

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**NICOLET AREA TECHNICAL COLLEGE FACULTY ASSOCIATION,  
affiliated with the WISCONSIN EDUCATION ASSOCIATION COUNCIL,  
and WEAC NORTHERN TIER UNISERV CENTRAL**

and

**NICOLET AREA TECHNICAL COLLEGE BOARD OF DIRECTORS**

Case 23  
No. 68018  
MA-14090

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**Appearances:**

**Gene Degner**, Director, Northern Tier UniServ, 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501-1400, for Nicolet Area Technical College Faculty Association, affiliated with the Wisconsin Education Association Council and WEAC Northern Tier UniServ Central, referred to below as the Association.

**Robert W. Mulcahy**, Michael Best & Friedrich, LLP, Attorneys at Law, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, for Nicolet Area Technical College Board of Directors, referred to below as the Board or as the Employer.

**ARBITRATION AWARD**

The Association and the Board are parties to a collective bargaining agreement, which provides for the final and binding arbitration of certain disputes. The Association requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of Peter Jensen, who is referred to as the Grievant. The Board and the Association discussed whether the Board objected to arbitrating the grievance and ultimately agreed that they would arbitrate their dispute regarding the interpretation of Article XV, Section A of the collective bargaining agreement but not their dispute regarding the interpretation of Sec. 118.22, Stats., regarding the Board's non-renewal of the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as Arbitrator. Hearing on the grievance was held in Rhinelander, Wisconsin on October 28, 2008. Melody West transcribed the hearing and filed a transcript with the Commission on November 10, 2008. The parties filed briefs and reply briefs by January 2, 2009.

### ISSUES

The parties did not stipulate the issues for determination. The Board states the issues thus:

Does Article XV, Section A of the Contract apply to probationary employees?

If not, what is the remedy in this case?

The Association states the issues thus:

Did the (Board violate) the rights afforded (the Grievant) under the Collective Bargaining Agreement; in particular, Article XV, discipline procedure, when it non-renewed his contract for the '08-'09 school year?

(I)f so, what is the appropriate remedy?

I read the record to pose the following issues:

Did the Board violate Article XV of the collective bargaining agreement through its non-renewal of the Grievant's contract for the 2008-09 school year?

If so, what is the appropriate remedy?

### RELEVANT CONTRACT PROVISIONS

#### **XV. DISCIPLINE PROCEDURE**

- A. The Employer shall notify a bargaining unit employee in writing of any alleged delinquencies, indicate expected correction, and indicate a period for correction. In the event said delinquencies could result in termination of employment, copies of any notice to the bargaining unit employee shall be forwarded to the Association.
- B. A bargaining unit employee shall at all times be entitled to have present a representative of the Association whenever requested to meet with the administration or when being reprimanded, or disciplined for any infraction of rules or delinquency in professional performance, except in emergency situations. When a request for such representation is made, no action shall be taken with respect to the bargaining unit employee until such representative of the Association is present, except in emergency situations, and then the administration shall be able to act unilaterally.

- C. No bargaining unit employee shall be suspended, reprimanded, reduced in rank or compensation, deprived of any professional advantage, or otherwise disciplined without just cause. After serving a two (2) year probationary period, no bargaining unit employee shall be non-renewed except for just cause. Any such action shall be subject to the grievance procedure set forth herein. All information bearing on any disciplinary action will be made available to the bargaining unit employee and the Association.

### **BACKGROUND**

The grievance, filed on April 30, 2008 challenges a series of Board acts concerning the Grievant's non-renewal, including violations of Sec. 118.22, Stats. The documents generated through the grievance procedure include points ranging from the merits of the grievance to issues of substantive arbitrability. As noted above, the parties ultimately agreed to arbitrate their dispute concerning the interpretation of Article XV. Regarding the non-statutory bases for the grievance, the April 30 grievance states:

Third, the District violated their own policy on treatment of probationary employees. . . .

Fourth, Article XIV, Discipline Procedure, paragraph A., provides . . . Mr. Brown indicated . . . that (the Grievant) had two major delinquencies. This was the first time any . . . were brought to the attention of (the Grievant). Further, there has been no written evaluation or oral/verbal evaluation of (the Grievant) and no time for corrective action with regards to the delinquencies. . .

The reference to "their own policy" is to a four-page document which is entitled, "Probationary Teaching Faculty – Developmental Approach", and which states,

New faculty were hired who exhibited these characteristics:

- a passion for teaching and learning in their discipline,
- a willingness to use innovative teaching techniques and technologies to create flexible learning environments,
- a commitment to assessment and improvement of student learning,
- the development of independent, lifelong learners, and
- productive engagement in department and college development efforts.

Nicolet develops in students, its core abilities of effective written, oral, and interpersonal communications, critical thinking skills, self-directed inquiry and growth, self awareness and esteem, local and global awareness and

commitment, and ethical considerations and integrity. We ask faculty and staff to also model these core abilities.

Nicolet College is committed to the success of new faculty. To assist new faculty in their role, an extended orientation has been developed - the Teaching and Learning Seminars. The Teaching & Learning Seminars are scheduled every Monday morning from 8:00 - 10:00 AM for four semesters. . . .

**Feedback on performance will be provided as follows:**

- 1. Student course feedback . . .**
- 2. Classroom observations and course material review . . .**
- 3. Instructor and Dean/Director meeting each semester . . .**

The final page of this document is entitled, “**Teaching Faculty Duties/Responsibilities**”; then states the following introductory paragraph, “The following duties reflect the instructional plan, the college mission, vision, values and strategic plan, and teaching faculty job descriptions”; and concludes with eleven separately numbered paragraphs, including the following:

1. Develop, maintain and deliver performance-based, learning-centered instruction in accordance with the mission/vision and philosophy of Nicolet College, in their discipline.
2. Develop, maintain and improve programs and courses through:
  - a. working collaboratively with other faculty and administrators,
  - b. program review,
  - c. curriculum and course development,
  - d. assessment of student learning,
  - e. advisory committees,
  - f. scheduling, and
  - g. student recruitment and retention.
3. Serve and engage in the college-wide community life including institutional projects, committees and governance.

. . .

8. Interact with and represent the College to communities and organizations including the University of Wisconsin System and other 4 year colleges, the Wisconsin Technical College System, district high schools and employers, Native American tribal communities, advisory committees, and professional groups related to the field.

9. Participate in partnerships and/or promote articulations with high schools and 4-year degree colleges. . . .

The Board's implementation of this policy is referred to below as the "Developmental Process."

The "Faculty Job Description" for the Grievant's position is entitled, "Automotive Technician -- Transportation Technology Core Instructor" and states:

. . .

### **Duties/Responsibilities**

The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

Fifteen bulleted entries follow this heading, including the following:

- Develop, maintain and deliver performance-based, learning-centered instruction in accordance with the mission/vision and philosophy of Nicolet College primarily within the automotive technology program and secondarily across a transportation technology core and small engine technologies curriculum. Automotive instruction includes the full range of eight automotive technical repair areas as described by the National Automotive Technician Education Foundation (NATEF) program standards. Small engine instruction includes engine, chassis and power flow systems included in recreational marine and outdoor power products (turf equipment, snowmobiles, ATVs and/or motorcycles).

. . .

- Establish and maintain contacts with external stakeholders.
- Develop, maintain and improve programs and courses, by working collaboratively with other faculty and administrators through program review, curriculum and course development, assessment of student learning, advisory committees, and student recruitment and retention.

. . .

- Represent the College and interact with communities and external organizations including the University of Wisconsin System and other 4 year colleges, the Wisconsin Technical College System, district high schools and employers, Native American tribal communities, advisory committees, and professional groups related to the field.
- Promote articulations with high schools and 4-year degree colleges

...

The position description also served as the posting for the vacancy filled by the Grievant in the summer of 2006.

At the time he applied for the position, the Grievant was an Automotive Technology instructor at Rhinelander High School. In late June of 2006, he submitted his resume together with supporting narrative to Daniel Groleau, the Board's Director of Human Resources. The Grievant was one of six applicants for the position. The Board established an interview committee to screen the applicants. Rick Foral, a Dean of Instruction, chaired the committee, which included another Dean, a support staff member from the Automotive Technology Program (ATP), some teaching staff members and an advisory committee member. The committee recommended the Grievant's hire to James Brown, the Board's Vice President of Instruction. With Foral, Brown conducted an interview with the Grievant. After this, Brown had the Grievant's references checked, then met with the Board's President. The decision to make an offer of employment was determined at this meeting. After the decision to extend an offer had been made, Brown consulted with Groleau and then the Board offered the position to the Grievant, who accepted. The Board hired the Grievant effective August 3, 2006, placing him at the BA, Step 4 cell of the salary schedule.

The Board's degree offering in the ATP is a two-year course. The program's capacity is twenty first-year and twenty second-year students, for a full enrollment of forty students. For the Fall semester of the 2006-07 school year, the Grievant worked a 100.65% teaching load, including class work made available during the semester by the departure of a Small Engine Program instructor. The Small Engine Program is now known as the Outdoor Power Program and is referred to below as the SEP. For the Spring semester of that year, he worked a 102.87% load. For the 2007 summer session, the Board contracted with the Grievant to develop curriculum for the SEP. For the Fall semester of the 2007-08 school year, the Grievant worked a 138.9823% load. For the Spring semester of that school year, he worked a 117.746% load. Mark Switek was a non-probationary instructor in the ATP at the time of the Grievant's hire. Switek's teaching load from the Fall semester of the 2006-07 school year through the Spring semester of the 2007-08 school year was: 134.46%; 116.67%; 135.3257%; and 125.3087%. Switek lacked the certification to teach SEP programs that the Grievant instructed.

The overloads reflect the teaching schedules, but not ATP enrollment levels, which fell over this period. During his tenure, the Grievant did not instruct a class above thirteen students. The Board experienced a fairly steady decline in student enrollment from the 2004-05 through the 2007-08 school years.

Declining enrollment prompted a meeting between Brown and Jensen on September 3, 2007. This was the second of three meetings involving Brown and Jensen. The third came on December 13, 2007, when Brown informed the Grievant that he intended to non-renew his teaching contract. The Board issued a written, preliminary notice of non-renewal dated

February 20, 2008. Subsequent Board acted to non-renew the Grievant's teaching contract prompted the filing of the grievance.

The balance of the **BACKGROUND** is best set forth as an overview of witness testimony.

**Rick Foral**

Foral has served as Dean for roughly two and one-half years and was the Grievant's direct supervisor. Brown is Foral's direct supervisor. Prior to becoming Dean, he served as a contract full-time faculty member since 1987 and as an adjunct faculty member for roughly five years. His service on the faculty centered on the ATP. Foral attended Brown's hiring interview with the Grievant in early July of 2006. Much of the interview focused on the Grievant's personal qualifications and experience, but much of the interview centered on Brown's concern with the ATP, which was in decline. Brown stressed the need for the program to demonstrate greater ability to recruit and to retain students. Brown noted the need for a vision to guide the program to reflect greater emphasis on critical thinking and greater rigor that linked success as a student to success in the workplace. Outreach to local schools and to local employers was critical to this vision. The Grievant concurred and emphasized his own vision regarding this effort as well as his agreement that the program could grow under that vision. The interview included discussion of the melding of the ATP and SEP portions of the department.

The documentation submitted by the Grievant to Groleau in June of 2006 included a narrative that states:

It is with a great deal of interest and enthusiasm I present to you my enclosed resume . . . I have experiences in the area of Automotive Technology through formal education, working as a dealership technician and performing design-engineering duties for General Motors Corporation. I also possess knowledge of small engine technologies via my time with Harley-Davidson Motor Company, my professional affiliations and as an active user. To conclude my experiences and skills with both educational areas I am a judge for the Society of Automotive Engineer's Clean Snowmobile Challenge, avid snowmobiler and enduro motorcycle racer. I feel the two subject areas of automotive technology and small engine technology are on a collision course. As there is clear bilateral linkage between them, my professional ambition is to continue to bridge them. Individually these subjects stand on their merits but when applied together, the potential to produce highly educated students becomes evident. Many of the competencies developed and principles explored in small engine technologies are applied and demonstrated in the automobile.

. . .

I believe today's community colleges must remain responsive to a wide range of needs from across their service areas. They should provide opportunities for students who are working toward advanced degrees and also those who wish to obtain skill development training in an occupational field. This must be done while providing for personal interest and continuing education classes that are needed by non degree seeking students. The college also needs to work closely within the community to support efforts in economic development by providing access to its research capabilities and specialized training that may be needed to encourage business and industry initiatives. I believe in the integrity of each person, in the importance of each person's quest to keep learning, to improve the self, to be a person of dignity in that search and to enhance possibilities for economic as well as personal satisfaction through learning. I believe that the technical college system in Wisconsin has the charter to produce highly educated students that can think critically. This ability to think critically will provide them with a solid foundation and tools to master any situation that confronts them. In a world heavily laden with technology this means educating student to think like an engineer. With those skills in place the student will be prepared for any career opportunity. . . .

After the Grievant's hire, Foral was responsible for overseeing the Developmental Process for the Grievant's tenure as a probationary employee.

The Developmental Process strained after Brown's September 3 meeting with the Grievant. Brown met with Foral in Brown's office after he met with the Grievant. Brown expressed to Foral "his growing dissatisfaction" {Transcript (Tr.) at 28} with the Grievant's outreach efforts. Brown noted that ATP enrollment continued to decline and that he voiced this to the Grievant to motivate greater outreach efforts regarding recruitment. Brown took the Grievant's response to be that he was too busy to engage in such efforts, and Brown impressed on Foral the need for Foral to get the Grievant to commit more effort toward student recruitment and retention.

Foral responded by meeting with the Grievant in the Grievant's lab after Foral's discussion with Brown. Foral attempted to convey to the Grievant that Brown's direct visit to the Grievant "was a very significant event" (Tr. at 46) concerning the ongoing decline in ATP enrollment. He encouraged the Grievant to try to improve his relationship to Brown. He continued throughout the Fall semester to visit the Grievant's lab to discuss outreach activities. He encouraged the Grievant to contact the Recruiter and the School-To-Work Coordinator. Foral also discussed the need for the Grievant to get out to feeder schools and to promote Articulation Agreements with area high schools, which authorize advanced standing in Board programs to successful students in technical education courses at covered high schools. Foral also discussed other types of recruitment efforts available to the Grievant. Foral perceived little follow-up effort from the Grievant. He knew of no contacts from the Grievant to the Recruiter or the School-To-Work Coordinator. He signed no Articulation Agreements initiated by the Grievant and Foral is responsible to sign all such agreements. Foral felt he extended



“considerably more frequent” (Tr. at 38) visits to the Grievant’s classes than to any other faculty. He visited the Grievant’s lab roughly twice a month to discuss enrollment-related issues. He noted that the visits produced little response from the Grievant regarding outreach activities.

Declining enrollment in ATP programs had prompted discussions between Foral and Brown in the summer of 2007. Brown encouraged Foral to restructure ATP course offerings to reduce their cost in response to declining enrollment. Foral reduced the ATP component of Switek’s and the Grievant’s schedules for the Fall 2007 semester. The reduction could have reduced the available teaching load for the two teachers below a full load, but Switek’s course load was boosted through the creation of a Pretech Auto course, offered though Three Lakes High School. This course moved Switek to an overload for the semester. The Grievant’s teaching load was supplemented by the creation of SEP courses. Overloads are not typically offered to probationary teachers, but were offered to the Grievant in recognition of his prior experience teaching as well as his certification.

Foral felt the declining enrollments from the Fall of 2004 through the 2007-08 school year were particularly troublesome because they reflected growing losses of second year students, which posed retention issues on top of recruitment issues. Foral never specifically warned the Grievant that his job was in jeopardy. As he viewed it, such warnings are not part of the Developmental Process and are not required by the labor agreement for a probationary teacher. The Developmental Process is meant to coach, not to discipline.

Foral attended the December 13, 2008 meeting at which Brown advised the Grievant that Brown intended to non-renew him. Brown specifically advised the Grievant that he should consult the Association. When the Grievant pressed Brown for a rationale for the non-renewal, Brown responded only that the Grievant “didn’t fit” (Tr. at 65). When the Grievant and Foral left the meeting, Foral told the Grievant that he did not expect the non-renewal process to happen “this suddenly” (Tr. at 66). Foral made no recommendation on the point prior to the meeting. Foral participated in a collaborative effort among the Deans to establish the Developmental Process. The Grievant and one other employee were the first employees to whom Foral applied the Developmental Process.

### **James Brown**

Brown conducted the hire interview with Foral and the Grievant in early July of 2006. He started with preliminary questions regarding the Grievant’s interest and experience, then offered his own view of what he expected of a faculty member. That led to Brown’s initiation of a discussion regarding the challenges to the ATP. He mentioned the recruitment and attrition issues and the importance of reenergizing the program. The Grievant responded with his own vision of how to bring rigor and vitality to the program. The discussions were detailed, with Brown highlighting the eleven secondary school districts served by the Board, and the need to build a network among instructors throughout the district.

In the summer of 2007, Brown instructed Foral to reconfigure ATP labs to assure their efficient use in light of declining enrollments. This ultimately produced overloads for Switek and the Grievant. An instructor must agree to take on an overload, and the Grievant did so. Brown did not feel that the overload conflicted with the need for outreach efforts. The Grievant's schedule for the Fall, 2007 semester built in five and one-half hours per week of office time as well as thirteen hours per week of program management time, part of which could have been devoted to outreach.

Against this background, Brown met the Grievant on September 3, 2007. The visit was to highlight that the Grievant had one year of experience but the program continued to experience retention and recruitment issues. Brown wanted to follow-up with the Grievant on the vision the two had discussed in the hiring interview and on how the Grievant would implement that vision. Brown articulated his concerns, and took the Grievant's response to be that he was "too busy" to engage in outreach activities. Brown indicated his surprise at the response and his view that the outreach activities were a significant part of the job. Brown noted that the program had only ten first year students, one of whom was part-time. He also noted that the program had only seven second year students. Brown left the meeting, "extremely concerned" and convinced that the Grievant assumed no responsibility for outreach activities.

Brown then discussed the conversation with Foral, emphasizing the significance of the issue and that if there was no improvement, Brown would consider non-renewing the Grievant. He noted to Foral that this decision would have to be made by December of 2007 to fit within the statutory non-renewal system. The Grievant made no effort to contact Brown after these discussions, directly or through Foral.

Brown's next meeting with the Grievant was on December 13, to advise him of Brown's intent to non-renew him. Brown did not inform the Grievant of the need to bring an Association representative, because he wanted only to advise him that he intended to start the non-renewal process. He specifically advised the Grievant to seek Association representation in the matter, and declined to discuss the specifics of his concerns because he felt that would not be appropriate until the Grievant secured representation. When pressed for a reason, he gave a general statement to the effect that "this was just not a good fit" (Tr. at 128). He expected either the Association or the Grievant to contact him after this point to discuss the matter, but no such contact occurred and the matter went through the non-renewal and grievance process. Brown did make inquiries of the incumbent Association President, Bruce Cray, regarding whether the Association was aware of the December 13 meeting and whether there would be any discussion outside of the formal non-renewal process. Cray informed him that further contact on the matter would have to come through the UniServ representative.

Brown did not initiate any formal warning or disciplinary type action regarding the Grievant because that is not part of the Developmental Process. The Developmental Process relies on coaching rather than discipline to modify employee teaching behavior. In his view, Foral coached the Grievant regarding the need for outreach activity and secured no better

response than Brown received on September 3. In his nine year tenure with the Board, Brown knew of no instance in which the formal disciplinary process was used with a probationary employee. During that period, two instructors were non-renewed during their probationary period, Matt Hogland and David McIntyre. Each chose to resign. Each was exposed to the Developmental Process and neither received any type of formal discipline or notice regarding deficiencies.

### **Daniel Groleau**

Groleau has served as the Board's Human Resources Director since June of 2005. His review of personnel files established that two instructors were non-renewed during their probationary period since 2000. Neither received a written evaluation or any formal notice of teaching delinquencies. No grievance was filed on behalf of either teacher during their tenure. In Groleau's view, this reflects that each teacher's probationary period was subject to the Developmental Process. Hogland resigned in February of 2003 and McIntyre in January of 2007.

### **Bob Kanyusik**

Kanyusik has served the Board as an Art instructor for twenty-six years. He has been involved in the negotiation of each labor agreement bargained between the Association and the Board. He has served the Association in a variety of positions, including President. Hogland and McIntyre are the first two probationary employees subjected to the non-renewal process during his tenure. The then-incumbent Human Resources Director brought Hogland's difficulties to the attention of the then-incumbent Association President the summer before the school year in which the Board initiated the non-renewal process. A Dean informed Kanyusik of McIntyre's difficulties during the second semester of McIntyre's first year. Kanyusik spoke on a number of occasions with McIntyre in an attempt to address them. The Board ultimately determined that it would invoke the non-renewal process in the second year of McIntyre's probation period. It offered McIntyre the option to resign and McIntyre accepted. The Board has notified Kanyusik of potential non-renewal situations on roughly five occasions regarding non-probationary teachers. In his view, the presence of teaching difficulties has, prior to the Grievant's situation, produced "a kind of communication" (Tr. at 168) to ameliorate the situation.

To his knowledge, the parties never discussed in bargaining whether or not the second sentence of Article XV, Section C waived the operation of Section A to probationary employees.

### **Peter Jensen**

The Grievant is currently employed by the Caterpillar Corporation as a Senior Research Engineer. He was unaware that the Board was considering non-renewal prior to the December 13 meeting, which Brown initiated. Prior to the meeting, the Grievant phoned

Foral to see if Foral was attending and to determine if he knew what would be discussed. The meeting consisted of little more than Brown advising him of Brown's intent to initiate the non-renewal process and advising him to seek Association representation when the Grievant sought to learn why Brown intended to seek his non-renewal.

He met Brown on only three occasions: the July, 2006 interview; the September 3, 2007 discussion in the ATP lab; and the December 13, 2007 meeting. The September 3 meeting took place in the ATP lab when Switek and the Grievant were introducing a new set of students to the lab. Brown initiated the conversation by noting how low ATP numbers were, but also noting that SEP numbers were high. Brown emphasized the need for a plan to increase the numbers of ATP students. The Grievant acknowledged the need to increase numbers but emphasized that he felt he would soon be teaching at a 150% load level and this meant "we needed to have some discussions as to how that would look" (Tr. at 179). He never told Brown that he was "too busy" for outreach activities. At most, he told Brown that recruitment efforts outside of normal business hours would not be fruitful. His estimate of a 150% load reflected his assumption that he would become a Cluster Leader, which would have added 10% to his load. Events did not bear this assumption out, because the Board does not assign this duty to probationary employees. The September 3 conversation lasted perhaps five minutes.

At the time of their conversation, the Grievant instructed classes in the evening hours, often staying at the school until 11:00 p.m. Most of the high schools within the Board's district are located at least forty-five minutes from Rhinelander. Foral discussed outreach with him on an ongoing basis, but the discussions never included a direct order to perform any specific outreach duty and never included any statement that the Grievant was failing to meet Board expectations. To the extent jeopardy to his job was discussed, it was to the effect that if there are no students there will be no job.

He was "very surprised" (Tr. at 183) by the December 13, 2007 meeting. He did not contact Brown after either the September 3 or the December 13 meetings. Cray did contact him after the December 13 meeting, to inform him that the Board wanted to know if he wanted to resign his position. He declined to do so, and felt that he should pursue the non-renewal process if that is what it took to learn the Board's rationale. He did not receive any formal warning in any form that his job was in jeopardy.

The Grievant noted that in his first year of teaching he contacted the Board's Recruiter and made himself available as a resource to any on-site program she offered on the ATP or SEP, including serving as a tour guide. After his conversation with Brown on September 3, the Grievant approached Switek regarding outreach activities. He summarized the discussions thus:

And given that Mr. Switek did not have the workload that I had and did not have the long hours that I had, the decision was made for us to concentrate our efforts and have Mark go to several high schools, carry the message forth of the virtues of Nicolet College.

And my role in that was to communicate with these people either via telephone or via e-mail in an attempt to set up meetings or be part of that meeting organization so there was a notion that we were a united front, and we were farming for that business actively and independently and then coming together (Tr. at 196).

The Grievant also noted that he stopped at the automotive dealership of an Advisory Committee member on his way home from classes. He succeeded in getting one of his students placed in an internship at the dealership. He acknowledged that the different school calendars between the College and the high schools within its district could permit outreach activities during school breaks.

Further facts will be set forth in the DISCUSSION section below.

### THE PARTIES' POSITIONS

#### The Board's Brief

After a review of the evidence, the Board argues that the labor agreement, read as a whole, supports the Grievant's non-renewal. Arbitral and judicial precedent establish the general interpretive proposition and the evidence supports its specific application to the grievance. More specifically, the first sentence of Section C of Article XV "confers the just cause standard on discipline procedures" and is "clearly reversed by the second sentence" which waives the application of just cause "for nonrenewal of probationary employees." The Association unpersuasively attempts to divorce the remaining sections of Article XV from this unequivocal waiver. The other sections are silent on whether just cause applies to the discipline of probationary and non-probationary employees alike. However, this general ambiguity is fully addressed by the specificity of Section C. Any other conclusion "would render meaningless the total waiver of the 'just cause' standard for probationary employees in paragraph C."

Arbitral precedent makes it "well established that an employer may terminate its probationary employee for any reason not otherwise unlawful." Significantly, such precedent includes litigation within Wisconsin's technical college system, see NORTHEAST WISCONSIN TECHNICAL COLLEGE, MA-11446, DEC. NO. 6350, (Gratz, 2/02). This decision is well rooted in both public and private sector arbitral precedent. Association publications confirm this. The precedent is so well established that the general proposition is an "industry standard."

The non-renewal reflects the application of the industry standard and comports with the parties' past practices. Article XV has been in effect since 1986 "without modification." Throughout that period, the District has utilized a "formal developmental process" rather than a just cause structure to handle the development of probationary staff. The process does not involve written evaluations or other procedural requirements afforded non-probationary staff. It has resulted in the non-renewal of at least two probationary staff. Neither produced a

grievance. This consistency over time must be respected under the labor agreement. Arbitral precedent confirms the persuasive force of past practice as a guide to the interpretation of contract language. The absence of Association objection to this practice coupled with the absence of any attempt to change the language of Article XV undercuts the Association's case and supports the Board's. This is further underscored by the absence of any Association challenge to the Board's December 13, 2007 notice to the Grievant of its intent to non-renew his contract. The absence of a specific challenge to the Board's announced rationale confirms the Grievant's deficiencies regarding outreach and recruitment efforts.

Even if Article XV demanded formal notice of deficiencies, the Grievant received them in fact. The Grievant was experienced when hired and was hired in significant part because of his avowed ability to develop curriculum and implement it in a fashion that would enhance the recruitment and retention of students. A detailed review of the evidence establishes that the duty to recruit was known and emphasized by the Board from the point of hire and throughout his tenure. More specifically, the ongoing decline in enrollment and retention during the Grievant's tenure alerted him to the jeopardy to his position. His acceptance of an overload concerning the SEP confirms this. It reflected a substantial decline in the automotive program. Association contention that the overload confirms that the Grievant lacked available time for outreach and recruitment activity will not stand up to scrutiny. His teaching schedule built in 18.5 hours of professional and office hours that could have been devoted to recruitment and outreach. The Grievant's assertion that he was "too busy" for the activities Brown highlighted in the September confrontation ignores the low enrollment in the ATP and ignores that the Grievant never meaningfully responded to Brown's concerns. His failure to seek a reduced load is inexplicable. His sole demonstrated outreach activity was to visit "a NATC advisory committee member who owned a car dealership" on the Grievant's "way home" from work. The Grievant's attempt to pass responsibility for outreach activity to fellow instructors confirms his inability to assume responsibility for a fundamental part of his job.

In sum, the Grievant "was aware of his deficiencies in the areas of recruitment and retention well in advance". Beyond this, he was aware of "the seriousness of the low enrollment in the program" which had an unquestionable impact on his job security. Even though the labor agreement does not require notice of deficiencies, the record establishes that the Grievant received them in fact.

Nor will the record confirm that the Grievant did not know why he was non-renewed. Brown's unwillingness to go into detail on the point on December 13, 2008 is "easily explained and understood" because the Grievant lacked Association representation. Brown repeatedly followed up with the Association after this meeting, but for two months received no meaningful response. This pattern of behavior is consistent with the Board's prior implementation of the developmental process.

It follows that the Board committed no violation of Article XV. Section C, as confirmed by bargaining history and past practice establishes that "this grievance should be denied."

### **The Association's Brief**

After a review of the evidence, the Association contends that the “issue is not whether the Employer needed just cause for nonrenewal but rather did the Employer properly forewarn the employee of delinquencies prior to nonrenewal.” The terms of the sections of Article XV “are all clear and concise.” The reference to “a bargaining unit employee” makes it obvious that the sections apply to any form of arguable discipline short of non-renewal.

More specifically, the language of Section A “makes perfect sense in light of paragraph C” and establishes that any employee has “a right, probationary or nonprobationary, to know if they are not performing adequately.” While Section C makes it clear that the Board may non-renew without application of the just cause standard, such a non-renewal should not come as a surprise. Past practice confirms this.

As a general matter, arbitral precedent confirms that clear and unambiguous contract language “must be given its plain meaning.” Here, “the beauty of the language” makes it evident, with “no cause for misunderstanding or mistake” that any unit employee must be forewarned of any deficiency. The Employer’s attempt to read the sections out of existence beyond the one sentence waiver concerning non-renewals, seeks to achieve in grievance arbitration a result never secured in bargaining.

Since “the District has little or no history of nonrenewal” the plain purpose of the terms of Article XV acquire greater significance. To the extent past practice has any bearing, it rests on two prior non-renewals of probationary employees. Significantly, in “both cases, the Union was apprised at least a year in advance as well as the employee.” Kanyusik’s testimony establishes this and makes it evident that the Grievant’s is “the first nonrenewal of a probationary employee where the employee did not accept an offer to resign.” Because the Board failed to give notice of deficiencies, the agreement establishes a plain violation of employee rights under Article XV.

The evidence establishes that the Grievant’s non-renewal came from “out of the blue.” Article XV permits non-renewal of a probationary employee, but demands that it not come as a surprise. Here, neither the Association, nor the Grievant nor the Grievant’s immediate supervisor knew what was coming prior to the December 13, 2007 meeting. That meeting afforded the Grievant no more explanation than that he “did not fit.” That Brown had only two prior meetings with the Grievant underscores that the action came as a bolt “out of the blue.” The evidence makes it probable that Brown felt “rebuffed during his classroom meeting in the spring of 2007 and carried a grudge into the fall of 2007”. The absence of any supervisory input is significant.

The evidence fails to establish any deficiency on the Grievant’s part. His working an overload puts to rest any contention that he had the time Brown thought he had for outreach activities. The Board’s known expertise in bargaining precludes any assertion that they were unable to secure in bargaining the reading of Article XV that they assert in grievance arbitration.

Rather, the evidence establishes that Article XV demands that an employee receive notice of deficiencies and time to correct them. To read these basic rights out of existence is to subvert the plain meaning of Article XV. To remedy the breach of Article XV, the Association concludes that “the only action can be to reinstate the bargaining unit employee and have management do it right if they so choose to continue to want to norenew the Grievant”.

### **The Board’s Reply**

The Association cannot on the one hand concede that just cause does not apply to the non-renewal while on the other hand asserting that the Board is bound to give notice of deficiency coupled with time to address the deficiency. Those “requirements are part of the building blocks of the just cause standard”. No such inconsistency mars the Board’s reading of Article XV.

The Association’s view of past practice is flawed. The evidence turns on two prior non-renewals. Neither employee received the forewarning the Association seeks for the Grievant. The assertion that the Board “notified” the Association of the deficiencies a year in advance stretches the evidence. At a minimum, the Association’s argument confirms that the District is not obligated to give formal notice or invite formal Association involvement. Kanyusik’s testimony is better explained by the Board’s reading of Article XV than the Association’s.

Association assertion that the non-renewal came from “out of the blue” has no support in the evidence. The Grievant had many written documents to detail his duty to provide outreach and recruitment efforts. Beyond this, he had repeated contacts with supervisors to confirm the point. The Grievant’s testimony underscores that he was well aware that his position rested on the quality of his ability to recruit and retain students. In fact, the “message” regarding the criticality of recruitment “could not have been clearer!” That the Grievant could perform in the classroom cannot obscure the inadequacy of his recruitment efforts. The absence of any meaningful contact between Association representatives and the Board between the December 13 meeting and the formal notice of non-renewal confirms that it came as no surprise. Kanyusik’s testimony establishes that any past involvement of the Association in the non-renewal process came through informal contacts, not formal, contractual notice. That the incumbent Association President did not testify confirms that he “was involved and well aware of the forewarnings to (the Grievant).” The evidence confirms that the non-renewal came as no surprise.

Nor is there evidence to support the Association assertion that the Grievant was “too busy” for outreach activities. Whatever curriculum duties the Grievant had regarding the small engine program fell in the summer not during the fall semester, when outreach activities were expected. The credibility of the Grievant’s testimony regarding the amount of overload he assumed is tenuous. Fellow instructors also worked under an overload, yet found time to engage in outreach activities. Beyond this, Brown’s testimony regarding the content of the



Grievant's instructional day is unrebutted and establishes significant time available for outreach.

The assertion that the non-renewal traces to a "grudge" is "wholly without support in the record." It overstates the contentiousness of the Spring, 2007 meeting; misstates Brown's state of mind; and ignores that whatever Brown felt regarding the meeting is traceable to the absence of outreach activities. The Board concludes by reasserting that "this grievance should be denied."

### **The Association's Reply**

The Board's brief follows two themes. Neither is supported by the evidence. The first is that the second sentence of Article XV, Section C waives any and all rights of all probationary employees. The second is that the Grievant's interview for the position can somehow substitute for the absence of any forewarning of work deficiencies.

The September 3, 2007 meeting gave no notice of deficiencies. That meeting was casual, came at the start of the school year and preceded the commencement of a full classroom's instruction. This is, at best, a casual visit rather than notice of work deficiencies. The Board's analysis of the Grievant's overload obscures the obvious, which is that the Board wanted the Grievant to assume an overload in addition to the burden of outreach activities. That Brown told the Grievant to "grow" the program during a pre-employment interview cannot substitute for adherence to the requirements of Article XV. Nor can the Board's reading of Section C be viewed to read Article XV as a whole. In fact, the Board's reading renders Sections A and B regarding probationary employees meaningless. Nor does the Board faithfully apply the precedent it cites. Article XV rights are more explicit and detailed than those applied in the other decisions.

The two prior non-renewals are an insufficient base upon which to erect a binding past practice. Even admitting that the contacts regarding deficiencies in those cases were informal cannot obscure that the Association and the affected employee were well aware of work deficiencies prior to the declaration of the intent to non-renew. Beyond this, whatever is said of the December 13 meeting cannot obscure that Brown's assertion of the intent not to renew surprised the Grievant's immediate supervisor. This stands in marked contrast to the two prior non-renewals, where the immediate supervisor advised the Association and the employee of work deficiencies. It follows that the Board violated the Grievant's rights under Article XV, and that the "only way to rectify this situation is to sustain the grievance and order that the employee be re-employed and be made whole for all losses suffered as a result of these alleged violations."

### **DISCUSSION**

The statement of the issue requires some comment because the parties disputed its scope prior to agreeing to arbitrate the Grievant's termination. They could not stipulate the precise

issue posed by the grievance, but agree that Article XV, Section A is its focus. The Board's statement focuses exclusively on Article XV, Section A, but obscures that there is a factual dimension to the dispute and that each party argues provisions beyond Section A for use in its interpretation. My statement of the issue essentially tracks the Association's, but is narrower contractually to clarify that the dispute does not extend beyond Article XV. It does broaden the scope of the factual dispute to clarify that the non-renewal process is at issue rather than the non-renewal decision standing alone.

The grievance poses a fundamental issue regarding an arbitrator's authority to review the non-renewal process. This is a contractual matter, but the role of fact is significant. The interpretive difficulty starts with the impossibility of reconciling either party's view of Article XV with its terms. The Board reads the second sentence of Section C to waive any application of "just cause" to a probationary employee. Granting that the sentence must be read to preclude just cause review of the substance of the non-renewal of a probationary employee cannot obscure that the breadth of the waiver is irreconcilable to the terms of Article XV and to Board conduct. Each section of Article XV uses "bargaining unit employee", and the parties agree that the Grievant was "a bargaining unit employee." The Board offers no explanation how the broad waiver it asserts can be reconciled to this reference. None is evident. Beyond this, Brown ran the December 13 conference in compliance with Article XV, Section B. He acknowledged that he declined to afford any detail of his reasoning because of the Grievant's need to seek Association representation. The assertion that this reflected a statutory right is a point not reachable in this forum, but affords little guidance. The Board does not view the Developmental Process as disciplinary and does view Brown's conclusion regarding the Grievant's "fit" as a matter within its discretion. The meeting had no investigatory or disciplinary overtones under that view. There is little to account for Brown's conduct of the meeting beyond the force of Section B and its applicability to, "A bargaining unit employee." Significantly, the terms of the section do not limit it to discipline, given the reference to "whenever requested to meet with the administration."

The Association's reading of "a bargaining unit employee" is persuasive. However, its view reads the second sentence of Article XV, Section C out of existence. The evidence does not establish that the Board "suspended, reprimanded, reduced in rank or compensation, deprived of any professional advantage, or otherwise disciplined" the Grievant unless its action to non-renew his contract is taken to fall within that reference. The Association affords no explanation of how to bring the non-renewal decision within that reference without reading the second sentence of Article XV, Section C out of existence. None is evident. The assertion that Section A poses a procedural duty binding the Board has persuasive force, but is difficult to reconcile with Association conduct. In the two prior non-renewals of probationary employees, the Association did not respond to the Board's notice of potential difficulties by seeking strict application of Article XV, Section A. Nor did they do so here until the arbitration process. Beyond this, the grievance does not challenge the Developmental Process, but asserts the Board failed to follow it.

The impossibility of accepting either party's reading of Article XV poses the issue. The relationship of its sections cannot be considered clear or unambiguous. Bargaining history and past practice offer the most persuasive guides to resolving ambiguity since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. Here, however, neither affords binding guidance. The parties have not addressed the applicability of Article XV to probationary employees since agreeing to its terms. There has been no significant change to its terms and each party argues the absence of negotiated changes supports their view. Nor is evidence of past practice determinative standing alone. The two relevant non-renewals afford a weak basis to infer sufficient consistency to make the past conduct binding.

Against this background, the sections of Article XV must be read as a whole and interpreted in a manner that gives effect to each. This is less to "split the difference" between the parties than to read the evidence in a fashion that honors evidence of mutuality where it can be found, and reads the sections as narrowly as possible. This requires focusing the dispute. The parties agree that the second sentence of Section C precludes applying just cause to the substance of the Grievant's non-renewal. The dispute thus turns to how the procedures of Section A apply to a probationary employee.

The applicability of Section A to "a bargaining unit employee" extends its procedures to a probationary teacher. The more troublesome issue is how to do so without rendering the second sentence of Section C meaningless. This poses whether Board use of the Developmental Process, rather than the just cause disciplinary process, substantially complied with the requirements of Section A as applied to the Grievant. This fact-based review permits the reconciliation of Sections A and C while honoring evidence of agreement indicated by the parties' conduct. The prior non-renewals involved greater dialogue between the Board and the Association. As noted above, however, the Association has not, prior to this arbitration, sought that Section A be strictly applied to a probationary employee. The reference to "a bargaining unit employee" does point in that direction, but strict application of the section reads the second sentence of Section C out of existence. The parties' past conduct, in my view, reflects this dilemma. They share an understanding that the Board has wider latitude regarding termination of a probationary employee than a non-probationary employee. More than the parties' conduct is posed on this point. The second sentence of Section C highlights that a non-probationary teacher has a contractually recognized right limiting the scope of Board authority to terminate employment. That right is not earned until after the two-year probationary period. The interpretive issue is to permit that latitude without rendering the protections of Section A meaningless.

The first sentence of Section A demands written notice of alleged deficiencies, coupled with expected correction and a period for correction. The second mandates direct reporting of the delinquencies to the employee. The final sentence demands that copies of a notice of delinquencies that "could result in termination" be "forwarded to the Association." The tension between the Board's application of the Developmental Process to the Grievant and the disciplinary procedures of Section A focuses on the absence of written notice of delinquencies

and notice to the Association. The absence of notice to the Association is the most troublesome aspect of the evidence. The Board saw no obligation to provide the written notice because it views the Developmental Process to call for coaching rather than discipline.

The absence of written notice is, in my view, not a fatal flaw. There is no dispute that the Grievant had a series of documents that highlighted the need for outreach duties, including the job description and periodic instructional communications (e.g. Employer Exhibit 4). The more significant point regarding Section A is that a teacher be notified of alleged deficiencies; of how to correct them; and of a time frame to do so. Here, the evidence establishes the Grievant received each. There is no dispute that he was a solid instructor. The delinquency turns on recruitment and retention activities. On that point, there is no lack of notice. Brown's September 3, 2007 meeting would not be sufficient standing alone to establish such notice. As the Association points out, it was a single brief encounter at an awkward point in the student day. However, the contact does not stand alone. Foral's testimony stands without rebuttal and establishes a series of contacts through which Foral highlighted the need for outreach as well as the specific types of activity that would address it. Foral testified that he met with the Grievant roughly two times per month on these points, and that this was greater than with other instructors. The Grievant's testimony confirms his, and establishes that there was no significant response from the Grievant. The absence of a specific time frame is a less than weighty consideration. The two-year probationary period was known. No less known is that a non-renewal demands formal action not later than the second semester of the second year of probation. That the Grievant needed to respond prior to that semester can not reasonably be considered in doubt. In sum, the Developmental Process afforded the Grievant notice of delinquency as well as time to attend to it.

As concerns the Grievant, Board failure to confront him disciplinarily under Section A is debatable as a policy matter. The Grievant's ability to instruct was never questioned and any value subtlety has on matters impinging directly on job security is, in my view, tenuous. However, contract interpretation is not a matter of an arbitrator's view of educational policy, but a matter of determining areas of agreement between bargaining parties. I do not think Section A mandates that the Board treat the Grievant's development as a disciplinary matter. Brown and Foral preferred to "coach" the Grievant, in effect hoping to see the initiative for the recruitment and retention vision spring spontaneously from him rather than being imposed from supervisors. To compel the disciplinary approach brings with it just cause and this undercuts the second sentence of Section C. Thus, as a matter of contract and of fact, I view the Developmental Process implemented by the Board with the Grievant to constitute substantial compliance with the requirements of Section A regarding notice of delinquency and a time sufficient to address it.

In sum, the parties advance arguments that cannot be reconciled to the terms of Article XV or to their own conduct. The Board's reading of the second sentence of Section C reads the reference to "bargaining unit employee", which is common to each section, out of existence. The Association's reading of "bargaining unit employee" is persuasive, but its application of the reference reads Section A in a manner that renders the second sentence of

Section C meaningless. The Association does not challenge the use of the Developmental Process regarding a probationary employee, but does challenge whether its use in this case renders Section A meaningless. In my view, the evidence establishes that the process applied to the Grievant constitutes sufficient compliance with Section A that it is beyond arbitral authority to overturn the Grievant's non-renewal based on a strict application of Section A.

Before closing it is appropriate to tie this conclusion more closely to the parties' arguments. The Board asserts that arbitral authority establishes an industry standard, acknowledged in Association publications, that permits the non-renewal of a probationary employee for "any reason except an arbitrary or illegal reason." An industry standard is best applied to pattern contracts. More significantly here, there is no dispute that the Board enjoys wider latitude to non-renew a probationary than a non-probationary teacher and no reason to believe either party questions the industry standard. The disputed point is less an industry standard applied to the Board's rationale, than whether the Developmental Process was so infirm an application of Section A that the Grievant should be reinstated until Section A is properly applied. As noted above, the Developmental Process afforded the Grievant sufficient notice of a delinquency regarding outreach activities that it substantially complied with Section A. The evidence confirms that the Board had an objective basis in proven fact for its decision to non-renew. This is less a statement of my agreement with the decision than a confirmation that it places the specific exercise of Board discretion beyond arbitral authority to overturn.

The strength of the Association's position is procedural. Their assertion that the Grievant was blind-sided has force. It aptly describes how the Grievant felt. That Brown met with the Grievant only three times and was the motive force for the non-renewal is troublesome. This does not, however, reduce the non-renewal decision to a personal grudge between Brown and the Grievant. Brown is a small portion of the Developmental Process and that process is the key factor regarding the application of Section A. Brown's hiring interview with the Grievant has no direct bearing on Section A, but highlights what became the dominant theme of the Grievant's tenure, which is the continuing downward spiral of the ATP regarding recruitment and retention. The interview does set the stage for the September 3 meeting, because it was the persuasive force of the Grievant's "vision" for ATP that prompted his hire. This has some significance on the issue of notice. Brown's negative reaction to the September 3 meeting has no bearing on the application of Section A. Either of the parties' differing characterizations of the depth of his reaction can be taken as accurate. In my view, his reaction reflected that following the hiring interview, he felt the Grievant embodied a vision for the future of the program, but following the September 3 discussion, felt the vision was vanishing before his eyes. There is no doubt he took the Grievant's response to be that the Grievant was "too busy" for outreach activities.

What is procedurally significant about the transaction is what followed. What followed was Foral's repeated and ongoing "coaching" of the Grievant to engage in outreach efforts and to improve his relationship with Brown. The latter aspect of that coaching is significant only to underscore that Foral attempted to convey the jeopardy of the Grievant's position. The coaching and the lack of a meaningful response from the Grievant on outreach activities is the

point that undercuts the Association's procedural argument. The record will not support the conclusion the Grievant was blind-sided on this point. The Grievant's call to Foral prior to the December 13 meeting highlights that he knew the meeting boded ill. The Grievant's sense that he had been blind-sided reflects his confidence in his instructional performance. This was his strength and that is not at issue here. Rather, the issue is whether the Board put him on notice of the need for more outreach activity and gave him the opportunity to address that need. It did so. Had the Board held the Grievant solely responsible for departmental recruitment or retention numbers would present a different case. Here, the Board sought no more than outreach activity. The lack of response cannot be held against the Board. That the Grievant worked an overload reflects his ability, but does nothing to address the issue of outreach. That Brown sought that the Grievant apply prep or office time to outreach cannot be held against the Board, since program numbers were well below capacity. The assertion the Grievant had no time for such activity assumes that the ATP could not function at capacity and does nothing to explain why Switek had time for it.

I have reconciled the application of the second sentence of Section C with the other sections of Article XV through a fact-based determination of whether the Board's Developmental Process substantially complied with the process due the Grievant as "a bargaining unit employee" under Section A. The weakest portion of the Board's application of the Developmental Process turns on notice to the Association. Such notice has been informal in the past and the Association has not sought strict application of Section A until this arbitration. The Association focused its case less on its institutional rights than on the Grievant's employment rights. The remedy sought by the Association is an all or nothing proposition, focusing on the Grievant's retention. If the Developmental Process consisted of nothing more than Brown's visits with the Grievant, the Association's case could stand and its remedial request could follow. Those visits, however, do not define the Developmental Process. The Developmental Process turned more on Foral's coaching and, as noted above, that process substantially met the requirements of Section A. This cannot obscure the weakness of the record concerning notice to the Association. Because this is not directly in issue, the Award does not specifically address the point. Bargaining on the fundamental ambiguity within Article XV regarding its applicability to probationary employees has not been sought and is not addressed in the Award below. Whether or not the Developmental Process meets the requirements of Section A regarding probationary employees cannot, in my view, be resolved by an arbitrator as a general matter. Absent action through bargaining, the ambiguity within Article XV must play out through a case-by-case analysis.

As a legal matter, the non-renewal process of a probationary employee should not carry the stigma of a discharge for cause. This probably carries little weight regarding the Grievant's leaving one job to invest two years with the Board then return to the job market. Success in that return cannot obscure the difficulty of the journey. I close on that note to highlight the limits of the process. The contractual issue is far more about arbitral authority than about instructional performance. In my view, the quality of the Grievant's teaching performance as a general proposition is beyond an arbitrator's authority, leaving the narrower issue of whether the Developmental Process used by the Board substantially granted him the

procedural rights due him under Section A of Article XV. The conclusion that it did states more about the authority of an arbitrator than about the Grievant's performance as a teacher.

**AWARD**

The Board did not violate Article XV of the collective bargaining agreement through its non-renewal of the Grievant's contract for the 2008-09 school year, because the Developmental Process substantially complied with his rights while he was "a bargaining unit employee" under Section A, working within "a two (2) year probationary period" under Section C.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 1st day of April, 2009.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator

