

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
NICOLET AREA TECHNICAL COLLEGE FACULTY ASSOCIATION
and
NICOLET TECHNICAL COLLEGE

Case 18
No. 61349
MA-11899

Appearances:

Mr. Gene Degner, Executive Director, Northern Tier UniServe – Central, P.O. Box 1400, Rhinelander, WI 54501, appearing on behalf of the Union.

Michael, Best & Friedrich, L.L.P., by **Attorney Robert W. Mulcahy**, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, WI 53202-4108, appearing on behalf of the College.

ARBITRATION AWARD

The Nicolet Area Technical College Faculty Association, hereinafter referred to as the Union, and the Nicolet Technical College, hereinafter referred to as the College, are parties to a collective bargaining agreement (CBA) which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the College's decision not to allow Bryan Shoneboom, hereinafter referred to as the Grievant, to displace or "bump" other less senior employees following his layoff. The undersigned was appointed by the Commission as the Arbitrator and held a hearing into the matter in Rhinelander, Wisconsin, on October 29, 2002, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed. The parties filed post-hearing briefs by December 15, 2002, marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

ISSUES

The parties were unable to stipulate to a statement of the issues and have left it to the Arbitrator to frame the issues to be decided.

The Union would frame the issue as follows:

Did the College violate the rights of Bryan Shoneboom under the Collective Bargaining Agreement between the parties, in particular, Article XVIII [sic], Layoff, when they laid him off and did not allow him to bump into position [sic] for which he was qualified? If so, what is the appropriate remedy?

The College would frame the issues as follows:

1. Is the Machine Tool program in the same program area or subject area as the Internship Coordinator position?

If no, then the grievance must be denied. If the resolution of issue No. 1 is not dispositive of the grievance, then:

2. Does Article VXII(E) [sic] permit a certified instructor in the Machine Tool program area to bump into a non-certified Internship Coordinator position?

If no, then the grievance must be denied. If the resolution of issue No. 2 is not dispositive of the grievance, then:

3. Is the Grievant qualified for the Internship Coordinator position?

The undersigned frames the issue as follows:

1. Did the College violate the terms of the Collective Bargaining Agreement when it denied the Grievant the opportunity to displace a less senior bargaining unit employee following the Grievant's lay off?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE VII. GRIEVANCE PROCEDURE

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6. Level Six. 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.

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ARTICLE XVII. LAYOFF

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E. Displacement.

1. A bargaining unit employee who receives final notification of layoff may displace any other bargaining unit or non-bargaining unit employee who would be a bargaining unit employee if employed more than 50 percent in day or evening assignment with less seniority in the same program area or subject area for which he/she is certified or certifiable and qualified.
2. A bargaining unit employee who receives notice of layoff has five (5) working days from notification date to inform the President in writing whether he/she wishes to displace another bargaining unit employee and specifically identify the subject areas or bargaining unit work areas of displacement.

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BACKGROUND

The Grievant was employed by the College as an instructor in the Machine Tool Operation and Machine Tooling Technics Program in 1997 and continued in that capacity until June of 2002, when he was laid off. Upon receipt of his layoff notice, the Grievant informed the College that he intended to exercise his rights under Article XVII, Section E of the CBA and displace into one of four positions for which he believed he was qualified. He listed the positions in order of his preference as follows:

1. Business and Industry Trainer/Facilitator
2. Transition/Placement Specialist/Tutor Program Coordinator
3. Internship Coordinator
4. Basic Education

The College denied his request to displace or “bump” into any of the above positions on the following grounds: it found him to be “not certified or certifiable” to teach in the Basic Education area; it found him to be lacking in academic preparation and work experience in the “areas that would make (him) certifiable to teach in Instructional area 102 (Business and

Industry Training/Facilitator); it found him to be not qualified to fill the Transition/Placement Specialist/Tutor Program Coordinator position because he did not have at least a “bachelors degree in an area closely related to career development, human services, or education” nor did he have “substantial experience in employment counseling, job development, and in working with a broad spectrum of students including those with disabilities;” and it found him not to be qualified for the Internship Coordinator position because he had no academic preparation or work experience in providing direct placement and follow-up services for students nor did he have a solid working relationship with businesses who use interns in a wide variety of program areas.

The Union filed a grievance on behalf of the Grievant which was not satisfactorily resolved at any of the first five levels of the grievance procedure. The grievance now appropriately comes before the undersigned pursuant to the terms of Article VII, C. 6 of the CBA.

THE PARTIES' POSITIONS

The Union

The Union argues that the Grievant is qualified to bump into either of two positions: the Internship Coordinator position or the Transition Placement Specialist/Tutor Program Coordinator. It maintains that the College should provide for a period of on-the-job-training to allow the Grievant sufficient training to transition into the job. The College must extend a “breaking-in” period for bumping employees to become acclimated to a new position. Failure of the College to do so would so narrowly define the bumping rights section of the CBA so as to render it irrelevant.

The fact that the CBA provides for bumping rights “offsets any claim by the College that the person currently holding that position is better qualified.” “Better qualified” is not a criteria which should be considered because professional training and limited experience, such as possessed by the Grievant, are sufficient qualifications for either of the two positions.

The Union identifies the “key phrase” in the CBA to be the reference to “same program area or subject area” found in Article XVII, E, (1). It argues that the phrase which follows, “for which he/she is certified or certifiable and qualified,” was added simply to cover those positions which required certification and does not narrow the focus of the right to bump strictly to those positions which require certification. The word “program” encompasses a much broader area than just the academic program in which the Grievant teaches. An example is found in the College catalog’s reference to a continuing education program which the Union argues is so broad that “anything fits” into it. It refers to other catalog references to “Associate Degree Programs,” Technical Diploma Programs,” “Certificate Programs,” University Transfer Programs,” Science Degree Programs” and “Basic Education Programs” and a reference to the “post-secondary programs” and draws the conclusion that “. . . a program is made up of several courses or several subject areas. Internship and tutoring would just be one of those courses or subject areas included in the program.” The College offers

many services to its students which are “auxiliary” in nature, but are none-the-less part of a program. Therefore, the reference in Article XVII, E, (1) to “program area” is broad enough to embrace the two positions into which the Grievant wishes to bump.

Giving further support to the Union’s interpretation of the word program as used in Article XVII is the language found in subparagraph 2, Section E of that article which requires the displacing employee to notify the College of the specific subject area or bargaining unit work area into which he or she wishes to bump. The Union concludes that this language, when read together with the language in the preceding paragraph under Section E, renders the term “bargaining unit work areas” synonymous with the term “the same program.”

The Union argues that the Grievant should not be estopped from asserting his right to bump into the position of Transition Placement Specialist/Tutor Program Coordinator merely because he failed to present evidence of his qualifications to do so at any given stage of the grievance procedure, including, presumably, the hearing before the Arbitrator because the College did not offer the Grievant anything in return for him dropping the claim. The Grievant never indicated that he did not wish to be considered for the position and, hence, should be considered for it now.

Finally, the Union re-affirms that the Grievant is qualified for either of the above two positions. He is qualified for the Internship Coordinator position because he “has done almost all of the responsibilities as required to a great degree, and has testified he has the ability and training to do the remainder.” He is qualified to fill the Transition Placement Specialist/Tutor Program Coordinator position because he testified that he was and because of his teaching history and experience and his academic training.

The College

The College first argues that the Arbitrator has no jurisdiction over the question of whether the Grievant may bump into the Transition/Placement Specialist/Tutor Program Coordinator position because the Union failed to exhaust its remedies under the contractual grievance procedure. Because the Union failed to advance any evidence on this issue at level four or level five of the grievance procedure and because “It is well settled that the Arbitrator has no authority to render judgment on a claim that has not been processed through the grievance procedure to arbitration” this portion of the grievance must be denied. If that were not enough, this part of the grievance must still be denied because the Union failed to provide any testimony or other evidence at the hearing about the Grievant’s qualifications for the position or to show that the position was in the Grievant’s program or subject area or that he was certified/certifiable for it. Absent such evidence the Union fails in carrying its burden of proof.

The CBA’s bumping rights are very limited. The Grievant has no contractual right to bump into the non-certified Internship Coordinator position because the CBA restricts his bumping rights to those positions in the Machine Tool program or subject area. The

Grievant's program area is the Machine Tool program, one of 26 program areas delineated by the College. He was an instructor certified in the Machine Tool program only and all of his experience was in that field. Consequently, he was not certified or certifiable in any other program area. Subject areas are designated by a number in the course catalog and the Grievant was certified in subject area number 420, which corresponds to the fundamental courses in the Machine Tool program. He was also certified to teach in subject area number 404 but he was not certified, nor certifiable, to teach in any other subject area. Since the CBA restricts his bumping rights to junior positions within the Machine Tool program area and subject area 420, he has no rights to bump into another program or subject area.

The Internship Coordinator position is not in the Machine Tool program area or subject area 420 because it reports to the Director of Evaluation/Placement-Special Needs and is in his program area. There is no evidence contained in this record which could support the argument that this position could be classified as a Machine Tool program position. Because the CBA prohibits bumping outside of the employee's program area or subject area, and because the Internship Coordinator is not in the Grievant's program area or subject area, the grievance must be denied.

The CBA restricts bumping into any position which does not require certification. Since the Internship Coordinator position does not require certification, even if it were in the same program and subject area, which it is not, it is nonetheless outside the scope of the Grievant's bumping rights. Any other interpretation, says the College, would render the phrase "certified or certifiable" a nullity, something arbitrators should seek to avoid since arbitrators should generally apply a presumption that the parties intended their words to have meaning and effect. The Union has offered no valid reason to deviate from these established contract interpretation principles. The College asserts that arbitrators have repeatedly held that were the CBA permits bumping into positions for which certification is required, then only those positions for which certification is required are within the available bumping "pool."

The Grievant is not qualified to fill the Internship Coordinator position. The employer has the exclusive right to determine qualifications necessary for a particular position and, subject to an arbitrary and capricious standard, the arbitrator should not intervene in setting qualifications. Here the qualifications established for the position of Internship Coordinator were developed based upon the job duties of the present incumbent and were not arbitrary or capricious. Additionally, the Grievant fails to meet the experience or knowledge requirements established for the position. He does not have three to five years of direct placement services and any experience he may have received through working with placements in the Machine Tool area comprises less than 5% of the total interns placed in 1999. Also, he does not have extensive knowledge of the area labor market, another requirement of the position; he has not had experience working with social services and community agencies providing employment related services; he is not actively involved in professional or community organizations which deal with job placement and employment issues; there is no evidence that he is a Certified Job Developer or that he is certified to teach A.R.T. training (Attracting, Retaining and Training Employees); he would need some training on areas that have internships; and, most significantly, he has a lack of experience working with employers in the area served by the

College. All of these things are requirements of the job and his shortcomings in these areas renders him not qualified for the Internship Coordinator position. The Grievant would not have been given an interview had he submitted his resume off the street due to his failure to meet the minimum qualifications of the job.

The College finally asserts that the CBA does not require it to train the Grievant for the position. The fact that the Grievant may have the ability to become qualified for the job is irrelevant because the contract only grants him the right to bump into positions for which he is “certified or certifiable and for which he is qualified,” not into positions for which he “believes he could become qualified with training.”

DISCUSSION

The Arbitrator finds the meaning of the language in Article XVII, Section E, subparagraphs 1 and 2 on their faces to be clear and unambiguous, making an examination of past practice or bargaining history unnecessary.

The College correctly asserts in its brief that the bumping rights established by the CBA are very limited. It permits a laid off employee to displace 1) a less senior employee, 2) in the same program area or subject area, 3) for which he/she is certified or certifiable and qualified. Seniority is not an issue in this case.

The Union argues that the word “program” encompasses a much broader meaning than just the academic program in which the Grievant teaches. It points to references in the College’s catalog which use the word program and suggests that these references prove that virtually “anything fits” into the definition of the word “program.” It says that many services offered by the College are auxiliary to its academic programs and, as such, should be available to the Grievant to bump into. This construction ignores the fact that the College’s catalog (Employer Exhibit 15) specifically outlines each degree and diploma program under the “Educational Offerings” section. There are 26 of them. One of them is the Machine Tool Operation and Machine Tooling Technics program, the educational program in which the Grievant is certified to teach. In the description of each educational program is a paragraph entitled “About the Program.” There are numerous other references to the word “program” in the catalog, the vast majority of which refer to the “educational” programs listed in the catalog. Hence it is clear that the “program” referred to in the bumping section of the CBA refers to the educational programs set forth in the catalog.

The Union’s construction also ignores the rest of the language in subparagraph 1 which, of course, must be read together with the preceding language relating to “program area.” The rest of the language says “or subject area for which he/she is certified or certifiable and qualified.” This tells us quite clearly that in order to exercise his displacement rights the Grievant must be certified or certifiable and qualified to teach the courses into which he or she seeks to bump, and the courses must be in the same program area (Machine Tool Operation and Machine Tooling Technics) or subject area, (in the Grievant’s case areas 404 and 420), in

which he or she is currently certified or certifiable and qualified. The intent of the parties to restrict bumping rights in this way is clear from the foregoing language. If the parties had intended to grant the broad bumping rights the Union's construction would allow they could have simply provided for bumping rights to apply to "any bargaining unit position for which he/she is qualified or for which he/she could become qualified." Acceptance of the Union's construction would amount to a *de facto* modification of the terms of the CBA, a remedy which the Arbitrator is not authorized to provide under Level Six of the grievance procedure. If the Union wishes to extend bumping rights in this way it must do so at the bargaining table.

The language in subparagraph 2 merely sets forth the time period during which the laid off employee must give notice to the administration of his or her intention to exercise bumping rights and of the position into which he or she intends to bump. It does not modify or expand the meaning of the word program in subparagraph 1.

The Union is also wrong in its assertion that the Grievant should be able to bump into the position of either Internship Coordinator or Transition Placement Specialist/Tutor Program Coordinator, neither of which require certification. The CBA's reference to "certified or certifiable" as opposed to language such as "for which he/she is, or could otherwise become, qualified" is indicative of the parties' intent to grant displacement rights only into positions which require certification. Any other interpretation would render the existing language meaningless and create ambiguity where non currently exists, a result contrary to sound principles of contract construction.

Given the foregoing analysis, it is not necessary for the Arbitrator to address the issue of waiver or estoppel nor is it necessary to analyze the qualifications, or lack thereof, held by the Grievant.

In light of the above, it is my

AWARD

1. No. The College did not violate the terms of the Collective Bargaining Agreement when it denied the Grievant the opportunity to displace a less senior bargaining unit employee following the Grievant's lay off.
2. The subject grievance is denied.

Dated in Wausau, Wisconsin, this 14th day of February, 2003.

Steve Morrison /s/

Steve Morrison, Arbitrator