

AWARD

IN THE MATTER OF ARBITRATION

BETWEEN

FLORIDA ATLANTIC UNIVERSITY

And

UNITED FACULTY OF FLORIDA

Grievance No. 2009-2
Grievant: Lester Embree
(Grievance concerning teaching assignments)

Date of Hearing: 10/20/09

Briefs Received: 11/23/09

Date of Decision: 12/19/09

APPEARANCES

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Grievance concerning
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I. STATEMENT OF THE CASE

Florida Atlantic University (FAU or University) and the United Faculty of Florida (UFF or Union) are parties to a collective bargaining agreement (CBA) which governs the terms and conditions of employment of all faculty members employed by the University. It also provides for a grievance procedure culminating in final and binding arbitration as the mechanism to be used to resolve any disputes concerning the interpretation or application of its terms.

At issue in this case is a grievance which was filed March 24, 2009, by Dr. Lester Embree, who is employed by the University as an Eminent Scholar and Professor of Philosophy. His grievance arose when he received a letter dated February 25, 2009, from Manjunath Pendakur, the Dean of the College of Arts and Letters, advising him that he was being assigned to teach two philosophy courses in the fall of 2009 and two philosophy courses in the spring of 2010. It is the grievant's contention that these assignments, which essentially doubled the course assignments he had received throughout his employment, violated certain provisions

contained in Section 9.3 and 9.4 of the CBA. The grievance reads in pertinent part as follows:

PREAMBLE

Dr. Lester Embree, William F. Dietrich Eminent Scholar in Philosophy, has received an annual assignment from the Dean of the College, Manjunath Pendakur, dated February 25, 2009 in which he is assigned to teach four courses in 2009-2010. One of these courses makes up for one currently assigned that did not achieve sufficient enrollment, so this is an assignment of one additional course.

Like that of the other eminent scholars, Dr. Embree's assignment agreed to in his appointment (1990) and since then has been 75% research and service and 25% teaching (i.e., two courses). He is currently teaching two courses for 2009 on the annual assignment basis, which the dean is seeking to change to an academic year basis. In the last decade (1998-2008) Dr. Embree has authored three books, edited or co-edited 13 volumes, and published 27 essays. He has also performed extensive "professional service" by speaking at universities and in professional conferences, teaching workshops, etc. chiefly in Asia, Europe, and Latin America, which the previous dean called "carrying the flag," and all of the evaluations in his record have been overall excellent.

Dr. Embree disagrees with the increase in his teaching load and the consequent reduction of his professional service for the time period in question.

STATEMENT OF GRIEVANCE:

- 1) The Dean of the College is the person responsible for making assignments and evaluating eminent scholars.
- 3) The assignment violates Section 9.3 of the Collective Bargaining Agreement (CBA) in failing to consider the employee's professional growth and development. Moreover, the assignment has been imposed arbitrarily and unreasonably.
- 2) In accordance with 9.4c of the CBA only the person making the assignment can change the assignment of an employee.
- 3) In the Grievant's appointment letter of May 1, 1990 from then University Provost and Vice President Leonard Berry, it is written: "[O]ne of the Legislature's purposes in establishing the endowed chair program was to bring students in contact with

distinguished scholars. Therefore, teaching one course a term starting in January 1991 is appropriate." Presumably the eminent scholars across the University were hired with this original agreement. In any case, the change of assignment of February 25, 2009 contradicts the original agreement with Dr. Embree.

Remedy sought:

The assignment of an additional course in this or any other way will be withdrawn and the 25%/75% assignment structure returned to.

When the parties were unable to resolve the issues in dispute through the grievance procedure, the UFF invoked arbitration. Following the selection of the undersigned as arbitrator a hearing was conducted at the FAU campus at Boca Raton, Florida on October 20, 2009. In the course of the hearing both parties were afforded ample opportunity to present evidence and to cross-examine witnesses called by the opposing party. Upon receipt of post-hearing briefs the record was closed pending the issuance of this opinion and award.

II. THE ISSUE

At hearing the parties stipulated to the following formulation of the issue: Did FAU violate Section 9.3 (a) and/or 9.4 (d) of its CBA with the UFF when it gave the grievant, Lester Embree, his teaching assignments for the 2009-2010 school year? If so, what should the remedy be?

III. RELEVANT CONTRACT PROVISIONS

Article 9 - Assignment of Responsibilities

Section 9.3 Considerations in Assignment.

- (a)** Assignment will be made with the consideration of the following:
- (1) the needs of the program or department/unit in the areas of teaching, research and services;
 - (2) the employee's qualifications and experiences, including professional growth and development;
 - (3) the character or complexity of the assignment; and
 - (4) the opportunity to fulfill applicable criteria for tenure, promotion, continuing multi-year appointments, successive fixed multi-year appointments, and merit salary increases.
- (b)** The employee shall be granted, upon written request, a conference with the person responsible for making the assignment to express the employee's concerns. If the conference with the person responsible for making the assignment does not resolve the employee's concerns, the employee shall be granted, upon written request, an opportunity to discuss those concerns with an administrator at the next higher level.
- (c)** The Board and the UFF recognize that, while the Legislature has described the minimum full academic assignment in terms of twelve (12) contact hours of instruction or equivalent research and service, the professional obligation undertaken by a faculty member will ordinarily be broader than that minimum. In like manner, the professional obligation of other professional employees is not easily susceptible of quantification. The University has the right, in making assignments, to determine the types of duties and responsibilities which comprise the professional obligation and to determine the mix or relative proportion of effort an employee may be required to expend on the various components of the obligation.
- (d)** Furthermore, the University has the obligation to monitor and review the size and number of classes and other activities, to consolidate inappropriately small offerings, and to reduce inappropriately large classes.

Section 9.4 Annual Assignment

(a) Communication of Assignment. Employees shall be apprised in writing, at the beginning of their employment and at the beginning of each year of employment thereafter, of the duties assigned in teaching, research and other creative activities, public service, and of any other specific duties assigned in teaching, research and other creative activities, public service, and of any other specific duties assigned for that year.

Except for an assignment made at the beginning of an employee's employment, the person responsible for making an assignment shall notify the employee prior to making the final written assignment. The assignment shall be communicated to employees no later than six (6) weeks in advance of its starting date, if practicable.

* * *

(d) Equitable Opportunity. Each employee shall be given assignments which provide equitable opportunities, in relation to other employees in the same department/unit, to meet the required criteria for promotion, tenure, continuing multi-year appointments, successive fixed multi-year appointments, and merit salary increases.

* * *

Article 20 – Grievance and Arbitration Procedures

20.4 Burden of Proof. In all grievances except disciplinary grievances in accordance with Article 16, Disciplinary Action and Job Abandonment, the burden of proof shall be on the employee. In disciplinary grievances, the burden of proof shall be on the University or the Board.

* * *

Article 20.8(f)(3) – Authority of the Arbitrator.

The arbitrator shall neither add to, subtract from, modify, or alter the terms of provisions of this agreement. Arbitration shall be confined solely to the application and/or interpretation of this Agreement and the precise issue(s) submitted for arbitration. The arbitrator shall refrain from issuing any statements of opinion or conclusions not essential to the determination of the issues submitted.

Where an administrator has made a judgment involving the exercise of discretion, . . . , the arbitrator shall not substitute the

arbitrator's judgment for that of the administrator. Nor shall the arbitrator review such decision except for the purpose of determining whether the decision has violated this Agreement. If the arbitrator determines that the Agreement has been violated, the arbitrator shall direct the University to take appropriate action.

IV. SUMMARY OF THE EVIDENCE

The operative facts of this case are relatively simple and largely undisputed. Since at least 2008, the University has been one of many Florida public entities to fall victim to the state's ailing economy, suffering major budget cuts resulting in workforce reduction, hiring freezes, and limited to no wage increases for over two years ongoing. In the last two years the state has reduced the FAU budget by \$50 million.

Consequently, less funds are available for instructors. As a direct result of the budget crisis and lack of qualified faculty to teach, the Dean of grievant's college, the Dorothy F. Schmidt College of Arts and Letters (the "College"), needed faculty to teach additional classes for 2009-10 to meet the needs of the students. The average teaching load for faculty in grievant's college is five classes per year. The Dean asked all College faculty to volunteer to teach more classes in this difficult fiscal year.

The grievant, Lester Embree, is the William F. Dietrich Eminent Scholar in Philosophy at FAU. He was hired to this position in 1990. The "Eminent Scholars Program" was established by state legislation in 1979 and it provides state matching grants for public state universities to attract the top talent in research and most eminent scholars to such universities.

Holders of Eminent Scholar positions are "endowed professors", each holding an "endowed professorship". From 1990 to the present Professor Embree has had a long and productive career with a record of scholarship and professional service that has raised the profile of FAU internationally and made him one of the most eminent scholars in the world in his field, which is the Philosophical School of thought known as "Phenomenology".

At the time Professor Embree was hired in 1990 he was sent letters from the University Provost outlining the terms and conditions of his endowed professorship and informed that his duties and responsibilities would include teaching, research and public service. A pertinent excerpt from one such letter to Professor Embree reads as follows:

"You propose many exciting activities which will require significant time. However, one of the legislature's purposes in establishing the Endowed Chair Program was to bring students in contact with distinguished scholars. Therefore, teaching one course a term starting in January, 1991 is appropriate."

Prior to 2009 no change in this original teaching arrangement had ever been proposed to Professor Embree. Consistently, except for one semester when he was on sick leave, the grievant taught two courses per year from the date he was hired up to the 2009-2010 academic years.

Prior to 2009 all other eminent scholars in Professor Embree's College also each taught only two courses per year. During the last ten years, the grievant taught his two courses during the Spring semester because the Fall semester had proved to be more fruitful than the Spring semester for

conducting his many international activities and appearances. It was noted that the usual teaching load for faculty who are not eminent scholars at FAU is around five courses per year, but those faculty members do not have to meet as high expectations and requirements of academic research as do eminent scholars.

For the Spring 2009 term Professor Embree was asked to volunteer to teach an additional course because of the difficult financial circumstances the University was facing. He initially agreed to do so as a one time favor out of concern for the well being of the University. Thus, rather than his usual two courses in the spring 2009 semester, he was scheduled to teach three. However, two of these three courses failed to generate high enough enrollments to be held and as a result, as a last minute change, he was given an Introduction to Philosophy course to replace the two cancelled courses. Thus, he ended up teaching two courses in the Spring of 2009, as he had done for many years.

In February of 2009 the grievant received his academic year 2009-2010 assignment. When this occurred he was told that he "owed" the University an extra course since he had only taught two in the Spring term rather than his usual two plus the extra course for which he had volunteered. In addition, he was informed that he would have to teach yet another course in the Fall as well as two in the Spring of 2010, meaning that his 2009-2010 assignment would consist of four courses,

rather than his usual two. Even though his teaching load was doubled, he was also informed that the expectations for his research and related productivity would remain unchanged. Thus, he faced a doubling of his teaching load with no diminution of expectations for his primary responsibilities which were in research and related professional services.

The grievant testified that when he received notification concerning his annual assignment for 2009-2010 he offered to secure \$15,000 from an institution in Taiwan to pay for the cost of a stand-in adjunct instructor to teach his philosophy courses but his offer was rejected. In that regard a memorandum to the grievant from University Provost and Chief Academic Officer John Pritchett requesting that he forego an opportunity to teach in Taiwan and rejecting his offer to fund an adjuncts reads as follows:

"SUBJECT: Proposed teaching assignment for Academic Year 09-10

Lester, I have given considerable thought to the conversation we had last Thursday relative to your proposed assignment for the coming year. And we all agreed that the year we are about to enter is unprecedented relative to our resource shortfall. We are looking at every avenue to address the challenges.

With that said, I am requesting that you forego your Taiwan opportunity and accept the proposed instructional assignment. As we discussed, I visualize this as a one year only alteration to your assignment and it applies only to Academic Year 09-10. As for ensuing years, should additional challenges arise, we will have additional discussions.

Please know how much I appreciate you and all that you do."

A further explanation on the reasons the grievant was expected to teach rather than travel to Taiwan in the Fall of 2009 was provided in a memo to him from Dean Pendakur dated February 9, 2009, which reads as follows:

"I am not in favor of you being away during fall 2009 for the following reasons:

1. We are faced with a serious economic crisis and we need your help in teaching during the fall semester. You owe the Department three courses and trying to teach them all in one semester is a bad idea for a variety of reasons. I have requested that you teach a 2-2 course load next year to help the College.
2. Reimbursing the College with \$15,000 from Taiwan is not going to help because adjuncts are by no means equal to what a senior faculty member could do for students in the classroom.
3. If it was a Federal grant as opposed to some money from another university, I would think of this differently because a federal grant is prestigious to win and the overhead helps the whole university and its mission.
4. Some senior faculty members have already volunteered to teach an extra course in 2009-10 to help the University survive the drastic budget cuts. Given that, you would be setting a good example to others by offering an extra course in 2009. As I have said many times to you that there are serious concerns on the part of the faculty at large about the Eminent Scholars and that contributes to poor morale in our College. By helping the whole institution at a time like this with an extra course that you could teach you will help me in building the bridge between the Eminent Scholars and the faculty at large.

Dean Pendakur testified that he assigned the four course teaching load to the grievant only after carefully considering the needs of the Philosophy Department, the Eminent Scholars

Program and the College entirely. The Dean also considered the needs of the Department and Program in the areas of teaching, research and service. In addition he considered the grievant's qualifications, experience, professional growth and development, as well as the character and complexity of the assignment. He further explained that the assignment provided equitable opportunity and would not hinder the grievant's ability to earn a merit salary increase if one is to be provided in the future.

IV. DISCUSSION AND DECISION

As a preliminary matter it is important to point out that because the grievance does not involve discipline, Article 26.4 of the CBA places the burden of proof on the Union. It is therefore incumbent upon the Union to demonstrate that the action of FAU that is being challenged is inconsistent with some mandate, limitation or restriction, either express or implied, in the CBA. In this case that translates into a burden on the part of the UFF to convincingly establish that FAU violated Article 9.3(a) or 9.4(b) or otherwise violated the grievant's rights under the Agreement when it doubled his teaching assignment for the 2009-10 school year.

The arguments advanced by the UFF to support its position in this matter are essentially four-fold. First, FAU failed to comply with the requirements set out in Article 9.3(a) of the CBA pertaining to the factors

which must be considered in making annual assignments. Second, FAU is violating Article 9.4(b) of the CBA by giving the grievant an annual assignment which will result in him being denied an equitable opportunity for a merit pay increase compared to other Eminent Scholars in the College. Third, the UFF contends that the doubling of the grievant's teaching load is in violation of the terms and conditions under which he was hired. Finally, UFF argues that it is also in violation of a past practice that has extended throughout his tenure under the terms of which he has consistently been limited to teaching no more than two courses per year.

As a beginning point in analyzing the merits of this dispute it is useful and instructive to refer to the well-established arbitral principles pertaining to the reserved rights concept that are frequently applied in cases of this nature. Those principles relate to the inherent authority that is vested in an Employer and the limitations that can be placed on that authority *vis a vis* the Collective Bargaining Agreement. In that regard it should be understood that in analyzing a question concerning whether or not an Employer has the right to take certain action, one must begin with the proposition that an Employer has an inherent right to take virtually any action that is consistent with the objectives of managing its business operations, directing the workforce and scheduling the work. Proceeding from that standpoint, the Collective Bargaining Agreement must then be examined for the purpose of determining what areas of the Employer's

broad discretion have been "carved away" through the process of collective bargaining in such a manner that limitations are thereby placed on that discretion. Stated another way, the interpretation of a Collective Bargaining Agreement begins from the standpoint that such an agreement never gives the Employer anything. Rather, the authority is there simply because of the Employer/employee relationship. Accordingly, because the Agreement is simply a series of bargained-for limitations upon the authority of the Employer to manage and direct the work force, it is not analyzed from the perspective of what employer actions are allowed. Instead, one looks to the Agreement to see if the Employer has been prohibited from performing in a certain way, or is required to perform in a certain way or if the Employer's actions are unreasonable in that they interfere with employee rights protected by the Agreement. Therefore, unless the Agreement places limitations on the Employer's prerogative the basic authority to take certain action remains in the Employer.

After due consideration of the relevant contract provisions in the light of these concepts and principles, I find nothing therein which either expressly or by reasonable implication, places any restrictions on the authority of the University to assign duties to faculty members other than the requirement that the relevant factors set out in Article 9.3(a) must be considered. Indeed, the language of Article 9.3(c) makes it indisputably

clear that the assignment of annual faculty duties is a negotiated management right that is virtually unfettered. It provides as follows:

“. . .The University has the right, in making assignments, to determine the types and duties and responsibilities which comprise the professional obligation and to determine the mix or relative proportion of effort an employee may be required to expend on the various components of the obligation.”

Given this language, it is clear that the Dean of the grievant's college, the College of Arts and Letters, has the negotiated authority to assign faculty members to teach such courses he deems appropriate to operate the College (up to a full regular teaching load of 8 classes per academic year) provided he considers certain relevant factors. The specific factors the Dean must consider in determining annual work assignments, which are made up of any mix of three components – teaching, research and service – are set out in Article 9.3(a). It provides that “assignments” will be made with the consideration of the following:

- (1) the needs of the program or department/unit in the areas of teaching, research and services;
- (2) the employee's qualifications and experiences, including professional growth and development;
- (3) the character or complexity of the assignment; and,
- (4) the opportunity to fulfill applicable criteria for tenure, promotion, continuing multi-year appointments, successive fixed multi-year appointments, and merit salary increases.

One of the key issues in this case concerns whether or not the Dean did in fact give due consideration to these factors when he made the

annual assignment in question. Based upon several considerations, I find that this issue must be decided in the affirmative. First of all, the grievant acknowledged that the level of importance of these enumerated factors is evident by their ordering, which places departmental needs in the area of teaching at the top of the list. Moreover, it is beyond legitimate dispute that the Dean is in the best, if not the sole position, to evaluate these factors as they apply to any given assignment.

Second, the University presented clear, credible and virtually uncontested documentary evidence and testimony which fully support a finding that the Article 9.3(a) factors were properly considered by the Dean in making the assignment. Included among these are the Dean's February 9, 2009 correspondence (Union Exhibit 6), the Provost's February 16, 2009 memorandum (Union Exhibit 8), and the Dean's email to the grievant in January, 2009 (Union Exhibit 4), which stated:

"I may have to cut the adjuncts in [the Department of] Philosophy and also the new instructor line that I promised given the fiscal crisis. We don't yet know what the size of the cut will be but we have been asked to prepare for a ten percent reduction, which means almost \$2.3 million for our college. Everyone will be asked to step up to the plate to save the student credit hours which are a big source of revenue for operating the University."

During his testimony the Dean provided a thorough and detailed explanation as to the consideration he gave each of the factors in deciding upon the grievant's 2009-10 teaching assignment. His testimony stands unrefuted.

Finally, an arbitrator's authority to second-guess or overturn a decision that has been made by a Dean or other administrator in a case of this nature is severely restricted by the terms of the Collective Bargaining Agreement. In that regard, the language of Article 20.8(f)(3) provides clearly and unequivocally that where, as here, an administrator has made a decision involving an exercise of discretion, an arbitrator may not substitute his judgment for that of the administrator. Instead, his role is to decide whether the administrator's decision violated the Agreement. Therefore, since the evidence does not support a finding that a violation occurred, or that the decision otherwise constituted an abuse of the Dean's discretion and authority, that decision must be upheld.

Turning next to the "equitable opportunity" argument, it should be noted initially that the grievant admitted that because he was already fully tenured and promoted, the opportunity for a merit increase in the future was the sole issue. In essence, it is the Union's position that Article 9.3(a) and 9.4(d) were violated because the 2009-10 teaching assignments represents an inequitable increase in his teaching load which can deny him an equitable opportunity for a merit increase. I find that this position is untenable both contractually and as a matter of fact.

To begin with, the grievance is at least arguably deficient from a procedural standpoint because a violation of Article 9.4(d) was not set forth in the grievance. As a result, the arbitrator may lack jurisdiction to

consider this argument based on the language of Article 20.8(a)(3), which states that, “[o]nly those acts or omissions in sections of the Agreement identified at the initial filing may be considered at subsequent steps”. However, even if the complaint regarding a violation of Article 9.4(d) is considered to be arbitrable from a procedural standpoint, it must nonetheless be rejected on substantive grounds for several reasons. First of all, the evidence shows that the assignment will not hinder the grievant’s opportunity if a future merit increase is offered. In that regard, the Dean testified that for the year in question the grievant’s assignment will become the basis for his annual evaluation and that 50% of the evaluation would be based on teaching and the remainder on research and services. Thus it is clear that if the grievant satisfactorily performs the duties of his assignment, he will be eligible for a merit increase.

Second, even if the grievant’s concern about the possible loss of a merit increase were valid, there still is no basis for claiming a violation of Article 9.3(a). This provision does not prohibit the Dean from making an assignment that would lessen the opportunity for a wage increase. Rather, it only requires that the Dean consider equitable opportunity as the least of four enumerated factors when making a decision regarding assignments. Although no guarantees are required, the Dean nonetheless testified that he fully considered the merit increase factor and stated that the assignment will have no adverse effect on that factor.

Finally, as the University aptly noted, the argument that the assignment will hinder the grievant's opportunity for a future merit increase is based entirely on speculation and is not ripe for a determination. At hearing the grievant agreed that no wage increase was offered to any faculty nor is any planned. In addition, the UFF representative testified that no known negotiations have occurred which even contemplated 2009-10 merit increase funding. It was also understood and agreed that if the grievant was denied a merit wage increase at some point, he would have the opportunity to file a grievance at that time.

The UFF also argues that the Dean refuses to recognize the Eminent Scholars program as a legitimate program of the University and thus he fails to consider it or its needs as required by Article 9.3(c)(1). This argument is flawed in several respects. First of all, it is based in part on the grievant's mistaken belief that he is in the Eminent Scholars Department, when in fact no such Department exists. By his own admission, his job title, tenure and courses taught all fall within the Philosophy Department and the Chair of this Department oversees class scheduling for his courses. The CBA is based on the premise that all tenured faculty members are members of an academic department and in this case, while the grievant is a member of the Eminent Scholars Program, he is clearly affiliated with the Philosophy Department.

In addition, the Dean testified that he did in fact consider the needs of the Eminent Scholars Program when making the 2009-10 assignment. In that regard, unrefuted testimony established that all Eminent Scholars, including the grievant, were asked to teach additional courses for the academic year. The evidence also reflects that the Dean was dealing with a College-wide fiscal crisis, which required all programs, units and departments to increase productivity, teaching and otherwise, for the year. Thus the question of whether the grievant is in the Philosophy Department is largely irrelevant in this case because the evidence showed that the Dean considered both the departmental and program needs with respect to Article 9.3(a).

The Union has also argued that the University violated the CBA by failing to consider the assignment of others, such as Department Chairs and other Eminent Scholars, when making the grievant's 2009-10 assignment. This argument is undermined by the fact that Article 9.3 makes no mention of consistency among faculty members in assignments. To the contrary it states that, "the University has the right, in making assignments, to determine the types of duties and responsibilities [and] the mix or relative proportion of effort an employee may be required to expend." Article 9.3 does not require the Dean to consider the assignments of others. Having failed to negotiate a provision which makes a comparison of other's assignments as a factor to be considered in

Article 9.3 (a) the Union can not achieve that objective through arbitration.

To support its position with respect to this issue the Union also relied on the fact that non-bargaining administrators (i.e. Department Chairs) were not assigned to teach more than the prior year. The flaw in this argument is that it is not supported by the facts. The Dean denied this allegation and testified that many Department Chairs in the College were in fact required to teach additional classes. In contrast to the grievant, the Dean is in the position to know. Moreover, the grievant admitted that he is not privy to administrators' assignments or their specific duties.

The Union also presented the testimony of Dr. Greenspahn, a Professor of Jewish Studies in the Department of Languages and Linguistics, concerning his teaching load for 2009-10. Even assuming for the sake of argument that other Eminent Scholars' assignments were relevant, this witness is not a valid comparator because he does not teach the same classes as the grievant and is not in the same academic department.

Turning next to the Union's reliance upon a past practice under the terms of which the grievant has consistently taught no more than two courses per school year as a basis for sustaining the grievance, I find that this reliance is misplaced for several reasons. As a preliminary manner it

is important to understand what a past practice entails. As traditionally defined and understood in the context of labor management relations, a past practice represents a consistent and unequivocal response to a set of circumstances which occur with sufficient regularity, over such an extended period of time that it is tacitly accepted by the parties as an implied term of the CBA. Evidence of past practice can be used to ascertain the proper interpretation of ambiguous contract language or to fill in the gaps with regard to matters that are not specifically included in the written contract. It is also recognized that once it is established as such, a practice has as much vitality as the written term of the contract itself and must be accorded the same respect as any other term of the Agreement. However, no matter how well established a practice may be it is unavailing to modify contract language that is clear and unambiguous.

When these concepts and principles are applied to the instant dispute the conclusion is inescapable that the practice in question is unenforceable because it conflicts with contract language that is undeniably clear and unambiguous. In that regard, Article 9.3(c) gives the University virtually unfettered authority to make teaching assignments. It provides in pertinent part:

“The University has the right, in making assignments, to determine the types of duties and responsibilities which comprise the professional obligation and to determine the mix or relative proportion of effort an employee may be required to expend on the various components of the obligation.”

Given the indisputable clarity of this language an arbitrator has no other option but to give it its plain meaning and apply it as written. As noted on Coastal FLA Police Benevolent Ass'n. v. The City of Port Saint Lucie, 29 F.P.E.R. ¶ 110, an arbitrator may not consider "facts surrounding past practice unless the Collective Bargaining Agreement is ambiguous". Here, by all accounts, including an acknowledgement by the grievant and the UFF Contract Enforcement Chair, the language of Article 9.3 (c) is clear and unambiguous and there is no need for interpretation. Accordingly, the past practice cannot prevail over the clear language of this provision.

The only remaining issue concerns the Union's argument that increasing the grievant's course load beyond one course per term is in violation of the terms of his employment set out in a May 1, 1990 letter to him from then-Provost Leonard Berry, which includes the following:

"You propose many exciting activities which will require significant time. However, one of the legislatures' purposes in establishing the Endowed Chair Program was to bring students in contact with distinguished scholars. Therefore, teaching one course a term starting in January, 1991 is appropriate."

In essence it is the grievant's position that the terms of this letter should supersede any contradictory provision of the CBA because he relied upon his interpretation of the letter when he accepted the position that he was offered at FAU. Based upon several considerations, I find that the grievant's position is legally and factually unsustainable. First of all, the

parole evidence rule prohibits the consideration of such extrinsic evidence when the applicable language of the negotiated CBA is unambiguous. As previously explained, the language at issue here clearly meets that standard. Under the terms of Article 9.3 (c), the assignment of duties is a clearly defined management right. That being the case, the parole evidence rule precludes an arbitrator from looking to extrinsic evidence such as the May 1, 1990 letter concerning the terms of the grievant's employment or past practice to ascertain its meaning.

Second, the CBA specifically limits an arbitrator's authority to consider such extrinsic evidence to situations where there is a need for an interpretation of ambiguous language. It states in pertinent part in Article 20.8 (f)(3):

"The arbitrator shall neither add to, subtract from, modify, or alter the terms or provisions of this agreement. Arbitration shall be confined solely to the application and/or interpretation of this agreement and the precise issue(s) submitted for arbitration."

The parties agree that interpretation is not an issue herein and that only the application of the relevant language of the CBA is before the arbitrator. Accordingly, the CBA requires the exclusion of parole evidence in this case.

Third, even if the parole evidence were to be taken into account, it does not conclusively establish that the grievant's initial assignment was intended to be permanent. In that regard the evidence shows that when the grievant was hired he asked Dr. Berry for a temporary release from

his teaching duties in order to get settled into his new job. Dr. Berry denied that request and assigned the grievant to teach two classes per year starting in January, 1991. Dr. Berry testified that this was the "minimum" the grievant would have taught and it was based on a request for a reduced teaching load by the new professor and the needs of the College at that time. He also made it clear in his testimony that the arrangement was not intended to be permanent and that to do so it would conflict with contract language regarding annual assignments.

Dr. Berry's contention that the initial assignment was not intended to be permanent is also supported by the language of the letter itself. The letter is qualified rather than absolute and it states that the initial teaching assignment "starting in January, 1991 is appropriate". If the assignment was permanent and not dependent upon the fluctuating needs of the department, the words "is appropriate" and any date would have been omitted. Thus, the language is consistent with Dr. Berry's explanation that he could not anticipate what the needs of any college or department would be in future years at the time the letter was written.

Finally, even assuming for the sake of argument that Dr. Berry intended to provide the grievant a permanent limited teaching assignment, he was legally prohibited from doing so because it would circumvent the clear language of the CBA. It is beyond legitimate dispute that a University official has no authority to enter into an agreement which

would create special terms and conditions of employment for a member of the bargaining unit. Since the negotiated CBA governs the wages, hours and other terms and conditions of employment for all of the members of the bargaining unit, Dr. Berry lacked the ability to deviate from the annual assignment provision in Article 9.

In support of its position that Dean Berry lacked the authority to alter the CBA via his 1990 letter the University submitted a recent decision in a case that arose at the University of South Florida. In that case a tenured professor and chair at USF sued the University alleging that letters exchanged with the Dean before the professor began his job purportedly set the terms and conditions of employment and were later violated. Pappas v. FLA Bd. of Educ., Case No. 01-010697 (Hillsborough County Circt., July 9, 2004). In that case the court held that the letters from the Dean "do not constitute an enforceable agreement." Id. at p.4. "[T]he authority of [the] Dean. . . to agree to terms of employment with [the] professor were governed by State law. . . and the CBA." The court went on to say that "because the letters contained terms and conditions that are in clear conflict with the authority. . . they are not binding on USF". The court also noted that since the professor's employment was governed by annual contracts in conjunction with the CBA, the terms and conditions of his employment changed every year.


The facts of the present case are nearly identical. The grievant's assignment is issued annually by the Dean as required by the CBA and may change each year or stay the same. Even if the 1990 letter from Dr. Berry did state that the grievant's initial assignment was permanent and unchangeable, it is not binding on FAU because it is in direct conflict with Article 9 of the CBA. As the Court in USF made clear, no letter of understanding issued by a College administrator can supersede or circumvent the CBA.

In sum and in short, the Union has not met its burden of proving that the University violated either Article 9.3 (a) or 9.4 (d) of the Collective Bargaining Agreement when it increased the grievant's teaching assignments for the 2009-10 school year. Accordingly, for the reasons set forth and explained above, the grievance must be denied.

AWARD

In accordance with the foregoing opinion and for the reasons set forth therein, the grievance is denied.

STANLEY H. SERGENT
ATTORNEY • ARBITRATOR



Stanley H. Sergent
Arbitrator

Sarasota, Florida
December 19, 2009