AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

ARBITRATION OPINION

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT, BOARD OF TRUSTEES

April 26, 2012

-and-

Case No. 54 390 00758 11

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT, FEDERATION OF TEACHERS AFT, LOCAL 2000

Subject: Salary Adjustments for Masters Degree Holders

Statement of the Grievance: "In accordance with ARTICLE XI, Grievance Procedure, we are submitting Grievance #009-11 Francine Rouleau and Sarah Slobodzian and all others similarly situated faculty

"FACTS LEADING TO GRIEVANCE: Grievants have requested MA+30 pay based on the contract and [the Decision of Arbitrator Robert McCormick in AAA Case No. 54 390 00886 07] but the college has denied them until April 6, 2011. On that date personnel action notices were issued changing their pay to MA=30. The college indicated it would not make the pay retroactive.

"GRIEVANCE: Article XXVIII of the Master Agreement states that holders of two year master's degrees of 50 semester hours or more of earned graduate credit and holders of three year graduate professional degrees of 80 semester hours or more of earned graduate credit shall be credited for salary purposes as being on the Master's Plus 30 Semester Hour Schedule...

"The college is now paying the 2 named grievants at the MA+30 level but the pay should be retro-active to date of hire.

"RELIEF DEMANDED: The college provide to the Federation a list of everyone in the college who has a two-year master's degree of 50 semester hours or more.
Anyone with such a degree to be paid at MA+30 retroactive to date of hire.
All newly hired faculty be paid at MA+30 rate."

Contract Provisions Involved: Articles XI, XXVIII of the January 1, 2010 - December 31, 2012 Master Agreement

Appearances:

For the Employer: James C. Zeman, Attorney
Bellanca, Beattie & DeLisle, PC

For the Federation: Gillian H. Talwar, Attorney
Mark H. Cousens Law Firm

Grievance Data:	**Date**:
Grievance Filed:	April 12, 2011
Case Heard:	February 9, 2012
Briefs filed, Hearing Record Closed	April 18, 2012

Statement of the Award: The grievances of Sl Slobodzian and F. Rouleau are granted. Each was entitled to h ave ben paid at the Masters plus Thirty level from her respective date of hire. The College is ordered to make them whole for their loses atributable to the eror in placing them at an improper pay level from that date forward.

BACKGROUND

This case concerns a dispute about the payment of the "Masters Plus 30" wage rate to certain faculty members. Grievants S. Slobodzian and F. Rouleau, Instructors, were hired in the Fall of 2005 and 2006, respectively, as adjunct faculty (not full time).[1] Each possessed a Masters in Fine Arts Degree (MFA). It is undisputed in this record that in accordance with the Agreement each should have been paid at the Masters plus 30 rate at her date of hire. That did not happen. Instead, each was paid at the Master's pay grade, approximately a six-dollar-per-hour lower figure.

Ultimately, in April 2011, the Employer corrected Slobodzian's and Rouleau's current hourly rate to the proper [Masters plus 30] amount. However, it denied their demand for a retroactive payment, i.e., to remedy the under-payment in their wages for the time between their hire dates and April 2011, a period that extended over approximately five years-eight months for Slobodzian, a year less for Rouleau. The College's refusal of retroactivity triggered the grievance that is the subject of this arbitration.

The Employer contends the Grievants knew or should have known about the error in their wage payment but instead they "sat on their rights". It urges their "prolonged inaction divests the Federation and its members of the right to hold the College responsible for unintentional errors in setting a pay rate." The Employer refers to a history of a resolution of similar disputes that should have alerted Grievants to their issues. This Opinion will briefly recount this history.

The first dispute, in 2006, involved a grievance over the payment of different pay levels to identically credentialed faculty in the Dietary Technology Department (DT). M. Glazer, the arbitrator, ruled that the disparity in wage payments amounted to an unreasonable exercise of discretion and ordered the College to pay similarly credentialed faculty at the same pay level.

The DT case alerted the Federation to the likelihood of other faculty not being paid a proper rate and prompted the distribution of a survey of its members in the Fall of 2006 to determine who, if any, were not receiving the appropriate pay rate. The Federation, using the information from the survey, then filed a grievance in January 2007, naming faculty whom it identified from the survey and believed had been assigned incorrect pay rates.

Ultimately, the case involved eight grievants. R. McCormick was the arbitrator. The faculty members came from geology, fine arts/humanities, mathematics, sociology, computer

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[1]The Federation refers to this case as a "clas action", covering "other similarly situated" members. Union Exhibits 3 - 16 identify the persons curently known to be seking similar relief.

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science, history. Most if not all had attempted individually to have their pay rates corrected without success, either by contacting HR or filing a Faculty Salary Adjustment Request (FSAR). In several instances their inquiries had gone unanswered, in others they were denied.

McCormick granted the grievances of seven grievants; the eighth was remanded to the parties due to lack of sufficient information on the relatedness of his graduate work to the subject of his teaching area(s).[2] The seven successful grievants were placed on the masters plus thirty pay level back to their dates of hire or the date of confirmation of the degree by receipt of transcript.

The Federation and the Grievants in the instant case assert a right to be covered by the principle enunciated in the McCormick decision, namely, the College's contractual obligation to compensate faculty in accordance with the Agreement and to be made whole from the start. The Employer disagrees, stating that neither the Federation nor the grievants in this case took action to limit their losses, to alert the College to its mistake(s), to cure the situation. Most particularly, it notes that one of the grievants in the McCormick case, C. Melikan, is in the same arts/humanities area as are Slobodzian and Rouleau. They were aware, or should have been, of Melikan's part in the 2006 survey and in the grievance arbitration before arbitrator McCormick and its outcome, yet they made no effort to participate in the survey or to sign on as grievants before McCormick in order to remedy their claims.

DISCUSSION AND FINDINGS

The sole issue in this dispute is whether Grievants - each possessing at their date of hire an MFA placing them according to Article XXVIII of the Agreement at the Masters Plus 30 pay grade - are entitled to the Masters Plus 30 pay grade from the date of hire. The Employer makes several arguments to support its denial of this Grievance.

Timeliness. The Employer contends the Grievance is untimely. It notes the claimed violations go back to August 2005 (Slobodzian) and August 2006 (Rouleau), well past the ten-to-twenty day filing period provided for in the Agreement. At the arbitration hearing the Employer stated:

> Our bottom line position is that once an instructor has allowed - has acquiesced in a pay rate for a significant period of time that this grievance is untimely and should not be entitled to any adjustment. (Tr 26)

I find this argument to be without merit. First, the circumstances of their employment. The instructors do not work in a close community or department where inter-collegial contact is present. The testimony is that they have faculty-wide meetings once or twice a year. Grievants are adjunct faculty who come and go; there are five campuses and the opportunities for sharing information are minimal. Inquiring from another person what his/her pay grade is could be construed as intrusive. As to the 2006 upgrade to fellow art instructor Melikan, he had a 2001

[2]There is some discrepancy in the numbers of employee-grievants whose grievances were sustained. The Union Brief speaks of ten; I counted six, with one remand and one remedied back to the date of receipt of her official transcript, because she "obtained additional graduate credits after starting employment with the college."

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hire date; his longer service could well have been believed to explain his higher pay. The Employer's near-certainty that Grievants had to have known of Melikan's increase to Masters Plus Thirty in 2006 is an inference unsupported by record evidence.

Second, a critical factor is that the Federation does not receive information about the pay grades/credentials of newly hired faculty and is thereby unable to monitor pay level assignments. Hence it could not know, as of the date of hiring, or for that matter any time, what faculty members were being shorted. The party in possession of that information - the College - had and continues to have a continuing obligation to assure compliance with Article XXVIII. Certainly the FSARS filings and various inquiries from members preliminary to the McCormick arbitration matter should have alerted the payroll office to review records to determine if the problem of mistaken grade level assignments was widespread and required attention beyond the eight named grievants. (I believe the initial filing involved many more employes.)

Third, it is of some weight that the Agreement does not expressly cite the MFA as entitling instructors to the Masters Plus 30 pay grade. Rather, it speaks in terms of numbers of hours earned/credited. As Rouleau testified when she was asked why she did not respond to the Federation's Survey,

> I had just been hired and I just assumed that the Wayne County paid me appropriately and I just -- I didn't question the authority of Wayne County at that time. (Tr 54)

Fourth, a party, the College, asserting laches - i.e., an unreasonable delay in asserting a claim - should be able to demonstrate timely responses ("clean hands") to employees' inquiries/claims. The record in this case - including the arbitration opinions from the Dietetics Department case and from Arbitrator McCormick - cites numerous instances when employees submitted FSARS and letters asking about their pay levels and their inquiries were either answered months later or not at all.

Fifth, Grievants seek retroactivity in their grievance, filed April ll, 2011, just days after they received an adjustment in their pay but were denied retroactivity. Viewed in this light, their grievance could be said to be timely. Finally, arbitrators accept the doctrine of a continuing violation, that each erroneous payment constitutes a new violation.

Grievants' Failure to Respond to Survey and Participate in Grievance before McCormick. The College cites these "failures" as reason to deny this grievance. I do not agree that Grievants' non-participation in the Survey or Grievance constitutes a bar to seeking the benefit or protection of the McCormick Award. Neither the Federation nor the College placed the faculty on notice that non-participation in these activities - i.e., responding to the Survey, signing onto the Grievance - would result in forfeiture of rights to the arbitral remedy, if awarded. Given Grievants' somewhat limited connection to the academic community, together with their limited familiarity with management-union matters - demonstrated in their testimony - they appeared to believe that they would be dealt with "appropriately", i.e., win the same benefit as that awarded to similarly credentialed faculty members. That would be consistent with the theory in the Glazer case as well as the principles enunciated in the McCormick Opinion..

The McCormick Opinion/Award. As noted earlier, Grievants in the McCormick case who possessed the contractual credentials for Masters Plus Thirty pay grades but who had been paid at the Masters level were made whole to the date of hire (or in the case of a grievant whose credentials were earned after hire, to the date of receipt of transcript). The Arbitrator, addressing the College's argument opposing the grievance, wrote:

> The College argues that it established the grievants' initial wage rates in good faith, that the grievants, all college faculty members, 'have a significant burden to monitor their own pay rates.' and, if they believed their compensation was not what it should be, then promptly to notify the Union and, if necessary, to grieve the matter. The Union also has, the College argues, an obligation to keep its membership apprised of applicable pay rates.
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> The infirmity in this argument is that the College was bound not by a good faith standard in compensating instructors, but by the actual standard set forth in the contract. Put differently, the College agreed in Article XXVIII(D)(1) to pay part-time faculty according to the rates set forth in the contract, dependent upon their degrees and, in the case of the masters plus 30 credits category, additional credits earned 'in excess of and subsequent to those hours earned for the Master's Degree." [Article XXVIII(B)(2)©] Thus, it was incumbent upon the College to compensate these instructors ab initio at the level to which their credentials entitled them. While it is also true, as the College points out, that employees have some obligation to monitor their pay and benefit levels, **their failure to do so under these circumstances** cannot undo the Employer's prior obligation to compensate them at the agreed-upon rates from the outset of employment. [Bold-face added]

The College insists Grievants are not entitled to benefit from the McCormick award and its grant of retroactivity. The Employer refers to the "circumstances" cited by McCormick that excused the employees' "failure to monitor their pay...levels." It contends participation by the grievants in the McCormick case in the Federation survey formed a "predicate" for the relief awarded them by McCormick, that it was the "circumstance" he considered. This is speculation at most. In fact, McCormick does not elaborate on these "circumstances" and he could be just as well be referring to the College's lengthy delays in responding to FSARS and other employee inquiries as reasons that the purported obligation to monitor one's pay level should not apply to grievants in his case. No rationale in the McCormick decision supports the College position here.

The College further argues the doctrine of "res judicata", asserting that the remedy sought by the grievants is barred. The Federation is not seeking to relitigate the controversy decided in the McCormick case. McCormick affirmed that it is the College's obligation that all unit members are entitled to their contractually described rate of pay *ab initio*. The Federation can be said to be seeking enforcement of the McCormick award whereas the College is attempting to relitigate the matter.

I find Slobodzian and Rouleau are entitled to be made whole for the losses in compensation attributable to the Employer's erroneous placement of them in the Master's pay grade rather than the Master's Plus Thirty grade and such adjustment must be made back to their respective dates of hire.

As noted earlier, this grievance is filed by the Federation on behalf of Slobodzian, Rouleau and "all others similarly situated faculty". The "others" are identified in Union Exhibits held in reserve. It was understood that with the issuance of the decision in this case the parties would then review the records of the "similarly situated" members to determine a remedy, if any. At the parties' request I will retain jurisdiction for sixty days to hear appeals from this subsequent proceeding. Such appeals are to be directed to the offices of the American Arbitration Association.

AWARD

The grievance of Slobodzian and Rouleau are granted. The College is directed to make each grievant whole for her losses attributable to the Employer's failure to place them in the Masters plus Thirty pay level from their date of hire. The adjustment is to be made back to their respective dates of hire.

RUTH E. KAHN, ARBITRATOR