

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY ARBITRATION TRIBUNAL

In the Matter of:

WAYNE COUNTY COMMUNITY COLLEGE,
Employer,

- and -

AAA No. 54 390 00196 11

Retirees Class Selection

WAYNE COUNTY COMMUNITY COLLEGE
FEDERATION OF TEACHERS,
Union.

OPINION AND AWARD
OF ARBITRATOR

APPEARANCES:

For the Employer

James Zeman, Esq.
Bellanca, Beattie & DeLisle
20480 Vernier Road
Harper Woods, MI 48225

For the Union

Mark H. Cousens, Esq.
26261 Evergreen Road
Suite 110
Southfield, MI 48076

OPINION AND AWARD OF ARBITRATOR

This matter was heard at the Southfield, Michigan offices of the American Arbitration Association (AAA), on November 2, 2011, before arbitrator Nora Lynch, selected by the parties through procedures of AAA.

At the hearing both sides were represented and were afforded full opportunity to examine and cross-examine witnesses and to present evidence and arguments on the issue. Briefs were filed by both parties and the record closed as of January 11, 2012.

THE GRIEVANCES:

Grievance Number 005-10 alleges that retirees from the Michigan Public School Employees Retirement System were denied the opportunity to teach classes they had previously selected. Grievance Number 006-10 alleges that full-time and part-time faculty were removed from the seniority list and/or not allowed to select classes in violation of Article XV of the Master Agreement. As “Facts Leading to the Grievance,” the Union states the following:

At the class selection for Spring 2011 recent retirees from the Michigan Public School Employees Retirement System were denied the opportunity to select classes for Spring 2011. Part time instructors were dropped from the seniority list. In some instances instructors had not yet retired or had been retired for more than the month of separation mandated by Michigan Law. Retired full time instructors were told they could not select. The Vice-Chancellor for Educational Affairs indicated the faculty were not allowed to select because such selection was in violation of state law.

The Michigan Public School Employees Retirement System mandates that retirees not work within the month of their effective retirement date. Since Spring 2011 classes will not begin until January 2011 none of these faculty will be working within the month of their effective retirement date. There has been no change in the Michigan law that would affect the way retirees have previously been allowed to select or teach.

RELEVANT CONTRACT PROVISIONS:

ARTICLE IV CONFORMITY OF LAW

A. This Agreement is subject in all respects to the laws of the State of Michigan and the United States with regard to the powers, rights, duties, and obligations of the Employer, the Federation, and the employees in the Bargaining Unit.

B. In those instances where any state law is contested, the provisions of that law shall be implemented until such time as a court of competent jurisdiction declares it to be unconstitutional, null, or void.

C. In the event any provision of the Agreement shall at any time be held contrary to law by a court of competent jurisdiction from whose final judgment or decree no appeal has been taken within the time provided for doing so, such provision shall be void and inoperative. The parties shall meet for the purpose of rewriting directly affected provisions of this contract and those provisions only. However, all other provisions of this Agreement shall continue in effect and such court determination shall not affect any other portion of this Agreement.

* * *

ARTICLE XV ASSIGNMENTS

F. ASSIGNMENT PRIORITIES

The following order of preferences shall be followed for determining who shall receive particular instructional assignment provided that all selections are made in conformity with the provisions of this Article including but not limited to section B(1)d. Class selection for all part-time instructors shall proceed in descending seniority order. Each instructor shall select his/her assignment in round-robin fashion, selecting two (2) classes each time until an instructor's maximum load is reached. Seniority order shall be followed within each of the below listed priorities:

* * *

5. Qualified full-time Faculty members of Wayne County Community College District retired under the Michigan Public School Employees Retirement System who is selecting class assignments. Seniority is determined by the number of years teaching at the College. These individuals shall be limited to two (2) classes each. Beginning with the summer 2011 selection, qualified full-time faculty members retired under MPSERS shall be allowed to select up to three (3) classes per semester, but no more than six (6) classes per academic year.

* * *

9. Qualified part-time Faculty retired under the Michigan Public School Employees Retirement System with 100 or more hours of seniority who are selecting class assignments. Seniority is determined by the number of equivalent years of teaching at the College. These individuals will be allowed to select two (2) classes with a maximum of six (6) contact hours. Part-time retirees with two hundred (200) or more credit hours of teaching at the College will be allowed to select up to three (3) classes with a maximum of twelve (12) contact hours during any semester.

PUBLIC ACT 75 OF 2010

An Act to amend 1980 PA 300, entitled “An act to provide a retirement system for the public school employees of this state....

Sec. 61

(8) Notwithstanding any other provision of this act, for any retirant who retires on and after July 1, 2010, and following a bona fide termination, including not working in the month of the retirant’s retirement effective date, and who becomes employed by a reporting unit and the retirant’s amount of earnings in a calendar year exceeds 1/3 of the retirant’s final average compensation, the retirant shall forfeit his or her retirement allowance and the retirement system subsidy for health care benefits from the retirement system for as long as the retirant is employed at the reporting unit. Any retirant who has forfeited the retirement system subside for health care benefits and wants to retain health care benefits shall pay the retirant’s and retirement system’s costs for such health care benefits. Upon termination of employment at the reporting unit, the retirement allowance and health care benefits shall resume without recalculation.

Sec. 81b(1) Notwithstanding section 81, a member may retire with a retirement allowance computed according to this section if all of the following apply:

(a) The member files a written application with the retirement board within the incentivized retirement application period stating a retirement allowance effective date that is on or after July 1, 2010 but not later than September 1, 2010. A member may withdraw a written application submitted by a member on or before June 11, 2010. A written application submitted by a member and withdrawn on or before June 11, 2010 is irrevocable.

* * *

(2) Upon his or her retirement as provided in this section, a member who retires with a retirement effective date on or before September 1, 2010 shall receive a retirement allowance equal to the member's number of years and fraction of a year of credit service multiplied by 1.6% of the member's final average compensation if the final average compensation is \$90,000.00 or less and the member is eligible to retire under section 81 with a retirement allowance that is not subject to reduction under section 84(2)....

OFFICE OF RETIREMENT SERVICES
Public Schools Employees Retirement System

Working After you Retire

If you return to work and earn wages from a *participating Michigan public school*, you may be subject to *employment restrictions* or *earnings limitations* as explained below.

* * *

Employment Restrictions

You may not work within the month of your retirement effective date (even as a volunteer) for a participating public school. If you anticipate working for the state of Michigan in the month of your retirement effective date, additional restrictions could apply if you transferred state of Michigan service that was used in your pension calculation. Contact ORS for details before completing your retirement application.

Note: You must have a bona fide termination of employment before your retirement effective date. A bona fide termination is a complete severing of your employee/employer relationship, and you cannot have a promise of reemployment or a contract for future employment in place prior to your termination of employment.

FACTUAL STATEMENT:

The Wayne County Community College Federation of Teachers represents a bargaining unit of full and part-time instructional employees of the College. The current collective bargaining agreement covers the period from January 1, 2010 to December 31, 2012.

For each of the three semesters (fall, winter, and summer) full-time and part-time instructors select classes in seniority order from available classes based on their preferences and qualifications. As detailed in Article XV(F) of the contract, Assignment Priorities, qualified faculty retired under the Michigan Public School Employees Retirement System are included in the selection process, with seniority determined by the number of years teaching at the College, and select classes after current employees have made their selections.

On May 19, 2010, the Governor signed into law Public Act 75 of 2010, amending the Michigan Public School Employees Retirement Act (MPSERA). To encourage public school employees to retire in 2010, the changes in the law included a one time change in the retirement multiplier, from 1.5% to 1.6% for eligible employees choosing to retire during the July 1, 2010 through September 1, 2010 window. The Act was also aimed at discouraging “double dipping,” in which an individual retires and collects his or her retirement allowance while continuing to work for the same entity following retirement. For those public school employees retiring after July 1, 2010, including those taking advantage of the retirement incentive, the law required a “bona fide termination” of employment.

The Office of Retirement Services (ORS) is responsible for overseeing the retirement system for public school employees. The ORS maintains a website to keep employees informed of the retirement process and any restrictions or limitations involved. One restriction imposed by the ORS even prior to the statutory requirement found in PA 75 required that retirees be off the payroll for 30 days before they would be eligible to teach again. This rule has been historically followed by the parties. After the passage of PA 75, ORS delineated another restriction. On its website under the heading Working after you Retire, it defined the term “bona fide termination” as a complete severing of the employee/employment relationship, without a promise of reemployment or a contract for future employment in place prior to termination of employment. The ORS website repeats this restriction under the heading Retirement Incentive Information FAQs, indicating that for a termination to be bona fide “you cannot have a promise of reemployment or a contract for future employment in place prior to termination.”

After the passage of PA 75 approximately 28 full and part-time faculty resigned during the July 1, 2010 through September 1, 2010 window period to take advantage of the increased pension multiplier. Although they had already selected classes for the fall 2010 semester, the College assigned other faculty to teach these classes which it decided was necessary in order to comply with the amended provisions of MPSERA, requiring a “bona fide termination” of employment.

In the summer of 2010 the usual class selection process was conducted for instructors to select classes for the spring 2011 semester. At that time a number of recently retired individuals who attempted to select classes were turned away by the College under the premise that to permit these retirees to pre-select classes would have constituted an acknowledgement of a promise for future employment in violation of PA 75. The retirees were informed that they would need to reapply in order to teach at the College. Those who chose to do so were hired by the College.

POSITIONS OF THE PARTIES:

The Union:

The Union asserts that the Employer violated the agreement by imposing a condition upon the rights of certain retirees to continue to work on a part-time basis. Under the contract, and long standing practice, retirees have the unfettered right to work if work is available. According to the Union, no part of PA 75 prohibits a public employer from employing a retiree. The Union disputes the Employer's position that after July 1, 2010, as a condition of the receipt of a retirement allowance, a person must agree to permanently separate from his or her employer. The Union maintains that the addition of the phrase "bona fide termination" to the law provides the Employer no rights and imposes on it no obligations. Even if it could be found that PA 75 mandates a permanent separation, the statute does not supersede the collective bargaining agreement. Further, the Union argues that it is not the role of the College to enforce the pension law.

The Employer:

The Employer maintains that removing the grievants from pre-selection of classes did not violate the collective bargaining agreement but was in conformance with the PA 75 requirement of a "bona fide termination." The College has traditionally followed the rules and procedures of the ORS and is entitled to defer to the meaning of the statute published by the ORS. In this case, the ORS has specifically interpreted "bona fide termination" to mean a complete severance with no promise of future reemployment or contract for reemployment in place prior to termination of employment. A public employer cannot simply ignore the directives of the ORS, the agency responsible for administering the pension system. The Employer argues that the operative provisions of PA 75 supersede the asserted rights of the grievants under the terms of the collective bargaining agreement. The collective bargaining agreement specifically defers to state law in Article IV (A) and in any event the decisions of arbitrators are subject to and governed by external laws.

DISCUSSION:

The parties agree that Public Act 75, amending MPSERA, was intended to encourage public school employees to retire by making a one-time enhancement in the retirement multiplier, and was also aimed at preventing the practice of "double-dipping," whereby public employees collect a retirement allowance while continuing to be employed by the same entity. They disagree on the interpretation and application of the phrase "bona fide termination" added by the amendments. The Union asserts that this phrase imposes no obligation on the Employer, and its application by the Employer preventing retirees from utilizing the pre-selection process violates the contract. The Employer maintains that it is following the ORS interpretation and directive, as it has in the past, which requires a complete severing of the employee/employer relationship, with no promise of reemployment or contract for future employment.

The phrase “bona fide termination” is not specifically defined in PA 75, however the ORS, the agency responsible for administering the state pension system for public school employees, has done so. Although the Union charges that the Employer is giving this phrase an importance not intended by the legislature, the Employer is appropriately following the definition and directives of the ORS as it has in the past. The ORS specifically defines “bona fide termination” as a complete severing of the employee/employment relationship with no promise of reemployment or contract for future employment. This limitation is clearly set forth on the ORS website available to those considering retirement after July 1, 2010. By attempting to follow the order of preferences for pre-selection of classes contained in the contract, retirees are relying on their previous seniority and relationship with the College, and essentially receiving a promise of reemployment. Under the ORS definition of “bona fide termination,” for the Employer to allow this would violate the statute.

Article IV(A) of the contract expressly incorporates state law, providing that the agreement is subject in all respects to the laws of the State of Michigan and the United States. Thus in interpreting the contract, an arbitrator must consider, and avoid conflicts with, external law. Whatever occurred in the past with respect to priorities given to retirees who return to teach has been changed by PA 75. The amendments to the MPSERA altered the relationship of retirees to the Employer by requiring a complete break in employment as a condition to receiving retirement benefits. By virtue of this change in the law, the provisions of Article XV(F), Assignment Priorities, no longer apply to those who retire after July 1, 2010.

It is true as asserted by the Union that no part of PA 75 prohibits a public employer from employing a retiree. However, those individuals who retired under the provisions of PA 75 have not been prohibited from working for the College on a part-time basis. In order to give effect to the statutory amendments, the Employer has legitimately required that they reapply.

I conclude that by eliminating the privilege of pre-selection of classes for the grievants, the Employer is deferring to the statutory requirement that retirees make a “bona fide termination” of employment, and is not in violation of the collective bargaining agreement. Accordingly, the grievances are denied.

AWARD:

The grievances are denied.

Nora

Lynch/s/

Arbitrator

Dated: February 13, 2012