Sugerman #1

STATE OF MICHIGAN

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration between

Employer,

-and-

Union

Opinion and Award and of Arbitrator: Donald F. Sugerman

Gr: Employee 1, Assignment/Reduced Load

OPINION

I

THE PARTIES/AGREEMENT

Union is the recognized, exclusive bargaining representative for all faculty members (full-time, full-salaried and part-time who hold faculty rank carrying at least two-thirds teaching load, including department chairpersons) employed by Employer. The Agreement between the Union and the Employer that governs this dispute was effective for the period July 1, 2002 through June 30, 2005. ("Agreement" or "CBA," Exhibit J-1)

II

THE ISSUE

This dispute arises from a difference of opinion between Employer and the Union over the interpretation of a provision in the CBA. It deals with how faculty members on reduced teaching loads schedule their classes[1]. More specifically, the question may be stated as follows: Is a faculty member on reduced load required to spread his/her teaching hours over

[1] A full teaching load is I2 hours in each of the two semesters of the school year, A reduced load is not less than 50% of a full load. At his sole discretion, the Employer President may permit a reduced load of 33 and 1/3% of a full load.

both the Fall and Winter semesters of the school year as claimed by the Employer or, can those hours be taught in one of those two semesters, as claimed by the Union?

III

RELEVANT CBA PROVISIONS

ARTICLE C UNION RIGHTS

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C3. EQUAL APPLICATION

This agreement shall be applied equally in all cases with respect to wages, hours, terms and conditions of appointment_ In no case shall arbitrary, capricious or discriminatory action be taken. It shall be applied without regard to race, creed, religion, color, national origin, age, sex, marital status or handicap or any other condition protected by stated Employer policy or by law.

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ARTICLE D ACADEMIC CONDITIONS

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4. TEACHER LOAD AND REQUIREMENTS

D 4.1 CREDIT HOUR TEACHING LOAD AND OVERLOADS

Each faculty member normally shall have a teaching load of not less than 24 nor more than 38 credit hours over a three semester appointment. Any teaching load in excess of the above 24 credit hour limit, during the basic two (2) semester appointment, shall be compensated for at the rate of $600 per credit hour. Payment for any credit hour overload shall be made as soon as possible following the official Winter term count. No overload shall be scheduled for any faculty member without his or her consent and advance notification to the Union; no overload in excess of three () credit hours will be scheduled without Union and the faculty member's consent.

ARTICLE I DEPARTMENT ORGANIZATION AND DUTIES

I3. ADMINISTRATION CONSULTATION

The department chairperson, at the initiative of the department, shall coordinate matters of departmental concern including class schedules, teaching assignments of faculty members, adjunct faculty (including the Departmental PT/FT ration), number of preparations. departmental budgets and class size, and is responsible for advising the dean or director on such matters and other matters of departmental concern. The chairperson is also responsible for the performance of all departmental duties. Deans or directors will meet and confer at regular intervals with department chairpersons

individually and collectively to discuss such matters as budget, class schedules, class size, hiring (including adjunct faculty and the Departmental PT/FT ratio), teaching assignments of faculty members, number of preparations, and other relevant matters.

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ARTICLE M FRINGE BENEFITS

M 4.5.3 REDUCED LOAD

On attaining the age of fifty-five (55) (with at least ten (10) years service to EMPLOYER) or after twenty-five (25) years service to Employer, whichever comes first, a faculty member may choose to reduce his/her regular teaching load while continuing to be treated as a member of the faculty for all other purposes. In such cases salary will be proportionate to load and fringe benefits will be continued. (Fringe benefits based upon a percentage of compensation, such as F.I.C.A. and retirement contributions, will be reduced in accordance with the amount of salary reduction.) The following requirements will apply to the foregoing:

i. The faculty member involved must give advance written notice to his/her dean no later than January 15, prior to implementation of any such load reduction for the following Fall semester and no later than September 15 prior to such implementation for the following Winter semester.

ii. Such load reduction cannot be to less than a fifty percent (50%) load. (With the written consent of the Employer President, which consent may be granted or not granted on a discretionary, nongrievable basis, load reduction could be reduced to a thirty-three and one-third percent (33 -113% load.) A reasonable effort will be made to accommodate the faculty member's desire in scheduling such load between the Fall and Winter semesters, recognizing that class scheduling requirements must receive first priority.

iii. Once having reduced load the faculty member involved may not thereafter rescind such reduction; provided, that this principle will not preclude one (1) or two (2) hour load variance from one (I) Fall/Winter combined load to the next, based on class scheduling requirements.

iv. A faculty member who elects reduced load on or after January 16, 1997, can continue in such status for a maximum of seven years after the implementation of such reduced load status. The voluntary election by such a faculty member to take reduced load automatically includes an agreement by the faculty member to retire from all employment at EMPLOYER no later than the end of such seven year period. However, faculty who elect reduced load status on or before January 15, 1997, will not be subject to any maximum number of years for this status.

IV

STATEMENT OF THE CASE

Employee 1 ("Employee 1" or "Grievant")[2] has been a member of the Computer

Science Department for over twenty years. In the Fall of 2004, Employee 1 notified his department that he intended to go on a reduced load of twelve hours for the 2005/2006 school year and that he wanted to teach those hours in the Fall semester. The department chair determined that he could accommodate the reduced load, and, accordingly, he approved the request.

According to Employee 1, the Department, by its Chair, Chairperson 1, submitted its 2005/2006 schedule to Dean 1, Dean of the College of Science, Engineering and Technology. As is the usual routine, Dean 1 presented the computer science department's 2005/2006 course schedules to Professor 1, Vice President for Academic Affairs.

Professor 1 reviewed the schedule and noticed that Employee 1 was scheduled to teach all twelve course hours in the Fall semester and none in the Winter semester. He denied the schedule. Professor 1 notified Dean 1 that the schedule was denied as CS116 (one of Employee 1's courses) had been cancelled and replaced with CS 101. Professor 1 canceled CS116 in order to make certain that Employee 1 would have to schedule a Winter class in order to meet the credit hour reduced load requirement. After receiving Professor 1's denial, department members reworked the scheduled and placed Employee 1 as the instructor for CS101.

On November 16, 2004,[3] Employee 1 submitted his formal, written request for a reduced load to Dean 1, with a copy to Employee 2, Director of Staff Relations. The memo stated that in accordance with the Agreement "I will be moving to a reduced load of 50% beginning in the 2005-2006 school year. I have submitted my schedule for the Fall of 2005 and will be planning to teach my half time load in the Fall semester," (Exhibit U6)

[2]Once an individual has been identified, only his/her surname or title will be used thereafter.

[3]All dales without a year refer to 2004.

On November 24, Employee 1 went on a planned sick leave to have heart surgery. Employee 1 was to be off work until March of 2005. At the time he went on leave, Employee 1 had had no further communication regarding his course schedule and he assumed that the department's latest course schedule had been accepted by Professor 1.

Upon return to work in March 2005, Employee 1 reviewed the online class schedules and discovered that his name had been removed as the instructor for CS 101. When Employee 1 learned that he would not be able to teach CS101 or CS116, he contacted the Math Department and was approved to teach an algebra course in the Fall. When Professor 1 reviewed this newest schedule, he refused to allow Employee 1 to teach the math class. Professor 1 testified that he did so to prevent Employee 1 from teaching his course load in only one semester.

According to Professor 1, the reduced load is meant to reduce course hours from each of the semesters, not just one. Professor 1 testified that there are too many people eligible for early retirement or load reduction and that the scheduling is such that faculty is needed to teach both semesters, Professor 1 testified that over the years he has refused to allow several other faculty members from teaching their reduced loads in one semester.

Employee 1 taught two courses (eight credits) in the Fall of 2005 and in November 2005 he notified the Employer that he would be retiring as of December 31, 2005. As such, Employee 1 did not teach CS105 which was scheduled for the Winter of 2006.

V

THE GRIEVANCE

On April 29, 2005 the Union filed a grievance stating:

> In accordance with the Faculty Contract, Section M 4.5.3, on November 16, 2004, Employee 1 notified administration that he would be moving to a reduced load of 50% beginning in the 2005-2006 school year. He submitted a schedule for the Fall 2005 and is planning to teach half-time load in the Fall semesters. When one of his courses,

> CS-116, was canceled, he pursued additional courses to meet the 12-credit load requirement in the Fall semester for half time. Employee 1 first opted to teach a staff line course, CS-101. Dr. Professor 1 said Employee 1 could not teach that course, but allowed Employee 3 to teach the other section of CS-101. Employee 1 asked Employee 4 if there was an intermediate algebra course he could teach. Employee 4 agreed to allow him to teach a section of Math 103 and again, Professor 1 said that no fun - time faculty could teach that course when indeed there are four full-time math faculty teaching that course. It is believed that Employee 1 is being discriminated against because of his age and his work in the Union. (Exhibit J-2)

On June 10, 2005, Employee 2 notified the Union that the decision to deny Employee 1 from teaching in one semester is "not based on any discriminatory reasons, but rather is based on the contractual rights and practice of the Employer to not allow faculty on reduced load to teach the entire load in one semester." (Exhibit J-2)

The grievance was processed to Step III. Employer consistently denied the grievance. In this pasture the case reached arbitration.

A hearing was held on June 1, 2006, in City A. The parties were represented as set forth above and had the full opportunity to make opening statements, to call witnesses, to introduce exhibits and to file post-hearing briefs. Based on my observation of the witnesses, evaluation of the evidence, and consideration of the arguments, I issue this Opinion and Award.[4]

It is important to note that at the hearing the Union abandoned its assertion that Employee 1 was discriminated against because of age and/or his concerted, protected activity on behalf of the Union. It thus limited its argument to the claim that Employee 1 had a contractual right to teach his entire reduced load in the Fall semester, and that the Employer violated the Agreement by failing to allow him to do so. The Employer also agreed to withdraw its Motion to Dismiss the case, based upon the Union's statement that any relief granted in this case was to operate only prospectively. In other words, it would not provide relief to the Grievant.

[4] While I have considered every argument advance by each party, only those deemed relevant to the disposition of the case are set forth herein. The advocates have my thanks for their able, helpful post-hearing briefs.

VI

DISCUSSION

Employer argues that the contract language is clear and unambiguous and should be applied as written. According to the Employer, the Agreement makes it clear that a reduced load must be spread over the Fall and Winter semesters, and cannot be taught in only one semester.

The Union also finds the contractual language to be clear and unambiguous. However, it argues that the Agreement supports accommodating a faculty member's request to teach in one semester while on reduced load. According to the Union, the Employer violated the CBA in denying Grievant’s request to teach his reduced load in one semester.

Specifically, the parties allege that the following sentence in Article M 45,3, is plain and unambiguous:

> A reasonable effort will be made to accommodate the faculty member's desire in scheduling such [reduced] load between the Fall and Winter semesters, recognizing that class scheduling requirements must receive first priority.

The Employer argues that the phrase, "between the Fall and Winter semesters," particularly the words "between" and "semesters" makes it clear that this provision contemplates a reduced load spread over the two school year semesters. Carrying the entire load during one of those semesters would not, it asserts, comport with the plain language of the provision.

Furthermore, the Employer maintains that other provisions in the Agreement support its interpretation. While the cited provisions (Article D 4.land Article D 20.1) point to a basic two semester appointment (meaning a faculty member will have a teaching load of no more than 24 credit hours over the Fall and Winter semesters), they refer only to a full teaching load arid therefore are of no assistance and do not evidence an intent by the parties with respect to a reduced teaching load.

On the other hand, the Union asserts that the disputed language is clear — the Employer must make a reasonable effort to accommodate the faculty member's desire to schedule his/her reduced load. If this means scheduling the load all in the Fall semester, then, if it can be accommodated by the department, it must be done.

However, while the language does not preclude a reduced load taught in one semester, it does not expressly authorize it either. The fact that the language refers to accommodating the faculty member's desire in scheduling, does not imply an intent to allow the faculty member on a reduced load to schedule all of his/her classes in one semester.

Under the "plain meaning rule," if the contractual words are plain and clear, conveying a distinct idea. There is no occasion to resort to interpretation, and the meaning is to be derived entirely from the nature of the language used.[5] While both parties would have me find that their interpretation of the CBA is clear and unambiguous, I do not find this to be the case. Article M 4.5.3 is not straightforward and unambiguous, at least rot as it applies in this instance. Nothing in the CBA mentions allowing or excluding a one semester reduced load. As such, the parties' intent is not clear from the plain meaning of the CBA.

It appears to me that the main concept expressed in the subject provision was that an effort would be made to accommodate the schedule of the faculty member on reduced load, but if a conflict arose, the primary obligation of the Employer was to its students and to other faculty. For this reason, it seems doubtful that the phrase "between the Fall and Winter semesters" was mutually intended (or for that matter unilaterally intended by either of the parties), to require that the reduction be taught over two semesters or to prohibit the reduced load from being taught in one semester.6 It was something that I believe was not contemplated.

[5]Elkouri and Elkouri, How Arbitration Works, Sixth Edition, Alan Miles Ruben, Chief Ed., The Bureau of National Affairs, Washington, D.C. (2003), at p. 434.

This being the case, it is appropriate at this juncture to repeat (as I did in the Case No. 54 39 98 05 involving these same parties), the oft quoted statement on the role of the arbitrator in contract interpretation matters:

> Whatever may be the inaccuracy of expression or the inaptness of words used in an instrument in a legal view, if the intention of the parties can be clearly discovered, the court will give effect to it and construe the words accordingly. It must not be supposed, however, that an attempt is made to ascertain the actual mental processes of the parties to a particular contract. The law presumes that the parties understood the import of their contract, and that they had the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument. The language must be sufficient, when /coked at in the light of such facts as the court is entitled to consider, to sustain whatever effect is given to the instrument. [7]

Compounding the problem, aside from the language used, is that other tools that often assist in determining intent, such as the proposals and counter proposals when the provision was negotiated over fifteen years ago and the contemporaneous discussions relating thereto, are of little help. Who proposed the language, whether it was accepted as proposed, or whether changes offered, cannot be gleaned from this record. As to the discussions, it is unclear exactly what was said between representatives of the parties at the bargaining table or in side-bars they may have had.

President 1, former Union President, who was involved in the initial contract negotiations over fifteen years ago, testified that during, negotiations there was discussion about the particular provision, and that the end result was that "there was no conclusion that we barred any particular combination" and that he did not recall any conversation restricting the use of 12 hours in one semester and zero hours in the second. (Tr. p. 131, lines 20 - 22 and Tr. p. 132. lines 12 - 15) President 1 testified that the primary thrust of the discussions

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[6]On at least One occasion, a member substituted a summer term as on of the two terms.
[7]12 American Jurisprudence §227, pp. 746-748 (citations omitted).

was that the request would not pose an undue burden upon a department. (Tr. p.127, lines 17-19)

Although there was no countervailing testimony regarding the original discussion, President 1's recollection %vas admittedly hazy, and therefore his testimony, while interesting, cannot serve to provide the basis for a determinative decision about the intent of the parties.

Since the parties' intent is most often manifested in their actions, past practice is the most widely used standard to interpret ambiguous and unclear contract language. Past practice may be introduced to divine the intent of the parties. The presence of a well-established practice, accepted or condoned by both parties, rnay constitute, in effect, an unwritten principle on how a certain type of situation should be treated." *Texas Utility Generating Division,* 92 LA 1308, 1312 (McDermott, 1989).

In this case, the past practice of the Employer evidences an intent to allow a reduced load to be taught in one semester. In the past ten years there have been approximately five occasions in which the Employer allowed a faculty member to teach a reduced load in one semester.

Employee 5 and Employee 6 each worked a semester as they were sharing an office due to limited office space. [8] Employee 8 was permitted to teach his reduced load in the Fall semester for six years. Employee 8 had an independent study class in most of the Winter terms.[9]

[8] In 1993/1994 and 1994/1995, Employee 5 had 12 hours in the Fall and Employee 6 had 12 hours in the Winter. In1995/1996, however, Employee 5 again had 12 hours in the Fall, but Employee 6 was on sabbatical.

[9]1n 1998/1999 Employee 8 had 12 hours in the Fall and no hours or independent study in the Winter term. For 2000/2001, 2003/2004 and 200412005 he had a full reduced load in the Fall with independent study in the Winter. President 1 testified, without contradiction, that independent study is not considered a part of the teaching load. The fact that Employee 8 was permitted to teach a reduced road in one semester is significant and is not impacted by the independent study contention of the Employer.

President 1 and Employee 7 were also permitted to teach reduced loads in one semester as they mentioned the possibility of retiring within a few years.[10] The Employer admits that a past practice has been established: It seeks to distinguish the instanced noted above. "[I]n very limited circumstances the Employer has exercised discretion and allowed Faculty members to teach their reduced load in one semester". (Employer Brief, p. 11) Employer contends, however, that those limited circumstances (notice of retirement, shared teaching and shared offices, and agreement to teach independent study during the off semester) do not evidence an intent to permit reduced loads in one semester.

While the Employer argues that these examples cannot be broadened to apply in this case, I must respectfully disagree. By authorizing these one semester reduced loads, the Employer has by its own actions, interpreted the Agreement to permit this type of application. For the past ten or more years the Employer has allowed select faculty members to teach their reduced load in one semester. As the Employer has permitted one semester reduced loads for some faculty members, its claim that the CBA prohibits such action, clearly or otherwise, cannot be embraced. Its effort to distinguish these exceptions is unpersuasive.

Professor 1 testified that he has a policy of allowing eligible faculty members to teach their reduced load in one semester if they announce their prospective retirement (Tr. p. 105) He would allow a one semester reduced load if the faculty member planned to retire in say one, two, three, or even four years. By doing this he has clearly allowed the possibility of a faculty

[10]Weave- went on half Toad in the Fail of 2002. He was allowed to teach 12 hours in Winter. For 2003/20(4 and 2004/2005 his load was split between the two semesters. Employee 7 apparently announced in the Fall of 1997 that he would retire in June 2000. He taught 12 hours in the Fall of 1997 and no hours in the Winter semester that school year. In 1998/1999 his hours were split 8/3. And in 1999/2000 he had 12 hours in the Fall. From the statistics, it appears that a retirement announcement gives the member the opportunity to teach the load in one of the two semesters and/or bow they will divide the reduced Toad between semesters. It appears from President 1's case that he did not commit to retire, but simply indicated that he would like to retire if conditions were favorable. While President 1's request to lump his reduced hours into a single semester vas subsequently denied, Professor 1 did not explain the reason for this and President 1 did not ask. It appears to me that the Employer's claim that Employee 1's situation can he distinguished from faculty who were permitted to teach a reduced load in one semester (possible retirement, independent study, sharing an office, etc.) is , to be charitable, weak tea.

member teaching a one semester reduced load if s/he is going to retire in five or six years; or something less than the maximum permitted by those retiring after the grandfather date. By approving certain faculty members to teach reduced loads in one semester, Professor 1 cannot now retreat and assert that one semester reduced loads are not permitted by the Agreement, even when such a schedule can be accommodated.

By his actions, Professor 1 has selectively allowed certain faculty members to have one semester reduced loads (and he has denied that opportunity to others who were unaware of the criteria being used to decide these matters).[11] As the Grievant retired in 2005 it is possible, based on Professor 1's testimony, that Employee 1 could have been eligible for a one semester reduced load. Yet, he was never informed of Professor 1's application of Article M 4.5.3 and therefore never given the same opportunity as other faculty members who were allowed to teach the full reduced load in one semester. Professor 1's application of this policy was, in this case, arbitrary.

By allowing the practice of one semester reduced loads in certain circumstances, the Employer has sanctioned an interpretation of the contract that permits reduced loads to be taught in one semester, provided, of course, all other factors are resolved. Grievant notified the Employer within the prescribed time limit and requested a fifty percent: teaching load. Apparently, the computer science department was able to accommodate Grievant's scheduling request (while first considering course selection) inasmuch as the chair and the dean approved it and sent it to Professor 1 for final approval.

Professor 1 appears to have gone out of his way to insure that Employee 1 not teach his reduced load in one semester. This, so-called "policy" and the reasons for the denial were not

[11] Professor 1 stated that in a couple of instances, he denied permission for a faculty member to teach the full reduced load in a single semester, The dates these denials occurred were estimated and the circumstances in each case was not fully explained. These denials then do not establish a past practice showing a contrary intent. There is no indication that the denials were grieved or made known to the Union.

communicated to Employee 1 until after the grievance giving rise to this case was filed. As such, the Employer failed to make a reasonable effort to accommodate Grievant's request and this constituted a violation of the Agreement.

The Employer argues that it will be harmed were the grievance sustained because of the number of faculty members who would be eligible for reduced loads and who might elect to work only one semester. This, it contends, would severely limit its ability to meet scheduling demands. First, it is not clear in the record whether there are more members eligible for reduced loads than were employed since the provision entered the CBA. Second, the decision in this case cannot turn on this factor, hut must be based on an interpretation of the Agreement. Third, the one semester reduced load can be rejected whenever it would adversely impact class scheduling requirements. Finally, this provision is subject to negotiations between the parties and, at the appropriate times, can be modified or removed altogether.

Since 1999/2000 there have been about ten faculty members per year on reduced loads. Clearly, scheduling of faculty has been accommodated and schedules satisfied. It is not clear that the infrequent request to teach the entire toad in one semester would present a significant problem, especially if there is the possibility of splitting the assignment between two members. Further, the Employer's argument that the cost differential is a factor is unpersuasive. Once again, this may not be the basis for the decision in this case. (As an aside, the cost difference was not proven.) Dr. Mien testified that only fringe benefits are at issue here and no cost was given to support a finding that this would be other than *de minimis* (or possibly even offset were the replacement for a full-time faculty member paid at a lower rate as could well be the case).

AWARD

For the reasons set forth above, the grievance is sustained. The Agreement does not require that a faculty member teach a reduced load spread over the Fall and Winter semesters. The reduced load may be taught in a single semester. Each case, of course, must turn on its individual fact situation: In deciding this issue, the Employer is entitled to consider the needs of the Employer, its students, and other faculty schedules. In doing so, however, it may not deny such a single semester schedule simply because it would prefer the reduced load to be taught over the two semesters.

Donald F. Sugerman, Arbitrator

August 31, 2006