

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**AMERICAN FEDERATION OF TEACHERS - WISCONSIN
LOCAL 395, AFL-CIO**

and

WISCONSIN INDIANHEAD TECHNICAL COLLEGE

Case 86
No. 65652
MA-13283

(Scott Theilig Grievance)

Appearances:

William Kalin, Staff Representative, AFT-Wisconsin, appeared on behalf of the Union.

Victoria Seltun, Attorney, Weld, Riley, Prens & Ricci, S.C., Attorneys at Law, appeared on behalf of the College.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and College or WITC, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the above-captioned grievance. A hearing was held on July 12, 2006, in Shell Lake, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties filed briefs by August 16, 2006, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUE(S)

The parties did not stipulate to the issue(s) to be decided herein. The Union framed the issue as follows:

Did the College violate Article IV, Section D, Paragraph 3, when it denied the grievant the opportunity to teach the adult community education class “Woodworking for Absolute Beginners”? If so, what is the appropriate remedy?

WITC framed the issue(s) as follows:

1. Did the Union waive its rights to pursue this 2004 grievance when the issue was not resolved in contract negotiations and it sought to revive this issue 14 months later?
2. Did the College violate Article IV, Section D, Paragraph 3, when it denied the grievant the right to bump a part-time instructor out of the adult community education class “Woodworking for Absolute Beginners”? If so, what is the appropriate remedy?

Having reviewed the record and the arguments in this case, the undersigned finds that WITC’s wording of the issues adequately states the issues to be decided herein. My rationale for this decision will be addressed in the DISCUSSION.

PERTINENT CONTRACT PROVISIONS

The parties’ 2004-06 collective bargaining agreement contained the following pertinent provisions:

ARTICLE IV – WORKING CONDITIONS

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Section D. Employment Opportunities

1. Notice of any professional position vacancy within the bargaining unit shall be posted at all campuses during the school year. Current active members of the bargaining unit shall be notified of vacancies at their WITC e-mail addresses at the time the vacancies are sent to newspapers, Web-based recruitment sources, or other outside advertisers. The notice shall include a job description, including remuneration offered, duties, responsibilities and a statement of required qualifications.

Eligible teachers will be notified by mail of vacancies that occur during the summer, with said copy sent to Union President.

2. No teacher assigned to a campus in the Wisconsin Indianhead Technical College District shall be transferred from one city to another city within the district unless mutually agreed upon by the teacher and the College President or designee.

3. When courses such as part-time adult education courses or apprenticeship courses in the cities of Ashland, New Richmond, Rice Lake and Superior are offered by Wisconsin Indianhead Technical College that are outside of the normal work day, full-time contract teachers under this contract shall be given first option of applying, providing said teacher is qualified. Seniority shall be the determination factor in filling positions for said courses. Rate of pay shall be adjusted annually to correspond with regular staff (beginning of school year) and shall be as follows:

...

Section G. School Day and Assignments

1. Teachers will have their regular teaching days scheduled within a span of eight (8) working hours at all attending centers, except nursing instructors in the ADN program may be scheduled a span of 8 ½ working hours on regular teaching days. In all cases the actual number of working hours shall not exceed 35 hours per week unless an overload is assigned.
 - a. Noncredit courses are appropriate for teachers' standard workload.

...

5. Teachers shall express in writing preference in teaching assignments. Such request shall be submitted at least twenty (20) school days prior to the completion of the preceding semester. If the instructor does not receive the assignment, they shall be notified in writing of the reasons.

...

Section S. Management Rights

...

2. Board functions: The Board possesses the sole right and responsibility to operate the College and all management rights repose in it, subject to the express provisions of this agreement. These rights include, but are not limited to the following:

...

- g. The direction and arrangement of all the working forces in the system, including the right to hire, suspend, discharge or discipline or transfer employees.

...

- i. The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards and judgment of employment performance.
- j. The determination of the layout for the equipment to be used, and the right to plan and control school activities. The determination of the processes, techniques, methods and means of school operations.
- k. The right to establish hours of employment, to schedule classes and assign workloads; and to select textbooks, teaching aids and materials.

...

- 3. Exercise of Management Rights: The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board; 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.

Section T. Staff Reduction

- 1. 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 for 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. Notice of such layoff shall be sent prior to the July 1 preceding the school year in question by registered mail, return receipt requested, to the last known address of the employee.

A teacher who has the least seniority 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.

FACTS

WITC operates a technical college with several campuses in Northern Wisconsin. The Union represents a bargaining unit of all teachers of WITC's campuses teaching "at least 50% of a full teaching schedule."

The College typically offers 300 adult community education classes each school year. The College charges a fee for these classes and the revenue generated goes back into the College's general fund. The College has traditionally staffed these adult community education classes with part-time instructors. These part-time instructors are hired for their particular expertise. For purposes of program consistency, the College prefers to hire these instructors for multiple semesters/years. The College finds it difficult to maintain a program offering if the instructors change every semester. The part-time instructors are not included in the bargaining unit and are paid on a different salary schedule.

Scott Theilig is a full-time instructor in the Wood Technics Department at WITC and thus a member of the bargaining unit. Prior to the start of the 2004-05 school year, he wrote to Margaret Forrester, the Associate Dean of Business and Community Education, and requested that he be permitted to teach the adult community education class "Woodworking for Absolute Beginners" for the fall 2004 semester, and for that semester only. When Theilig made this request, this particular class was taught by Chad Weber. Weber is a part-time instructor who has taught that class for the past seven years. Granting Theilig's request (to teach that particular class) would have required the displacement (i.e. bumping) of Weber. Forrester informed Theilig that the College was unwilling to displace a part-time instructor (Weber) for one semester in order to create an overload for Theilig who already had full-time status. Forrester offered Theilig the opportunity to teach another section of "Woodworking for Absolute Beginners" (other than the one Weber was teaching), or another woodworking course for the fall semester, but he declined the offer. Forrester ultimately denied Theilig's request to teach that class on the basis that that class was not vacant.

On September 28, 2004, Theilig filed a grievance over the College's denial of his request to teach an adult community education class for the fall 2004 semester. The College denied the grievance at Step 2 on November 10, 2004. The matter was appealed to the Board level on November 19, 2004.

On December 15, 2004, Perry Palin, the College's Vice-President of Human Resources, wrote Bill Kalin, the Union's representative, and suggested that the parties try to resolve the grievance in bargaining (which was then getting underway for the parties' 2004-06 collective bargaining agreement). The parties subsequently agreed to do that (i.e. to address the matter in bargaining). On December 22, 2004, Kalin sent a letter to Palin which provided:

This correspondence is to confirm. . . [that] the parties have agreed to hold the grievance in abeyance pending negotiations in an attempt to arrive at a mutually agreeable resolution.

The Theilig grievance was subsequently discussed at the bargaining table, but was not resolved.

In May, 2005, the Union petitioned for interest/arbitration with respect to the parties' 2004-06 collective bargaining agreement. The Union's preliminary final offer (that accompanied the interest/arbitration petition) only addressed economic issues; it did not include any language issues.

The parties' 2004-06 collective bargaining agreement was signed on December 5, 2005.

On January 25, 2006, the Union notified WITC that it intended to pursue the instant grievance to arbitration.

...

There is no practice of full-time teachers bumping part-time instructors out of teaching an adult community education course.

POSITIONS OF THE PARTIES

Union

The Union's position is that the College violated Article IV, Section D, Paragraph 3, when it denied Theilig the opportunity to teach the adult community education course in question. It makes the following arguments to support that contention.

First, the Union responds to the College's contention that the grievance was not appealed to arbitration in a timely fashion. The Union acknowledges that there was a one year gap between the time that the grievance was denied by the College and the time the Union appealed it to arbitration. The Union avers there was a simple reason for this gap. The reason was that the College suggested that the parties try to resolve the grievance in bargaining (which was then getting underway for the parties' 2004-06 collective bargaining agreement). The Union agreed to do that. To support that premise, the Union cites Palin's letter to Kalin dated December 15, 2004 (wherein Palin suggested trying to resolve the grievance in bargaining), and Kalin's letter to Palin dated December 22, 2004 (wherein Kalin confirmed that the parties had agreed to hold the grievance in abeyance pending efforts to try to resolve the grievance in negotiations). The Union avers that the matter was discussed in bargaining, but was not resolved. It further notes that the parties' 2004-06 collective bargaining agreement was signed on December 5, 2005 and that the Union appealed the grievance to arbitration on January 25, 2006. According to the Union, these facts establish that during the one year gap, the parties made a good faith effort to try to resolve the grievance in bargaining, but were unable to do so. The Union believes it should not be punished for trying to resolve the grievance in bargaining, especially when it was the College that suggested the parties try that. Finally, the Union also asserts that the first time the College raised timeliness as an issue was at the hearing. The

Union therefore asks the arbitrator to address this case on the merits and not dismiss it on procedural grounds.

With regard to the merits, the Union argues that the College violated Article IV, Section D, Paragraph 3 when it denied Theilig the opportunity to teach a particular adult community education course. The Union's contention is based on the premise that the section just referenced gives full-time teachers the contractual right to teach classes so long as they are qualified and senior. As the Union sees it, the meaning of that language is clear and unambiguous in providing that if a full-time teacher is qualified and senior, they are entitled to teach the course (unless a more senior, qualified full-time teacher also applies, in which case it [i.e. the class] would go to the more senior teacher). The Union avers that Theilig met those two criteria (i.e. qualified and senior), so he should have been allowed to teach the course in question.

According to the Union, its interpretation is consistent with how this language has historically been applied. To support that premise, the Union cites the testimony of former union president Mark Kearns that until this case arose, a full-time teacher had never been denied the opportunity to teach an adult community education class.

Anticipating that the College will argue that there was no vacancy in the course that Theilig wanted to teach because a part-time instructor (Chad Weber) was already teaching the course, the Union emphasizes that part-time employees are not bargaining unit employees, and are not issued an employment contract or given a letter of employment. Building on that, it is the Union's view that the College has no legal responsibility to re-employ part-time instructors from one semester to the next.

Finally, the Union addresses the College's contention that if the Union prevails and full-time teachers are able to unilaterally assume the work of part-time teachers, the task of staffing the adult community education program will be much more difficult than it currently is. The Union essentially acknowledges that that could happen if full-time teachers bump part-time teachers out of some classes. Be that as it may, it is the Union's view that that possible scenario should not be controlling. The reason is this: this is a grievance arbitration case as opposed to an interest-arbitration case (meaning that what is at issue is what the language actually says; not what it should say). Building on that premise, the Union argues that the contract language is controlling; not anything else. The Union asks the arbitrator to apply the contract language exactly as written.

The Union therefore requests that the grievance be sustained and the grievant made whole.

College

The College contends that the grievance should be denied for two basic reasons. First, the College avers that the Union waived its right to arbitrate this grievance because it waited

14 months before it appealed it to arbitration. The College argues that the grievance should be denied on that basis alone. Second, if the arbitrator addresses the merits, the College contends it did not violate Article IV, Section D, Paragraph 3 when it did not allow the grievant to bump a part-time instructor out of the adult community education class in question. It elaborates on those contentions as follows.

First, the College argues that the grievance was not appealed to arbitration in a reasonably prompt fashion. It acknowledges that in December, 2004, the parties agreed to hold the grievance in abeyance pending negotiations. The grievance was not resolved in the subsequent negotiations. In May, 2005, the Union petitioned for interest/arbitration with respect to the parties' 2004-06 collective bargaining agreement. The College notes that the Union's preliminary final offer (that accompanied the interest/arbitration petition) only addressed economic issues and did not include any language issues. The College avers that since the Union knew the grievance had not been resolved in bargaining, and its final offer did not reference the grievance, the Union should have appealed the grievance to arbitration in May, 2005. That did not happen. The College asserts that it did not know the Theilig grievance was still active until the Union appealed it to arbitration in January, 2006. The College's position is that it was prejudiced by the Union's unreasonable delay in pursuing this grievance to arbitration. It cites several arbitrators who dismissed grievances when the union failed to promptly seek arbitration, and it asks this arbitrator to follow their lead. Finally, in response to the Union's contention that it did not raise a procedural arbitrability objection until the hearing, the College essentially acknowledges same, but argues that it can raise a procedural arbitrability objection at any time, even at the arbitration step.

Next, assuming that the arbitrator finds that the Union did not waive its right to arbitrate this grievance, the College contends that neither the contract language nor the parties' past practice support the Union's position that a full-time teacher may bump a part-time instructor out of a teaching position at the full-time teacher's request.

First, the College relies on the Management Rights clause to support its position herein. It avers that it retained the right to make teaching assignments as well as the right to make educational policy decisions regarding the staffing of its adult community education program. The College maintains that consistent with its expressed and reserved management rights, it has structured its adult community educational program with part-time instructors with specialized knowledge in particular subject areas. Whenever a vacancy exists, full-time teachers are offered the right of first refusal to teach those classes. However, when an adult education course is already staffed by a part-time instructor, the full-time teacher does not have a contractual right to bump the part-time instructor out of a teaching assignment.

Second, the College argues that notwithstanding the Union's contention to the contrary, Article IV, Section D, Paragraph 3 does not give full-time teachers the right to bump part-time instructors of adult education courses out of their positions at the whim of the full-time instructor. The contract language simply does not support that contention. All that Paragraph 3 says is that full-time teachers get "first option of applying". The College avers

that the word “applying” implies that a vacancy exists. Building on that premise, the College maintains that in order to apply for a position, there must be a vacancy. It argues that no vacancy existed in this case. Here’s why. When Theilig attempted to “apply” for the adult community education course in question, another employee, namely part-time instructor Weber, already held that position (i.e. taught that course). That being so, what Theilig was essentially seeking was to displace (i.e. bump) Weber out of the position so he could teach it. The College contends that the problem with that scenario is that there is no reference to bumping rights in Article IV, Section D.

Third, the College avers that under this collective bargaining agreement, the only situation where bumping is contemplated is in connection with a layoff or a reduction in a teacher’s teaching assignment. (See Article IV, Section T, Paragraph 1). Only where a full-time teacher is facing a reduction or decrease in their teaching assignment does this bumping come into play. The College emphasizes that neither circumstance was triggered here because in the grievant’s case, he was not facing a staff reduction or layoff; rather, he was carrying a 100% teaching assignment. He was merely seeking an additional “load” to earn more money for one semester only. Building on the premise that there is no specific contract language which permits full-time teachers to bump part-time instructors out of a teaching assignment, the College avers that the arbitrator’s job in this case is to enforce the contract as written.

Fourth, the College also relies on Article IV, Section G to support its position here. It notes that that section guarantees bargaining unit members an assignment of up to 35 hours per week unless an overload is assigned. The College asserts that it cannot assign an overload assignment without the instructor’s consent. Building on that premise, it argues that the converse must also be true and a faculty member cannot demand an overload assignment. It further notes that under Paragraph 5, teachers may express preferences in teaching assignments, but they cannot demand it; thus, the College has the final say in making assignments. The College avers that what happened here was that the grievant sought an additional assignment over and above his full-time assignment. According to the College, its right to schedule and assign employees to teaching assignments overrides his desire to displace an existing part-time instructor.

Finally, the College argues that there is no past practice which supports the Union’s position either. To support that premise, it avers that there is no past practice of full-time teachers bumping part-time instructors out of teaching a community education course. It asserts that no such situation has ever occurred at the College.

The College submits that if the arbitrator finds that full-time teachers can bump part-time instructors out of teaching a community education course, this will have a major impact on the College’s ability to plan and staff such courses. According to the College, program continuity would be impacted because qualified instructors would be reluctant to take on a teaching assignment of unknown duration.

The College therefore asks that the grievance be denied.

DISCUSSION

Procedural Arbitrability

Inasmuch as the College has raised a procedural arbitrability contention, it will be addressed first.

As was noted in the FACTS section, this grievance was originally filed in September, 2004. After it was filed, the parties agreed to hold it in abeyance and try and settle it in bargaining. The grievance was subsequently discussed in bargaining but was not resolved. The Union unilaterally reactivated the grievance in January, 2006, when it appealed the grievance to arbitration.

The College argues that the Union waived its right to arbitrate the grievance because it did not appeal it to arbitration in a reasonably prompt fashion after the grievance did not settle in bargaining. It asks that the grievance be denied on that basis alone. However, I have decided that I am not going to decide this case based on the College's procedural arbitrability objection. It is presumed for the sake of discussion that the grievance is procedurally arbitrable. My reason for making this finding will become apparent at the end of my discussion.

Merits

The reason there is no stipulated issue in this case is because the parties saw the substantive issue differently. As the Union saw it, the College (improperly) denied Theilig the opportunity to teach the adult community education class in question. As the College saw it though, the issue was whether Theilig had a contractual right to bump Weber (the part-time instructor who was teaching the adult community education class) out of that class so that he (Theilig) could teach it. I adopted the College's wording of the substantive issue because it explicitly referenced bumping, and this case ultimately involves bumping. Thus, the issue is whether the College violated Article IV, Section D, Paragraph 3 when it denied the grievant the right to bump a part-time instructor out of the adult community education class that the grievant wanted to teach. Based on the following rationale, I answer that question in the negative, meaning that the College did not violate that portion of the collective bargaining agreement by its actions here.

My discussion is structured as follows. First, I will address the relevant contract language. In the context of this case, four contract provisions are relevant: Article IV, Section S; Article IV, Section D, Paragraph 3; Article IV, Section T, Paragraph 1; and Article IV, Section G, Paragraph 1. These contract provisions will be addressed in the order just listed. After that, I will address whether a past practice is applicable here.

Attention is focused first on the Management Rights clause which is found in Article IV, Section S. That clause provides in pertinent part that the College has retained the

right to make teaching assignments. It also indicates that the College has retained the right to make educational policy decisions regarding staffing. As it relates to the College's adult community education program, the record indicates that the College has structured that program so that it is mainly staffed with (unrepresented) part-time instructors. Given that grant of general authority to the College to make teaching assignments and make educational policy decisions regarding staffing, the question is whether there is a contract provision which limits that general authority. The Union essentially contends that there is, and this limitation on the College's general authority to make those decisions is found in Article IV, Section D, Paragraph 3. According to the Union, that provision gives full-time teachers the right to bump part-time instructors out of teaching positions. The focus now turns to that provision.

I begin my discussion of that provision with an overview of the entire section. Article IV, Section D addresses "employment opportunities" for full-time teachers. Paragraph 1 says that position vacancies will be posted, and employees will be notified of same via e-mail. Paragraph 2 says that teachers will not be transferred from one College location to another unless the teacher and the College mutually agree to same. Paragraph 3 says that when certain courses ("such as part-time adult education courses") "are offered. . .that are outside of the normal work day, full-time contract teachers under this contract shall be given first option of applying, providing said teacher is qualified." The next sentence provides that "seniority shall be the determinative factor in filling positions for said courses." The Union reads these two sentences together to say that if a full-time teacher is qualified and senior, they get to teach the course. The Union avers, of course, that Theilig met those two criteria (i.e. qualified and senior), so he should have been allowed to teach the course in question. However, I find that the Union's proposed interpretation of Paragraph 3 fails to give meaning to the word "applying" which is in the phrase "first option of applying". "Applying" for a position necessarily implies that a vacancy exists. Thus, in order to apply for a position, there must first be a vacancy. If there is such a vacancy, then the senior, qualified applicant gets it. Here, though, when Theilig "applied" for the "Woodworking for Absolute Beginners" adult education course, it was not vacant. It was already filled by Weber, a part-time instructor. While the Union emphasizes that Weber was a non-bargaining unit employee, that point, while true, does not somehow alter the fact that the position was already filled. What Theilig essentially sought to do was displace (i.e. bump) Weber out of that position so that Theilig could teach it. That scenario (i.e. a full-time teacher bumping a part-time instructor out of a class) could certainly occur if the contract language explicitly said that full-time teachers can bump part-time instructors from classes the part-time instructor is teaching. However, Paragraph 3 does not say that. There is no reference whatsoever to bumping rights in that paragraph. Notwithstanding the Union's contention to the contrary, Paragraph 3 does not say that full-time teachers can bump part-time instructors from classes that the part-time instructor is teaching. Instead, as just noted, it simply says that full-time teachers get "first option of applying" (when the College is filling a vacancy).

A review of the collective bargaining agreement establishes that bumping rights only exist in the context of a layoff or a reduction in hours (see Article IV, Section T, Paragraph 1). That's it. Bumping only comes into play, so to speak, when a full-time teacher is facing a

reduction or decrease in their teaching assignment. Neither circumstance was triggered here because Theilig was not facing a reduction or a layoff. Instead, he already had a 100% teaching load and he was trying to add an additional class to it to earn more money for one semester only.

Theilig's attempt to add an additional course to his already existing full-time assignment invokes Article IV, Section G, Paragraph 1. Here's why. That paragraph guarantees that "the actual number of working hours" for bargaining unit members "shall not exceed 35 hours per week unless an overload is assigned." While the term "overload" is not defined in that section, a generic definition of same is teaching more than a full-time work load. Applying that generic definition to this factual situation, Theilig was attempting to add an overload to his full-time assignment on his own volition. It appears from the record that a previous arbitrator found in another WITC grievance arbitration case that overloads are voluntary and cannot be assigned to a full-time teacher without the teacher's consent. WISCONSIN INDIANHEAD TECHNICAL COLLEGE (Ronald Hagen grievance), Case 40, No. 41992, MA-5524 (Karen Mawhinney, 7/25/90). Building on that arbitrator's finding, the converse must also be true, so a full-time teacher cannot demand that the College give them an overload assignment. Both the teacher and the College have to consent to an overload assignment, and here, the College did not consent to the overload sought by Theilig.

Having found that the above-referenced contract language does not support the Union's position, I further find there is no past practice which supports the Union's position either. Insofar as the record shows, there is no practice of full-time teachers bumping part-time instructors out of teaching a community education course.

Finally, I have decided to note that I have not based my decision herein on the College's contention that if the Union were to win this case, it would have a major impact on its ability to plan and staff community education courses. Instead, I have based my decision entirely on the contract language.

In sum then, it is held that the existing contract language does not permit full-time teachers to bump part-time instructors out of a teaching assignment. If the Union wants to change that so that full-time teachers can bump part-time instructors out of a teaching assignment in a non-layoff situation, it will have to get that right through bargaining.

In light of the above, it is my

AWARD

That the College did not violate Article IV, Section D, Paragraph 3 when it denied the grievant the right to bump a part-time instructor out of the adult community education class "Woodworking for Absolute Beginners." Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 7th day of November, 2006.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

