BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**NORTHEAST WISCONSIN TECHNICAL COLLEGE
EDUCATIONAL SUPPORT PERSONNEL OPERATIONAL SUPPORT
AND TECHNICAL SUPPORT**

and

**NORTHEAST WISCONSIN TECHNICAL
COLLEGE DISTRICT BOARD**

Case 104
No. 60534
MA-11654

(Bargaining Unit Position Grievance)

Appearances:

Mr. David A. Campshure, Bayland UniServ Director, on behalf of the Association.

Davis & Kuelthau, S.C., by **Mr. Robert W. Burns**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "College", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Green Bay, Wisconsin, on June 10, 2002. The hearing was transcribed and the parties there agreed I should retain my remedial jurisdiction if the grievance is sustained. The parties subsequently filed briefs that were received by October 9, 2002.

Based upon the arguments of the parties and the entire record, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

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> Did the College violate Article III, Section 7, of the Operational Support and the Technical Support contracts when it created certain part-time casual positions outside the bargaining unit and, if so, what is the appropriate remedy?

BACKGROUND

The College traditionally has hired casual employees who are outside the two bargaining units involved in this proceeding.

The parties' prior agreements stated in Article III, Section 3, that all employees who worked more than 18¾ hours a week constituted regular part-time employees who were in the bargaining units. If employees worked fewer hours, they were deemed to be casual employees and outside the bargaining units.

The parties in 1999 bargained over that issue and then agreed to the following language which is contained in Article III of the current contracts:

. . .

> 3. The term "employee(s)" as used herein means all regular employees working 18¾ hours or more per week. Beginning January 1, 2000, the term "employee(s)" as used herein means all regular full-time and regular part-time employees working more than 832 hours per year."

. . .

> 7. Casual employees working on a regular basis less than 18¾ hours per week for working on an on-call basis shall continue to be excluded from this Agreement except for such positions as may be held by staff who qualify for coverage under the 1982, 600 hour three year rules and regulations of Municipal Retirement System. Should this exception be met, Article III, sub 5D shall apply. (The above 600 exception to be effective for hours accumulated on or after January 1, 1985.)
>
> Beginning January 1, 2000, positions requiring a casual employee to work on a regular basis 832 hours or less per year shall be excluded from this Agreement. The employer agrees that such casual employee positions shall not be utilized in such a manner as to displace any present bargaining unit positions. A position which was not in the bargaining unit because it was 832 hours or less per year that later becomes part of the bargaining unit because it is more than 832 hours per year shall be

> considered a vacancy and posted and filled in accordance with other provisions of this Agreement.

It is undisputed that no bargaining unit employees after January 1, 2000, were laid off or had their hours reduced because of the creation of those positions; that there are now about 192 bargaining unit positions in both bargaining units as opposed to the about 167 bargaining unit positions in both bargaining units that existed when the new language in Article III was agreed to in 1999 (College Exhibit 1); that the second paragraph of Article III, Section 7, above became effective January 1, 2000, and thereby superceded the first paragraph of Article III, Section 7, which is no longer in effect; and that another, separate grievance has been filed over a related issue that has no bearing here.

Sandra Kraft, who served as the Association's president and who chaired the Association's 1999 bargaining team, was called by the Association to testify. She said that the Association in negotiations wanted to "eliminate what was called the 600 hour, three-year rule" which prevented part-time employees from working more than three years; that the parties then agreed a "truly part-time position" would only serve as a "supplement for overload of work"; and that it was her "interpretation" that two part-time positions would be combined into one bargaining unit position because the Association was looking at positions, rather than people.

On cross-examination, Kraft testified that the Association in negotiations never asserted that the College had to establish a certain number of positions and that there was never any discussion in negotiations over whether the College was required to combine positions so they would total more than the 832-hour threshold set forth in Article III, Section 7, above.

Karen Parr-Jerabek served as the Association's president during the processing of the grievance and she also served on the Association's 1999 bargaining team. She testified that the Association wanted to "protect the unit members, to give them the benefits of being a unit member. . ."; that we "had the position identified as position versus people to cover the positions and that we thought would be bargaining unit positions"; and that there was some difficulty in obtaining information from the administration regarding the number of hours actually being worked by casual hourly staff.

On cross-examination, she testified that the College under the contracts can determine whether it wants to create full-time or part-time positions; that the College cannot create several part-time, non-bargaining unit positions of less than 832 hours apiece; and that the College in such situations must combine them into a full-time position. She added that she is unaware of any bargaining unit member who had his/her hours reduced because of part-time employees.

Pat Prunty also participated in the 1999 contract negotiations on behalf of the Association. She agreed with Kraft's testimony as to what then transpired regarding the intent to change Article III and said: "we were very definite to put positions in all our language, that it was 832 hours per position." She also said that the parties discussed whether two employees could work in a position that totaled over 832 hours. Asked whether the College ever specifically agreed to combine two or more positions if they totaled over 832 hours, she replied: "I'm just not sure."

Assistant Manager of Human Resources Kelly Holtmeier did not participate in the 1999 contract negotiations. She testified about the creation of certain part-time positions, including two part-time positions that were created after full-time employee Rich Bigari left in 1998, which was before the January, 2000, cutoff date set forth in Article III, Section 7, above. Asked whether the College could do the same thing today, she replied, "No" because "we would interpret that as a displacement of a unit position." She added that the creation of certain new part-time positions did not result in displacing any bargaining unit employees and that she is unaware of any contract language requiring the College to combine part-time employees.

On cross-examination, Holtmeier testified that she is unaware of whether Sue Cravillion and Joanne Cantwell share a job and also whether Janet Allen and Jackie Shepard share another job.

Human Resources Manager Sandy Ryczkowski participated in the 1999 contract negotiations on behalf of the District. She testified that the revised language in Article III was aimed at prohibiting part-time employees from working over 832 hours a year and at prohibiting the displacement of a bargaining unit position "with a position that's not a bargaining unit position." She agreed that the College after January 1, 2000, cannot create two part-time positions to displace an existing full-time bargaining unit position, but she added that the College can create new part-time positions if they do not displace full-time bargaining unit positions. She also said that there was never any agreement in 1999 negotiations to combine part-time positions and that while the Association raised that issue, "that was not the final result of the negotiations." She stated that there never was any agreement in negotiations to limit the College's right to establish or fill positions and she agreed with Holtmeier's testimony that the College after January 1, 2000, could not create two part-time positions out of a former full-time position the way it did before that date with Bigari's former position.

On cross-examination, Ryczkowski testified that the College proposed doing away with the prior 600-hour requirement; that, "I don't recall any conversation about combining" in the 1999 negotiations; and that "part-time and casual employees are the same thing."

The Association filed the instant grievance on July 11, 2000 (Joint Exhibit 3), wherein it identified various part-time positions it believed should be converted to full-time positions.

POSITIONS OF THE PARTIES

The Association claims that the parties in the 1999 negotiations concentrated on "excluding a position, not an employee from the bargaining unit"; that, "The language of Article III, Section 7, clearly references positions, not employees"; that this change can be seen in Section 7's prior reference to "employees" and its current reference to "positions"; and that Kraft and Prunty's testimony clearly establishes the parties' intent. The Association asserts that the College errs in claiming that Article III, Section 7, applies only to instances in which a current bargaining unit is displaced; that such displacement is not needed because "Any position that uses casual employees over 832 hours belongs in the bargaining unit"; and that its grievance "does not allege that current bargaining unit positions were displaced." It also contends that the entire contracts must be read as a whole, rather than only concentrating on the last sentence of Article III, Section 7; that its grievance refers to displacement because the College failed to treat the disputed part-time positions as vacancies; and that Article II, the contract's management proviso, is modified by the express terms of Article III, Section 7. The Association does not request a monetary remedy; instead, it requests an order directing the College to post the disputed part-time positions.

The College maintains that the grievance is without merit because its "understanding of the parties' intent of Article III, Section 7, is consistent with the current language" which permits the College to create part-time positions of less than 832 hours of work a year, provided that such positions do not displace any bargaining unit members. The College also contends that, "The examples cited in the grievance fall short of being considered contract violations"; that it has "a managerial right to establish positions" under Article II of the contracts because it never relinquished that right in negotiations; and that, it "is not required to combine part-time positions in order to create bargaining unit positions." The College also states that the Association's allegations "are not supported by testimony or evidence"; that the Association is improperly trying to restrict the College's "right to establish positions"; and that the record supports the College's position.

DISCUSSION

Nothing in the contracts expressly addresses whether the College can or cannot create new part-time positions of less than 832 hours a year in order to avoid creating full-time positions that are in the bargaining unit. Hence, while both parties rely on particular parts of the contracts to support their respective positions, I find that it is necessary to look at the bargaining history to ascertain the intent of the parties when they agreed to the new language in Article III, Section 7.

As to that, Association witnesses Kraft, Parr-Jerabek, and Prunty all testified that it was the Association's intent to limit the creation of part-time positions and to thereby require the College to combine part-time positions into full-time positions so that more employees could benefit from being in the bargaining unit.

While that no doubt was their intent, there is no evidence that the College ever agreed to that. Thus, Kraft stated on cross-examination that there was no discussion over whether the College would be required to combine such part-time positions and Prunty – who was asked whether the College ever agreed to combine positions – replied, "I'm just not sure." Human Resources Manager Ryczkowski also participated in those negotiations and she flatly stated that there was never any agreement in the 1999 negotiations to combine part-time positions and that even though the Association made that proposal, "that was not the final result of the negotiations."

I credit Ryczkowski's testimony and find that there was never any mutual agreement in negotiations requiring the College to combine part-time positions in the fashion urged here by the Association. Absent any such agreement, the College retains its right under Article II of the contracts, entitled "Management Rights Reserved", and applicable state law to determine whether to create part-time positions of less than 832 hours per year, provided that the College complies with Article III, Section 7, and not displace bargaining unit employees.

For as stated in _How Arbitration Works_, Elkorui and Elkouri (BNA, 5th Ed., 1997) p. 723:

. . .

> "It is generally recognized that in the absence of a contractual provision limiting management's rights in regard to filling vacancies, as for example a clear requirement to maintain a certain number of employees on a particular job, it is management's right to determine whether a vacancy exists and when and where it will be filled." (Footnote citations omitted).

. . .

Here, since there is no "clear requirement" to either combine part-time positions into full-time positions or to maintain a certain number of full-time positions, the District retains the right to determine the number of part-time and full-time positions and to also create new part-time positions that do not run afoul of the displacement language of Article III, Section 7. Since no bargaining unit employees after January 1, 2000, have been displaced by either reducing their hours or eliminating their positions, it follows that the District has not violated Article III, Section 7.

In this connection, it must be pointed out that the examples listed in the Association's grievance (Joint Exhibit 3) all involve part-time positions that were either created before the January 1, 2000, date set forth in Article III, Section 7, or newly-created part-time positions created after that date. Hence, nothing herein should be misconstrued to mean that the College is free to create part-time positions out of existing full-time positions. To the contrary, Human Relations Manager Holtmeier acknowledged that the College today cannot create the part-time positions that were created after full-time employee Bigari left employment in 1998 and Ryczkowski agreed with her testimony.

In light of the above, it is my

AWARD

That the College did not violate Article III, Section 7, of the Operational Support and the Technical Support contracts when it created certain part-time casual positions outside the bargaining unit. The grievance is therefore denied.

Dated at Madison, Wisconsin, this 10th day of January, 2003.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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