

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between:

WAYNE COUNTY COMMUNITY COLLEGE

-AND-

Gr: Students/Bea Talpos

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

OPINION AND AWARD

A hearing in the above-captioned matter was held before the undersigned arbitrator, Robert A. McCormick on October 11, 2007 in Southfield, Michigan. At the hearing, the Parties examined witnesses and introduced documentary evidence in support of their respective positions. Thereafter, through Counsel, the Parties submitted written briefs to the arbitrator. This Opinion and Award is based upon careful consideration of this evidence and argument.

APPEARANCES:

Bruce A. Sucher, Esq.

Attorney, Wayne County Community
College

Gillian H. Talwar, Esq.

Attorney, Wayne County Community
College Federation of Teachers

WITNESSES:

B. Talpos

CALLED BY:

Union

G. Swan

Employer

ISSUE:

Did Wayne County Community College (herein, "the College" or "the Employer") violate the collective bargaining contract with the Wayne County Community College Federation of Teachers, AFT Local 2000 (herein, "the Union") by permitting more than twenty-five students to enroll in online courses?

RELEVANT CONTRACT PROVISIONS:

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 obligation 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 \$30.00 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 week of class.

ARTICLE XXXVI

DISTANCE EDUCATION

D. Class Size

The class size for any distance education course which is offered at the District shall be that class size established for the course as taught at the District in a traditional delivery mode, pursuant to Article XVII (A) of the Collective Bargaining Agreement, with the following exceptions:

- b. The class size for any on-line course shall not exceed twenty-five (25) students for the term of this contract

FACTS:

The facts of this case were presented through the testimony of two witnesses: Dr. Beatrice Talpos, Professor of Political Science at Wayne County Community College (herein, "the College"); and Dr. George Swan, Vice-Chancellor of the College.

Dr. Talpos, a faculty member at the College since 1971, teaches courses in Political Science and American History. She has also served as chief negotiator for the Union for two years, as grievance chair for approximately ten years, and as a member of the Union negotiation team for some eight to ten years.

Dr. Talpos testified that the College has offered online classes since approximately 1998

or 1999. A part of distance learning, she said, online classes are classes in which a class web site is established where students obtain assignments, and interact with the faculty member as well as other students. Known as asynchronous learning, both students and faculty are able to come to the website at their convenience to accomplish weekly assignments in such online classes.

Dr. Talpos testified that Article XXXVI of the Parties' collective bargaining agreement¹ dealing with online classes has been part of the Parties' collective bargaining agreement since 2000, and that the language has remained unchanged in the contract since then. She testified that before this language was agreed upon, the practice at the College was to limit the number of students in online classes to twenty students. Enrollment was not cut off at that point, she said, but if more than twenty students enrolled in the class, a new section was created, and the same instructor would teach, and be compensated for teaching, the new section.

In 2000, Dr. Talpos said, the Union proposed in negotiations to limit the class size in online courses to twenty students.² The College, on the other hand, sought to set the class size at thirty. She was aware, she said, that there was a fairly sizeable dropout rate among online students, and, thus, she said, the Parties settled on twenty-five students as the maximum on-line class size.

There was also discussion during those negotiations, she recalled, about how this class size language would interact with other parts of the contract, including language requiring additional compensation to teachers for regular classes that exceeded the contractual limits. Dr. Talpos remembered telling Jim Zeman, the negotiator for the College, that she wished to make it

¹ Joint exh. 1.

² See, Union exh. 3.

clear that Article XVII did not apply to distance learning, and he that he responded "of course not."³

Dr. Talpos testified that small class sizes are more important for online classes than for regular classes because online classes require a "totally different way of designing the course" in order to stimulate student engagement. Students must engage with the instructor, she said, as well as with the material and the other students. Faculty teaching online classes must take significant training before undertaking such instruction and, Dr. Talpos said, the College now has a formal, semester-long, program leading to certification that is required of faculty before they can teach online courses. Moreover, Dr. Talpos said, online classes take a great deal of time to develop. "You can't just take your notes and upload them," Dr. Talpos said, you must prepare a class that will bring out maximum student engagement." She estimated that approximately ten additional hours for each contact hour are required to adequately prepare an online class. An online class is not a lecture situation, she said. Instead, she added, "you have to have students doing something all the time." As a result, she said, preparing small written assignments each week is usually required. Unless students are regularly submitting work, she said, "you don't know if they are out there."

Recording student attendance in online courses is problematic, Dr. Talpos said, and becomes a matter of reviewing the various assignments, quizzes and the like that the students are undertaking. While the dropout rate for courses at the College generally is high, Dr. Talpos said,

³ The College objects to the consideration of this testimony on the basis that it is an out of court statement offered for the truth of the matter asserted and is, therefore, hearsay and inadmissible. This objection is considered in the Discussion section of this Opinion and Award.

when a student drops out of an online class, they may do so only after they have already participated to some degree. Dr. Talpos testified that if she does not hear from a student for a while she will attempt to contact him or her to try to find out why they are not participating. The nature of online classes, she said, requires an unusually high degree of e-mail communication between teachers and students and among students as well.

Dr. Talpos identified a document entitled "Percentage of enrolled credit hours by campus"⁴ dated September 7, 2006⁵ which noted that she was teaching one section of History 250 and six sections of Political Science 101. In five of those six sections, the class limit was set at thirty and in one it was set at thirty-two. A similar document for Fall, 2007⁶ shows Dr. Talpos teaching two sections of History 250 and four sections of Political Science 101. In each of those sections, the maximum enrollment is set at thirty. According to Dr. Talpos, the College did not ask the Union to agree to raise the limit for online courses from the contractual limit of twenty-five, and instead has continued to schedule classes for more than that number. The College has not allowed more than thirty students to enroll in her classes this semester, Dr. Talpos said, and while some students have dropped out, she has more than twenty-five students in each of her classes. Online faculty, Dr. Talpos said, have never been compensated for teaching the additional students in their classes.

Dr. Talpos acknowledged that the drop out rate may reach as high as thirty to forty percent during the semester and that such a rate would often bring the number of students

⁴ Union exh. 4.

⁵ The grievance in this matter was lodged this same date. Joint exh. 2.

⁶ Union exh. 5.

actually enrolled in a class to below twenty-five. Dr. Talpos also noted that Article XVII - Class Size - Section C describes the compensation to be paid to faculty whose classes exceed the maximum. She argued, however, that this section does not apply to distance learning and that online faculty are not entitled to an additional \$30 per student under this section. Instead, she said, the College should create an additional section when enrollment exceeds twenty-five and compensate faculty for teaching an additional section in such circumstances.

Dr. Talpos testified that Article XVII, the Distance Learning language of the contract, was first agreed upon in early 1990's when it dealt exclusively with distance learning. The language, however, has been carried over in subsequent contracts since then. Online teaching, she said, did not begin until approximately 1999. She acknowledged that the contract itself does not require the addition of a new section in an online class when enrollment exceeds twenty-five.

Dr. Talpos testified that while the overall drop out rate in her online classes may be as high as thirty to forty percent, students drop out over the course of the entire semester so that even if the class ends with twenty-five students, she will have taught more than that number during the semester. She also noted that simply because a student drops out does not mean that another will take his or her place. Students may not register after the fourth week of class.

Dr. Swan testified that his duties include curricular planning with particular responsibility for general education and transfer programs. As such, he said, he supervises instruction to all classes, including online and interactive television classes, except career programs. Dr. Swan testified that all classes have the same expected outcomes. They all require a syllabus, a text, examination, and final grades regardless of whether the class is taught online or in a classroom.

Dr. Swan stated that the maximum size of classes is set when the schedule is created, but

may be modified by the administration based upon student demand. Determining that maximum figure, he said, takes into account the possibility of dropouts. According to Dr. Swan, the maximum class size may be over and above what the contract says. "Because of increasing student enrollment," Dr. Swan said, "we have lifted capacities knowing that they will exceed the contract limits." While a high dropout rate is one factor in determining maximum class sizes, he said, it is not the primary consideration. Instead, he said, he looks at the modality, the facility, the capacity of technology, and student ability to master what the course may require. So, for example, English and Speech classes have lower limits because of the challenges of dealing with developmental students. The final class size, he said, is determined at the same time as the final grade roster according to the number of students who have a final letter grade or an incomplete.

If a final grade roster in any class, including an online class, exceeds the maximum number set by contract, Dr. Swan said, an instructor may request overload compensation along with submission of the final grade roster. If the faculty member fails to submit the request for additional compensation, however, then he or she does not receive the overload compensation. No other form of compensation, Dr. Swan said, has ever been paid to faculty who teach classes that exceeds the maximum number.

Dr. Swan testified that he is responsible for online courses. Dr. Stephanie Bulger, Vice-President for Curriculum and Technology, he said, develops the schedule and certifies training for teachers, but it is his responsibility to approve the curriculum and to determine when to add or cancel classes. He is also charged with overseeing and approving faculty assignments to teach as well as for overload compensation when enrollment in classes exceed the contractual limits. Such overload compensation, he said, is provided only upon a teacher's written request at the

conclusion of the semester, based upon the final enrollment in the class.

Dr. Swan acknowledged that he has never received a request for extra compensation for excessive enrollment from a faculty member who taught an online course. Inasmuch as he approves the entire schedule, he takes into account the number of classes and their sizes. For an online class, he said, Dr. Bulger sets the class size and submits the proposed schedule to him for his approval. For a schedule to be posted, he said, both he and Debraha Watson must approve it.

Dr. Swan testified that online classes are similar to on-campus classes, and that class sizes differ for a variety of courses including online courses. For example, he said, while the maximum class size for an on-campus course is generally thirty-six, he said, English and Speech classes have a maximum of twenty-five students, and laboratory courses are limited by the number of lab stations available. If enrollment exceeds those limits, he said, faculty receive additional compensation. In a regular class with a limit of thirty-six students, Dr. Swan said, a new section of the class is opened if enrollment exceeds fifty. In the case of an interactive class, however, a new section is not opened until the enrollment reaches sixty.

Other facts that bear upon the resolution of this case appear later in this Opinion and Award.

DISCUSSION:

The issue in this case is whether the College violated Article XXXVI of the contract when it enrolled more than twenty-five students in online classes. That question, in turn, depends upon whether Article XVII of the contract limits the remedy available to affected faculty in such cases to an additional \$30 for each student enrolled in online courses above the

contractual limit of twenty-five.

The facts of the case are not substantially disputed. The College concedes that more students have been permitted to enroll in online classes than the limit described in Article XXXVI (D)(b) which unambiguously dictates that “the class size for any online course shall not exceed twenty-five (25) students for the term of this contract. . . .” The resolution of this case, thus, turns upon whether the contract provides an exception to this mandate, or as the College argues here, limits the remedy available to affected faculty for its breach.

The College argues that Article XVII (C) of the agreement limits the compensation due faculty, including online faculty, when their class sizes exceed the “head count maximum,” and it fixes that compensation at \$30 per student if affected faculty apply for it in writing on forms provided by the College.

The Union, for its part, underscores Dr. Talpos’ testimony regarding her conversation with the College’s negotiator, Jim Zeman, during negotiations in 2000 which resulted in the Parties’ adoption of Article XXXVI of the contract. The College, however, objects that this testimony constitutes hearsay and is inadmissible. The Union, in turn, argues that it is not hearsay, and that even if it were, Mr. Zeman’s remark was an admission against the College’s interest and, therefore, admissible.

In the judgment of the Arbitrator, Ms. Talpos’ testimony recounting an out-of-court statement by a third person was offered for the truth of the matter asserted, namely that Article XVII does not modify Article XXXVI. Put differently, Ms. Talpos’ recollection of Mr. Zeman’s statement was offered to show that the College understood that online faculty whose classes exceeded twenty-five students would not receive an additional \$30 per student because Article

XVII would not apply to online classes. Reliance on such evidence is highly problematic for the same reason that affidavits are inadmissible as evidence – the inability of the respondent to examine the witness’s recollection of the events. As such, even if such a statement were deemed an admission against interest, it would provide the thinnest of reeds upon which to support the Union’s claim. For these reasons, the Arbitrator rejects Ms. Talpos’ description of Mr. Zeman’s statements as inadmissible hearsay.

Instead, however, the resolution of this case depends upon the proper interpretation of the contract language itself, and the touchstone for that proper resolution is the Parties’ intent.⁷ That is, did the Parties intend for Article XVII to modify Article XXXVI so that an online faculty member’s exclusive remedy when his or her class size exceeds twenty-five students is the \$30 per student compensation described in Article XVII? Or, on the other hand, did the Parties envision that the class size limits for online classes set forth in Article XXXVI were an exception to the general class size dictates of Article XVII such that class size limits could not be exceeded for online courses and that the \$30 per student compensation would not apply in the online setting? For the following reasons, the Arbitrator has determined that the Parties agreed that Article XXXVI meant what it said, that online classes sizes would be capped at twenty-five students.

First, the language of Article XXXVI is unambiguous, directing that the class size for any online class “shall not exceed twenty five students.” Such a clear directive can be disregarded

⁷ “The primary goal of the . . . arbitrator is to determine and carry out the mutual intent of the parties.” Elkouri & Elkouri, How Arbitration Works (BNA Books, 4th ed. at 343.) “The rule primarily to be observed in the construction of written agreements is that the interpreter must, if possible, ascertain and give effect to the mutual intent of the parties.” *Id.* at 348.

only by compelling evidence that the Parties intended otherwise,⁸ and that the College could, in fact, enroll more than twenty-five students. Under the College's interpretation, that plain language of Article XXXVI would be rendered meaningless because there would be no limit upon the College's ability to enroll students in online courses, save perhaps those set forth in Article XVII (D) under which an additional section would have to be created if enrollment reached at least fifty – twice the agreed upon limit. Such a reading of the contract would offend the settled principle that contracts should never be interpreted to render meaningless a clear contractual provision.

It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.⁹

Next, the language of Article XVII, applying as it does to "regular headcount maximums," applies generally to Wayne County Community College students except those enrolled in English and Speech, as well as laboratory and shop classes. Article XXXVI, by contrast, is specific, applying only to a subset of classes. As an aid in contract interpretation, Arbitrators often consider the maxim that "where there is conflict between specific language and general language in an agreement, the specific language will govern."¹⁰ Thus, this conflict should be resolved in favor of the more specific commands of Article XXXVI.

Moreover, the language of Article XXXVI and its bargaining history support the

⁸ "If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed." Elkouri, *supra* n.7 at 348.

⁹ John Deere Tractor Co., 51 LA 631, 632 (Updegraff, 1946).

¹⁰ Elkouri, *supra* note 7 at 356.

conclusion that the Parties intended Article XXXVI to be an exception to the class size dictates of Article XVII. During those negotiations, the Union sought to cap online class sizes at twenty students, while the College sought a maximum of thirty. The Parties compromised at twenty-five. This bargaining suggests that the Parties viewed the question of class size for this type of class as significant, not merely a goal to be disregarded for an additional \$30 per student. Indeed, if the Parties intended that the only remedy for faculty whose classes exceed twenty-five would be the \$30 per student stipend provided to other faculty whose classes exceed the “regular headcount maximum,” then there would have been no reason for the Parties to have bargained and included the specific limit set forth in Article XXXVI. Instead, the Parties viewed Article XXXVI as an exception to Article XVII that, among other things, specifically limited online class sizes to twenty-five students.¹¹

Having concluded that the Parties intended the specific dictates of Article XXXVI not to be limited by Article XVII, and that the College has breached that provision by permitting more than twenty-five students to enroll, the remaining question goes to the appropriate remedy. First, the Award in this matter will direct the College to cease and desist permitting enrollment in online classes to exceed twenty-five students. The Union, however, argues that online faculty whose classes have exceeded the contractual limit should be made whole for past instances in which class sizes exceeded twenty-five.

While a make-whole remedy may be presumptively appropriate for contract violations under different circumstances, the circumstances of this case, including the complex task of

¹¹ It is noteworthy in this regard, that no online faculty member has requested compensation under Article XVII (c), nor does the Union claim it here.

fashioning such a compensatory remedy, persuade the Arbitrator that an order directing the College to cease and desist permitting "the class size for any online class to exceed twenty-five students" is appropriate. The College, after all, will be required to alter its enrollment procedures to preserve this promise – not a simple task. Thus, in the judgement of the Arbitrator, this remedy will preserve the Union's right to enforce its agreement, while affording the College the opportunity to revise its scheduling protocols to conform to the dictates of the contract.

AWARD:

For the foregoing reasons, the grievance is sustained. The College shall cease and desist permitting the class size for any online class to exceed twenty-five students.


Robert A. McCormick
Arbitrator

January 13, 2008
East Lansing, Michigan