BEFORE THE ARBITRATOR

In the matter of the arbitration of a dispute between

ADMINISTRATORS' AND SUPERVISORS' COUNCIL

And

MILWAUKEE BOARD OF SCHOOL DIRECTORS

Case 428
No. 64078
MA-12797

Rosana Mateo-Benishek Demotion

Appearances:

William Rettko, Attorney at Law, Rettko Law Offices, 15430 West Capitol Drive, Suite 200, Brookfield, WI 53005-2621, appearing on behalf of the Council.

Donald Schriefer, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, WI 53202, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, the Administrators and Supervisors Council (hereinafter referred to as the Council or the Union) and the Milwaukee Board of School Directors (hereinafter referred to as either the District or the Employer) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over the District's decision to demote Rosana Mateo-Benishek from her position as a principal. The Undersigned was so designated. An arbitration hearing was held on the matter on October 19, 2004, at the District offices in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits and other evidence as were relevant to the dispute. The parties submitted briefs and reply briefs, the last of which was received on January 14, 2005, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUES

The issues may be fairly stated as:

1. Whether or not the Grievant received tenure as a high school principal prior to her demotion?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

PART IV

WORKING CONDITIONS

A. WORK YEAR

1. The regular work year for employees in this bargaining unit shall be determined by the employer based upon the needs of the position. Where changes in the work year of a position are contemplated, it shall be discussed with the ASC and, where appropriate, impact bargained.

. . .

3. The work year for the fifteen (15) regular high school principals shall be twelve (12) months.

. . .

WORK YEAR SCHEDULE#

ELEMENTARY	Days
Principal	199
Assistant Principal	199

MIDDLE	Days
Principal	199
Assistant Principal	199
Assistant Principal – Data Processing	203*

. . .

HIGH	Days
Principal	260
Assistant Principal	202
Assistant Principal – Data Processing	208**
Assistant in Administration	202
Assistant Principal – In Charge of Athletic Duties	205.5***

. . .

PART VII

PERTINENT BOARD RULES

Pertinent provisions of Article III of the Rules of the Board which relate to wages, hours, or conditions of employment of the members of the ASC unit, shall become part of the contract.

. . .

RELEVANT ADMINISTRATIVE POLICIES OF THE MILWAUKEE PUBLIC SCHOOLS

Administrative Procedure 6.22
LEAVES AND ABSENCES: STAFF

. . .

(2) LEAVE AND REASSIGNMENT

. . .

(c) Any semester in which a probationary teaching employee is absent for 36 school days or more may not be counted in the total of six semesters of teaching service required for tenure, except as provided in the respective labor agreements.

. . .

6.25: PROBATION AND TENURE: STAFF

(1) CERTIFICATED STAFF

(a) Initial appointments, as well as promotion to any certificated position, in the Milwaukee Public Schools shall be on a probationary basis, for one semester - or one-half work-year for 12-month employees - provided that, before acquiring permanent tenure, each employee shall have successfully served six semesters, or three work - years, on probation.

(b) Probationary personnel shall be re-appointed semi-annually. For the monthly meetings of the Board in January and June, and at such other times as may be necessary, the superintendent shall prepare for the Board or its designated committee a report of teachers, administrators, and supervisors, as well as recreation and adult education personnel, serving on the probationary list who are recommended for continued employment.

(c) In the case of personnel covered by the teacher tenure law, recommendations for re-appointments shall be submitted to the Board or its designated committee for employees in their sixth semester of service prior to the completion of the sixth semester. The Board or its designated committee shall consider the recommendations and take necessary action thereon.

(d) Upon completion of probationary service, a certificated employee shall be deemed permanently employed during satisfactory service and good behavior, without further action by the Board.

(e) Certificated staff members who have been permanently appointed and have resigned from the service of the Board, if re-appointed by the Board, shall resume their status as to tenure in the position to which re-appointed.

. . .

BACKGROUND

There is no real dispute about the events giving rise to this grievance. The Grievant, Rosana Mateo-Benishek, was a tenured assistant principal in the Milwaukee Public Schools. In the middle of the Fall semester of 2001, she was promoted to Principal of Riverside University High School. She was advised of the promotion through an October 30th letter from Human Resources Director Karen Jackson:

. . .

> I am pleased to inform you that the Board of School Directors at its meeting on October 25, 2001, confirmed your appointment as Principal, Riverside University High School. This assignment is effective October 26, 2001, and the work year is 260 days at an annual salary of $83,390.43.
>
> Clarifications which you may seek with respect to fringe benefits can be found in the attached document. Additional questions can be directed to me at 475-8205.
>
> Our records indicate that you have a Principal K-12 license on June, 2005.
>
> The appointment is recognition of your ability to effectively contribute to the Milwaukee Public Schools. The approval of the Board represents a vote of confidence in your ability to perform the duties involved in this position. I know I speak for the entire MPS staff in congratulating you on your appointment.

. . .

Following the initial appointment, Dr. Benishek was included in the probationary employees reassignment lists for the Fall of 2002, Spring of 2003, Fall of 2003 and Spring of 2004. She was not included on the list of appointments for the Spring of 2002.

Dr. Benishek served as principal at Riverside until 2004, when she was advised by Superintendent William Andrekopoulus that she would not be reappointed. The Superintendent's April 29, 2004, letter stated:

. . .

> This letter is to inform you that I have decided not to reappoint you to another semester of probationary service as a principal in the Milwaukee Public Schools. My action of non-reappointment effectively terminates you as a probationary

> employee at the end of this semester. You have, however, acquired tenure as an assistant principal. Therefore, you will be reassigned to an assistant principal position within the school district effective on the date yet to be determined in the fall of 2004. You will be advised of the exact date as soon as we have that information.
>
> It is expected that you continue to fulfill all principal duties and responsibilities at an acceptable level of performance for the remainder of this semester at Riverside University High School.
>
> You are to make arrangements to have all of your personal effects removed from your office by the afternoon of June 30, 2004. Your keys are to be returned to your administrative specialist.
>
> The Acting Director of the Department of Human Resources, Ms. Deborah Ford, will contact you to work out the details of your return to assistant principal status.
>
> . . .

The School Board's Committee on Finance/Personnel approved the non-renewal report on June 22, 2004, and the full Board approved it on June 24th. The semester ended on June 30th. On July 29, 2004, she was advised that she had been reassigned as an assistant principal at Bayview High School.

The policies of the School District require that a new principal's appointment "shall be on a probationary basis, for one semester - or one-half work-year for 12-month employees - provided that, before acquiring permanent tenure, each employee shall have successfully served six semesters, or three work -years, on probation." The sole issue before the Arbitrator is whether the Grievant achieved tenure as a high school principal before she was demoted to assistant principal.

At the hearing, Deborah Ford, the District's Executive Director of Human Resources, testified that Administrative Procedure 6.25 distinguishes between school year employees and 12-month employees. Twelve-month employees in the District are primarily High School Principals and Central Office staff. Twelve-month employees must serve a probationary period of three calendar years, and must be reappointed twice yearly during that time. The reappointments are accomplished at the same time as the reappointments for school year staff, who are reappointed each semester. This is done as a matter of convenience, because the bulk of the District's employees work on a semester basis.

According to Ford, the Grievant did not successfully complete three years of probation, since she terminated prior to October 26, 2004, the third anniversary of her initial appointment. Even if her probationary period had been calculated on a six semester basis, she would not have qualified. Under Administrative Procedure 6.22, credit for a semester of service is not available to employees who have not been in the covered position for 36 or more days in a semester. Ford stated that this policy has been in place, and uniformly enforced, for the seventeen years she has worked for the District, and was in place prior to her arrival. The Grievant's appointment took place 46 days into the Fall semester of the 2001-2002 school year, and thus she would not have earned any service credit for that semester. For this reason, she was listed on the May, 2002 probationary employee report as having only one semester of service. That listing was not challenged by the Grievant or the Council.

On cross-examination, Ford agreed that six reappointments were required for the Grievant to retain her position during her probationary period, but denied that reappointment itself was the measure of successful service and said that total time successfully served was what was important. She agreed that the exclusion of semesters with 36 or more days missed was not expressly stated in the labor agreement or in Administrative Procedure 6.25, but said it was implicit in that rule, and explicit in Procedure 6.22. She noted that the Administrative Procedures are incorporated by reference into the collective bargaining agreement.

John Weigelt, the Executive Director of the Administrators' and Supervisors' Council, testified that his understanding has been that six reappointments to a probationary position are sufficient to satisfy the requirements of Procedure 6.25, and that there had been cases in the past when administrators sought to extend probation before the sixth reappointment so as to avoid tenure being granted. Weigelt said that the shift of High School Principals from school year contracts to 12 month status had not changed the six semester/six reappointment system in place before the change, and that prior to the hearing he had never heard of a 36 month service requirement for High School Principals.

Weigelt said that, while the ASC receives copies of the tenure reports each semester, they are reviewed only for obvious issues, and are not checked to insure that proper credit for service is being given to each appointee. He stated that the rule discounting any semester of service with 36 or more days missed was something he had never heard of before the arbitration hearing.

On cross-examination, Weiglet said that this case was the first time there had been any dispute about whether six appointments or six full semesters of service were required for tenure. He agreed that 12-month supervisory employees were required to serve a three year probationary period, but expressed the opinion that principals and assistant principals were indistinguishable for probation purposes, and that assistant principals were on a six semester basis for probation. He agreed that assistance principals were 10-month employees, and that High School principals and perhaps the Charter School principal were the only 12-month principals in the system.

Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

The Employer

The Employer takes the position that the Grievant was still in her probationary period when she was returned to the rank of Assistant Principal. Administrative Procedure 6.25(1)(a) requires a 12-month employee, such as a high school principal, to complete a three work year probationary period. The Grievant's claim that she received tenure for completing six semesters is flatly contradicted by the plain language of the policy. Six semesters is the relevant time period for 10-month employees, but the policy draws a clear distinction between 10 and 12-month employees. Interpreting her probationary period as six semesters renders the term "three work years" mere surplusage in the policy. If the probationary period was supposed to be six semesters for everyone, there would have been no need of the reference to "three work years" for 12-month employees, nor any need to distinguish between 10-month and 12-month employees. A probationary period measured in years makes sense for full year employees, since their employment is continuous, and is not based on the old agrarian schedule of not working in the summer.

Even if the Arbitrator somehow concluded that the Grievant was subject to a six semester probationary period, the fact is that she did not complete six semesters as a high school principal. She became a principal in the midst of a semester, too late under the established policies to receive credit for a semester of service for her first two months in the position. Administrative Procedure 6.22(2)(c) does not give credit for a semester in which 36 or more days go by without the person being employed in the position. Forty-six work days passed in the Fall semester of 2001-2002 before the Grievant was appointed. Her first semester of creditable service would have been the Spring semester of 2001-2002. She was demoted at the end of the 2003-2004 school year, after five semesters of creditable service. Thus, even if the Grievant was correct in her belief that six semesters are all that is required for tenure, her service is insufficient.

The Grievant made reference in the hearing to the number of reappointments she received, and attempted to analogize being reappointed to having successful service. That completely misreads the requirements for tenure. The tenure policy does not tie tenure to a particular number of reappointments. Rather, it hinges tenure on successful service for a specified period of time. The number of reappointments is irrelevant.

The Grievant did not successfully complete any arguable period of time needed to satisfy the tenure requirements. Accordingly, the Arbitrator must conclude that she was a probationary employee when she was demoted.

The Union

The Union takes the position that the Grievant satisfied the requirements of tenure and could not be dismissed from her position on the whim of the Superintendent. The policy governing tenure is simple – an employee must be reappointed semi-annually during probation, and must successfully serve three work years (six semesters), as measured by each reappointment. The Grievant's first appointment was in the Fall semester of 2001-2002. She continued as principal through the Summer of 2004. While the School Board was haphazard in its duty to formally approve her reappointment for the Spring of 2002, there can be no argument that she was effectively reappointed for that period. Thus, her period as principal encompasses six semesters of successful service.

The Board attempts to deny the Grievant her right to tenure by arguing that she is a 12-month employee and must serve a three year probationary period. However, the Board ignores the fact that a work year must be defined in the context of the entire policy. Since the policy itself calls for semi-annual reappointments, and since the semi-annual reappointments are semester based, it cannot be the case that the work year for the Grievant alone, among all employees, was from October to October. Instead, the work year must be understood as being two semesters, based on the standard school calendar. This is consistent with the history of her reappointments, which were for the following semesters, not for an arbitrary six calendar month period. The reappointments were accomplished at the same time as the other reappointments for probationary employees, all of whom were on a semester to semester schedule. The Grievant successfully completed her sixth semester, the end of her third work year, as of the last day of the Spring semester in 2004. She continued to be employed as principal after that time. The Board took no action to remove her, and the Superintendent took no timely action to terminate her probationary employment. Having waited until after she completed her probation to take any formal action regarding the Superintendent's desire to non-renew her, the Board forfeited its right to terminate her without cause.

DISCUSSION

The only issue before the Arbitrator is whether the Grievant, Dr. Benishek, had completed the probationary period for a high school principal before she was terminated. On the record of this case, there is no calculation that allows me to conclude that she did.

The Grievant was appointed on October 26, 2001. Part IV, Section 3 of the collective bargaining agreement provides that "The work year for the fifteen (15) regular high school principals shall be twelve (12) months." The Board policies, which are incorporated into the collective bargaining agreement, provide that "Initial appointments, as well as promotion to any certificated position, in the Milwaukee Public Schools shall be on a probationary basis, for one semester - or one-half work-year for 12-month employees - provided that, before acquiring permanent tenure, each employee shall have successfully served six semesters, or three work-years, on probation." Thus, the probation period for a 12-month employee is "three work years."

There are three points of contention between the parties. The first is whether the term "work year" for a 12-month position means two school semesters, or instead refers to 12 calendar months. If it does mean semesters, the second question is whether the Grievant was entitled to credit for a semester of service for the Fall of 2001, and thus was in her sixth semester – or third work year – of creditable service at the time she was given notice of termination. If so, the third question is whether allowing the Grievant to serve out the final semester as a principal automatically rendered her a tenured principal.

Clearly, if the work year for a high school principal is, as the contract says it is, 12 months or 260 work days, the Grievant's probationary period would be measured from her date of appointment on a calendar basis, and she would have been four months short of three years when her service at Riverside came to an end. The Council argues that the context in which the term "work year" is used in Administrative Procedures indicates that it is intended to be understood as two semesters, since the schedule for reappointments for 12 month and school year employees is the same, and both are to be accomplished semi-annually:

> (a) Initial appointments, as well as promotion to any certificated position, in the Milwaukee Public Schools shall be on a probationary basis, for one semester - or one-half work-year for 12-month employees - provided that, before acquiring permanent tenure, each employee shall have successfully served six semesters, or three work -years, on probation.
>
> (b) Probationary personnel shall be re-appointed semi-annually. For the monthly meetings of the Board in January and June, and at such other times as may be necessary, the superintendent shall prepare for the Board or its designated committee a report of teachers, administrators, and supervisors, as well as recreation and adult education personnel, serving on the probationary list who are recommended for continued employment.

The Council's argument does some violence to the actual language of the contract and the policy. The familiar principle of contract interpretation is that when parties use different terms, they intend different meanings, and simply as a matter of mathematics, two school semesters do not add up to 12 months. If the Board intended that the probation period for 12-month employees be measured in semesters, they need not have included the distinct references to "work years" when referring to those employees. The fact that they did strongly suggests that they intended a different calculation.

While the reappointments of school year and 12-month employees are accomplished at the same meetings and on the same schedule, that administrative convenience is hardly conclusive proof that the probationary periods for the two groups are the same. A twice yearly review serves both groups, and as a general rule, the 6-month anniversary for a high school principal will roughly coincide with ends of semesters, assuming that they are normally

appointed at the beginning of the school year. The only distinction in this case is that the initial appointment came mid-semester, so that including the review of the Grievant's reappointment with the rest of the probationary employees meant that the decision would be slightly off the 6-month interval.

The Council's argument is ingenious, but is wholly inconsistent with the plain meaning of the collective bargaining agreement and the Board policies incorporated therein. It is also inconsistent with the practice followed for other 12-month employees such as supervisors. Based upon the definition of the work year in the collective bargaining agreement, I conclude that the "work year" for high school principals is 12 calendar months, and that the three work year probationary period of the Grievant ran from October of 2001 through October of 2004.

I note that, even if the language allowed for the Association's interpretation that service was measured on a semester basis, the Grievant would not have had six semesters of service at the time of her termination. There was uncontroverted evidence that Administrative Procedure 6.22 prevents probationary employees from receiving credit for any semester in which 36 or more school days pass without the employee being employed in the promotional position. The Grievant was promoted on October 26, 2001, 46 school days into the Fall semester. Thus, she would not have received credit for that semester, and the Spring semester of 2004 would have been only her fifth as a high school principal. For much the same reasons, the "six reappointments" argument must fail. It is inconsistent with the actual contract language, there were only five actual appointments, and the lack of credit for the Fall semester of 2001 explains and justifies the lack of a second appointment in Spring of 2002.

On the basis of the foregoing and the record as a whole, I have made the following

AWARD

The Grievant, Dr. Rosana Mateo-Benishek, was a probationary employee when she was demoted in June, 2004.

Dated at Racine, Wisconsin, this 5th day of May, 2005.

Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator

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