American Arbitration Association

In the Matter of the Arbitration Between

Eastern Michigan University
Federation of Teachers **Opinion and Award**

-and-

Re: Posting Positions

Eastern University
AAA # 01-15-0002-6385

The undersigned, Kenneth P. Frankland, was mutually selected by the parties under the auspices of the American Arbitration Association to render an Opinion and Award in its case number 01-15-0002-6385. Hearings were held at Eastern Michigan University, Ypsilanti, Michigan, June 26, and August 14, 2015. The parties presented witness testimony, introduced exhibits, and submitted written briefs on October 9, 2015 and thereafter the record was closed.

APPEARANCES

For the Employer:

Gloria Hagge, Attorney
Arnold Fleischmann, Dept Head (W)
David Woike, Academic V.P (W)

For the Union:

Mark Cousins, Attorney
Petra Hendrickson, Grievant (W)
Nevena Trajkov, Grievant (W)
Laura Zimmerman, Grievance Officer
Sonya Alvarado, Past Pres. (W)
Lisa Laverty, Union President (W)

When the Employer hired two part-time teachers outside the bargaining unit, did the Employer violate the contract by failing to post on the website and failing to advise incumbent union part-time teachers of openings in PS 112 teaching positions for fall 2014?

PERTINENT CONTRACT PROVISIONS:

Article XV, Section 153
Article XV, Section 158
Article XV, Section 164
Article XV, Section 165
Article XV, Section 167

Statement of Facts and Proceedings

The Political Science Department of Eastern Michigan University, the department in question in this matter, uses three kind of instructors to teach classes each semester: 1). Full time tenure track who are regularly assigned 12 credit hours; 2). Full time lecturers (FTL) who are regularly assigned 15 credit hours and; 3). Part time lecturers (PTL) who are typically assigned less than 15 credit hours and no more than 29 in any academic year. PTL's are hired for each semester and have no guarantee of work in the next semester but by practice, once hired by EMU, a PTL will generally be retained in successive semesters as needs arise. The instant Union represents both full and part time lecturers.

This cases involves the Fall 2014 semester and persons assigned to teach PS112. (While originally other classes were in the grievance, the parties have limited this case to PS112 only.)

Sometime in the summer of 2014, EMU hired Athena King and Alexander Zamelin as PTLs to teach PS112 classes; neither person was previously in the bargaining unit. On September 22, 2014, the Union filed a grievance (J-2) which in part stated:

> Prior to hiring from outside the bargaining unit, the Department Head did not inform existing bargaining unit members of the availability of additional work, nor did the Department Head solicit interest or requests for assignments of the additional work from existing bargaining unit members, Additionally, the new part time lecturer positions were not posted on the employer's web-based posting system.

The Union asserted that this action violated the contract in two ways, Article XV, Section B.5c and Article XV, Section A. [Each paragraph of the contract is numbered and in J-1 the identified paragraphs are 167 and 153]

As a remedy the Union is very specific and requests monetary compensation for two persons who they allege lost the opportunity for additional work in the amount of $20,880; require web postings and; a specific manner of notifying unit members of the opportunity for

additional work.

A step I meeting was held on October 7, 2014 and on October 14, Arnold Fleischman, Political Science Department Head authored the University response. (J-3) He noted there were two Grievants involved, Navena Trajkov and Petra Hendrickson both doctoral students who had taught the semester before. He noted paragraph 158 of the contract discussing the employer's sole discretion for hiring and noting availability, qualifications and suitability were key factors for hiring. He found both persons wanting.

Of note, Fleischmann stated:

"**The grievance is correct that I did not notify part-time lecturers that there was additional work available nor did I post the positions. [Bold Added]** However, I must deny the grievance because of the inappropriate remedy recommended. In the future, the department will abide by the contract in posting available positions to existing part-time lecturers and potential new hires."

On October 28, 2014 the Union appealed to Step 2. (J-4) The University replied on November 18, 2014 by Tom Venner, Dean of the College of Arts and Science and he agreed with Fleischmann and noted neither Grievant was harmed but the University would follow the contract in the future.

On December 5, 2014 the Union appealed to Step III arguing that the Grievants were harmed and should be compensated. On January 13, 2015, David Woike, Assistant Vice President for Academic Affairs, denied the compensation remedy proposed. He did say the University would post positions on the web site whenever practicable.

The parties invoked arbitration and through the services of AAA, selected the undersigned as the arbitrator.

A hearing was scheduled for June 26, 2015 and after opening statements, the Union requested an adjournment that was granted and the final hearing was held on August 14,

2015. The Union argued that there was no maximum of 12 hours for PTLs as seemed to be the University position and it needed time to research and prove that was not the case. The 12 versus 15 hours will be discussed later. At the hearing, Sonya Alvarado, past Union President, testified that David Woike on several occasions said that the University did not have an expressed policy of 12 hour limitation for PTL's. She identified Union Exhibits 31, 31, 32 and 33 in support of those statements.

Lisa Laverty is a full time teacher in Political Science, President of EMUFT and was the grievance officer for the Union on this case. She referenced U-16 a memo from David Woike to all Department Heads, after the McCormick arbitration decision, telling them how to post positions and Woike referenced ¶ 167 of the CBA to make "every reasonable effort" to hire from within the bargaining unit. At step one, no one mentioned cap on PTL's. (U-17) At step three, in Union notes of the meeting, (U-19) Woike agrees there is no University policy limiting part timers to a 4-4 load.

Laverty explained that after the first hearing adjournment the Union staff reviewed copious University records and found many examples of PTL's that had taught more than 12 hours in a semester but less than 30 for the year. (See, Union Ex 22, 23, and 24).

Nevena Trajkov is a PTL having taught PS112 before. She is a doctoral candidate in political science at Wayne State University. (See, U-11, CV)

U-26 is her fall 2014 and Winter 2015 schedule that shows she taught four courses each including PS112. She was available and would have taught either of the PS 112 classes given to King and Zamalin had she been offered another class. She noted that PS 112 is a general education requirement (U-27); is an entry level class not required for political science majors (U-29) and her syllabus explaining the outline of the course. (U-28)

During cross-examination, she indicated this is her only job and she agreed that in the past she had never taught more than12 hours in any semester.

Petra Hendrickson, is a PTL and a doctoral candidate in political science at Michigan State University (See, U-9, E-2 her CV). Her fall 2013, winter 2014 and fall 2014 schedules (U-10) shows she taught three classes each in those semesters involving global issues and political violence. She had not taught PS 112. She was aware PS112 is an introductory class in American government. She read all the available syllabi and was convinced she could teach that course. She agreed that her last teaching at EMU was fall 2014and that she lived in East Lansing.

David Woike, Vice President of Academic Affairs testified that he advises all Department Heads on the provisions of the CBA. He confirmed that there is no limit on the PTL course load but 12-12 is generally the norm based upon past practices especially in the political science department. But 15-15 would make a PTL full time and that should be avoided.

Arnold Fleishmann has been the political science department head since 2009 and does the scheduling. He reviewed various schedules and noted that his regular policy is to assign not more than 12 hours to a PTL for better efficiency.

For fall 2014, he needed two instructors and he hired from outside after he looked at the internal possibilities and whether they matched his needs or had the qualifications to teach the class. As to Trajkov, she was at 12 hours and his past practice was not to exceed 12 hours unless an emergency arose and thus he thought she could not be a candidate. As to Hendrickson, she had no experience in teaching PS 112 and he was gravely concerned of her teaching abilities based upon feedback from her students in other classes. He deemed her not qualified. Fleishmann did refer to another unit member in J-3 and at the hearing other possible candidates did come up when he was discussing why Trajkov and Hendrickson were unqualified.

During cross-examination, he said the new hires came from referrals from the

faculty, each a doctorate, King in American politics and Zamalin in political theory. Both had taught introductory courses in the past.

POSITIONS OF THE PARTIES

UNION

The Employer breached the CBA by failing to post available work that might be considered by PTL's and also breached the contract by hiring persons from outside the bargaining unit without first making every reasonable effort to hire from within as required by ¶ 167. The Employer at Step one admitted not posting and not making the effort to notify incumbents of possible work. As a remedy, two grievants should be made whole for the loss of the work opportunity; they were well qualified for the PS 112 classes and there is no cap on the work load of a PTL.

EMPLOYER

The Union failed to sustain the burden of proof that two persons identified a Grievants are entitled to compensation for three courses in the Fall 2014 Semester that they did not teach. The Employer does not concede the contract was violated. Fleischmann did make a reasonable effort to assign incumbent lecturers before hiring others. Economic damages are not appropriate as the alleged grievants have not shown they suffered any loss and the arbitrator should not award economic damages under the facts of this case.

DISCUSSION

This is a contract interpretation matter and as such the Union has the burden of persuasion, or burden of proof. Typically, arbitrators examine the language and if no ambiguity arises then simply apply the language the parties bargained to the facts of the

case. We often say that all the terms in a contract should be looked at and try to harmonize a construction that saves or preserves as much as possible rather than discarding some terms. We often say that all the terms in a contract should be looked at and try to harmonize a construction that saves or preserves as much as possible rather than discarding some terms.

The Alleged Violation

The grievance, J-2 was filed September 22, 2014 after the Union discovered that two new persons were hired from outside the bargaining unit of PTLs in the political science department to teach PS112 in Fall 2014. (The grievance mentions other classes but the Union abandoned those claims and proceeded on the one class.)

Two sections were noted as breached, Article XV, Section B.5.c (¶ 167) and Article XV, Section A (¶152-156) Thus, the Union must show how that was done to succeed and carry the burden of proof.

The most pertinent language at issue is as follows:

¶167

> When additional courses become available in a department, the Employer shall make every reasonable effort to hire from within the Bargaining Unit prior to hiring form outside the Bargaining Unit . . .

¶153

> Prior to hiring any new Employee, the hiring Department shall, whenever practicable, use the Employer's web-based posting system to announce and invite applications for existing or potential vacancies.

There is no ambiguity, the words speak for themselves and thus are simply applied to the facts. Notwithstanding the University statement in the Brief that it did not concede a violation, the evidence is overwhelming to the contrary. The best proof is the statement of Arnold Fleischmann in the Step one response, J-3, "**The grievance is correct that I did**

not notify part-time lecturers that there was additional work available nor did I post the positions." He further replied that the grievance would be denied because of the inappropriate remedy. And as will be discussed shortly, this matter is less about a contract violation and all about a remedy for a violation.

There is a delicate balance in the contract to protect employee job security without conceding or diminishing management prerogatives and that is what bargaining is all about. (See, ¶¶ 151-168) Here, the Employer upset that balance. Notice is important so that PTL's can at least have an opportunity to compete for additional work when available. That an opportunity was missed in fall 2014 is inexcusable. This is quite surprising since the identical sections in this case had already been construed by Arbitrator McCormick on October 2, 2013. (U-13) The only difference is this case is the Political Science Department and the other the Math Department.

The parties both urge that all sections noted above should be construed as a whole and no section is more important than another, I agree. Thus, McCormick noted, management has sole discretion to offer appointments ¶158, within the parameters stated in that section, and although Fleischmann used that section to explain why two PTLs were not qualified in his opinion, that use was in appropriate as two steps were not taken before even considering candidates for offers.

The proposed economic remedy arises from the Union's strong belief that the members should be given a right of first refusal when additional work arises. But, that view is inconsistent with the actual contract language. As the Employer notes and as McCormick found in his opinion, the Union tried to bargain that position to no avail and the parties settled on the language of ¶167 as a compromise. While the Employer is not required to make an offer to an incumbent, it is required and does have to make every "reasonable effort" to hire from within. That process cannot start until notice is given and candidates

apply. Fleischmann had the cart before the horse in the vernacular. Here, there was **no effort** to follow the contract. Fleischmann said he considered incumbents, found none to satisfy his needs and hired from outside. Whether there was any consideration is questionable as the Step one response discusses two people who were not mentioned by name in the grievance. One could speculate or infer as the Union does that the Step one response was *post hoc* to explain a reasonable effort. This view is supported by reference in the University Brief that in Fleischmann's view there were others in the unit superior to Trajkov and Hendrickson. While he said that he considered all in the unite hiring outside, on reflection his later comments belies that statement. In any event, as the parties suggest, I need not review that aspect of the case and define reasonable effort since none was ever made.

What is unfortunate in this case is that the McCormick Opinion was in October 2013, was undoubtedly well know to leaders of the University but the message seems not to have been received by this Department head. I say this because Dr. Woike authored guidelines for posting newly available courses for part-time lecturers in November 2014 that are very extensive, well thought out, and should obviate another occurrence of this type of grievance. Why the delay post-McComick decision is unknown but surely the filing of this grievance may have increased the urgency to develop and share a document that all department heads should follow. This document speaks well of the University's intent in the future. But, the past is the past and the Employer did breach the contract as alleged by the Union and so that portion of the grievance must be granted.

REMEDY

Having found a breach of the contract, the next step in any case is what remedy is appropriate for the found violation. This is where the parties have very divergent opinions

and truly is the heart of this case.

The University position is that if there is a "technical breach" (Brief at 15) only the remedy in the McCormick opinion is appropriate. Economic compensation is not proper because the Union has not demonstrated that the two persons who are the alleged "Grievants" suffered any damages, were harmed in any way. Since the Union did not prove that the two would have been hired, they suffered no loss. And even if they had applied, they would not have been offered a job by Fleischmann as he applied ¶158 criteria.

The Union responds that economic remedy is needed as this is the second time this has happened and within a year of the McCormick decision involving the same sections of the contract. The normal and usual cease and desist remedy is inadequate given these facts and a deterrent to prevent similar future violations is needed. And the Union waged a very spirited campaign trying to establish that Fleischmann misapplied the criteria in ¶158 especially relying upon a cap of the class hours that a PTL could teach or that a certain person was unqualified to teach PS112 and thus those were worthy candidates and but for the lack of notice should be compensated.

The largest portion of the University Brief at 16-28 is devoted to discussing the burden of proof of the Union and especially the concept of proof of injury to particular grievants. I have no quarrel with the propositions that the cited cases stand for. Yes, the Union does have the burden to show injury from the violation. And, yes, some loss or injury should be shown so that a monetary award is not totally speculative.

At page 25, the University cites *Virginian Metal Products*, 94 LA 798 (1990) for the proposition that arbitrators deny awarding damages where damages were too speculative and/or the employer proceeded in good faith. The employer had assigned bargaining unit work to supervisors and on the facts of that case, the arbitrator denied damages as the proper bargaining unit member to get damages could not be ascertained. That case is

distinguishable from our case based upon our facts.

This case is very similar to an improper assignment of bargaining unit work to outsiders. In those cases, arbitrators are not reluctant to award monetary damages to unit employees for lost work.

I have reviewed the grievance in great detail and my impression is that it was filed as a group grievance to rectify a violation identical to that which occurred in the McCormick case. There are no named grievants in (J-3). In the remedy sought portion, "due to the lost opportunity for additional work, each grievant" is the first and only time the word is used.. The thrust of the remedy is to compensate for the lost work opportunity that members of the whole unit sustained. It is unclear how Trajkov and Hendrickson became the examples of lost opportunities for the group. Their names surface in the Step one response of Fleishmann as if they were the only persons within the unit that may been damaged. The extraordinary emphasis on their credentials and the manner in which Fleischmann dismissed them as candidates is totally misplaced. In my view this is a **group grievance.** Had either Trajkov or Hendrickson filed individual grievances it would be an entirely different case, but they did not. They were illustrative of lost work opportunity in the eyes of the Union.

That there was damage to the group is documented and why some monetary award is appropriate comes surprisingly from the University Brief at 24.

> Finally, as Fleischmann noted (Joint Exhibit 3), **had the additional sections(s) of PS 112 been assigned to an incumbent Part-Time Lecturer, his choice would have been Daniel Veale.** Veale had significant experience teaching the course and was assigned only six credit hours in the Fall 2014 Semester. (See chart above). **There were also other Part-Time Lecturers who would have more logically been assigned to teach PS112 than Hendrickson, or Trajkov for that matter.** In addition to Veale, **Jackson was assigned only nine credits in the Fall 2104 semester and had experience teaching PS112. He <u>likely</u> would have been assigned an additional section of PS112 before Hendrickson**.
> **(Bold and Emphasis Added.)**

Plainly, whether intentional or not, the Employer concedes there were unit members who logically could have been assigned additional work, citing Veale and Jackson and both would **likely** have been assigned. Thus, had ¶167 been implemented and "every reasonable effort" made to hire from within, it is more probable than not that incumbents would have been assigned. There is little room for speculation.

While the emphasis on denigrating Hendrickson's credentials to teach PS 112, a non-major, non-required general course seems harsh, to question her prior work could well be within management prerogatives in ¶158. As to Trajkov, if the **sole** reason for not assigning her another class is the Department practice of a limit of 12 hours, that decision seems tilted toward arbitrariness. The Union protested and spent considerable time developing the fact there is no University limitation upon the hours a PTL may be assigned and Dr. Woike readily concurred in that assessment. That being said, it is left to another day whether the cap alone as a reason to deny an opportunity to work is a proper management prerogative within the constructs of the CBA.

Since I believe the record supports a clear loss of work opportunities to unit members, there is damage to the group and the loss in my view is measurable and not speculative.

Had ¶167 been implemented a minimum of one and more probably two unit members, according to Fleishmann, seemed qualified and more probably than not would have been assigned classes and thus are identifiable individual grievants. (Veale and Jackson). It should be noted the compromise language of ¶167 contains the mandatory term "shall" not "may" and thus the Employer has an affirmative duty to "make every reasonable effort "to hire from within". It just seems reasonable that notwithstanding the breach a practical application of this language by Fleischmann would have reached this result.

I am not impressed with the Union proposed remedy as it presupposes the fact of non compliance with ¶167 translates to automatic offers to incumbents, the right of first refusal concept. As stated above, that concept is not in the CBA. The proposal bespeaks of Union frustration that the parties have not able reach an accord on a remedy for the prior breach as directed by McCormick. But the Union methodology does provide guidance and some rational basis to assess damages, namely classes lost times minimum per credit hour rate.

I believe the record justifies that at least two unit members could well have been assigned one class each at a minimum had ¶167 not been breached. Accordingly, one class each is six hours times $1160.00, the minimum rate, an award of $6,960.00.

Arbitrators generally follow the principle that they have inherent power under a contract to award monetary damages. Such is limited usually by the record demonstrating that an injury has occurred, the grievant(s) are ascertainable and the damages are not too speculative. In discipline cases, these factors are more easily ascertainable. Not so in contract interpretation cases. But here, there are unique facts that as assessed above lay the foundation for the monetary award. I am satisfied this award is not punitive; it is logical and appropriate given the very unique facts of this case. This is the second violation of the same provisions, a prior award to cease and desist was entered and was not followed by one Department for no explicable reason. A further cease and desist directive does not address the loss of additional work suffered by the unit members and the bargained duty. not complied with, that the Employer "shall make every reasonable effort to hire from within the bargaining unit". The more logical and sensible conclusion is the breach cannot be remedied other than with a monetary award. This award is measured and fits the facts of this case.

REMEDY

1. To the extent that violation of Article XV, section B.5.c and Article XV have been violated, the grievance is **Granted.**
2. The proposed remedy in paragraphs 2 and 3 of the grievance (J-2) is **not granted.**
3. Instead of the Union suggestions for the found violations, the Employer is directed to cease and desist from any action that impedes proper application of the contract provisions. The arbitrator does not impose directions upon the Employer's right to administer the contract as it deems appropriate. Rather, the Employer should take every reasonable step to ensure that the guidelines published in November 2014 are followed by all departments employing PTLs.
4. A monetary award of $6,960.00 is **GRANTED** payable to the Union on behalf of all its unit members. The Union may disburses the award in any manner it deems appropriate.

CONCLUSION

This has been an extraordinary matter and as stated previously was a remedy case more than anything else. The analysis leading to the monetary award was challenging. The parties were very vigorous in their advocacy as was expected and the Briefs were most helpful. While parties are rarely totally satisfied with an arbitration award, the thought is that reasonable minds can always differ and the decision when left to a third party may disappoint one or both. I endeavored to provide a fair decision of a very difficult case and feel comfortable that the objective was achieved.

Respectfully submitted,

Kenneth P. Frankland

Arbitrator

Dated: October 23, 2015