BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN FEDERATION OF TEACHERS
LOCAL 395, AFL-CIO

and

WISCONSIN INDIANHEAD TECHNICAL COLLEGE

Case 69
No. 62475
MA-12305

Appearances:

William Kalin, Staff Representative, Wisconsin Federation of Teachers, AFT/AFL-CIO, 6659 E. Country Road B, South Range, Wisconsin 54874, appearing for the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Christopher R. Bloom**, 3624 Oakwood Hills Parkway, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing for the College.

ARBITRATION AWARD

The Union and the College are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration. The parties selected the undersigned as Arbitrator from a panel of arbitrators submitted by the Wisconsin Employment Relations Commission ("Commission"). By letter dated August 12, 2003, the Commission appointed the undersigned as Arbitrator. Hearing in the matter was held on September 15, 2003, at the College offices, Shell Lake, Wisconsin. The hearing was not transcribed. By letter dated November 18, 2003, the Arbitrator asked the College to "advise me as to the College's position on whether or not I have jurisdiction to determine a violation of Sec. 118.22, Stats." By letter dated December 12, 2003, the College consented to jurisdiction. The parties completed their briefing schedule on December 15, 2003.

After considering the entire record, I issue the following decision and Award.

ISSUES

The parties were not able to stipulate to the issues for decision. The Union poses the following issues:

1. Should the Grievant, Richard Conley, have been treated as a non-probationary employee under Article IV, Section T, of the contract?

2. If so, what is the appropriate remedy?

The College frames the issues in the following manner:

1. Is the grievance timely?

2. Did the College violate the collective bargaining agreement when the Grievant was non-renewed on January 16, 2003?

Having reviewed the entire record, the Arbitrator frames the issues in the following manner:

1. Is the grievance timely?

2. If so, did the College violate the collective bargaining agreement when it determined that the Grievant, Richard Conley, was a probationary employee and when it non-renewed him at the end of the 2002-2003 school year?

3. If so, what is the appropriate remedy?

DISCUSSION

Richard Conley ("Grievant") was hired by the College on July 25, 2000. The Grievant was employed with the College for the 2000-2001 and 2001-2002 school years. On March 26, 2002, the Grievant signed a contract to teach for the 2002-2003 school year.

On or about January 16, 2003, 1/ the Grievant had a conversation with Campus

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1/ Unless otherwise stated, all dates herein refer to 2003.

Administrator Jan Brill who notified the Grievant that he was going to receive a "nasty letter" that his contract was being non-renewed. On January 16 the College sent the Grievant a letter notifying him that his contract would be non-renewed at the end of the 2002-2003 school year due to "the suspension of the CIS/Programmer Analyst program at the Superior campus effective the 2003-2004 school year." College Vice President Perry Palin verbally informed Union Representative William Kalin of the Grievant's layoff in a conversation at or about this same time.

The January 16 letter from the College to the Grievant notified the Grievant that he did "not qualify for bumping and recall rights under the provisions of the collective bargaining agreement" due to his probationary status. The Grievant opened the letter from the College when he got home on January 16, read the first few lines and set it aside. He did not notice the last paragraph of the letter with respect to the absence of recall rights until he reviewed the letter again in February.

On May 13 the College received an undated letter from the Grievant claiming that he had earned status as a non-probationary employee because he had "now completed my obligations for the 2002/2003 contract year." In that letter, the Grievant stated that he had accrued all the benefits associated with that status.

On the same day, Union Representative Kalin filed a grievance with Vice President Palin alleging that the College violated the contract by not providing the Grievant with bumping or recall rights. That grievance made no claim that the Grievant had been improperly non-renewed.

By letter dated May 28 Vice President Palin responded on behalf of the College denying the grievance because it was not filed in a timely manner. In addition, Vice President Palin responded that because the Grievant's employment spanned three academic years instead of three calendar years he was not entitled to bumping or recall rights. He noted that it had been the College's practice "to release probationary teachers at the end of the third year, when necessary, without extending bumping or recall rights to the employee."

The College initially raises a procedural objection that the grievance was not submitted in a timely manner.

Article III, Section B, of the contract states that a grievant shall "submit the grievance in writing to the appropriate administrator with or without representation, within 20 school days following the act or condition which is the basis for the grievance." The College notified the Grievant that his contract was being non-renewed in a letter dated January 16 and that letter also was copied to Union Representative Kalin. It states as follows: "As a probationary instructor you do not qualify for bumping and recall rights under the provisions of the

collective bargaining agreement." Based on this sentence, the College believes that the January 16 letter serves as the "act or condition which is the basis for the grievance." The College opines that because the grievance was not filed until May 13 - nearly four (4) months after both the Union and the Grievant were notified that the Grievant would not receive recall rights as a probationary employee - it is untimely filed.

The College makes a strong argument that the grievance should have been filed much earlier. The January 16 letter clearly notified the Grievant that as a "probationary instructor" he did "not qualify for bumping and recall rights under the provisions of the collective bargaining agreement." The Grievant was negligent in failing to read the entire letter upon its receipt.

However, while the College announced its intent to non-renew the Grievant's employment contract in January of 2003, the non-renewal became "effective with the end of the current 2002-2003 school year." Only at that point, pursuant to Article IV, Section T, of the contract do teachers who "**have completed a probationary period**" become entitled to certain bumping and recall rights. (Emphasis in the Original). The College denied those rights to the Grievant when he was "effectively" non-renewed because he was a "probationary instructor." Contrary to the College's assertion, this is the adverse act or condition giving rise to the dispute, not the College's announcement in January of its intent to non-renew the Grievant at the end of the school year. The "occurrence" for purposes of applying the contractual time limits for filing a grievance is the later date. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 5th Ed., 1997), p. 280. It is undisputed that the Union filed a grievance in this matter prior to the end of the 2002-2003 school year, at which point the Grievant was actually let go. Therefore, the grievance is timely under Article III, Section B, of the contract.

The Arbitrator turns his attention to the merits of the dispute.

Article IV, Section A 1, of the contract states that all new employees of the College "shall serve a three (3) year probationary period."

Article IV, Section T 1, of the contract states as follows:

> Whenever it becomes necessary to decrease the number of employed teachers **who have completed a probationary period** by reason of a decrease in pupil population within a specific campus, or any other reason, employees shall be laid off in the inverse order of seniority by program (i.e., machine shop, accounting, etc.), or major instructional area, and by campus. (Emphasis in the Original).

Section T 1 also states that the least senior teacher " in the program or in a major instructional area to be reduced may transfer to another program or major instructional area in which they are certified and there is a less senior employee in that program or instructional area." It goes on to state such teachers "who have completed the probationary period" are reinstated in the inverse order of layoff, and retain seniority for two years. Regarding reassignment, Section T 2 states that a teacher "who has completed a probationary period" and had their individual teaching contract non-renewed because of lack of work retains the right to be reassigned to teach other courses in their area of certification. Section T by its clear language thus applies only to those teachers who have completed a probationary period.

The collective bargaining agreement provides the probationary period is three (3) years. The contract clearly provides an individual must "complete" the probationary period to receive the recall rights requested by the Grievant herein. The question before the Arbitrator is whether or not the Grievant completed his probationary period.

When interpreting contract language, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. *The Common Law of the Workplace, The Views of Arbitrators*, National Academy of Arbitrators, Theodore J. St. Antoine, Editor, Chapter 2, Contract Interpretation, Carlton J. Snow, Chapter Editor, s. 2.5 Ordinary and Popular Meaning of Words, p. 69 (1998). The word "year" is defined as a period of time measured by the Gregorian calendar during "which the earth completes a single revolution around the sun, consisting of 365 days, 5 hours, 49 minutes and 12 seconds of mean solar time divided into 12 months, 52 weeks, and 365 or 366 days, and beginning on January 1 and ending on December 31." *The American Heritage Dictionary of the English Language, New College Edition*, (10th Ed. 1981) p. 1483. It also means "calendar year." Id. There is no evidence that the parties intended a different meaning. Thus, the word "year" in Article IV, Section A 1, references a calendar year and/or roughly 365 days, not a "school year" or two academic semesters as argued by the Union.

Other provisions of the agreement can be examined by the Arbitrator to determine the meaning of the disputed contract language. Elkouri and Elkouri, supra, p. 492. For example, Appendix B, Article I, Section A, Paragraph 2, of the contract states:

> Upon satisfactory completion of a **school** year, a teacher may advance one (1) step vertically from their previous status for the ensuing consecutive **school** year for full-time teaching. (Emphasis in the Original).

Similarly, in the contractual grievance procedure, Article III, Section B, Paragraph 1, specifies "school" days as opposed to calendar days:

> The grievant shall submit the grievance in writing to the appropriate administrator with or without representation, within 20 **school** days following the act or condition which is the basis for the grievance. The appropriate administrator shall give an answer within 10 **school** days. (Emphasis in the Original).

The remaining provisions of Section B in the grievance procedure also specify "school" or "working" days as the proper time measurement. Even the section referencing a "three (3) year probationary period" differentiates a school day. Article IV, Section A, Paragraph 2, of the contract refers in several instances to the disciplinary procedural time line in "school" days. Therefore, it is clear that the parties were able to expressly specify "school" years in the agreement when that was their intent. Since they failed to do so in Article IV, Section A, it is reasonable to conclude that they intended the reference to a "three (3) year probationary period" means calendar years, not school years or two academic semesters.

Such an interpretation is consistent with the parties' practice. In this regard, the Arbitrator notes that the Grievant's seniority date is July 25, 2000, consistent with his date of hire. (Employer Exhibit No. 1). Other employees have seniority dates that reference a date during the calendar year, not the beginning of the school year. Id.

The College has required other employees to complete three (3) calendar years of service prior to the completion of their probationary period. (Testimony of Perry Palin, Vice President, Human Resources for the College).

Based on the foregoing, the Arbitrator finds that the Grievant would have completed his probationary period on July 25, 2003. The Grievant was notified of his non-renewal on January 16 effective the end of the school year, sometime in May 2003. As a result, he was not employed for three years, and was a probationary employee when his employment was terminated.

The Union argues, however, that the College's non-renewal of the Grievant's teaching contract three days prior to the date of notification of the non-renewal is in violation of Sec. 118.22, Stats. Therefore, according to the Union, the Grievant's contract was not non-renewed in contravention of the aforesaid statute.

The College argues that its failure to provide the Grievant with a private conference before the Board pursuant to subsection 3 of Sec. 118.22 Stats., does not make its refusal to renew the Grievant null and void.

Sec. 118.22(2) Stats., provides that on or before March 15 of the school year during which a teacher holds a contract, the employer "shall give the teacher written notice of renewal

or refusal to renew the teacher's contract for the ensuing school year." It expressly states: "if no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year." Failure to provide such notice is grounds for an order that a district to renew a teachers contract. STERLINSKE V. SCHOOL DISTRICT OF BRUCE, WIS., 565 N.W.2D 273 (Wis.App. 1997).

The College gave the Grievant written notice of refusal to renew his contract prior to March 15, 2003. However, the College non-renewed the Grievant's teaching contract three days prior to the date of notification of its non-renewal action. (Joint Exhibit No. 6). As a consequence, the College failed to give the Grievant a preliminary notice in writing that it was considering non-renewal of his contract and an opportunity for "a private conference with the board prior to being given written notice of refusal to renew the teacher's contract." Sec. 118.22(3), Stats.

The strong public policy reasons for affording teachers these procedural rights were discussed in FAUST V. LADYSMITH-HAWKINS SCHOOL SYSTEMS, 88 WIS. 2D. 525, 277 N.W.2D 303, 306 (1979):

. . .

> The provisions of that statute advance the legislatively declared public policy of promoting fairness and thoughtful decisionmaking in the rehiring of public school teachers. In addition, it establishes a comprehensive and orderly procedure governing the renewal or nonrenewal of teacher contracts in school districts which have no tenure system. These procedures inure to the benefit of not only the teacher and the school district but to the public at large.

. . .

The College, however, argues that notwithstanding any violation of subsection 3, the parties mutually agreed through their actions that the Grievant's contract was terminated at the end of the 2002-2003 school year pursuant to subsection 2 of the aforesaid statute.

Sec. 118.22(2) Stats., states: "Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board." Here, the College unilaterally decided to non-renew the Grievant and informed him by letter dated January 16 of his non-renewal effective at the end of the 2002-2003 school year. However, the Grievant never challenged his non-renewal at any time before the instant September 15 arbitration hearing, even though he knew January 16 the reason for his non-renewal - the suspension of the CIS/Programmer Analyst program at the Superior campus effective the 2003-2004 school year. Indeed, he then agreed that there was no reason to continue his position

under those circumstances. (Joint Exhibit No. 6 and Testimony of the Grievant). When the Grievant received written notification of his non-renewal, he briefly glanced at the notice and filed it away. He never challenged his non-renewal when he raised a question about his "non-probationary" status in an undated letter to the College in May 2003. (Joint Exhibit No. 7). Nor did his May 13 grievance challenge his non-renewal. (Joint Exhibit No. 8). It, instead, only grieved over his "transfer and reinstatement rights." Id. The Grievant also did not dispute the non-renewal process prior to the beginning of the 2003-2004 school year.

In addition, the parties collectively agreed to include Article IV, Section T., Staff Reduction, as part of their labor agreement. Article IV, Section T, basically covers layoff, bumping and recall and specifically provides that when it "becomes necessary to decrease the number of employed teachers who have completed a probationary period by reason of a decrease in pupil population within a specific campus, or any other reason, employees shall be laid off in the inverse order of seniority by program . . . , or major instructional area, and by campus." Laid-off teachers who have completed a probationary period are granted significant benefits and rights to bump, transfer and be recalled under the provision. Since the Grievant's professional teacher contract specifically incorporates the terms and conditions of the collective bargaining agreement, including the aforesaid layoff provision, (Joint Exhibit No. 5), the parties have mutually agreed to a mutual modification of the contract as authorized by Sec. 118.22(2) Stats. MACK V. JOINT SCHOOL DISTRICT NO. 3 ETC, WIS., 285 N.W.604, 612 (1979). Were it not for the provisions of the layoff clause (Article IV, Section T) of the collective bargaining agreement, the College would be required to proceed under the "refusal to renew" provisions of Sec. 118.22, Stats., that relate to a permanent and final termination of employment. MACK V. JOINT SCHOOL DISTRICT NO. 3 ETC, *supra,* p. 610.

As noted above, the College informed the Grievant of his non-renewal by letter dated January 16. However, because the action took place pursuant to Article IV, Section T, of the contract it is clear that the parties effectively treated the Grievant's non-renewal as a layoff. In this regard, the Arbitrator points out that in the January 16 letter to the Grievant the College expressly informed the Grievant that "as a probationary instructor you do not qualify for bumping and recall rights under" the aforesaid contractual provision. In his undated letter to the College in May, 2003, the Grievant specifically asked for "all the benefits associated with" his "status as a non-probationary employee" pursuant to the disputed contractual provision. (Joint Exhibit No. 7). The instant grievance also treated the action in question as a layoff by noting:

> I received your response, via voice mail, to the Union's proposal to resolve the issue of the layoff of Richard Conley. (Emphasis added). Since the College will not agree to provide recall rights to Mr. Conley, the Union proceeds with this grievance. (Joint Exhibit No. 8).

. . .

The Grievant, as a probationary employee, has no rights to bump or be recalled. He is likely to be permanently separated from employment with the College. However, that is the result of contract language collectively bargained and voluntarily entered into by the parties as well as the specific circumstances surrounding the Grievant's non-renewal. It does not change the outcome of this case.

The Union also argues that the College violated Article IV, Section A, of the contract when it non-renewed the Grievant. Article IV, Section A 1 states that a teacher shall not be non-renewed during the probationary period, "unless there exists a basis in fact therefore." However, as pointed out by the Union, the non-renewal action was "taken because of the suspension of the CIS/Programmer Analyst program at the Superior campus effective the 2003-2004 school year." (Joint Exhibit No. 6). The Grievant admitted that the number of students "was low in my program" and that it was "time for the College to move to something different." The standard articulated in Article IV, Section A 1, has been met. There was a sufficient reason or basis in fact for the College to non-renew the Grievant.

The Union further argues "that since Article IV – Section T – Staff Reduction specifically addressed the procedure to be followed when work does not exist for a faculty member in the following academic year, that is the procedure that must be followed by the college." (Emphasis in the Original). The Arbitrator agrees. However, Article IV, Section T 1 specifically states that it applies only to teachers "**who have completed a probationary period**." (Emphasis in the Original). Since, as noted above, the Grievant did not complete his probationary period before his non-renewal, he is not entitled to the protections of Article IV, Section T.

Having reached the above conclusions, it is unnecessary to address the other arguments raised by the Union regarding the Grievant's ability to obtain proper certification and his qualifications to fill other vacancies in the College.

Based on all of the above, the Arbitrator finds that the answer to the issue as framed by the undersigned is NO, the College did not violate the collective bargaining agreement when it determined that the Grievant, Richard Conley, was a probationary employee and when it non-renewed him at the end of the 2002-2003 school year.

In light of all of the foregoing, it is my

AWARD

The instant grievance is hereby denied, and the matter is dismissed.

Dated at Madison, Wisconsin, this 3rd day of February, 2004

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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