

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
WISCONSIN INDIANHEAD TECHNICAL COLLEGE
and
AFT – WISCONSIN, LOCAL 395

Case 91
No. 66124
MA-13435

Appearances:

William Kalin and James Mangam, Representatives, AFT-Wisconsin, 6602 Normandy Lane, Madison, Wisconsin 53719, on behalf of Local 395 and the Grievant.

Victoria Seltun, Esq., of Weld Riley Prenn & Ricci, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the College.

ARBITRATION AWARD

Pursuant to the captioned parties' request, the parties jointly selected Wisconsin Employment Relations Commission Arbitrator Sharon A. Gallagher from a panel of five randomly selected Wisconsin Employment Relations Commission staff arbitrators submitted by the Commission to hear and resolve a dispute between them concerning the termination of the Grievant's employment by letter dated April 18, 2006. A hearing was held in the matter on October 30, 2006 at Shell Lake, WI. No stenographic transcript of the proceedings was made. The parties submitted their initial briefs by December 16, 2006 and they reserved the right to file reply briefs. By letter received on December 20, 2006, the parties advised that they would not file reply briefs, whereupon the record was closed.

ISSUES

The parties stipulated that the following issues should be determined herein:

- 1) Did the College violated Article IV Section A and/or Article IV Section T of the collective bargaining agreement when it notified the Grievant of the termination of her employment.
- 2) If so, what is the appropriate remedy?

FACTUAL STIPULATION

The parties stipulated that the Grievant was a probationary teacher when she received the termination notice from the College dated April 18, 2006.

RELEVANT CONTRACT PROVISIONS**ARTICLE II – FAIR PRACTICES****Section E. Seniority**

1. Effective July 1, 1996, seniority shall commence with the date of signing of the initial full-time contract or the date of initial “full time” employment, whichever occurs first. Employees employed prior to July 1, 1996, shall maintain their prior seniority date. Any break in continuous service due to resignation, failure to return to work from approved leave of absence, failure to return after the recall period for layoff, or from extended disability beyond three (3) years nullifies the initial date of seniority.
2. A list shall be maintained by the administration showing the seniority of each member of the bargaining unit by campus. Such a list shall be made available to the Union Officers before October 15 of each year. Copies of such seniority list shall be sent to the Union, President and Vice Presidents. When the list is submitted to the Union Officers, it shall have 30 days for acceptance or rejection. The employer will not be held liable for any error in seniority.

. . .

ARTICLE IV – WORKING CONDITIONS**Section A. Discipline and Discharge**

1. All new employees within the Wisconsin Indianhead Technical College District shall serve a three (3) year probationary period, during which they will be given guidance, assistance and recommendations for improvement by their immediate supervisor and/or other supervisory

personnel. A teacher shall not be disciplined, discharged or non-renewed during the probationary period unless there exists a basis in fact therefore.

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2. After the probationary period, a teacher shall not be disciplined, discharged, or non-renewed except for cause. In the event a teacher is disciplined, discharged, or non-renewed, the full grievance procedure as set forth in ARTICLE III herein shall not be followed. In such event, the following procedure shall apply:
 - a. The teacher and the Union shall be promptly notified in writing of the discipline, discharge, or non-renewal, which shall contain a statement of the basis for the action. The teacher or the Union shall have five (5) school days within which to request a meeting with the College President (Step b).
 - b. The College President and/or representative shall meet upon request of the teacher within five (5) school days of such request for the purpose of discussing the action taken and the basis therefore. The teacher may have representation and counsel present at such meeting. Within five (5) school days following said meeting, the College President shall notify the teacher and the Union of any change in the employer's position.
 - c. If the teacher and/or the Union remain dissatisfied with the action taken after the meeting with the College President, either of them may submit the decision within ten (10) work days to the Wisconsin Employment Relations Commission for final and binding arbitration, pursuant to the provisions set forth herein; provided, however, that in grievances processed hereunder, this remedy of final and binding arbitration shall be exclusive of any other procedures or remedies afforded to any teacher by law. Failure to comply with the ten (10) day time limit set forth above shall be deemed a waiver of the right to arbitrate the issue.

. . .

Section S. Management Rights

1. Recognition of Board Rights. The Union recognizes the right of the Board and the College President to operate and manage the affairs of the Wisconsin Indianhead Technical College District, in accordance with its responsibilities under law. The Board and the College

President shall have all powers, rights, authority, duties and responsibilities conferred upon them and invested in them by the laws and the Constitution of the State of Wisconsin.

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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 working forces in the system, including the right to hire, suspend, discharge or discipline or transfer employees.
- h. The right to relieve employees from duty for lack of work.
- 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 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.

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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.

Such teachers who have completed the probationary period shall be reinstated in that campus in inverse order of their being laid off, if qualified to fill the vacancies.

The seniority these teachers have accumulated shall be retained, but shall not accrue from time of layoff. Seniority for the purpose of recall from layoff shall be retained for a period not to exceed two (2) years. All laid off teachers have a period of thirty (30) days to accept or reject a recall to work and during this time no new permanent appointment may be made to fill that vacancy.

2. If a teacher who has completed a probationary period and had their individual teaching contract non-renewed because of lack of work, the said teacher may be given the opportunity to be reassigned to teach other courses in their area(s) of certification to all college facilities if such a vacancy exists. In no instance shall a senior teacher replace an existing faculty member at another district location.

. . .

RELEVANT STATUTORY PROVISIONS

1118.22 Renewal of teacher contracts. (1) In this section:

(a) "Board" means a school board, technical college district board, board of control of a cooperative education service agency or county children with disabilities education board, but does not include any board of school directors in a city of the 1st class.

(b) "Teacher" means any person who holds a teacher's certificate or license issued by the state superintendent or a classification status under the technical college system board and whose legal employment requires such certificate, license or classification status, but does not include part-time teachers or teachers employed by any board of school directors in a city of the 1st class.

(2) On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employee at

the direction of the board shall give the teacher written notice of renewal or refusal to renew the teacher's contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year, or a teacher who does not receive a notice of

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renewal or refusal to renew the teacher's contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board.

(3) At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request therefore with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew the teacher's contract.

(4) A collective bargaining agreement may modify, waive or replace any of the provisions of this section as they apply to teachers in the collective bargaining unit, but neither the employer nor the bargaining agent for the employees is required to bargain such modification, waiver or replacement.

FACTS

The Associate Degree – Nursing (ADN) Program at the WITC Ashland Campus is a two year program in which the College normally employs one part-time instructor (hired for the Fall term) to teach first year courses and two full-time instructors (one hired for the Spring term). The Grievant, JJ¹ was hired in the Fall of 2003 as a part-time ADN Instructor². In December, 2003, the College posted a full-time teaching vacancy in the following position for the next semester:

ASSOCIATE DEGREE NURSING INSTRUCTOR

Applications are presently being accepted from learning-focused, creative and

1 The Grievant's initials will be used herein.

2 The Union provided some evidence to show that in the Fall of 2003, JJ had 17 hours of instruction/office hours per day, a 50% schedule, which arguably would have made her a full-time unit teacher. However, JJ never questioned her employment status nor did she file a grievance thereon in 2003 or thereafter. In addition, the parties stipulated herein that JJ was a probationary teacher at the time of her termination. Thus, the issue of JJ's employment status is not properly before me.

dynamic candidates for an Associate Degree Nursing Instructor at Wisconsin Indianhead Technical College Ashland. Responsibilities include serving as an advisor, role model and mentor to students. This position will teach full-time as of January 2004 with the possibility of continuing in August 2004.

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MINIMUM QUALIFICATIONS

Core Abilities

WITC seeks to employ individuals with talent, commitment, enthusiasm, strong interpersonal skills and the ability to:

- Assess own learning and progress toward established personal and professional goals.
- Demonstrate creativity, critical thinking, and problem solving skills.
- Communicate effectively in personal and group settings.
- Contribute to a diverse, respectful and inclusive working and learning environment.
- Effect change and demonstrate flexibility and positive leadership.
- Acquire and apply technology to working and learning.

Education/Training and Experience

1. Master's degree with a major in nursing (MS or MSN) or master's degree in public health-nursing or nursing education.
2. Minimum of two years (4,000 hours) occupational nursing experience.
3. Direct care experience as a practicing nurse within the past five years required.
4. Current active license as a Registered Nurse including licensure in the State of Wisconsin by start date.
5. Competency in:
 - a) Applying principles of learning
 - b) A variety of teaching strategies
 - c) Curriculum development
 - d) Guidance and counseling
6. Experience in or preparation for teaching in an associate degree nursing program preferred.

Note: In the assessment of credentials, a higher rating may be given for education/training, skills and experience beyond the minimum qualifications.

. . .

After considering various applicants including JJ, by letter dated March 1, 2004, the College selected JJ to fill this position and JJ signed a contract covering one semester's work (ER Exh. 2)³. Thereafter, JJ continued teaching in this full-time position through the 2004-05

3 After JJ signed this contract, the College sent the Union the annual up-dated seniority list (December, 2005) concerning which no objections were made by JJ or the Union to JJ's listed seniority date of 1-15-04. (ER Exh.

and 2005-06 academic years, pursuant to annual individual teaching contracts (ER Exhs. 3, 4, 7, 10).⁴

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It is undisputed herein that the College sought and received a grant with which to pay for JJ's full-time position so that the College could increase the ADN Program in response to increased demand for ADN student slots. As a result, the two year ADN Program enrolled 8 additional new students going from 16 to 24 students, a 1/3 increase. The grant received by the College was for one, two year ADN Program only. It is also undisputed that in the past, when a layoff has occurred at the College, the least senior employee in the department or program has been laid off; and that probationary teachers have no right to transfer to another Program or Department and they have no right to recall. It is also undisputed that JJ was the least senior employee in the ADN Program on April 18, 2006.

In the Fall of 2005, Ashland College Counselors began receiving ADN student complaints regarding JJ's job performance and her treatment of students. At this time student complaints were also made about full-time ADN Instructor P.S.⁵ but no complaints were received about ADN Instructor Kris Connell. The Counselors passed on these complaints to Nursing Program Dean, Piper Larson and Student Services Dean, Mary Stenberg. Stenberg then made Ashland Campus Administrator Don Marcouiller aware of these complaints. Thereafter, in October and November, 2005 at least two ADN students filed written complaints about the job performance of JJ and PS (ER Exh 12). During the Fall of 2005, Union President Leggate,⁶ Dean Larson and others met with ADN students at the Ashland Campus to discuss the complaints regarding JJ and PS.

Also in the Fall of 2005, Larson requested that ADN students evaluate JJ's job performance. A document was created to summarize the student comments concerning JJ's performance, (ER Exh. #14).⁷

On January 19, 2006, JJ and PS were invited to a meeting called by Administrator Marcouiller and Dean Stenberg due to Marcouiller's frustration over Dean Larson's inability to address/remedy complaints regarding JJ and PS's job performance. At this meeting, Marcouiller discussed ADN student complaints he had received concerning JJ and PS and ways to improve the ADN Program and JJ and PS's performance.⁸ A description and discussion of the student complaints regarding the ADN Program and JJ and PS's teaching performance and treatment of students occurred at this meeting. After this meeting, Larson drafted and e-mailed

6).

4 The Union asserted that ER Exhibits 3, 7 and 10 were internal documents not relevant or demonstrative of JJ's actual employment status. I disagree. The facts herein show that these documents consistently support the College's assertions herein and are regularly kept business documents relevant to this case.

5 Instructor P.S.'s initials shall be used herein.

6 Leggate stated that she attended workshops on all WITC Campuses regarding student attitudes (including ADN student attitudes) during the Fall of 2005.

7 As JJ's job performance evidence has been determined irrelevant and immaterial it has not been quoted herein or discussed in detail.

8 Connell was not invited and did not attend this meeting.

the following “Action Plan” to all attendees of the January 19, 2006 meeting.⁹

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Action plan for WITC Administration and ADN Faculty – January 23, 2006

Issues	Goal	Plan	Evaluation – who-when
Students’ perception that instructors have favorites while others are picked on or badgered.	No student feels “picked on”, but faculty are able to give feedback and evaluation comments with clinical performance.	Instructors convey fairness to all students Piper will visit both clinical groups to observe and gather feedback twice during the Advanced Clinical course, once in classroom, and also gather course and faculty evaluation per ADN procedures	Piper – share with faculty Discuss general feedback with Mary and Don
Students have to learn the material on their own, students do not understand the methodology used in the class room to foster critical thinking skills.	Students support the methodology used in the classroom. Students assist in building the classroom activities	Faculty review syllabus and competencies at specific intervals Faculty gather input on classroom activities as possible	Piper – with course and faculty evaluations as above
Students do not feel that instructors have compassion for their stress filled situations	All students feel respected and that instructors are sympathetic to their personal/professional issues	College Success workshop with Mary Leggate – periodic followup from Mary/counselors? P and J work to improve perceptions by listening and offering college resources as appropriate	Mary and Piper Should Mary visit the class as a whole group?
Students have been unable to address concerns directly due to their perception of possible retaliation	Students feel comfortable talking with each instructor about school topics	Continuous reinforcement that students must talk with faculty. Coaching by Piper, Mary and Don as to how students might approach the concern. Students may request advocate to be with them	Could we have a phone conference every other week to see how things are going?
Faculty have felt lack of support from campus staff because student accounts of situations were not validated, student reports were accepted as truths.	All issues are addressed while small and within the same work week with the student, administration, and faculty.	Include all parties in initial conversation to validate information to solve the identified or perceived issue Perhaps the phone conferences every other week to bring concerns to light?	As above
Perception that there is	Positive image for WITC	Clarify public image with	???

⁹ Neither PS nor Larson nor Marcouiller testified at the hearing.

negative public opinion about the nursing program in the community	nursing program	employers, students and agency staff	former clinical
Others ideas???			

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No evidence was presented to show that the above-quoted plan was ever implemented. In fact, Stenberg specifically denied that it was implemented. Steinberg stated that she continued to receive complaints from 5 ADN students after January 19, 2006 and that two students transferred out of the Ashland ADN Program and one student dropped out of the program entirely.

Thereafter, PS notified the College that she intended to retire at the end of that school year. As a result, the College posted PS's position on April 6, 2006, as follows:

ASSOCIATE DEGREE NURSING INSTRUCTOR

Wisconsin Indianhead Technical College is seeking a learning-focused, creative and dynamic individual for a full-time Associate Degree Nursing Instructor at the WITC Ashland campus beginning fall semester. The ideal candidate will demonstrate interest in and potential for excellence in facilitating student learning and development.

The Minimum Qualifications including "Core Abilities" were the same as those listed on the posting for JJ's 2004 full-time position and the "Education/Training and Experience" items were identical except that the following two items were added to those that appeared on JJ's position posting:

6. Dedication and commitment to student success and a commitment to the technical college mission.
8. Teaching experience with strong background assessment preferred.

On April 15, 2006, JJ sent HR Vice President Palin the following letter regarding the vacancy.

. . .

This letter is an official request to make a direct transfer into the position being vacated by PS's retirement. The position is a full time ADN position on the Ashland campus working with the second year students.

My employment at WITC began in Sept. 2003. According to the employee union contract, article 4, section T, paragraph 2 this transfer should be automatic.

. . .

The College sent no written response to JJ's transfer request but on April 17, 2006, JJ sent the following cover letter for her application for the vacancy:

. . .

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This letter is an official letter of interest in the ADN Instructor, Full Time, 2nd year at Ashland campus. Attached please find my resume and application.

I have been teaching at WITC for the last three years. I have maintained a high academic standard in the class room and in the clinical area. I take my responsibility of providing our community with well prepared nurses seriously. I have worked to maintain a professional relationship with all students while fostering a growth environment for all of my students. I value the interaction with the nursing students.

When I have been assigned course development, I have spent time developing learning activities for in class and online students to enhance optimal learning. My goal is to provide the best learning activities for each student, but to respect their time and energies as members of our community.

I have participated in nursing faculty staff meetings, campus staff meetings, and have maintained a working relationship with other faculty. I have worked with the other two nursing instructors without difficulty. I attended the Facilitating the Future, summer 2005, and learned some new class room tools for assessment.

I believe you will find in my personnel file the other information that you need. If you need me to resubmit any other information, please contact me and I will be more than happy to do so.

. . .

On April 18th the College sent JJ the following letter terminating her employment:

. . .

This letter constitutes official notice of termination of your employment effective with the end of the current 2005-2006 school year. This action is based on the planned elimination of your full time position in the ADN program at the Ashland campus.

College records indicate that you are a probationary instructor, without recall rights to other teaching positions. You are aware that a full time continuing position has been advertised for the Ashland campus, and you are welcome to apply for that vacancy.

. . .

It is undisputed that one of the ADN students who had complained in writing about JJ's job performance in the Fall of 2005 sent a letter to the College Interview Panel for the vacancy stating reasons "why JJ should not be hired" for the position PS had held (ER Exh. 15) and after having considered the student's letter, ultimately, the College selected another candidate for the vacancy.

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The Union then filed the following grievance on April 24, 2006:

This correspondence constitutes a grievance filed at Step 1 of the Grievance Procedure in which the Union asserts the College is in violation of Article IV, Section T Staff Reduction and/or Article IV, Section A Discipline and Discharge by its action of layoff and/or termination of JJ as contained in your correspondent of April 18, 2006.

If your April 18, 2006, correspondence is a layoff notice, it is unjustified and in violation of the Staff Reduction clause in that there is not a need for a layoff from the ADN program at the Ashland Campus because there is a vacancy for 2006-2007 school year.

If your April 18, 2006, correspondence is a termination notice, it is in violation of the Discipline and Discharge clause of the contract and is in violation of WI Stats 118.22 based on the statutory time requirement for non-renewal notice. I remind you that JJ is not a probationary instructor having begun her employment with the College the fall of 2003.

The Union asks that you withdraw your letter of April 18, 2006, and provide Ms. J with a contract for a full time, ADN position for the 2006-2007 school year.

. . .

POSITIONS OF THE PARTIES

Union:

The Union conceded that Grievant JJ was a probationary employee at the time she received her notice of termination. As an initial matter, the Union raised the issue whether the April 18, 2006 letter was a discharge letter or a notice of lay-off. Because the sole reason for termination stated in the April 18, 2006 letter was the ". . . planned elimination of your full-time position at the Ashland campus" the Union urged that on its face, the notice given appears to be a notice of layoff. Yet, the Union argued, the College's actions toward JJ (asserted concerns about her teaching performance) tend to support a conclusion that the April 18th notice constituted a letter of discharge for which the College failed to prove any "basis in fact," as required by Article IV, Section A (1) of the labor agreement.

Assuming the April 18th letter was a notice of layoff, the Union questioned whether JJ's position was in fact being eliminated. Rather, the Union urged that the record facts showed that JJ's position was not being eliminated because she had already begun performing the job

of retiring teacher PS when the College posted it as a vacancy in the Spring of 2006. Also, the Union queried why the College had posted PS's ADN position, because as of April 18, 2006, the College knew that one of three ADN instructors would be retiring at the end of the 2005-06 academic year and that there would be a need for the two remaining ADN instructors in the Fall of 2006.

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In addition, the Union noted that Union Representative Kalin stated that the College has never laid off an employee solely because they were probationary or in order to create a vacancy. Also, Local President Leggate stated that employees, whether probationary or not, have never had to bid for transfers to positions when they were already performing the same job. Here, the Union argued that there was no need for JJ to receive a layoff notice - - no position had been eliminated and there was no practice of laying off employees because of their probationary status and as the position JJ was in (PS's) was continuing. In short, the Union contended that the College should not have laid JJ off and required her to apply for the position she was then teaching.

If the College's action toward JJ was a discharge for poor performance, the April 18th letter never referenced JJ job performance or that she was a probationary employee and therefore these reasons, given at hearing, would not constitute "a basis in fact" for JJ's discharge. Furthermore, because the April 18th letter did not state JJ was being discharged nor did it list any of the alleged performance problems the College's witnesses testified to herein, this approach denied JJ due process and the ability to grieve the discharge. The Union asserted that the only evidence regarding JJ's performance was the fact that College Administrator Marcouiller wanted JJ out of the ADN program by the end of the 2005-2006 academic year and that two students had complained about JJ.

In regard to the former point, Jordan stated herein that Marcouiller resented JJ's advocacy for her retiring colleague, PS and that Marcouiller was hostile to JJ's note-taking in the January 19, 2006 meeting. Beyond this, the Union noted that JJ's evaluations were all positive. Regarding the student complaints, the Union observed that Article IV, Section B 1c only allows student evaluations of instructors to be used by teachers for self-improvement "and are not to become part of the teacher's file." Here, according to the record evidence, the College made two student complaints a major part of JJ's file and a major reason for JJ's termination and yet JJ stated that the College never gave her copies of these complaints - that she first saw them at the instant hearing. In addition, the Union pointed out that student complaints about teachers are common and that the complaints about JJ and PS had not been more numerous than those regarding other teachers; that the two students who complained finished the ADN program as successful students and one of them had also praised JJ's teaching previously; and that the overall student evaluations of JJ (done in 2005) were more favorable in general and contained few complaints.

The Union asserted that it was the College's contractual responsibility (Article IV Section B 1b) to provide teachers with "assistance" to improve "deficiencies in classroom

instruction.” This, the Union asserted the College failed to provide. Indeed, the College never informed JJ she had any deficiencies. In these circumstances, the Union urged the Arbitrator to reinstate JJ with full backpay.

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College:

The College noted that there is no question that JJ was a probationary employee at all times relevant to this case. Given JJ’s probationary status, the College argued that it had broad rights to terminate her, limited only by the express terms of the labor agreement which state at Article IV, Section A(1), that the College merely needed “a basis in fact” for termination. In addition, other provisions of the agreement such as Article IV Section A(2) and Article IV Section T, Staff Reduction only apply to non-probationary teachers so that they were not applicable to JJ. As the College contractually reserved the management rights to discharge, to determine the size of the work force, to assign employees and workloads and to judge employee performance, it had the right to terminate JJ’s probationary employment so long as the College had a “basis in fact” for its decision.

In the College’s view the record evidence demonstrated that the College had three separate bases for terminating JJ. First, JJ was never guaranteed or offered a long-term ADN position.¹⁰ Second, the grant funding and grant period which allowed for JJ’s full-time instructorship ended in 2006. Third, WITC had had legitimate concerns about JJ’s job performance since the Fall of 2005. Also, as a probationary employee, JJ had no right to transfer, (under Article IV Section T) into the full-time ADN position being vacated due to PS’s retirement.

The College urged that the limited duration of JJ’s employment due to the cessation of grant funding for her full-time position in April, 2006 was a sufficient non-arbitrary basis in fact for JJ’s termination. The College pointed to Arbitrator McGilligan’s Award in WITC AND AFT, CASE 60, NO. 62475, MA-12305 (2/05) as support for this assertion. Beyond this, the College noted that its Counselors as well as Student Services Dean Mary Stenberg and Administrator Marcouiller became aware of student concerns/complaints about JJ and the ADN Program in the Fall of 2005. The College described these concerns/complaints in its brief as follows:

The scope of the concerns revolved around the Grievant not hearing student questions, not responding to e-mails, not providing guidance to students, personal attacks on students, not following the syllabus, mind games, unprofessional conduct, intimidation, condescending remarks, lack of compassion, lack of fairness, retaliation, and negative public opinion about the ADN program in the community. (Er. Exs. 12, 13 and 14). WITC took these concerns very seriously.

¹⁰ I note that JJ admitted herein that she had no guarantee of employment from one year to the next when she signed her individual teaching contracts.

In January, 2006 Stenberg and Campus Administrator Macouiller met with JJ and PS to discuss student concerns about both JJ and PS, and the ADN Program. At no time during this meeting (or thereafter) did the College agree to allow JJ to assume PS's teaching position and the purpose and content of the meeting was to discuss student concerns/complaints about both teachers' job performance and teaching skills. Notably, when PS decided to retire, JJ applied

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for her position but she did not receive it, possibly due in part to a letter critical of JJ sent by one of JJ's students who was concerned about JJ's application for the vacant ADN instructor position. The legitimate concerns the College had about JJ's teaching skills and job performance were another "basis in fact" for her termination.

Furthermore, the College argued that it was not obliged to follow the non-renewal procedure set out in Sec. 118.22, Stats., because the Statute provides for opting-out if parties to a labor agreement agree upon specific layoff/non-renewal language. Here, the parties agreed that Article IV Section A (1) should cover non-probationary teachers and they specifically agreed to other language applicable to probationary teachers. In all of the circumstances, the College urged the Arbitrator to deny and dismiss the grievance.

DISCUSSION

It is undisputed that at all times relevant to this case, JJ was a probationary instructor. As such, the clear language of Article IV shows JJ was not entitled to the protections granted to non-probationary instructors contained in Article IV, Sections A(2) and T. The only provision applicable to the action taken by the College on April 18, 2006 which terminated JJ's employment is Article IV Section A(1). Therefore, the inquiry herein must be limited to whether the College had a "basis in fact" for its decision to terminate JJ on April 18, 2006. Furthermore, in the circumstances, the College's use of the term "notice of termination" in its April 18th letter to JJ showed that the College never intended to layoff or non-renew JJ.¹¹

The question then arises whether the reason given by the College in its April 18th letter to JJ was sufficient to constitute "a basis in fact" for her termination. In this regard, I note that there is no dispute on this record that the position JJ contracted to fill for the 2005-06 academic year would be eliminated due to the cessation of supportive grant funding at the conclusion of the two years that ADN Program was expanded. The elimination of JJ's position due to the down-sizing of the ADN Program in 2006 was fully supported by the facts of this case which the Union did not seriously challenge. As such, this evidence constituted "a basis in fact" for JJ's April 18, 2006 termination.

The Union argued herein that JJ simply assumed PS's position before PS retired. However, no documents were placed in the record to show that JJ was ever officially transferred or in any other way that she was officially allowed to assume PS's position at any

11 I agree with the College's assertion that Section 118.22(4) of the Statute allows parties to a collective bargaining agreement to "modify; waive or replace" any of the statutory provisions and by agreeing to Article IV Section A(1), the parties opted out of Section 118.22(4) concerning probationary teachers.

time prior to PS's retirement. Rather, JJ's 2005-06 contract with the College remained in full force and affect for the 2005-06 academic year. In addition, the evidence showed that the College never granted JJ's request, sent April 15, 2006, to transfer into PS's position. Indeed, PS's position was posted and thereafter, and JJ formally applied for it and was not selected.¹²

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¹² JJ's non-selection for this opening is not before me.

Thus, the evidence proffered by Union Representatives Kalin and Leggate concerning past practices involving probationary employees who assume open positions is not applicable here. In my view, the College's letter of April 18th shows that the College terminated JJ not because she was probationary¹³ but because the two year ADN Program funding had ended and her position had been eliminated. Here, the College never stated nor did it intend to layoff JJ. Notably, JJ was the least senior employee in the ADN Program as of April 18, 2006.

Beyond this, I note that a great deal of evidence was proffered herein regarding JJ's job performance. Yet, there was no reference in the April 18, 2006 "notice of termination" to any of this evidence. As such, JJ was never notified that her job performance was deficient, and she was never given any guidance, assistance or recommendations for improvements as clearly required by Article IV Section A(1). Therefore, because the record evidence concerning JJ's job performance was not stated as a reason for her termination, it cannot be and has not been considered herein as part of the "basis in fact" for JJ's termination required by Article IV, Section A(1).¹⁴ Therefore, based upon the above analysis¹⁵ I issue the following

AWARD

The College did not violate Article IV Section A or Section T of the collective bargaining agreement when it notified the Grievant of the termination of her employment due to the planned elimination of her full-time position. The grievance is therefore denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 20th day of April, 2007.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

13 Contrary to the Union's assertion, the College supplied uncontradicted testimony that another probationary teacher, Michelle McDonald had been terminated in 2003 or 2004 without Union objection.

14 Given this conclusion, how Marcoullier treated JJ on January 19, 2006 and the value of any student complaints regarding JJ as well as the College's retention and use thereof is not relevant or material herein.

15 The prior WITC cases cited by the College although relevant have not been particularly helpful herein as the facts of this case are distinguishable therefrom.