

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**NORTHEAST WISCONSIN TECHNICAL COLLEGE  
FACULTY ASSOCIATION**

and

**NORTHEAST WISCONSIN TECHNICAL COLLEGE  
DISTRICT BOARD**

Case 101  
No. 59696  
MA-11380

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Appearances:

**Mr. David B. Kundin**, Executive Director, Bayland UniServ, 1136 North Military Avenue, Green Bay, Wisconsin 54303-4414, for Northeast Wisconsin Technical College Faculty Association, referred to below as the Association.

**Mr. Robert W. Burns**, Davis & Kuelthau, S.C., Attorneys at Law, 200 South Washington Street, Suite 401, Green Bay, Wisconsin 54305-1534, for Northeast Wisconsin Technical College District Board, referred to below as the Board, or as the Employer.

**ARBITRATION AWARD**

The Association 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 grievance filed on behalf of Jack Gaywont, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 10, 2001, in Green Bay, Wisconsin. Sandra Rondeau prepared a transcript of the hearing, and filed it with the Commission on August 31, 2001. The parties filed briefs and reply briefs by October 17, 2001.

### **ISSUES**

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

Did the Board violate the collective bargaining agreement by denying the Grievant's internal bid for Posting #P1163 for the position of Mathematics Instructor?

If so, what is the appropriate remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE II MANAGEMENT RIGHTS RESERVED**

The Employer, unless otherwise herein provided, hereby retains and reserves unto itself, all powers, rights authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and of the United States, including but without limiting the generality of the foregoing, the right:

. . .

2. To hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions for their continued employment, to relieve from duty because of lack of work . . .

The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the Employer, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes, Section 111.70, and then only to the extent that such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

. . .

**ARTICLE IV**  
**CONDITIONS APPLICABLE TO TEACHING DUTIES**

**SECTION A. SENIORITY**

1. For the purpose of this contract, seniority is defined as the length of continuous service in the bargaining unit.

. . .

**SECTION C. TRANSFERS**

1. For transfer, qualifications being equal, seniority shall prevail.
2. Transfer, regardless of qualification, will not be available to an instructor unless there is a vacant position. However, this provision is not applicable if there is a layoff, in which case Article IV, Section F shall apply.
3. Involuntary Transfers: If a position is not filled after normal bid procedures, the employer shall have the right to appoint the least senior, qualified person to fill the position.

. . .

**SECTION E. POSITION OPENINGS**

1. The following procedure shall govern the appointment to available positions within the District:
  - a. The Administration shall prepare and make available to the Association a table of organization and a description of the qualifications required and duties for all professional positions within the District.
  - b. A list of all vacancies and the qualifications for such positions must be made available in advance to the professional staff. In the event of a vacancy, there shall be a minimum notification of fifteen (15) days prior to the filling of such vacancy and a copy sent to the bargaining representative.
  - c. All eligible personnel applying for these vacancies must be considered and notified of the result of such considerations. Teachers within the District will be given preference for positions within the unit certification when qualifications are equal, and a copy will be sent to the bargaining representative when final notification is made.

. . .

3. All qualified personnel may apply for openings within the District. Qualifications being equal, seniority shall prevail for openings within the unit certification.
4. New teaching positions and vacancies shall be subject to bid, and in all cases the senior qualified instructor shall be entitled to priority. . . .

#### **SECTION F. LAYOFF**

The definition of layoff shall be a reduction of workload from full-time status to less than 85% or a reduction of workload of part-time employees to less than 50%.

1. Certification
  - a. For the purpose of displacement and reassignment under this section, an instructor must be certified in the program or academic area for which he/she is to work. An instructor is certified in a program or academic area if he/she holds a Standard Life Certificate in that program or academic area, or if he/she holds a Provisional Certificate in a program area and has at least two years occupational experience within that area during the prior eight years; or if he/she holds a Provisional Certificate in an academic area and has at least thirty (30) credits in that academic area.
  - b. For the purposes of displacement, certification must be on file with the District on the day preceding the date of notification of layoff.
  - c. For the purposes of recall, certification must be on file with the District two weeks prior to the beginning of a normal academic semester for recall to positions during the time period from the beginning of that semester to the day prior to the beginning of the subsequent academic semester.

. . .

3. Displacement

- a. A staff member who receives notification of layoff may displace the least senior member in a program area or academic area for which he/she is certified.
- b. If a staff member holds certification in more than one area, he/she must displace the least senior person among those areas.
- c. A full-time staff member who displaces the less senior full-time staff member through this process shall be assigned a full load.
- d. A full-time staff member who displaces the less senior part-time staff member through this process shall be assigned a full load.
- e. A more senior part-time instructor may displace the less senior employee, whether part-time or full-time.

...

- h. Displacement shall be on a position-only basis.

...

**ARTICLE VII  
GRIEVANCE PROCEDURES**

**SECTION A. DEFINITIONS**

- 1. A grievance is a complaint by an employee in the bargaining unit, or the Association, where a policy or practice is considered improper or unfair; where there has been a deviation from, or the misinterpretation or misapplication of a practice or policy; or where there has been a violation, misinterpretation or misapplication of any provision of any agreement existing between the parties hereto.

...

**SECTION C. PROCEDURE FOR ADJUSTMENT OF GRIEVANCE**

...

STEP 3 ...

- c. Nothing in the foregoing shall be construed to empower the arbitrator to make any decision amending, changing, subtracting from, or adding to the provisions of this agreement.

...

### **BACKGROUND**

The grievance, dated August 3, 2000 (references to dates are to 2000, unless otherwise noted), cites Article IV, Sections C and E as the governing provisions, and specifies Subsections C1, E1c, and E3 as the governing paragraphs. The grievance seeks that the Grievant be awarded a position of Mathematics Instructor that the Board posted on May 9. The job posting states the qualifications for the position thus:

Master's Degree with a minimum of 18 graduate level credits in Mathematics.  
Prior teaching experience, including alternative deliveries preferred.

The Grievant and one other instructor, Stan Rickert, filed a letter of interest in the position with the Board. At the time each instructor applied for the position, the Grievant had fourteen graduate credits in Mathematics and Rickert had twenty-three. The Board awarded the position to Rickert, taking the position that the Grievant did not meet the posted qualifications for the position. The Master's Degree plus 18 graduate level credits in Mathematics qualification is referred to below as the M18 requirement.

The Grievant has served as an instructor for the Board for eighteen years. When hired, the Board assigned the Grievant to serve as a Data Processing instructor. At the time, such courses had a "107" prefix, to designate a computer programming type course. When hired, the Grievant had a Master's degree in administration with an emphasis in analysis. In November of 1990, the Grievant obtained certification (804) in Mathematics from the State of Wisconsin. He began instructing mathematics courses for the Board in the Fall of 1991. Between 1992 and 1997 the Board assigned the Grievant a mathematics course each semester. He taught mathematics on an extra-contractual basis in the Fall of 1991, and in the summers of 1999, 2000 and 2001. Extra-contractual courses are those that exceed a normal teaching load or which span periods of time outside of the normal school year. The Grievant has taught Data Processing Math Logic, which is now numbered 804-151 and Data Processing Math Statistics, which is now numbered 804-161. He has not, however, taught general education Mathematics for the Board.

In May, Fred Janusek retired from a position of Mathematics Instructor, which prompted the posting noted above. The Grievant filed a letter of interest in the position knowing that he did not meet the M18 requirement. He believed, however, that while the requirement might be demanded of a new hire, it would not be applied to an internal transfer request. The Grievant had acquired graduate credits in mathematics in the hope that he might someday instruct in the area. Data Processing is becomingly increasingly tied into changes in the information technology field, and the Grievant hoped to move away from that specialty as his career advanced. Because of his seniority, he could hope to exert some control over his teaching schedule in mathematics.

The Board structures its instructional activities into four divisions: General Studies; Business and Marketing; Health and Community Services; and Technical and Trades. The Board also provides community and outreach activities as part of its instructional program. The General Studies Division includes a general education and a basic education component. Mathematics is one of four departments within general education.

### **The M18 Requirement**

The North Central Association is the accrediting body for two and four year schools located in the northern portion of the United States. Accreditation is important to two and four year schools for a number of reasons, including the provision of financial aid to students and the transfer of credits between educational institutions. NCA accreditation can span no more than ten years. The Board secured accreditation in 1990 and in 2000.

As part of the accreditation process, the Board will perform “self-study” between accreditation reviews by NCA. Self-study is designed, at least in part, to demonstrate how the Board is acting to meet the published General Institutional Requirements (GIR) of the NCA. The NCA provides consultants to assist in that process. During a self-study process with the Board in the Fall of 1998, Joann Rathburn, an NCA consultant, advised Lori Weyers, the Board’s Vice President for Learning, that the NCA had promulgated following “Explication” of GIR 16:

### **Documenting the Centrality of General Education**

It is essential that an institution of higher education seeking initial or continued affiliation with the Commission document and make public the centrality of general education to its educational endeavors. An evaluation team considers whether the institution’s

. . .

- ♦ faculty teaching general education courses hold graduate degrees that include substantial study (typically a minimum of 18 semester hours at the graduate level) appropriate to the academic field in which they are teaching.

. . .

Rathburn and Weyers discussed the significance of this GIR as an NCA recommendation. NCA did not communicate the recommendation, and Weyers did not take it, as a condition of accreditation. She did, however, perceive the GIR to be significant to NCA.

At roughly the same time as the self-study process, the Board, in consultation with other Wisconsin Technical Colleges, evaluated the content of their general education programs as they relate to the requirements of an Associate Degree. Ultimately, these discussions led to the promulgation of a program standard by which the occupational supportive course requirements for an Associate Degree demand at least three credits in general education math and/or science. The Board responded to this requirement by changing the course numbers of the business math-related courses taught by the Grievant to a math number. This is reflected by the “804” reference in the two courses noted above. This development dovetailed with the NCA accreditation and self-study process, for the technical colleges, in consultation with the NCA, determined that general studies math teachers should be expected to meet the M18 requirement stated in GIR 16.

The decision to impose the requirement, however, did not address how or when to do so. On this point, the technical colleges reached different conclusions. One, North Central, determined that the M18 requirement should be imposed on all staff as soon as possible, and at the teacher’s expense. The Board perceived this to have caused an internal disruption it did not wish to incur. After a series of meetings involving Board administrative staff, the Board determined to implement the M18 requirement by attrition. The Board determined to state the M18 requirement on all job postings. From March 16, 1999 through the posting at issue here, the Board included the M18 requirement on all general education postings. During the decisional process, the Board also determined that unit teachers who did not meet the M18 requirement would not be required to meet the requirement for any courses then being taught. The Board did not formally notify the Association of these determinations.

The Board, however, implemented the requirement over time. In January of 1999, Weyers, Rathburn and Nan Hoppe, the Board’s Dean, conducted an inservice for general education instructors at which the M18 requirement was addressed, as well as the Board’s decision to implement it through attrition and through professional development plans. Weyers also discussed the M18 requirement with the Mathematics Team, and believed that the Team supported it. As noted above, general education job postings from March of 1999 included the M18 requirement. In collective bargaining negotiations in 1999, the Board discussed the matter



and the situation at North Central. No specific proposals were made by either party. At no point in any of this process did the Board and the Association discuss the effect, if any, of the M18 requirement on an internal applicant for a posted position.

The Board does not apply the M18 requirement to non-benefited or extra-contractual positions. Non-benefited positions are not in the Association's bargaining unit, which is restricted to half-time positions or greater. The Board employs roughly 700 non-benefited, and roughly two hundred-ten benefited teachers. The Board employs perhaps twenty-nine benefited general education instructors who teach courses for which the Board seeks to apply the M18 requirement. Perhaps nine of those instructors meet the M18 requirement. The Board does not apply the M18 requirement to layoff/recall situations as it does to job postings.

Weyers and Jay Foley, the Board's Vice President of Administration, testified that the determination not to apply the M18 requirement reflected the practical impossibility of hiring a sufficient number of non-benefited instructors to meet its instructional needs. Foley denied that the decision was implemented as a cost-savings device.

The Grievant testified that he was unaware he had been "grandfathered" to teach a general education mathematics course, without meeting the M18 requirement, until the arbitration hearing. He noted he did not feel the M18 requirement could be equitably imposed on internal applicants for posted positions. Among other problems, the requirement adversely impacted the job security of senior teachers. In his view, "qualified" and "certified" are equivalent terms as applied to an internal bid for a position.

The Board has employed Mel Jennings as a general education instructor since 1976. He presently serves as the Grievance Chairperson for the Association, and has served on the Association's bargaining team. In his view, the Grievant's view of "qualified" and "certified" is accurate. That the Board does not share this view has been noted during informal discussions and during collective bargaining. Prior to this grievance, neither party acted to bring that dispute to a head in bargaining or through grievance arbitration. In his view, the Association would not have agreed to the M18 requirement if the Board had notified the Association of its implementation. He, like the Grievant, was unaware of the "grandfathering" of current general education teachers to continue to instruct courses without meeting the M18 requirement. He was aware the Board sought to meet the NCA recommendation through attrition, but he did not believe the Board would apply the requirement to existing staff. The Board's implementation of the M18 requirement without notice worked an injustice on the Association, particularly its more senior teachers.

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

## **THE PARTIES' POSITIONS**

### **The Association's Brief**

The Association states the issues thus:

Whether or not the College's decision to select Stan Rickert over Jack Gaywont for the vacancy in Math (804) was arbitrary and thus violative of the relevant provisions regarding internal bidding in the CBA. If so, the Association seeks as a remedy that Jack Gaywont be given a math 804 schedule for the semester immediately following issuance of this Award. In addition, the Association seeks to have all NWTC-FA members receive equal treatment as far as "grandfathering" or other decisions about making exceptions to rules pertaining to issues of when staff who are certified in a content area, such as 804, are certified to teach in that area.

The Association contends that, on one level, "this dispute involves whether or not 'certified' is synonymous to 'qualified' for purposes of determining who should be selected for openings that staff members have a contractual right to bid on."

That contractual posting language refers to "qualified" while contractual layoff language refers to "certified." Any arguable distinction between these terms has, however, been blurred by "an intervening action by the College." Specifically, the Board chose to implement a requirement on benefited instructors that it chose not to extend to non-benefited instructors. The Board complicated this action by exempting certain benefited instructors from certain parts of the requirement.

The requirement is the Board's unilateral implementation of the M18 requirement. This requirement ran head-on into the practical difficulty that only about one-third of the Board's general education instructors could meet it. The Board responded by unilaterally excluding certain teachers from the requirement. Left out from this group were "faculty members who teach in one area but have certification in other areas." The Grievant falls in this group.

This distinction has no contractual significance. The Board did not negotiate with the Association, nor did it even advise the Association of its implementation of the requirement. The Board's actions are "not . . . fair or even-handed." The failure to negotiate sought to avoid a "protracted and likely unsuccessful" effort. The Board excluded part-time instructors from the requirement for no better reason than convenience or cost. That part-time instructors are not represented and receive no benefits underscores the weakness of the Board's attempt to justify the requirement as based solely on educational policy. That the Grievant was unaware,

until the arbitration hearing, that he had been “grandfathered” for courses he currently teaches manifests the dubious factual and contractual basis for the requirement.

That the Board has included the new requirement on hiring decisions or on some postings cannot be made into an Association waiver of its right to challenge the requirement. The “Association does not challenge the College’s right to implement new hiring criteria for NEW employees.” The Grievant is not, however, a new employee. To bring him within the “grandfathered” group of instructors “maintains and supports concepts of fundamental fairness and equitable treatment of bargaining unit members in application of the internal bidding procedures contained in the CBA.”

To implement the remedy sought by the Association will not prejudice any Board right, and poses no “adverse impact on the status the College seeks to protect with the NCA.” That it cannot adversely impact instructional services is evident by the Board’s decision not to impose the requirement on unrepresented, part-time instructors.

### **The Board’s Brief**

The Board states the issue thus: “Whether Northeast Wisconsin Technical College violated the Collective Bargaining Agreement by denying (the Grievant’s) application for a Mathematics Instructor assignment because (the Grievant) was not qualified for the position.”

After a review of the evidence, the Board contends that the controlling agreement provisions clearly and unambiguously grant it the authority to determine qualifications for the disputed position. Arbitral precedent establishes that clear terms permit no room for interpretation. Article II establishes the Board’s “unfettered inherent right to determine the qualifications of its instructors.” Since no other agreement provision limits this right, the Board’s exercise of discretion is appropriate. The Association should not be permitted to achieve a right through grievance arbitration that it never secured in collective bargaining.

To the extent the Board’s exercise of discretion can be questioned, arbitral precedent demands that the Association demonstrate “that requiring a master’s degree plus eighteen graduate level credits was arbitrary, capricious, discriminatory or made in bad faith.” Here, the evidence demonstrates the Board had legitimate reasons based in educational policy to implement the requirement.

Article VII limits the authority of an arbitrator from altering the labor agreement. Arbitral precedent underscores the basis for this. The establishment of qualifications for a college instructor is a policy decision demanding the expertise of “professionally trained and experienced administrators” not an arbitrator’s judgment.

To accept the Association's position would equate "qualification" with "certification." This would ignore that Articles II and Article IV, Sections E and F use the terms in distinguishable ways. To make the state-set requirement of "certification" equate to the Board set requirement of "qualification" would "effectively shift the authority and responsibility for determining faculty qualifications from NWTC to the State of Wisconsin, a result completely at odds with the plain language of the contract." Arbitral precedent underscores the need to grant meaning to each word of the contract, and to avoid equating terms the parties chose to distinguish.

Since March of 1999, the Board has consistently applied the requirement in postings. The Association "has never grieved or even protested (the Board's) right to require this qualification." This amounts to an Association waiver of the argument it asserts through the grievance.

Since the Board has the authority to set the M18 requirement, and since the Grievant cannot meet it, it necessarily follows "that this grievance (must) be denied in all respects."

### **The Association's Reply Brief**

The Association does not challenge "the management right to establish qualifications bur rather is challenging the (Board's) right to arbitrarily decide which qualifications will be waived and in what circumstances the College must apply these qualifications." Thus, the case is less about a dispute over management rights than "about fair and equitable treatment."

The Board misstates the dispute by arguing that the Association seeks to have an arbitrator "substitute his judgment for that of (Board) Administrators." The Association grants that the Board can implement the new requirement for new hires, but disputes the Board's authority to decline to apply it to "thirty of (the Grievant's) colleagues" while applying it to him. It is the plight of dual certification teachers that the Association questions, not the contract terms advanced by the Board.

The Association acknowledges that "there is some merit to the concept that if one is certified, then they should be qualified." However, that argument is not crucial to the grievance. Rather, the grievance challenges the selective enforcement of the Board's new requirement.

Contrary to the Board, the Association has not "previously had an opportunity to object to the selective application of this 'grandfathering' in of some instructors but not others." The Association does not challenge the changing of postings for new positions. Prior to this grievance, "there were no Association members who objected to, or were even impacted, by the new qualifications." There is, then, no evidentiary basis to find an Association waiver of the argument advanced by the grievance.

The case law cited by the Board is irrelevant to the determination of the grievance. The Board's exercise of discretion is the issue, and the evidence shows that the Board's "selective grandfathering" is "arbitrary capricious, possibly discriminatory and clearly in bad faith."

### **The Board's Reply Brief**

Contrary to the Association, the "only issue in the grievance is whether (the Board) had the authority to determine the qualifications of faculty for vacant positions." The asserted "grandfathering" issue misstates the dispute. The Board did not exempt all general education instructors from the new requirement: "Rather, (the Board) exempted current faculty from the master's degree plus eighteen requirement only for courses they were currently teaching." This does not create a new contractual issue, and mirrors the "legitimate exercise of (the Board's) management right to determine the qualifications of its faculty." The Board has chosen to implement the NCA's recommendation "through attrition." The Association's attempt to challenge the establishment of qualifications for a vacant position seeks to avoid the risk of displacing "grandfathered" teachers "based merely on the personal interests of the Grievant and other Association members."

The Board contends that the Association's arguments fail to cite contractual language because the "contract does not support the Association's position." The clear and unambiguous language of Articles II and IV must be applied as written.

The Association's attempt to construct a "disparate treatment argument" misstates the exemption from the requirement. Dual certification is not relevant to the Board's decision. Rather, the Board "exempted all current faculty in the General Education Program, including the Grievant, from the master's degree plus eighteen credit qualification for courses they were currently teaching." All faculty who applied for the disputed position were subject to the new requirement. None were exempted.

Nor will the evidence support a contention that the new requirement was "secret" or "adopted for convenience." Ignoring that arbitration is the wrong forum to assert the Board applied the new requirement against represented faculty while exempting non-represented faculty, the evidence affords no support for the Association's contention of improper Board action. The record establishes that the Board "did not require part-time faculty to satisfy this qualification because doing so was not practical." In any event, this decision does no more than underscore the Board's proper policy decision to meet the NCA requirement through attrition. The NCA's recommendation is a more persuasive statement of educational policy than is the Association's critique of the Board's implementation of the policy choice. The Board concludes by requesting that "the grievance be denied."

## DISCUSSION

I have adopted an issue for decision that draws on each party's view. The Board's focuses the analysis on Article II, Section 2 and Article IV, Section F. The Association's focuses on Article IV, Sections C and E. Each party asserts broader policy concerns. The Association's highlights that the Grievant's request involves "internal bidding." The issue stated above is phrased broadly to incorporate both lines of argument.

The interpretive issue involves the determination of "qualifications." Article IV, Section C1, governs transfer requests, granting a preference for seniority where "qualifications" are "equal." Article IV, Sections E1c, 3 and 4 govern the filling of vacancies. Subsection E1c grants a preference for unit applicants in filling vacancies "when qualifications are equal." Subsection 3 grants a preference for seniority for "openings within the District" for which "qualifications" are "equal" among applicants. Subsection 4 grants "priority" regarding "(n)ew teaching positions and vacancies" to "the senior qualified instructor." Whether considered a vacancy, a new position, or a transfer request, the Grievant's bid for the position vacated by Janusek presumes he is "qualified" if his seniority is to be given determining force.

As the Board points out, this brings Article II, Section 2 into focus. It authorizes the Board to "determine" employee "qualifications and the conditions for their continued employment." This authority and "the adoption of policies . . . in furtherance thereof" is limited "by the specific and express terms of this agreement."

The parties do not dispute the Board's authority to establish the M18 requirement, but the effect of its implementation on existing staff. Viewed as a contractual matter, the interpretive issue is whether any of the provisions of Article IV limit the Board's ability to find the Grievant unqualified for the position. Viewed as a policy matter, the issue is whether the Board should set qualifications beyond the Grievant's certification and experience. Article VII, Section A1 implies some latitude in the consideration of policy matters. Article VII, Section C, Step 3c, however, demands that such consideration be given a contractual basis.

The grievance lacks an authoritative contractual basis. The provisions of Article IV cited in the grievance assume the Grievant's "qualifications". There is, however, no demonstrated basis to overturn the Board's authority under Article II, Section 2 to determine the Grievant's failure to meet the M18 requirement flawed his bid for the vacant position.

It is undisputed that Rickert, unlike the Grievant, met the M18 requirement. Beyond this, there is no evidence that any consideration beyond the M18 requirement prompted Rickert's selection. Thus, the process was not skewed by non-employment based bias in favor of Rickert or against the Grievant.

The Association asserts policy-based limitations on this exercise of authority. The Association contends that the Board's determination to permit the Grievant to teach certain math courses, but to deny him a full-time position is arbitrary. This argument has persuasive force. The flaw in the argument is that the source of the requirement is the NCA, not the Board. Even if the pedagogic merit of the M18 requirement can be debated, the Board is not its source. The Board's role in the process is the decision to implement it through attrition. As each party notes, the decision sought to avoid the confrontation provoked at another technical college by a more or less immediate implementation. Beyond this, the decision preserved the Grievant's, and similarly situated teachers', ability to continue teaching certain courses. It also created a period of time for unit teachers to acquire the necessary credits. The merit of this thought process, as any thought process, can be disputed. It cannot, however, be characterized as arbitrary.

Nor can the implementation decision be dismissed as arbitrary because the Board's accreditation was not contingent on implementing an M18 requirement. To imply such a requirement reads Article II, Section 2 out of existence. It is undisputed that NCA consultants considered the recommendation significant and progress toward meeting it a worthy consideration in the accreditation review. To conclude the Board could not consider this in a qualification decision unless its accreditation was at risk renders Article II, Section 2 meaningless.

The Association forcefully highlights the incongruity of implementing the M18 requirement for benefited staff, but excluding non-benefited and extra-contractual teachers. The incongruity must be noted, and undercuts the significance of policy-based arguments on the need for an M18 requirement. However, the evidence indicates the accreditation process focuses on full-time staff. Even if this is not the case, the Association's argument cuts both ways. Apart from the practical considerations governing a technical college's curricular offerings, to highlight the centrality of benefits to full-time staff underscores their significance to the teaching mission. That requirements follow benefits in flowing toward the instructors who are central to the teaching mission cannot be characterized as an arbitrary process.

The Association also forcefully argues that the requirement should have been bargained openly. This point cannot be faulted. However, the issue is compulsion and more specifically what compulsive authority arbitration brings to the M18 requirement. The Association does not seek to bargain the Board's decision. Rather, it seeks to expand the "grandfathering" effect of the Board's implementation of the M18 requirement to shield internal bidders from the M18 requirement.

The labor agreement does not permit compulsion of this conclusion through grievance arbitration. As noted above, Article II, Section 2, permits the Board to determine qualifications. Nor will the agreement permit a conclusion that the Grievant's certification

establishes his qualifications. As the parties acknowledge, the provisions of Article IV, Section F can be read to equate certification with qualification. This equation, however, turns on the contractual use of “certification” or “certified” in Section F. An arbitrator cannot dismiss as inadvertent the parties’ decision not to use those terms in Sections C or E. The parties have the authority to equate “certified” with “qualified.” An arbitrator, however, must give effect to all the terms of the labor agreement. The parties’ use of “certified” and “certification” in Article II, Section F stands in contrast to the use of “qualified” and “qualifications” in Article II and Article IV, Sections C and E. The distinction in the use of the terms undercuts the Association’s contention that, with regard to this posting, “certified” equates with “qualified.” That Article IV does not expressly distinguish between the rights of internal and external applicants for openings further undercuts the Association’s contention.

Nor does the law support the assertion that bargaining could be compelled on the M18 requirement. Under the Municipal Employment Relations Act, “a municipal employer’s duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language” SCHOOL DISTRICT OF CADOTT COMMUNITY, DEC. NO. 27775-C (WERC, 6/94) AT 13, AFF’D 197 WIS.2D 46 (CT. APP., 1995). There is no persuasive evidence that the Association, by conduct, waived its right to bargain the M18 requirement during the term of the agreement. As the Association points out, prior postings including it constitute something less than a binding practice regarding the implementation of the M18 requirement on existing staff. The Board’s announcement of the requirement was not directed to the Association as an entity. In any event, it was subtle at best. Thus, the Association has not, by conduct, waived any right to bargain the M18 requirement. However, as the parties’ positions acknowledge, the labor agreement addresses the point at Articles II and IV. Because the labor agreement covers the point, the Association could not legally compel bargaining on it during the term of the agreement.

None of this establishes that the Association’s position is unreasonable. If adopted, it would lengthen the period of time by which attrition can be expected to bring the M18 requirement into place. There are valid reasons to do this, as the Grievant’s and Jennings’s testimony point out. This is not, however, a matter addressing the reasonableness of the Board’s implementation policy. Rather, the issue is whether the Board can be compelled, through grievance arbitration, to shield the Grievant from the M18 requirement in Posting #P1163. The language of the contract does not afford me that authority. Article II, Section 2 permits the Board to determine qualifications. Article IV, Sections C and E presume an applicant’s qualifications before the application of a seniority preference. Those sections, unlike Section F, do not imply that “qualified” means nothing other than “certified”. Since the Board had the authority to implement the M18 requirement, the contract affords no basis for an arbitrator to compel the Board to shield the Grievant from it. The Board’s selection of Rickert as the qualified applicant thus did not violate the labor agreement.



This conclusion must be restricted to its facts. The implementation of the M18 requirement does not pose any issue regarding whether the Board can select, without challenge, its view of the most qualified applicant. The issue here is not whether the Board chose Rickert because he possessed more credits than the Grievant. Rather, the issue is whether the Grievant met the minimum qualifications set for the position by the Board.

### **AWARD**

The Board did not violate the collective bargaining agreement by denying the Grievant's internal bid for Posting #P1163 for the position of Mathematics Instructor.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 10th day of January, 2002.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator

