AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR TRIBUNAL

In the matter of:

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT,
Employer,

-and-

AAA 54 390 0018011
Raised Caps

WAYNE COUNTY COMMUNITY COLLEGE, AFT LOCAL 2000
Union.
_____/

OPINION AND AWARD OF ARBITRATOR

APPEARANCES:

For the Employer

James C. Zeman, Esq.
Bellanca, Beattie & DeLisle, P.C.
20480 Vernier Road
Harper Woods, MI 48225-1411

For the Union

Gillian H. Talwar, Esq.
Law Offices of Mark Cousens
26261 Evergreen, Ste 110
Southfield, MI 48076

OPINION AND AWARD OF ARBITRATOR

This matter was heard on July 19 and August 29, 2012, at the offices of the Michigan Employment Relations Commission, Detroit, Michigan, before arbitrator Nora Lynch, selected by the parties through procedures of the American Arbitration Association.

At the hearing both sides were represented by counsel and were afforded full opportunity to examine and cross-examine witnesses and to present evidence and arguments on the issue. A transcript was made of the proceedings. Briefs were filed by both parties and the record closed as of December 14, 2012.

THE GRIEVANCE:

In the grievance filed on September 1, 2009, the Union alleges a violation of Article XVII, Class Size, of the collective bargaining agreement as follows:

> The Employer introduced classes into the schedule with caps 75 and 90. According to Article XVII, classes greater than or equal to 50 should be split into two approximately equal sections. As of the week before the start of classes, classes had 75 and 90 students.
>
> According to Article XVII D as of the close of late registration for any semester, the class, unless it is a telecourse, shall be divided into two approximately equal sections. Telecourses and interactive video courses will be divided when the headcount in the course is greater than or equal to sixty (60) as of the close of the second week of class.

The relief requested is that classes be split into 2 approximately equal sections of no more than 50 students or instructors be paid for an additional class. [1]

At the opening of the arbitration hearing, counsel for the Union also asserted that despite repeated requests, the Employer failed to provide enrollment data and, as a result, the Union can prove the contract violation but not the extent of the violation. [2]

RELEVANT CONTRACTUAL PROVISIONS:

January 1, 2007-December 31, 2009 Master Agreement

[1] The Union is seeking a remedy for Fall 2009, Spring 2010, and Summer 2010 semesters only since the dispute was resolved in the 2010-2012 contract.

[2] The Union filed an unfair labor practice charge with the Michigan Employment Relations Commission regarding the information request which was heard in August 2012.

Article XVII, CLASS SIZE

A. During the academic year the regular obligation headcount maximum shall be thirty six (36) students except that in English composition, and in Speech classes the regular obligation headcount maximum shall be twenty five (25) students, and further provided in laboratory and shop classes the regular obligation headcount maximum shall be the smaller of the following: the number of stations available for students to work at or thirty six (36) students.

B. The Employer shall give special consideration to the problems pertaining to the introduction of new courses, to the sustaining of advanced courses essential to the integrity of particular programs and/or departments, to commitments made to students enrolled in sequential programs, to changes in physical facilities of the College, and to experimental teaching methods, as these problems pertain to class size. In order to solve some of these problems, the regular headcount maximum may have to be increased in particular situations. However, the regular obligation headcount maximum as stated above shall be increased only after prior consultation with the Federation and after prior written approval of the Federation.

C. There shall be no additional payment for students in excess of the regular obligation headcount maximum per class unless students are placed without the instructor's permission. The instructor shall confirm the admission of additional student(s) in writing. In the event students are placed without the instructor's permission, the Faculty member shall be paid at a rate of thirty ($30.00) dollars per student for each student in excess of the total regular obligation headcount maximum per class, provided class size shall be computed on the basis of students officially listed on the computer produced final grade roster and for whom the instructor records a letter grade or an incomplete.

The Faculty member shall complete the request for compensation, on forms provided by the Employer, at the time of submission of final grades and shall receive compensation within twenty (20) days.

D. In the event that the student headcount is greater than or equal to fifty (50) as of the close of late registration for any semester, the class, unless it is a telecourse, shall be divided into two approximately equal sections. Telecourses and interactive video courses will be divided when the headcount in the course is greater than or equal to sixty (60) as of the close of the second (2^{nd}) week of class.

FACTUAL STATEMENT:

The Wayne County Community College District, Federation of Teachers, AFT Local 2000 (Union) represents a bargaining unit of all full-time and all regular part time faculty members: instructors, counselors, librarians, and coaches at Wayne County Community College District (WCCC or College). The collective bargaining agreement in place when this dispute arose covers the period January 1, 2007 to December 31, 2009.

The College consists of a University Center and five campuses: Downriver, Downtown, Eastern, Northwest, and Western. The student population consists primarily of "non-traditional" students, either older than the usual college student, or at-risk students who may have previously had difficulties with academics.

Background and Definitions:

The College's Educational Affairs Office is responsible for schedule development in collaboration with the chief academic officer. During schedule development "caps" are established, the maximum number of students allowed to register for a course. Considerations include the type of course, for example, lecture or laboratory, as well as the size of the available classroom. The fact that there is a cap, or a maximum number of students allowed to register for a class, does not necessarily mean that it is anticipated that the class will be that large, but is done to accommodate the constant enrollment changes during registration and to insure that ultimately there will be an adequate number of students in the final class roster.

The term "headcount" signifies the actual number of students who are in a class, however the parties disagree on when headcount is established. The number of students in a particular class may change after registration due to a number of factors. As discussed more fully below, on-line registration enables students to continually make changes in their schedule to best fit their needs, dropping and adding classes in order to get a particular time slot or faculty member or other reasons. After registration students may develop financial, employment, or transportation problems, making it impossible for them to attend the class. All of these factors make it difficult to readily establish an actual headcount.

An annual report made to the State, the annual activities classification structure report, or ACS report, includes a student headcount report. In this report there are two options for calculating headcount: the last scheduled day of the course, or the last date of the academic period. WCCC utilizes the second option. Section (C) of Article XVII of the contract requires that in order to be compensated for premium payment, class size, or headcount, is computed according to students on the final grade roster who are given a grade.

Headcount is performed by the faculty member physical in the classroom taking attendance. They are required to retain attendance records, for grade appeal purposes and particularly to support "positive attendance" reports required by the federal government. During the first three weeks of a semester, positive attendance is established for financial aid purposes;

if a student does not show up at least one day during the first three weeks they are removed from the course. Only faculty members have access to their class rosters.

Negotiations/Contract History of Class Size Article:

The contracts between the parties have traditionally contained provisions regarding splitting classes and allowing for overload payments when classes go over the contractual maximums. Claude Chapman was employed by WCCC as a counselor and instructor from 1972 until 1992. He was elected President of AFT Local 2000 in 1975 and served in that capacity until 1992. He negotiated all the labor contracts during that period and monitored the administration of the labor agreements with management. In each of the contracts during that period he was party to the negotiation of Article XV, (now Article XVII) Class Size. According to Chapman, the term "headcount" was used because State funding was based on the number of bodies actually in attendance at the school. Their numbers had to be precise because the State would perform an audit and if there was a discrepancy between what was reported and students actually in attendance the State would require reimbursement. At the beginning of the semester faculty members would receive a roster from the administration and would have to match it against the students actually in class. They were given another roster during the semester and again had to match it against actual attendance on the Bureau of the Budget (BOB) date which the State uses to determine funding.

Chapman testified that there were extensive negotiations on the issue of splitting classes. It was not always possible to split a class, based on space, available teachers, and other factors. The provision covering payment for class overloads was included in the contract in order to give faculty some relief when the headcount exceeded the class maximum and when the class was not split. According to Chapman, classroom space was a particular issue back then. The College was renting facilities from the Archdiocese and the Detroit Public Schools and the first permanent facilities were not opened until 1980.

At the time the grievance was filed the language of Article XVII had essentially been the same since the 1992-94 contract. In contracts prior to that time certain change were made in this provision, however each of these contracts provided for overload payments. The language of Article XVII was changed in the 2010-2012 contract. Enrollment for non-distance learning courses is now capped at 75, with no additional students permitted to enroll once that cap is reached. The compensation for students in excess of 50 has been raised and language on splitting a class was dropped.[3]

Registration Changes:

Beginning in approximately 2008, the registration process for students dramatically changed due to the implementation of Webgate, part of the College's Banner computerized system permitting on-line registration. The previous practice of manual registration was a cumbersome one. Registration took place at all five campuses. Students would come in at

[3] The terms of the new contract were applied retroactively to the Fall 2010 semester only.

certain posted hours, look at the printed class schedule, fill out a form for desired courses, and stand in line to register. If the desired class was not available, students would have to get out of line, check the schedule again, choose a different course, and then recycle through the process. Payment for classes was also handled manually, requiring the student to stand in line in another area to make payment and get a receipt. There was a definite begin and end date for registration, as well as a late registration date. Because of the inconvenience manual registration presented, schedule changes were minimal.

Once on-line registration was implemented, most registration took place by this method. On-line registration permits a student to register for classes 24/7, drop and add courses, access financial aid accounts and make payments. Registration opens approximately six to eight weeks before the semester begins. The on-line system allows students to use their computer to easily drop and add courses and access their information instantaneously. As a result, registration numbers are constantly changing and there is no official end date. The terminology "close of late registration" is a term that formerly appeared in the College calendar and schedule but has not been used for some time.

A document entitled "courses taken" (Exhibit 14) is generated by Banner during the registration period, a color-coded snapshot of registration activities in all courses and sections at one particular point in time. For example, Exhibit 14, a 48 page document, was created on 8/31/2010 at 8:53:45 a.m. Johnesa Hodge is the district vice chancellor for institutional effectiveness and information management. She testified that she schedules the daily running of the courses taken report during registration. According to Hodge, the document is for planning purposes and is only a snapshot as of a particular moment and changes constantly; it is not retained and cannot be retrieved from the Banner system. As the individual responsible for the report, she testified that the system does not have the capacity to run this data and information for a past point in time.

Anthony Arminiak has been the president of the Downriver campus for the past five years and has been employed by the College for 18 years in various capacities. Arminiak testified that registration began spiking in 2008 and 2009 due to the economy resulting in significant unemployment. Displaced workers were seeking an opportunity to learn new skills to get back into the work force. Arminiak testified that during the registration period he receives the daily courses taken document. He reviews the document and forwards it to Downriver staff and faculty to review. Because the information is constantly changing he does not retain copies of these reports. Arminiak testified that he has no authority over the Banner computer system and he has access only to one part, to approve requisitions for the Downriver campus. Arminiak also testified that as an administrator he has never been directly involved in splitting a class. He testified that there are huge challenges to splitting a class, including room availability, obtaining certified instructors for the additional class, and the impact of the student's schedule and choice of instructor.

Dr. Debraha Watson has been employed by the College since 1996 and is currently the president of the Northwest campus. She testified that she also receives the courses taken document during registration and reviews it to determine if adjustments are needed to add or drop classes. After reviewing the document she usually discards it because the data changes

minute by minute. She also testified that she did not receive any complaints or inquiries from faculty during the beginning of the fall 2009, spring 2010 or summer 2010 about splitting classes.

Faculty Testimony:

Bea Talpos has been employed by WCCC for 41 years as a full-time faculty member in the political science department and currently serves as the Union's grievance chair. Talpos testified that in September 2009 members of the department came to her complaining that the numbers of students in their classes were significantly over 50 and asking if there was something they could do about it. She advised them that a grievance had been filed. The two campuses most affected were the Western campus and the Northwest campus, both of which had lecture halls which would accommodate large classes. Talpos checked a September 1, 2009 computerized list of political science classes available for enrollment and found three classes capped at 75 and one class with a cap of 90. According to Talpos there were discussions at department meetings with respect to how to handle these large classes since the large number of students required a different approach to the class.

Talpos testified that prior to the 2009 semester she had classes over 50 but did not file a grievance because they were only one or two students over. According to Talpos, a grievance can't be filed over every violation; it was only when numbers increased significantly that the grievance was filed. Talpos testified that students often drop classes that they had originally registered for. Their reasons could include problems with transportation, child-care or employment conflicts. Students can drop courses without being responsible for tuition during the first week of a semester; they can drop courses with no academic consequences until approximately 10 weeks into the semester. Talpos testified that the number of students who originally register for the class may be appreciably different from the number who actually show up for the class. She also testified that it had been at least ten years since the term "late registration" had appeared in the College calendar.

Several other faculty members testified regarding classes assigned to them which went over the maximum headcount designated in the contract. Beverli Varner is a full-time psychology instructor at the Northwest campus. She testified that in the fall of 2009 she taught seven classes with a student maximum headcount of 36 which went over the maximum. One of these classes started with 75 students and ended up with 63 students. The other six classes had final student totals for which grades were submitted in the 40's. Varner testified that she approached someone to ask if the large class would be split but did not recall who it was due to the many changes on the campus at that time. According to Varner she was told that the class was designed to have a large number of students. Varner also contacted the Union but did not request that a grievance be filed. She applied for and received an overload payment for these classes at the end of the semester. Varner did not recall having large classes in the Summer 2010 semester. According to Varner she recalled classes being split in the 1970's and 1980's but did not recall class splitting occurring in the 1990's.

Stella Webster has been employed at WCCC as a part-time political science instructor for ten years. She testified that for the first few years she taught, the number of students in her classes were in the 20's and 30's. Eventually enrollments grew into the 50's and in the fall of 2009 "they exploded." She testified that she sometimes had classes of 70 students. For example, her class roster for American Government in January 2010, showed a total of 73 students. She acknowledged that at the end of the semester that number was reduced to 37, however she testified that that was not the norm and she ordinarily did not lose that many students. According to Webster, when she requested that the large classes be split, the administration denied her requests. She received payment from WCCC for the overloads.

Ellis Ivory is a part-time instructor of history and political science and has worked for the College for approximately 15 years. He testified that normally his classes were between 36 and 40 students. In the fall semester of 2009 he initially had two classes with 74 and 75 students enrolled. He asked the Western campus administration if these classes would be split and was told there was no plan to do so. Ivory also complained to the Union who told him that they intended to file a grievance over the matter. At the end of the semester the number of students in these classes was reduced to 48 and 43 respectively. He applied for and received an overload payment. According to Ivory, he recalled that prior to 2009 there were two to three other classes with more than 50 on the initial roster. He taught the classes and did not request that they be split.

Dr. Peace is the current president of AFT Local 2000 and has been employed by the College for 30 years. He recalled that in 1993 he had a history class with approximately 98 registered students and the class was split with another instructor. According to Peace, the class was split based on the number of students who had registered for it.

POSITIONS OF THE PARTIES:

The Employer:

The Employer raises several arguments with respect to the merits of the grievance. The Employer argues that raising caps and permitting registration up to the caps does not violate Article XVII of the collective bargaining agreement. The Union's focus on caps has no contractual significance since the contract refers to student headcount, not caps. A cap simply defines the number of students who may register for a class. Raising caps over 50 does not trigger the application of Article XVII. Instead it is student headcount which is significant, and this must be determined by faculty members. Because caps do not equate with headcount, the grievance is both facially defective and factually unsustainable.

The Employer also argues that impossibility of performance defeats the grievance. Class splitting language was placed in the contract at a time when there was adequate classroom space and available instructors. Enrollment has now greatly increased, on-line registration has created constant changing in enrollments with actual student headcount unknowable at the beginning of

a semester. To split the class up front would create unreasonable expense and be totally impractical.

The Employer further maintains that Article XVII (D) is ambiguous and obsolete. The term "close of late registration" no longer has any meaning. On-line registration is a fluid process and there is no predictable date when registration closes during any semester. To put the burden on the College to split a class at an undefined point when headcount can only be conjectured would create a harsh, absurd, and nonsensical result, contrary to acceptable rules of contract construction. Further, to split a class when initial registration levels reached fifty could force the College to run classes with ultimately low enrollment, resulting in a waste of public funds and resources.

Another argument advanced by the Employer is that the Union has acquiesced in classes with more than 50 students not being split by the College. Many of the faculty members who testified acknowledged that in the past they had simply gone ahead and taught the class even if there were over 50 students.

In response to arguments made by the Union regarding the refusal to provide enrollment information, the Employer maintains that the information it seeks on enrollment data does not exist at this point in time since the ever changing computerized data is not retained by the College. Further, since the Union waited almost two years to make a written request for information no attempt to preserve the information could be made.

The Union:

Initially the Union contends that the Employer was on clear notice of the Union's complaint. Although the term caps was used in the grievance, there is a very close correlation between headcount and caps. According to the Union, during this period of high enrollment, the high caps are indicative of the fact that headcount will greatly exceed the number requiring classes to be divided.

The Union also disputes that the term "close of late registration" is ambiguous. According to the Union, close of late registration can only be interpreted to mean within the first week of the semester because this is the only time it would make sense to split a class. Further, the Article states that the class "shall" be divided, which is a mandatory term.

The Union also asserts that it has been unable to present the full extent of the contract violation because the Employer has not responded to its repeated requests for enrollment data. The Union rejects the Employer's assertion that the enrollment data requested is unavailable and impossible to retrieve. The Union maintains that it cannot get the information from its own members because it does not know which members are affected and members do not keep records from semester to semester.

DISCUSSION:

The goal of an arbitrator in interpreting a collective bargaining agreement is to determine the intent of the parties. Particularly when there are ambiguous terms the agreement is to be construed as a whole and sections or portions cannot be isolated from each other or the rest of the agreement. Elkouri, *How Arbitration Works,* 5th Ed, 492-93. An interpretation which would lead to harsh or absurd results is to be avoided. An observation of arbitrator Harry H. Platt is particularly relevant here:

> Experience teaches that contracting parties are not always absolutely precise, nor can they be expected to be, in their agreement formulations. Not infrequently, words or phrases are unthinkingly included which, if construed according to their literal meaning would produce results in opposition to the main purpose and object of a provision. This is often true when….some of the language used was drafted by others in a different context and in response to other circumstances and policies.

Platt goes on to comment that it is up to the interpreter to modify the language so as to give effect to the intent of the parties and avoid a harsh result. *Consolidation Coal Co.,* 83 LA 1158 (1984).

At the time the grievance was filed, the language of Article XVII, Class Size, had not changed since the 1992-94 contract. This article was negotiated long before the dramatic changes in registration procedures due to the implementation of on-line registration as well as before major increases in enrollment at the College. These changes must be taken into account in reaching a reasonable interpretation of this Article and avoiding a harsh or absurd result. Although prior to the 1992-94 contract the parties made certain changes to the Article, a provision granting compensation for overloads was always included. According to the Union's former negotiator, even in previous years it was not always possible to split a class. It was anticipated that class size could go over the contractual maximum and splitting might not be possible. The provision on premium pay was included in order to compensate faculty should this occur.

In this case the parties disagree on the application of Article XVII, in particular the terms "headcount" and "close of late registration." The Union maintains that pursuant to contract language, student headcount should be determined at the close of late registration, which the Union defines to mean the first week of the semester. By not splitting classes when the enrollment had gone over the 50 at that time, the Union claims that the Employer has violated the contract. The Employer argues that the language of Article XVII (D) referring to close of late registration has not been used by the College for years and is ambiguous and obsolete. The Employer denies any contract violation, maintaining that to apply contract language as the Union suggests would lead to an absurd and harsh result since actual student headcount is unknowable at the beginning of the semester and to split the class at that point would be totally impractical and impose a financial hardship on the Employer.

I agree with the Employer that the term "close of late registration" is ambiguous and can no longer be applied given the fluctuations in enrollment effected by on-line registration. The contract provides no other guidance with respect to a date to establish headcount for purposes of splitting a class. The Article does state that in order to qualify for overload payment, headcount is established based on the final grade roster. Similarly, for purposes of State reporting, headcount is established on the last date of the academic period. Obviously, these dates will not work for purposes of splitting a class.

The Union's interpretation that the contract mandates a split once enrollment has reached 50 during the first week of a semester is unreasonable, given the effects of on-line registration. The testimony establishes that it is impossible to establish an accurate headcount that early in the semester due to the fact that on-line registration produces a great deal of flux at that time and enrollment figures constantly change. The testimony of the faculty demonstrates that by the end of the semester, headcount in the large classes is often reduced. For example, Ivory testified that in the fall semester of 2009 he initially had classes of 74 and 75 which by the end of the semester were reduced to 48 and 43 students respectively. Similarly in the fall semester of 2009 Varner had one class which started with 75 students and ended with 63; her other six classes were over the student maximum, but under 50. One of Webster's classes which started with 73 students was reduced to 37 at the end of the semester.

To interpret the contract as the Union suggests also ignores the impact on the Employer. Splitting classes which ultimately could be significantly reduced would result in a hardship to the Employer and a potential waste of resources. It could involve substantial expense, including adding faculty, extra classrooms, and possible schedule changes impacting both faculty and students. The Union also appears to have acquiesced in a broad interpretation of this article in the past. There is no evidence that in previous years it sought to strictly enforce the provision on splitting when classes went over 50. According to the testimony of faculty members, large classes were not always split in the past and no grievances were filed. They simply went ahead and taught the class without complaining to administration or requesting that the Union file a grievance. Talpos acknowledged this in her testimony, but stated that a grievance can't be filed over every violation and indicating that the Union didn't act until significant numbers were involved.

With respect to the semesters at issue here, testimony from some of the faculty members indicates that there were instances when classes which exceeded 50 were run without splitting. However, other than these examples the Union has failed to establish that the Employer had a practice of consistently running classes over the maximum during these semesters. The Union justifies this lack of proof by asserting that the Employer has failed to supply requested enrollment information. Employer representatives testified that enrollment data, or the courses taken document, changes daily and they do not retain reports sent to them during registration. The Union asserts that this data is accessible but other than surmise failed to produce any evidence that the information it seeks is available or could be retrieved through Banner. Given the unrebutted testimony of Employer witnesses, and lack of proof by the Union, I conclude that the enrollment information sought is not available.

The major concern of the Union in pursuing this grievance was compensating those faulty members who taught large classes in past semesters. However, a remedy has always been available to them under Section (C), which provides for compensation if class maximums are exceeded when teachers submit the proper paperwork with a final grade roster. The record establishes that faculty members had access to class rosters and attendance records and could have applied for compensation under this section. The faculty members who testified acknowledged that they received this compensation when they properly applied for it. [4]

It is clear that the primary objective of the parties with respect to Article XVII was to keep class size at a reasonable level. If this goal was not achieved, the contract contains two options: split the class, or compensate the faculty for the overload at the end of the semester. The record establishes that there are considerable difficulties involved in splitting a class and particularly in determining at what point a class should be split. This clearly was recognized by the parties when they negotiated changes in Article XVII in the 2010-2012 contract dropping the language on splitting. Given the ambiguity presented by the phrase close of late registration and the corresponding lack of certainty with respect to headcount, I conclude that the only way to reasonably construe this Article is to apply Section (C), which compensates faculty for overloads based on the headcount at the end of the semester. I therefore find no violation of the contract by the Employer. Accordingly, the grievance is denied.

AWARD:

The grievance is denied.

Nora

/s/ Lynch

Arbitrator

[4] The Union introduced two arbitration decisions in which a contract violation was found when on-line classes exceeded 25 students (Exhibits 5 and 6), arguing that these decisions, including the remedy, should be applied to the instant dispute. However on-line classes are specifically governed by Article XXXVI and the arbitrators agreed that Article XVII did not apply to on-line classes.

Dated: January 28, 2013