimilar, but located thirty miles apart, and also notes other temporary and separate job assignments given to the grievant.

The College explains that the reason the verbal agreement it alleges to have been reached between Mr. Pound and an Association president was never reduced to writing is because it was a clarification, not a modification. The College believes it has exercised due diligence and good faith in honoring that agreement and the terms of Article XX, N. It argues that the situation that evolved with respect to issuing letters of appointment to the grievant was not an oversight, and suggests that the grievant's workload would have been reduced if the College thought she was on the verge of bargaining unit eligibility.

The College believes the Association would have raised the issue in the fall of 1995 if it believed that aggregation of the grievant's workload had occurred. The College finds significant that the Association didn't do so; also significant to the College is that neither did it seek a waiver as to Gloria Bass's workload as it had in instances involving other employees.

The College argues that an adverse inference should be drawn from the fact that the Association never proposed to change Paragraph N after the alleged "agreement" was reached between Mr. Pound and the then Association president. The Paragraph N language has been the same ever since it was first adopted, the College asserts. The reason for this is that up to now the Association's interpretation of Paragraph N has been the same as that of the College, says the College.

Furthermore, the College argues that both parties had a heightened awareness of Article XX, N and vigilantly patrolled its boundaries. The College disagrees with the Association's characterization of Human Relations Director Pound's memo as "threatening." The college asserts Mr. Pound was well within his rights and was merely exercising management's rights granted under Article III of the CBA.

The determination of appropriate number and kinds of positions within the bargaining unit is a reasonable exercise of management's rights, argues the College. Mr. Pound, says the College, plays a critical role in creating new positions, the College continues, and looks at logical groupings of duties for a single employee. The cost of a higher salary and benefit package for bargaining unit faculty is a major consideration for Mr. Pound in exercising this responsibility, the College adds.

The College highlights Nita Fisher's testimony as well, particularly her description of the process involved in creating new positions. That process includes cost and revenue considerations, the College asserts.

The College summarizes the Fisher-Pound testimony that the work done by the grievant does not represent a logical grouping of duties: the jobs are designated for different functions (one instructional, the other non-instructional); require two different certifications; are located at two different campuses (thus requiring travel time payment); the combination would have resulted in greater expenditures not covered by revenue from the local school districts.

The College also argues that no past practice of aggregating the workload of separate, distinct positions exists. It finds two instances referred to in testimony as dissimilar from the existing case, and thus not applicable.

Finally, the College argues that if the grievant is somehow found deserving of a remedy, such remedy should be granted prospectively from the filing of the grievance. Citing arbitral authority, the College argues that a grievant's delay in filing a claim must not prejudice the employer even if the grievant is successful on the merits.

The College cites additional arbitral authority that even if the grievance results from a CBA violation of a continuing nature, the remedy should operate only prospectively.

Applying this argument to the instant case, the College argues that if the arbitrator concludes the grievance was timely filed and is meritorious, any remedy should run prospectively from the semester *following* the filing of the grievance.

In anticipation of what it believes the Association might argue, the College suggests that a finding that the second semester of 1997-98 is the grievant's "third" semester would ignore the testimony on the alleged "agreement" between Mr. Pound and the then Association president, ignores the good faith of the College since that "agreement," and rewards the Association for dilatory practices.

In summary, the College argues the grievance should be dismissed for three reasons:

1) The grievance was not filed in a timely manner.

2) The language of Article XX, N.1.b. is ambiguous and must be interpreted based on the past practice of the parties.

3) The intent and agreement of the parties is not to aggregate the workload of two separate, distinct positions.

Finally, the College argues that assuming *arguendo* that the grievance is upheld, the remedy should operate only prospectively from the 1998-99 academic year when the College first appropriately had notice and before assignments for the first semester of 1998-99 were made.

DISCUSSION

Article VII of the parties' collective bargaining agreement (CBA) not only describes the procedure to be followed when a grievance is filed, but specifically strips the arbitrator of any authority ". . . to amend, modify, nullify, ignore, add to, or subtract from the specific provisions of this agreement." Inasmuch as my authority to act in this matter flows solely from the authority granted me by the parties, my role is effectively, properly limited to applying the relevant contract language.

The parties' disagreement centers on three issues: 1) was the Gloria Bass grievance filed in a timely manner under Article VII, C. 1 of the parties' collective bargaining agreement? 2) Did the College violate Article XX, N of the collective bargaining agreement? 3) If so, what is the appropriate remedy?

Was the Gloria Bass Grievance Filed in a Timely Manner?

The threshold issue to be resolved is whether the grievance herein was filed within the time limitations established by the CBA. Such limitations as exist are found in Article VII, C. 1:

> C. Initiation and Processing
>
> > 1. Level One. The grievant will first discuss his/her grievance with the grievant's administrative supervisor within the ten (10) days following the date the grievant knew or should have known of the alleged grievances.

Noting the grievance herein was filed well after the grievant knew or should have known of the allegations contained therein and resting on this contractual provision, the College argues for dismissal of the grievance as non-arbitrable

Time limits on grievance filing and processing cannot lawfully or ethically be ignored by an arbitrator. BAHLSEN INC., 99 LA 515, 519 (NOLAN, 1992). Indeed, in the absence of a properly appealed grievance that fails to comply with contractual time limits the arbitrator is without authority to address the merits of the dispute. INLAND CONTAINER CORP, 90 LA 532 (IPAVEC, 1987). Thus, failure to observe clear time limits for filing and processing grievances generally will result in dismissal of the grievance if the failure is protested. Elkouri & Elkouri, *How Arbitration Works*, 5th ed. BNA, 1997, 276 (cit. omitted).

Furthermore, as a matter of principle, grievances should be filed promptly. "Memories over a span of time may become dim and the exact facts become distorted through the passage of time." AMERICAN SUPPLIES, INC., 28 LA 424, 428 (WARNS, JR., 1957).

If, on the other hand, there are doubts about the timeliness of a procedure, arbitrators usually resolve the doubts in favor of arbitrability. BAHLSEN, SUPRA. The burden of proving untimeliness rests with the employer. SANFORD CORP., 89 LA 968, 971 (WEIS, 1987). In addition, delay in presenting the defense of untimeliness is, as found by the overwhelming weight of arbitral authority, fatal to its efficacy. VENDO, 65 LA 1267, 1269 (MADDEN, 1975).

Moreover, it appears the greater weight of authority holds that where there is a continuing violation of an agreement a grievance may be filed at anytime during the continuing violation period, subject only to recovery limitations provided for in the agreement. STEEL WAREHOUSE CO., 45 LA 357, 360 (DOLNICK, 1965). Matters that have been found to constitute continuing conditions include erroneous seniority placement (AMERICAN SUPPLIERS, INC., SUPRA), continued assignment of oiling duties to engineers instead of oilers [COPOLYMER RUBBER & CHEMICAL CO., 40 LA 923 (OPPENHEIM, 1963)], an employer's continued use of employees in a lower rated classification to do work that should have been performed by employees in a higher classification [LYCOMING DIVISION, 43 LA 765 (KORNBLUM, 1964)], and failure to retransfer a physical education instructor to a counselor position [BOARD OF EDUCATION SPECIAL SCHOOL DISTRICT, 81 LA 41 (ROTENBERG, 1981)].

These cases all involve factual allegations protesting a continuing employee status or work assignment. None of them involves only a one-instance event. This distinguishes them from the cases cited by the College in support of its motion to dismiss the grievance. In each of those cases the action from which the grievant sought relief consisted of only one event: employee discharge or suspension.

In the instant matter, the grievance was formally filed on April 24, 1998. It alleges: "Nicolet Area Technical College is violating the collective bargaining agreement between the Nicolet Area Technical College Faculty Association and the Nicolet Board by not treating Gloria Bass as a full-fledged bargaining unit employee. This is a violation of Article XX, Workload and Workday, paragraph N."

The grievance allegation does not list a specific date on which this alleged violation occurred. It further uses the present tense of the verb "to be," i.e., "is," suggesting that the action complained of is a continuing one. Indeed, at the hearing of the matter the College made no pretense that its failure to grant Gloria Bass bargaining unit status was anything other than a situation that will continue into the indefinite future.

Based on the foregoing, I am persuaded that facts alleged by the Association constitute a continuing condition and that the grievance was timely filed.

Did the College Violate Article XX, N of the Colective Bargaining Agreement by Not Including Gloria Bass in the Bargaining Unit?

Pivotal to the merits of this dispute is the provision contained in Article XX, N. 1. b:

> b. Employees doing bargaining unit work, but not a bargaining unit employee, must have two consecutive semesters above the 50 percent full-time workload and be assigned the third semester before being considered in the bargaining unit.

Thus, the contract requires that an employee must satisfy three conditions before being deemed in the bargaining unit: 1) the employee must be doing bargaining unit work; 2) the employee must have two consecutive semesters above the 50 percent full-time workload; and 3) the employee must be assigned the third semester above the 50 percent work load.

The parties have previously agreed to a definition of "bargaining unit work." It appears in Article I, C. 1. and 2. of the CBA.

> C. As used herein, "bargaining unit work" shall consist of:
>
> 1. All those duties, assignments, tasks, or responsibilities which are fairly within the scope of responsibilities applicable to the kind of work performed by the bargaining unit employee; and
> 2. All those non-educational related duties, assignments, tasks or responsibilities which have been historically or customarily performed by bargaining unit employees in job classifications or positions included in the bargaining unit.

The duties, assignments, tasks, and responsibilities referred to subparagraph 1 appear to embrace instructional responsibilities typically performed by instructional staff or faculty. Although the College has maintained that no person holding the position of an ADVANCE instructor has bargaining unit status, that does not appear to have resulted from the nature of the work (which is clearly instructional) but rather from workload assignments of less than 50 percent. I am satisfied that the duties and responsibilities of an ADVANCE instructor represent bargaining unit work.

It is unclear whether librarians are regarded as "non-educational" (as the term appears in subparagraph 2). However, Article XX, J includes them as examples of "non-instructional bargaining unit employees from which it is clear that the duties, assignments, tasks and responsibilities of a librarian are deemed to be bargaining unit work. Thus I am satisfied that the duties and responsibilities of a college librarian also represent bargaining unit work.

It is undisputed that since the 1994-95 academic year Gloria Bass has been assigned the duties and responsibilities of an ADVANCE instructor. It is further undisputed that since the 1995-96 academic year, Gloria Bass has been assigned the duties and responsibilities of a college librarian. Given that the duties and responsibilities of each position represents bargaining unit work, I conclude that Gloria Bass has been performing bargaining unit work in each position.

Her assignment as an ADVANCE instructor included a total work schedule of 306 hours per semester. Her assignment as a librarian included a total work schedule of 306 hours per semester. Thus, by virtue of her two separate, distinct appointments since the fall of 1995, Gloria Bass has worked a total of 612 hours per academic semester for Nicolet Area Technical College.

Article XX, E. 2. establishes 630 hours per academic semester as a 100 percent load for non-instructional assignments that includes "library services." Article XX, E. 7. appears to establish the same standard for all bargaining unit members. A comparison of those contractual standards with Ms. Bass's hours adduces the additional information that since 1995 Ms. Bass has carried a workload equal to 97 percent of a full-time bargaining unit employee. 1/

1/ Ms. Bass's load differed in 1994-95. Though an ADVANCe instructor that academic year, she also had an appointment as a Special Needs Instructor from Nov. 1, 1994-June 30, 1995 for which she was expected to work a total of 408 hours. Thus for the 1994-95 academic year, Ms. Bass worked a total of 1,090 hours.

But the College objects that the grouping of ADVANCE instructor and librarian is not one it would make if it were creating a new full-time position. It argues that the two positions are simply not a good fit because each represents a different function than the other, thus requiring different skills from the other.

From the standpoint of a human relations technician or personnel specialist that is undoubtedly a sound argument. But fatal to that argument in this proceeding is the fact that it is nowhere recognized in the parties' collective bargaining agreement. Thus, however professionally proficient the "not a good fit" standard may be, I am precluded from adding it to the parties' agreement by Article VII, C. 6. If a modification to the agreement is to be made it must be forged by the parties in their collective bargaining.

The College points to an alleged oral "understanding" its Human Relations Director, Bob Pound claimed to have reached with the then Association president approximately five years ago. Under the terms of this understanding, Mr. Pound asserts that the Association agreed that separate, distinct appointments to the same employee could not be aggregated into a

full-time position or a position of more than a 50 percent workload, even if each of the appointments represented bargaining unit work.

This is denied by at least one Association president named by Mr. Pound as one of the two possible presidents with whom he reached the understanding. According to the hearsay testimony of Bob Kanyusik, Association past president Pat Folgert did recall discussing and agreeing with Mr. Pound that separate employment appointments to perform bargaining unit work could not be aggregated into one appointment. But the Folgert version had one important difference from that advanced by Mr. Pound: Mr. Pound recalled the "understanding" as applying to separate appointments to perform bargaining unit work emanating from only one bargaining unit; according to Mr. Folgert the "understanding" applied only to appointments to perform bargaining unit work that flowed from separate bargaining units.

It would have been helpful had the Association presented direct testimony from both Folgert and John Margitan (the other possible Association past president named by Mr. Pound). Nonetheless, the Folgert recollection entered the record as uncontested hearsay elicited by a vigorous, competent cross-examination. It deserves consideration.

I do not doubt the sincerity and good faith of Mr. Pound in advancing his version of the "understanding" he claims to have reached. The version propounded by the Association is equally plausible. Each suffers, of course, from the potential haziness of memories over a span of time as well being demonstrably self-serving. The disagreement between the parties as to the contents of the "understanding" five years after it was purportedly reached is understandable and perhaps inevitable. Certainly it demonstrates the reason for written memorandums.

In any event, the contents of whatever oral understanding may have been reached five years ago are immaterial. Article II, B of the collective bargaining agreement provides the agreement not be modified in whole or in part except by an instrument in writing duly executed by the parties. The alleged "understanding," of course, is neither in writing nor executed by the parties.

The College seeks to avoid application of Article II, B in this instance on the grounds that the "understanding" represents a "clarification," not a modification. But this argument has more than a tinge of sophism. For the version of the understanding the College purports to be merely a "clarification" in my opinion represents a significant addition to the contract language. Describing it as a "clarification" in this instance makes a distinction without a difference and does not do it justice.

Finally, the College claims the existence of a past practice, contending that the parties have consistently interpreted Article XX, N. 1. b. in accordance with Mr. Pound's version of the oral "understanding" he reached with an Association president. This practice, according to the College, has been followed both before and after the "understanding."

The Association denies any such past practice and attempted to demonstrate an alternate past practice contrary to the version advanced by the College.

Neither side succeeds. While evidence of a past practice can be an important aid to the interpretation of an ambiguous contract provision, I do not find sufficient ambiguity in this instance to invoke it.

Moreover, even if the ambiguity hurdle were surmounted, a past practice, to be binding, must be unequivocal, clearly enunciated, and acted upon as well as being readily ascertainable over a reasonable period of time. L & S PRODUCTS, 97 LA 282, 285 (MCDONALD, 1991). Both sides fail this test. As to the College's claim, at the very least it does not appear that the issue it attempts to address has ever been in contention or even acted on in the past. As to the Association's attempts, the examples it cites are simply not parallel with the facts of the instant matter.

I recognize that the normal practice in creating positions at Nicolet is through the orderly process described by Nicolet Vice-President Nita Fisher and confirmed by Bob Pound - a process that culminates in formal approval action by the Board of Trustees. Mr. Pound acknowledges, however, that a position could also be created through the process described in Article XX, N. 1. b, without further action by the Nicolet Board. In effect, the Board would have already acted by ratifying the language in question not only when it first appeared in the collective bargaining agreement but in subsequent agreements thereafter.

I also recognize that there are compelling fiscal reasons for the College to keep a careful balance of its revenues and expenditures. Moreover, as the College points out, the contract makes no specific mention of aggregate appointments adding up to a bargaining unit position.

But the College has a steep cliff to scale and in the end falls short despite its well-plotted efforts. For the language that does exist provides reasonable support for allowing multiple appointments of bargaining unit work to be aggregated. As the Association points out, the contractual test for bargaining unit status is not whether a *position* held by an employee amounts to more than a fifty percent workload. The test, instead, is whether *an employee not in the bargaining unit* is performing bargaining unit work that both amounts to more than a 50 percent workload for two semesters and has been assigned at least as great a workload for a third.

Thus, under the contract wording aggregation of multiple "bargaining unit work" assignments for bargaining unit status purposes is simply not prohibited nor, for that matter, even limited. Under these circumstances, the words of the collective bargaining agreement are certainly broad enough to permit aggregation of separate appointments involving bargaining unit work flowing from the same unit for purposes of determining bargaining unit status, and preclude the contract interpretation so assiduously sought by the College.

Based on this contract language and all of the other testimony and evidence adduced and considered herein, I am constrained to find that the College has violated Article XX, N. 1. b. of the collective bargaining agreement by not including Gloria Bass in the bargaining unit. Furthermore, based on the bargaining unit workloads of Ms. Bass since the commencement of her employment relationship with the College in the fall of 1993, I believe this has been a continuing violation since Ms. Bass received her employment assignments from the college in the fall of 1994.

What Is the Appropriate Remedy?

Not surprisingly, the parties disagree on this matter as well.

The College, of course, doesn't think matters should have proceeded to this point. But if the arbitrator finds the grievant deserving of a remedy, the College urges the remedy be applied prospectively, only, from the date of the filing of the grievance. Citing arbitral case law it finds applicable, the College asserts that retroactive pay and benefits are wholly unjustified in this case.

The Association views matters differently and proposes the grievant be granted seniority and be made whole monetarily from the commencement of the 1994-95 academic year. However, in the alternative as a "worst case scenario" the Association argues for seniority dating back to the beginning of the 1994-95 academic year, but the monetary "make-whole" award be retroactive to only the second semester of the 1997-98 school year.

The College anticipates an Association argument to treat the second semester of the 1997-98 academic year as the grievant's third semester. But, contends the College, this argument ignores both the alleged "understanding" of the parties and the College's "good faith" since the "understanding" was reached. Furthermore, the College continues, any effort by the Association to limit the remedy to one starting with the spring semester of 1998 ". . . is totally at odds with . . . (the Association's) obligation and professed diligence in policing the contract in this area."

Finally, the College urges that any remedy awarded run prospectively from the semester *following* the filing of the grievance. The College argues that the assignment of work to adjunct staff is done only once or twice per year and that it would have been extremely disruptive to the instruction offered by the College to remove instructors from their duties in mid-term. The College notes the grievance was filed on April 20, 1998 and asserts that it ". . . would not, at that juncture, reduce Ms. Bass' workload to conform to the Union's asserted interpretation of the contract."

Two of the arbitration authorities submitted by the College are persuasive guides that dilatory practices by a union should not be rewarded. In a discharge case, for instance, although the arbitrator reinstated the grievant, due to the arbitrator's belief that all parties (including the grievant) shared the responsibility for the extensive period of lost time from

work retroactive pay was awarded only from the date the grievance was filed. ED FRIEDRICH,45 LA 517, 522 (LARKIN, 1965). A remedy similar in form was fashioned in AMERICAN WELDING & MFG. CO., 45 LA 812, 816 (DWORKIN, 1965) in which the arbitrator found a continuing violation by the employer, but refused to grant retroactive pay relief covering the approximate five-year period prior to the date the grievance was filed (December 1, 1964).

This is not to say that I believe the Association was deliberately dilatory in filing its grievance in this matter. In my opinion the Association's failure to file a grievance on behalf of Gloria Bass at an earlier date probably resulted from Association mistake or ignorance of fact (as to the grievant's workload assignments). 2/ This, coupled with the College's mistake of law as to its contractual interpretation, resulted in a delay that benefited neither side.

2/ The grievant bears some responsibility, as well, for it appears she was singularly unaware of her potential bargaining unit status until contacted by an Association representative in early 1998. That she took no action until she was contacted by the Association, however, is consistent with her direct testimony that she and her husband had had no discussions concerning her situation prior to her being contacted by the Association, notwithstanding her husband's involvement in the College's negotiations with its represented employees.

I am not persuaded by the College's suggestion that relief commence with the semester *following* the semester in which the Association filed its grievance on behalf of Ms. Bass. The grievance was filed April 20, 1998. Whether the College wished to take action at that point to abate its potential liability to the grievant was solely within the control of the College. That it chose to take no action at that juncture seems to me an insufficient basis to "stop the clock," and is inconsistent with the arbitral authorities submitted by the College, cited above.

Under all of the circumstances I conclude that each party should share in the responsibility for the belated inquiry into the grievant's bargaining unit status. Consistent with the arbitration authorities submitted by the College cited above, I direct that the College 1) grant the grievant retroactive bargaining unit status effective April 10, 1998 (10 days prior to the date the grievance was filed) and 2) make the grievant whole both as to seniority recognition and monetarily (including benefits) from said date.

I further conclude that it may be helpful to the parties for me to retain jurisdiction in this matter for 60 days following the date the award is issued in the event the parties have any questions concerning implementation.

AWARD

Based on the foregoing discussion, I conclude and direct:

1) The grievance describes continuing conduct and was therefore filed in a timely manner under Article VII, C.1. of the parties' Collective Bargaining Agreement.

2.) The College violated Article XX, Paragraph N of the CBA by not including Gloria Bass in the bargaining unit.

3) The College shall take the following action:

a) The College shall grant the grievant, Gloria Bass, retroactive bargaining unit status effective April 10, 1998.

b) The College shall make the grievant whole both as to seniority recognition and monetarily (including benefits) from said date.

4) I shall retain jurisdiction in this matter for 60 days following the date the award is issued in the event the parties have any questions concerning implementation.

Dated at Madison, Wisconsin this 19th day of April, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Arbitrator

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