

In the Matter of Arbitration between)

Washtenaw Community College)
Ann Arbor, Michigan)

- and -)

Washtenaw Community College)
Education Association)

OPINION
AND
AWARD

Grievance regarding
part-time counselors

The undersigned, Charles M. Rehmus, was appointed by the American Arbitration Association to render an opinion and award in its Case No. 54 39 1203 75. Hearing was held in Ann Arbor, Michigan on January 29, 1976.

Appearing for the College:

James D. Tracy, Attorney
Davis S. Pollock, Dean of Administration
James A. Jones, Dean of Student Services Harry
Konschuh, Personnel Manager
Larry H. Hackney, Director of Counseling

Appearing for the Association:

Shirley Roberts, Grievance Chairperson
Dennis Bila, President
Donald Sims, Vice-President
Robert A. Reeves, Past President

The Association's post-hearing brief was received on February 20, 1976 and thereafter the record was closed.

Issue

The issue here is whether the College violated the Agreement when it assigned two counselors who had been hired on a "part-time" basis to work 40-hour weeks during August of 1975.

Background

At Washtenaw Community College, counselors are regular members of the faculty, but they are assigned a 40-hour week. In the negotiations that took place in 1973, the Association proposed that the counselors' work year, rather than being spread over the 52 weeks of the year, be equated with that of other faculty members who work 37 weeks out of 44 weeks in the year and are off during July and August. In the negotiations over this proposal, one of the issues raised by it was discussed at some length by the parties; namely, the fact that the heaviest counseling work load falls in the month of August just prior to the beginning of the new school year. Both parties were aware that if counselors' work year were made identical with that of teaching faculty there would no longer be counselors available on regular assignment during August. Apparently several different proposals were made and discussed which might have resolved this problem but which were not jointly agreeable. Finally, the College accepted the Association's proposal that counselors work on a 44 week basis but with the understanding, acceptable to the Association, that there would be no obligation to offer supplementary summer work to the regular counselors and that the College would hire whomever it saw fit to fill its counseling needs during August.

During the summer of 1974, the College did offer its regular counselors supplemental contracts to fill counseling needs during August. Most of the counselors accepted this offer but a few did not. The remainder of the counseling vacancies during August were filled by temporary employees who worked on a 40-hour a week basis. No objection to this arrangement was raised by the Association and no grievance was filed.

The following year, at its regular meeting on June 24, 1975, the College Board of Trustees offered Melvin Anglin a part-time summer counseling job (at 19 hours per week) from July 1 through August 30, 1975 (Assn. Ex. 1). In addition, the College also offered counseling work for the month of August to all ten of its regular counselors. Most of them accepted this offer of a supplemental contract but three exercised their privilege not to do so. It appears that the College attempted to seek other employees to fill the August shortage of three counselors but was unable to find other than Mr. Anglin and a William Riccobono. As a consequence, at its regular meeting on July 29, 1975, the Board of Trustees took the following action, reported from its minutes (Assn. Ex. 2):

Melvin Anglin, Counselor, part-time temporary status, increase hours per week from 19 to 40 for period August 11-29, 1975, hourly rate \$10.00.

William Riccobono, Counselor, part-time temporary status, effective August 11-22, 1975, at hourly rate of \$10.00, forty hours per week.

Part-Time
Counselors
Guidance and
Counseling

It will be noted that both Anglin and Riccobono are referred to as being in "part-time temporary status," although both were to work a full-time 40 hours per week during the respective periods in August when they were available. On August 18, 1975, the Association filed a grievance on behalf of the faculty, alleging that these two so-called part-time counselors were actually being assigned full-time duties in violation of the Agreement. Failing settlement in the course of the grievance procedure, the matter is now brought by the parties to arbitration.

Position of the Parties

The Association contends that the College's action in hiring people characterized as part-time and then assigning them to full time duties violates Paragraph 0112.1 of the Agreement. This Paragraph states (Jt. Ex.1):

Any faculty member who teaches half or more of the normal fifteen (15) contact hours or has assigned half or more of the duties performed by faculty members, or a combination of contact hours and duties performed, shall be considered a full-time faculty member under the terms of this agreement. Salary only shall be prorated in proportion to time worked.

The Association alleges that this incident is simply the latest in a long-continuing series of similar contract violations involving the improper use of part-time faculty. This is the reason that the Association sought to have the definition of full-time faculty quoted above added to the Agreement. It notes that other limits on the College's use of part-time faculty members have been added to the Agreement in order to prevent this same abuse. For example, the Agreement limits the percent of course credit hours that may be generated by part-time faculty in Paragraph 0112.6, and, in 0113.1, protects full-time vis-a-vis part-time faculty in the assignment of over-load work. Hence the Association contends that the principle involved in this grievance is extremely important to it. It says it must know who are part-timers and who are not, and be able to restrict the amount of work assigned to part-timers, if there is not to be constant erosion of the bargaining unit. The grievance originally asked that the two part-time summer counselors be reduced to actual part-time duties. This not having been done at the time, the Association now requests as a remedy that suggested implicitly by 0112.1--that Anglin and Riccobono be offered full-time contracts retroactive to August 11, 1975.

The College responded to this grievance on August 28, 1975 that Anglin and Riccobono were actually substitute counselors employed to work 40 hours per week during August, 1975. It states that this is contemplated by Paragraph 0112.4 of the Agreement which states:

Substitute Faculty Members (Semester or Less). Substitute faculty members hired for one semester or less, whether they conform to 0112.1 or not, shall not be considered full-time faculty members nor will they be subject to the provisions of the agreement.

As substitutes, Anglin and Riccobono could work a full-time week under 0112.4 without violating 0112.1. What is important is not what they were called but what they did. The College contends that it did not violate the spirit of the Agreement and that it did not harm the interests of the bargaining unit or any of the counselors. It simply acted to fill a need that both parties knew existed when they negotiated the Agreement.

To these contentions the Association replies that the summer counselors cannot be considered substitutes since under both dictionary definition and past College practice, substitutes can only take the place of someone who has a contractual obligation to work. The three counselors who did not work in August of 1975 had no obligation to work during that month and had accepted no obligation to do so. Hence they could not be substituted for. The Association notes that in past practice, substitutes have always been specifically identified as such by the Board of Trustees and used only to fill vacancies approved by the Board. Further, the Association contends that the remedy it seeks is the only remedy available at this time to make the Association whole, and that such a remedy is necessary if the College is not to violate repeatedly the express contractual provisions designed to prevent the assignment of more than half-time work to contractually-exempt faculty.

Discussion

On first impression, the Association's position in this grievance seems anomalous indeed. It acknowledges that the College needs a maximum staff of counselors during August and that there were vacancies in the counseling staff during August of 1975. Yet the Association contends that under the Agreement vacancies could only be filled by part-timers working on less than a half-time basis. Hiring four people to work 19-1/2 hours per week seems unreasonable when two temporary hires who were perfectly willing to work 40 hours were available. Moreover, only those two with requisite skills could be found at a time when student needs were greatest.

Upon further examination, however, the difficulty that the College's position in this grievance presents for the Association in the enforcement of the Agreement becomes clearer. If, as the Association asserts, it has had considerable difficulty in achieving conformity with the negotiated restrictions on the work that can be performed by part-timers, it is entitled to be put on notice of which individuals the Board of Trustees is hiring as contractually-exempt part-timers, and which are going to work half-time or more and are therefore entitled to protection and benefits under the Agreement.

The College initially asserts that there is some ambiguity in the meaning of part-time--whether part-time refers to a part of a day, a week, a semester, or a year. Without finally deciding this matter, it seems to me that the two counselors in issue in this grievance clearly were employed and assigned to work full time in August and yet were hired under the designation "part-time." The care with which the Board originally appointed Anglin for "19 hours per week" suggests that the College believed at that time that more hours per week would run afoul of 0112.1 (Assn. Ex. 1). I do not think the problem raised here can be resolved by saying that an individual can be hired on a full-time basis and so long as he or she does not work full time for a whole month, summer term, or a whole semester, no contract violation has occurred. Such a ruling would permit serious abuse of the part-time limitations in the contract.

The more basic defense raised by the College to this grievance is that the two summer counselors, no matter what they were called, were really substitute faculty members. Paragraph 0112.4 permits hiring of substitutes for less than a semester who, no matter how much they work, are not considered full-time faculty members and not subject to the Agreement. Aside from the Association's argument that the College did not consider the two men to be substitutes until after the grievance was filed, there is the more fundamental question--for whom were they to be considered substitutes? Essentially, it appears that the College is contending they should be considered substitutes for the three counselors who did not wish to accept supplemental assignments during August.

I agree with the position of the Association on this matter. Under standard definition, normal understanding, and these parties' past practice a substitute replaces another who would normally be there but for being on leave. No counselor had accepted a contractual obligation to fill the positions which Anglin and Riccobono accepted. They were, therefore, not substitute faculty members in the normally understood sense of the word. A ruling that they were would permit the College to fill any vacancy with a so-called substitute, thus vitiating the contractual restrictions against filling more than part-time positions with exempt employees. The parties may later wish to take a different view of this issue in a case such as that presented here. For me to find the two were substitutes, regardless of the College's good faith in the matter, I think would be to add to the Agreement.

Since Anglin and Riccobono were not substitutes, they were not properly assigned full-time duties under Paragraph 0112.4. Anglin was hired as a part-time employee and carefully assigned to 19 hours of work each week which, as noted, clearly suggests that the College was aware of the contractual limitations on its right to employ part timers. Yet later, both Anglin and Riccobono were assigned to 40 hours weekly while both continued to be designated as part timers. I can only conclude that this was a violation of Paragraph 0112.1 of the Agreement. They were assigned "half or more of the duties performed by faculty members," which required that they be considered

full-time, not part-time, faculty members and appointed as such by the Board of Trustees. The failure to do so was therefore a violation of the Agreement.

The Association contends that the only remedy now appropriate for this violation is that Anglin and Riccobono be offered full-time faculty status retroactive to August, 1975. I cannot agree with this position. During their negotiations in 1973 both parties admittedly were aware that when the counselor's work year was reduced from 52 to 44 weeks this might create a problem of possible lack of essential counseling services in August. After discussing but not resolving the problem, the nevertheless agreed to reduce the counselors' work year. In 1974 the College unilaterally resolved the problem apparently without Association objection. In 1975 the Association says the problem cannot be resolved except by very artificial, if not impossible means. This is a case of in pari delicto, where each party knowingly allowed a wholly unsatisfactory situation to be created. Though legal maxims are seldom of much help in resolving grievances, I am reminded of the common law principle that where the fault is mutual the law will leave the matter as it finds it.

Consider the result if I were to accept the Association's proposed remedy for the contract violation. Conceivably both Anglin and Riccobono might accept the proffer of full time employment. The College would then have 12 counselors on its rolls rather than the 10 that it needs. Yet in the summer of 1976, only 7 of the 12 might be willing to counsel during August. Again the College might be in the position of being unable to hire the number of part-time counselors it needed to perform the work and would be prevented from offering the number of temporary counselors it could find full-time work lest it would again have to increase its number of full-time counselors.

Such a remedy would only punish the College and/or the students. Paragraph 0906.2 of the Agreement specifically states:

- E. The Arbitrator shall not have power to award punitive damages.

I conclude that the Agreement forbids the remedy suggested by the Association. No other remedy is necessary to compensate injured faculty. All members of the counseling staff were offered August counseling for 1975. Therefore none of them suffered a loss by the fact that Anglin and Riccobono were hired full-time to perform it. Since punitive damages are forbidden generally in arbitration and specifically by the Agreement here, and since no bargaining unit member was harmed by the College's act, no remedy is appropriate in the circumstances of this contract violation.

It is of course apparent that an identical problem may arise in the summer of 1976. I can only suggest that the parties meet prior to that time and agree on how to resolve the problem of providing essential summer counseling services without a contract violation in the future.

AWARD

The assignment by the college of full-time duties to part-time employees was a violation of the Agreement and to this extent the grievance is sustained. No remedy is ordered, however, since no compensatory damages are appropriate and punitive damages are forbidden by the Agreement.

Chas M. Reihmus

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March 11, 1976