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STATE OF MICHIGAN

EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Fact Finding between,

JACKSON COMMUNITY COLLEGE,
Employer,

and

JACKSON COMMUNITY COLLEGE FACULTY ASSOCIATION, JACKSON COUNTY EDUCATION ASSOCIATION, MEA/NEA; Case No. L89 J-0630

JACKSON COMMUNITY COLLEGE CLASSIFIED AND TECHNICAL ASSOCIATION, MESPA/MEA/NEA, Case No. L89 J-0640

ASSOCIATION.
_____/

Fact Finder: Donald F. Sugerman

Appearances:

For the Employer: William M. Abbott, Esq. (Faculty Unit)
George J. Brannick, Esq. (C & T Unit)
Dr. Lee Howser, V.P. Adm. & Finance.

For the Association: Willie Mathews, Jr., MEA UniServ Dir.
Donnie Reeves, MEA UniServ Dir.
Duane Winter, MEA UniServ Dir.

Jackson Community College

FACT FINDER'S REPORT

Introduction

The Employer (sometimes also referred to as "JCC," College, or Administration) and the Association (sometimes referred to as MEA) were parties to a collective bargaining agreement covering classified and technical employees that had an expiration date of June 30, 1989 and another covering faculty with an expiration date

of August 31, 1989. They have been involved in protracted negotiations to replace those contracts, but without avail. As a result, Fact Finding was directed by the Employment Relations Commission (MERC) in accordance with Section 25(1) of Act 176 of the Public Acts of 1939, as amended.

A pre-hearing conference was held on February 19, 1990 by the undersigned--who was appointed by the MERC as the Fact Finder--with representatives of the parties. The purpose of this meeting was to identify and narrow the issues in dispute, have the parties explain their positions thereon, and to schedule dates for the hearing. Following this meeting the parties made one last attempt to resolve all of their outstanding issues through bargaining. Several difficult issues were resolved at this meeting. But others, unfortunately, were not, thus necessitating further formal proceedings.

A hearing was conducted at JCC on April 11, 1990. The parties were represented as set forth above, had the full opportunity to call witnesses and to present probative evidence bearing on the issues. At the close of the hearing, each party was given one week in which to submit additional comments\arguments that it believed relevant. A memo dated April 17 was submitted by the Association and a letter of the same date by the JCC Attorney in the C & T unit. Based upon the information received, I issue this Report.

I. The Faculty Unit

There are five issues separating the parties. These involve: A. Selection of Department Chairperson; B. Dental Benefits; C. Personal Affairs Days; D. Wage increase for Supplemental Faculty; E. Retirement Incentives and will be discussed seriatim.

A. Selection of Department Chairpersons

The selection, appointment, salary, teaching load and responsibilities of Department Chairpersons are set forth in Article VII of the Agreement. The MEA proposes changes in the method of selecting chairpersons and their teaching load.[1]

There are two primary changes in the proposed selection and appointment of chairpersons. First, under the current arrangement they are appointed annually and may succeed themselves without limitation. The MEA would restrict the term of chairpersons to three years but this limitation could be waived by a vote of the majority of the faculty members in a department (excluding the nominee).

The selection process is where the most significant change would take place. Currently, prospective chairpersons are nominated by his or her department, any member thereof, or by any

[1]It also proposed that departments with more than ten instructors be considered for division into two departments. No evidence, however, was presented on this proposal and further discussion thereon is therefore not warranted.

administrator. The president then selects the chairperson from among the nominees. If the appointment is from other than those nominated by the department, good and sufficient reason shall be shown.

The MEA would change this procedure by having nominations made exclusively by department (with administrators making only recommendations) and with the department, in essence, selecting the chairperson.

The MEA believes that the chairperson should be elected by department members; it feels this is an intra-department matter; that there is general agreement among the faculty that they should determining the chairperson; in some departments members feel the chairperson has not adequately represented them; and a chairperson nominated and selected by the administration is not seen as a legitimate representative of the department's faculty.

The JCC argues that chairpersons must have managerial skills. In this regard they hire adjunct faculty, construct schedules (with the input of department faculty), handle communications, order supplies, prepare budgets, and recommend the expenditure of substantial monies. As such, the chairperson is a representative of the college and not merely his or her department. Finally, the JCC contends that the present system has been in place for many years and that the president has virtually always selected the

appointee from among department nominees. The problem it opines stems from a recent incident in which the president did not appoint the chairperson who had been recommended by two of ten or eleven members of a department.

To begin, it is necessary to decide whether the chairperson is the representative of the college or the faculty. The duties of the chairperson are set forth in the following provisions of the Agreement: Article V Sections B2 and 7, Article VII Section A5, Article VII Section C, Article VIII Section B1d, Article IX Section F, Article XI Sections E2b4 and H5.

In most instances, it appears that the chairperson is not clothed with supervisory or managerial authority. For example, in the area of teaching assignments the final determination is made by the Instructional Dean "after consultation with the Department Chairperson." (pp. 9, 26). Indeed, the roll of the chairperson appears to be largely ministerial. Thus, instructors notify their chairperson of absences and confer with them when they have a grievance. But it does not appear that chairpersons authorize such absences or resolve grievances.

On the other hand, the fundamental roll of the chairpersons in most institutions of higher learning is to serve as the spokesperson for the department's faculty on academic matters. That is, presumably the situation here. For example, the standards for

class size in each department are established by mutual agreement between the administration and the chairperson concerned (p. 11). It is difficult to imagine the faculty having confidence in a system that enables the administration to both nominate and select the chairpersons. This does not mean, however, that a radical overhaul of the system is called for.

The process seems to be operating without undue problems. Therefore, it appears that it is the potential for abuse that is involved here. I recommend that Article VII Section A2 be amended by deleting the sentence, "Any administrator may also make nominations." (p. 29). Departmental members are adequately protected against the arbitrary appointment of non-departmental nominees by the provision in Section A2 that requires the president to show good and sufficient reason for making an appointment "from other than those nominated by the department." Implicit in the provision is that the chair come from among the members of the department involved. To avoid misunderstandings it is recommended that this requirement be stated.

The MEA's request to limit the term of chairpersons and to reduce their teaching loads based upon the number of faculty in the department must be rejected. No persuasive reasons for limiting the term have been presented. While the Union asks for a limitation of three years this may be waived by majority vote of department members. There seems no reason to change the existing

practice that is based upon satisfaction of the majority of the faculty in each department. Similarly, with respect to the reduction of work load, no evidence was presented to permit this fact finder to recommend that the proposal be adopted.

In summary then, it is recommended that the current provisions of Article VII be continued intact with the exception of Section A2 wherein it is recommended that the sentence permitting any administrator to nominate chairpersons be deleted from the Agreement and that language requiring the chairperson come from the department be added.

B. Dental Coverage

The parties have agreed to increase dental benefits. There is a disagreement, however, over whether orthodontia benefits will be covered at 50% as proposed by JCC or 80% as proposed by MEA. It appears there was a misunderstanding about this during negotiations. There are three classes of benefits plus the coverage for orthodontics. Benefit coverage was increased from 50% to 80% in the first three classes. The MEA believed the Agreement was to increase all coverage to 80%. Be that as it may, it appears that this misunderstanding was one of communications and not one of bad faith negotiations.

To a large extent, the dispute here is academic. Since most, if not all, orthodontia procedures exceed $2,000, employees will

receive the full coverage that is capped at $1,000 per eligible member per lifetime. Thus, it is only in the relatively rare instance where the orthodontic procedure is less than $2,000 that this dispute would make any difference at all. This being the case, one would imagine that there would be no cost to increase this benefit to 80%, or, at best, it would be very small. That may or may not be the case.

I recommend to the parties that an Actuary from Blue Cross be provided with the relevant data and asked to explain whether this proposed change would cause the premium to be increased. If not, I recommend that the 80% figure be made a part of the Agreement. On the other hand, if the answer is "yes" then it is recommended the contract remain unchanged and that orthodontia coverage be provided at the 50% level.

C. Personal Affairs Days

Article VIII reads, in relevant part, as follows:

> 4. Personal Affairs
>
> a. Leave may be permitted for matters which cannot be cared for in free time and which would result in legal, business, family or personal disadvantage if not covered at the appropriate time.
>
> b. Such leaves, when known in advance, shall be presented to the Dean one (1) week prior to the time the instructor wishes to leave and provision shall be made for handling the instructor's responsibilities in his/her absence. Approval, in writing, must first be obtained from the Dean. (p. 34).

The MEA proposes to change paragraph 4.b by deleting the last sentence requiring written approval. It apparently bases this request on an incident that occurred in 1988 wherein a professor requested a personal affairs day and obtained approval from his chairperson but was offended when the Dean requested some details. The professor refused to provide the information and did not pursue the matter.

According to the JCC there have been few problems in the implementation of this provision. It claims that some (albeit very little) specificity is required to obtain approval of a personal affairs day. In the explanation that was provided, JCC said that asking for a day to take care of a legal matter would be sufficient but asking simply for a day without any reason would not.

The MEA proposes no change in paragraph 4.a which spells out the reasons for which personal leave may be granted. It is limited to matters that cannot be cared for in a member's free time and would result in a disadvantage if not timely handled. That being the case, it would seem that some explanation is required. The JCC recognizes that neither detailed nor intimate information are needed. Implicit in this section is the requirement that a request for a personal affairs day should not be unreasonably withheld. Asking the faculty member to provide minimal information that supports the leave for the reasons called for in paragraph 4.a is reasonable. Accordingly, it is recommended that the language of

Article VIII Section 4.b be continued unchanged.[2]

D. Wage Increases for Supplemental Faculty

The parties agreed to an increase in the pay of supplemental/ adjunct instructors of $2.00 per contract hour. There is a dispute between the parties over the effective date of this increase. The JCC proposes to make it operative with the second semester and the MEA wants it retroactive to the beginning of the new Agreement.

According to the Administration, its purpose in offering the increase was to attract "more and better" persons to fill these positions. Since the first semester has now been completed an increase would not achieve that objective. The MEA relies on tradition. It says that the parties have frequently been late in concluding their contract and that wage increases have always been coterminous with the effective date. It finds no reason why the practice should not be continued. In response, JCC says that the pay of supplemental faculty has been increased infrequently over the years, perhaps only twice within recent memory. It believes that retroactivity was applied to that group in only one instance.

The JCC's reasoning seems somewhat simplistic. It recognizes

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[2]The MEA submitted 14 teacher contracts in Jackson County to support its position in this matter. It concludes that only 3 of those contracts require prior approval. I note, however, that most of the contracts differ from the one under consideration here in the reasons that leave may be taken and the requirements therefor. Thus, their use for comparative purposes are of little assistance.

that the old rate was not competitive. This suggests that it was also inequitable. Presumably, most of the supplemental and adjunct faculty are qualified and competent or they would not have been engaged in the first place. I conclude that the increase serves several purposes: To pay those who have taught the course a fair rate in order to retain them; and to attract other qualified and competent instructors. A compromise seems in order. It is recommended that the college pay the increased wage retroactive to the beginning of the school year to those instructors who continued to teach the second semester or who remained on the rolls for that period. It need not pay the increase to instructors whose tenure with the college was discontinued after the first semester.

E. Retirement Incentive

Article VIII of the Agreement provides, in relevant part, as follows:

> F. Retirement Incentive
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> 1. Eligibility and Benefit
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> a. Any bargaining unit member with fifteen (15) years of teaching experience, including ten consecutive years' service at Jackson Community College, and
>
> b. who is eligible for retirement under the Michigan Public School Employees Retirement System, and
>
> c. who retires from JCC, will receive a retirement benefit of twelve thousand dollars ($12,000) upon retirement. (pp. 38-39).

When the retirement incentive was initially negotiated, eligible employees received a benefit totalling $18,500 over a five year period. This was subsequently reduced to $16,000 and, somewhat later, because of an accounting requirement to fund increased benefits as a result of an advanced salary schedule, the amount was further reduced to the current level--$12,000. The intent, presumably, was to induce older and higher paid employees to retire in order to replace them with less costly personnel. The JCC contends that with the liberalization of the public schools retirement system this provision is no longer an incentive but simply an added benefit for employees who intend to retire anyway. For this reason it seeks to eliminate the provision contending that it is simply an increased cost item!

The JCC has not studied this question in depth. Its position seems to be predicated on comments made by two retiring faculty members who characterized the payment as "getting away bonus money." For its part, the MEA produced a survey that is hardly more meaningful. It shows that MEA had in its archives 350 agreements of the 533 k-12 Michigan public school districts. Of the contracts on file, 251 contained retirement/severance benefits and 100 had early retirement incentives. The JCC argues that these numbers are irrelevant because they involve elementary and secondary schools rather than institutions of higher education.

Neither the JCC's casual analysis nor the MEA's study is

particularly helpful here. The real question is whether the lump sum payment provides an incentive for employees to retire when they would not otherwise do so. No evidence was presented to demonstrate that the liberalized benefits under the retirement system make this incentive irrelevant. Common sense suggests that a lump sum payment of $12,000 may, in fact, be the motivating factor in an employee opting for retirement. Until a more definitive study has been undertaken, it must be assumed that the benefit is serving the purpose that was mutually intended. It is recommended that this benefit be continued in the new Agreement.

II. The Support Personnel Unit

There are four issues separating the parties over the support personnel contract. One of these involves orthodontia coverage that is common to both units and has been disposed of above. The other issues deal with promotions for unit employees and pay for technicians. They will be discussed below.

A. Promotions

In late 1988 the position of Senior Records Clerk was posted in accordance with the provisions of the Agreement. There were many applicants. These included bargaining unit employees and non-unit persons. The Employer selected a person for the job from outside the bargaining unit prompting a grievance by one of the senior applicants who was interviewed for the position. The case proceeded to arbitration under the unique system established by the

parties for resolving disputes over the application or interpretation of the terms and provisions in their Agreement.

For simplicity's sake it can be said that during the arbitration the Employer argued that the controlling provision was one that, in labor parlance, is referred to as "relative ability" clause. In How Arbitration Works, BNA 4th edition, the Elkouris define this term on page 611:

> . . . here comparisons between qualifications bidding for the job are necessary and proper and seniority becomes a determining factor only if qualifications of the bidders are equal.

The MEA argued that the Agreement contained a "sufficient ability" clause. This, according to the Elkouris requires that the most senior person be minimally qualified to perform the position. Under this type of clause "it is necessary to determine only whether the employee with the greatest seniority can in fact do the job." Thus, "comparisons between applicants are unnecessary and improper, and the job must be given to the senior bidder if he is competent, regardless of how much more competent some other bidder may be." (at 612).

The arbitrator who heard the JCC/MEA dispute determined that the language of the Agreement that, "Vacancies shall be filled by the senior qualified applicant" was a sufficient ability clause and not a relative ability provision. Arguing that it should be permitted to hire the best qualified applicant, the JCC wants to

either modify the language of the Agreement or to add a letter of understanding that would accomplish this goal. The MEA opposes such a change.

The JCC's demand for the right to hire the most qualified employee might make sense if the positions being filled were in its executive, administrative, or managerial service. But it is, in my opinion, shortsighted to impose this type of condition in the support personnel bargaining unit. There are several reasons why I believe such a clause would be counterproductive.

Full time support personnel cannot be treated as fungible goods. Many look upon their employment in terms of a career. Indeed, Article XVI f. of the Agreement states:

> All employees will be given an opportunity to submit, on a form prepared by the employer, a career path with desired goals within the framework of the institution.
>
> Employees not submitting a career path plan will be considered as having waived training opportunities which occur, become available or may be offered. (p. 26).

It is frequently difficult to measure this rather subjective matter of "relatively equal ability." Sometimes it is clear that one individual is more capable than another. But even so this has devastating results when the competition includes persons from outside the bargaining unit. What type of career paths are employees provided when they are qualified to perform the work at the higher level, but are passed over for persons from outside whom

the Employer deems more qualified?

Thus, there is a balance to be struck. The JCC's interest obviously must be protected. It is not required to promote those who are not qualified to perform the job. Where, however, a bargaining unit member is qualified, service to the institution should be considered and rewarded. If the Employer seeks to retain able and competent employees it must promote them when they are capable of performing higher level work, especially if it is a position that is on their career paths. Such promotions will certainly have a salutary effect on overall employee morale. I recommend that the Employer accept the language that has been negotiated and is now a part of the Agreement.

B. Longevity

Appendix B, Section D of the Agreement provides that:

> D. Longevity Pay
>
> Bargaining unit members will have their wages increased according to the following schedule in recognition of their extended years of service with the College.
>
> 1. Beginning 13th year through 19th year - 1%
>
> 2. Beginning 20th year - 2% (p. 46).

The MEA wants the current language continued. The Employer does not oppose this proposal. It would be quite simple then to simply recommend that the language remain unchanged. But that would not resolve the problem.

The Association contends that the language requires the Employer to grant longevity pay on an employee's anniversary date. The Employer has--since the unit was organized approximately five years ago--used the contract date of July 1 for computing longevity. While there may be an inequity in the system it provides for ease of administration. Otherwise, the Employer would be required to compute longevity on each employee's hire date rather than on the set date of July 1. Regardless, no information was submitted as to the number of employees adversely affected by the Employer's application of this provision. I believe that its consistent use of the July 1 date would very likely result in a mediator/arbitrator ruling against the Union. I reach this conclusion because the language of Appendix D appears to be ambiguous, thus the practice would be conclusive.

Since no change of language is suggested I recommend that it be continued unchanged. However, I have made the above observations in the hope that it will dissuade the Association from pursuing this matter in arbitration.

C. Technicians Wage Rates

The technicians are on a system quite unlike that of the and classified employees. Whereas the latter have a schedule the technicians have a range. The range works in this fashion. The technicians receive an increase in their base pay plus a percentage (1/12) of the difference between their new base wage and the top of

the range. The MEA proposes to increase the base by 6% and the range by 6%. It would do this for each of the two years for the new Agreement is operative. The JCC proposes to increase the base wage by 4.70% and the range by 2% for the first year and by 4.98% and 3.25% respectively for the second year. Since this results in an increase for some technicians of less than 6%, the Employer also offers to adjust their pay to insure an increase for all employees of 6%.

Because of the length of service of employees in the faculty and in the classified group there are more people who are at the top of the scale. In the faculty group, approximately 75% of the staff are already at the top of the scale and in the classified service this approaches 60%. The Employer has developed its salary proposals to yield a fixed amount for each group. The MEA proposal is tied to keeping all of the employees within the range that has been established. The range for technicians is the counterpart to the schedule for other employees.

Whereas the schedule is increased all along its path, a corresponding increase in the range produces a somewhat different result depending on the employee's base salary and the distance from the maximum. One employee is near the top of the range. In order to keep him within the range it is necessary to increase the percentage by an amount that seems to produces a somewhat dispro-

portionate jump to other employees in the group.[3]

The MEA has recognized this fact in prior negotiations where the base rate for this group was reduced to keep all employees within the range that was established. Although this is one way to handle the matter, I believe it is better to give the technicians the 6% increase in the base that has been afforded to the other employees and to adjust the range accordingly. This will also produce some inequities, but they will be fewer than if the other method is used.

I recommend that the base be increased by 6% for each of the two years of the contract and the range be increase by 2.5% each year. This will produce--in actual dollars--an amount roughly equal to that projected by the Employer as wage cost for this group.

Donald F. Sugerman

Donald F. Sugerman, Fact Finder

Bloomfield Hills, MI
May 19, 1990

[3]Phillips is the employee in question. Unless the range is increased by a total of at least a combination of 7% over the 2 years, he will be out of the range for the 1990\91 period.