six (6%) per month their first year of employment, and twelve (12%) a month thereafter. Percentage is based on Firefighter 3.

In Article 33, the question of "acting pay" is addressed:

> Section 33.1 - An employee, who for any reason is required to carry out the duties of a rank above that which he/she normally holds, shall be paid at that rank.

The Employer argued that the language at issue can be explained in the context of a long-established past practice. If contract language is silent or ambiguous on a particular matter, it is appropriate to analyze past practice to determine how the parties have treated the matter in dispute. In the absence of a written agreement, "past practice", to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. *Celanese Corporation of America*, 24 LA 168 (Justin, 1954).

The concept of past practice was further explained in *Chattanooga Box and Lumber*, 44 LA 373 (Tatum, 1965) where Arbitrator Tatum noted:

> Past practice comes into being when a Wage Agreement is silent, when the language in a Wage Agreement is ambiguous, when the language in a Wage Agreement is general, as in this arbitration, when the parties mutually give a certain meaning to particular words in a Wage Agreement, and when a certain way of doing a thing or not doing a thing has been understood and accepted or acquiesced in by the parties over an extended period of time.

In other words, past practice exists to give the bargaining relationship substance where specific contract language does not exist. In *Texas Utility Generating Division*, 92 LA 1308 (McDermott, 1989), Arbitrator Thomas J. McDermott explained the application of past practice in the following terms:

> 1. The activity or procedure represents a consistent response to a given set of circumstances.
>
> 2. It must have occurred a reasonable number of times over a reasonably extended period of time.
>
> 3. It was expressly or tacitly known to both parties.
>
> 4. It has had the expressed or tacit agreement of both parties: Where the contractual language is vague, very general or ambiguous the application of the agreement to specific situations requires that the arbitrator look at what the parties have done in the past. How the parties have applied these provisions in the past gives specific meaning to how they understand the disputed contractual language should be interpreted.
>
> In cases where the contract is completely silent with respect to a given activity, the presence of a well-established practice, accepted or condoned by both parties, may constitute in effect, an unwritten principle on how a certain type of situation should be treated. However, the application of this principle cannot be broad or sweeping.
>
> Care must be exercised to insure that the evidence does in fact prove the presence of a mutual agreement. Also, the practice must be carefully related to the conditions from which it originally arose, and that there had not been changes, which may require a change in the practice or its abolishment. However, there are also limited situations where the contract is clear and specific, and there is no ambiguity in its meaning, a practice may have developed that is clearly contradictory to the meaning of the contract language.

In its closing brief, the Union argues that the language at issue is clear and unambiguous. According to the Union, the paramedic premium should be paid as long as the affected employee holds paramedic certification, regardless of whether or not paramedic duties are being performed.

Conversely, the Employer argues that the payment of a premium to a temporary battalion chief would disrupt the fire district's overall salary schedule and would be unfair for permanent battalion chiefs. The Employer notes that the battalion chief job description does not contain any reference to paramedic duties, and the Employer contends that there is a well-established practice against requiring battalion chiefs to serve as a paramedic.

There is no question that Lieutenant Lundquist was expected to serve as a firefighter/paramedic in his normal employment with Snohomish County Fire District 7. However, I must determine whether pay practices applicable to the firefighter/paramedic classification should continue into temporary assignment as a battalion chief.

[1] Looking at the language at issue, I must conclude that the paramedic premium is not appropriate for temporarily assigned battalion chiefs. Article 23, Section 23.2 state that the premium is to be applied for those firefighters "employed as paramedics". The language does not say that the premium should be applied "for those holding the certification".

While I recognize that a firefighter cannot serve as a paramedic without appropriate certification, I must conclude that holding the certification must be linked to the work actually being performed. If a firefighter is assigned to paramedic duties, the premium is appropriate. The paramedic certification is a condition precedent to the premium, but without associated duties, the premium would not exist. Work must be done as a paramedic to earn the paramedic premium.

In this case, Lieutenant Lundquist served a temporary assignment as a battalion chief. There is no doubt that he was working as a paramedic while he was serving as a lieutenant. It is equally clear from the record that his paramedic duties ended with the temporary appointment as battalion chief.

The Employer presented credible evidence that it routinely stopped paying the paramedic premium when a firefighter/paramedic was promoted to the rank of battalion chief. The Union's argument that it did not know of such a practice is not persuasive. The Employer presented evidence that it routinely stopped paying for premiums once employees were promoted to the position of battalion chief. This is in keeping with the Employer's stated need to have battalion chiefs focused on management issues rather than the work expected of firefighter/paramedics.

The language of the collective bargaining agreement does not require payment of the paramedic premium in cases of promotion to battalion chief. The Employer's practice supports that result. The grievance must be denied.

AWARD

Based on the foregoing and the record as a whole, I conclude that Snohomish County Fire District 7 does not owe paramedic premium pay to Lieutenant Ryan Lundquist for the period of time when he was temporarily promoted to the position of Battalion Chief.

The grievance filed by International Association of Firefighters, Local 2781 is hereby *denied.*

Wayne State Univ.

Decision of Arbitrator

In re WAYNE STATE UNIVERSITY and WAYNE STATE UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS-AFT, LOCAL 6057

FMCS Case No. 171003/00018-6

January 30, 2017

Arbitrator: Lee Hornberger, selected by parties through procedures of the Federal Mediation and Conciliation Service

DISCHARGE

[1] Poor performance — Contractual improvement/mentoring process — State law — Past practice — Bargaining history ▶ 100.552535 ▶ 100.0235 ▶ 100.30 ▶ 24.355 ▶ 24.37

State university did not violate collective-bargaining contract when it began discharge proceedings under Board of Governors' statute against tenured faculty for alleged poor performance without first exhausting improvement program and peer mentoring process set forth in contract, where there is no evidence that such process was mandatory predicate for such action during decades that both statute and contract remained unchanged, changes made to article on improvement program and mentoring in 2012 negotiations primarily added penalties for faculty failure to participate and did not insert such predicate exhaustion language, and proposals and discussions by parties in these negotiations never stated that exhaustion of contractual mentoring process was required before statutory dismissal proceedings could be brought.

[2] Poor performance — Contractual improvement/mentoring process — State law — Bargaining history ▶ 100.552535 ▶ 100.0235 ▶ 100.30 ▶ 24.37

State university violated collective-bargaining agreement (CBA) when it applied mentoring procedure to tenured faculty it charged with insufficient scholarly activity that was different from "peer mentoring" pro-

cedure in CBA, even though exhaustion of contractual peer mentoring/improvement program is not prerequisite for commencing dismissal proceedings under Board of Governors' statute, where mentoring process in CBA is lawful abridgement of managment rights, parties' extensive negotiations in 2012 that improved comprehensive contractual mentoring process implies that university cannot use other mentoring procedures, and allowing employer to do so would provide for forfeiture of faculty member's right to utilize contractual mentoring process.

[3] Poor performance — Contractual improvement/mentoring process — State law — Incorporation by reference ▶ 100.552535 ▶ 100.0235 ▶ 100.30 ▶ 24.111

Board of Governors' statute, which, among other matters, address dismissal procedures for tenured faculty, is not incorporated into collective-bargaining contract between faculty union and state university, where parties know how to expressly incorporate statute into their contract but failed to do so, and there is no evidence as to effect of statute being so incorporated on union grievance alleging that state university violated contract when it began discharge proceedings under statute against tenured faculty for alleged poor performance without first exhausting improvement program and peer mentoring process set forth in contract.

REMEDIES

[4] Poor performance — Mentoring process — Cease and deist order ▶ 100.552535 ▶ 100.0235 ▶ 100.559501

State university that violated collective-bargaining contract when it applied mentoring procedure to tenured faculty it charged with insufficient scholarly and research activity that was different from "peer mentoring" procedure in contract is ordered to cease and desist from using mentoring procedure that is different from that provided for in contract, since default remedy in contract violation case is order directing employer to stop doing what it is doing in violation of parties' agreement.

For the employer—Amy Stirling Lammers, assistant general counsel.

For the union—Gordon A. Gregory (Gregory, Moore, Jeakle & Brooks PC), attorney.

HORNBERGER, Arbitrator.

Introduction

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Wayne State University Chapter, American Association of University Professors-AFT, Local 6057, (Union) and Wayne State University (Employer). The Union contends that the Employer violated the CBA when it did not fulfill the provisions of Art. XXIV before commencing dismissal proceedings under the Board of Governors' (BOG) statute on dismissal of tenured faculty (faculty) in a performance case. The Employer maintains that it did not violate the CBA when it commenced BOG statute dismissal proceedings without having fulfilled the provisions of Art XXIV. The Union says that the utilization of Art. XXIV is a mandatory requirement before there can be a BOG statute dismissal proceeding in a performance case. The Employer disagrees. In addition, the Union maintains that the Employer cannot use a mentoring procedure that is different than the mentoring procedure in Art. XXIV, and that BOG statute 2.51.01 is incorporated into the CBA. The Employer maintains that the Employer can use a mentoring procedure that is different than the mentoring procedure in Art. XXIV, and that BOG statute 2.51.01 is not incorporated into the CBA.

Issues

The parties did not agree on the wording of the issues at the hearing. The parties agreed they would submit their proposed wording for the issues in their post-hearing briefs and that I could frame the issues. (Tr. 12-14)

According to the Union, the issues are the following:

> Is the Employer required to apply the Art. XXIV.C mentoring process to faculty alleged to be non-productive, under-performing or similar failure?
>
> The second question is what is the appropriate

According to the Employer, the issue is the following:

> Whether the Employer violated the CBA by initiating dismissal proceedings pursuant to BOG statute 2.51.01, prior to engaging a peer review process pursuant to Art. XXIV.I.C., or by sending letters to faculty identified as lacking scholarly or research activity, or by requesting that these faculty attend a meeting and provide information to the Dean of the School of Medicine regarding their professional activities?

I frame the issues as the following:

Whether the utilization of Art. XXIV is a mandatory predicate before the Employer can bring BOG statute dismissal proceedings for alleged performance issues? If the answer is yes, what is the appropriate remedy?

Whether the Employer can use a mentoring procedure that is different than the mentoring procedure in Art. XXIV. If the answer is no, what is the appropriate remedy?

Whether BOG statute 2.51.01 is incorporated into the CBA. If the answer is yes, what is the appropriate remedy?

Relevant Contractual Language

Article VII
Past Policies

A. Continuation of Past Policies

Except as modified by this Agreement, the following actions formally approved by the Board of Governors shall remain unchanged for members of the bargaining unit:

Statute 2.41.01.180 The Role of Consulting by Faculty Members

Statute 2.41.04 Patent and Copyright Policy (July 13, 1984)

Statute 2.42.01 Academic Freedom

Statute 2.50.02 Family Employment

Statute 2.51.01 Appointments, Continuing Tenure, Termination and Dismissal Policies and Procedures for Faculty

Statute 2.52.01 Appointments, Continuing Tenure, Termination and Dismissal Policies and Procedures for Academic Staff

Statute 2.55.04 Retirement Regulations, Special Provisions;

Personnel

Under DSERS

This Article shall not prevent any change of an bring it into accord with the current contract; nor shall this Article prevent any changes by the Board of Governors to those actions not embodied in the Agreement.

B. Grievance of Changes

Issues concerning whether or not Board of Governors' actions which are general personnel policies applicable to the entire teaching faculty and/or academic staff, are being followed in a particular instance are subject to the Grievance Procedure.

Any grievance citing this Article must indicate the specific statute or policy violated including date of adoption by the Board of Governors.

C. Notice of Action to Delete

If the Administration wishes to delete any of the statutes contained in this Article or referred to in a Letter of Agreement, the Administration must notify the Association at least sixty (60) days in advance of presentation to the Board of Governors. If the Association objects to the deletion, the statute must remain intact.

Article XX
Term Appointments

* * *

C. Annual Review Provisions

1. General Provisions

Each year the unit tenure committee for faculty and the unit tenure/promotion committee for academic staff (see XXII.D and XXIII.B) shall prepare a written review for any bargaining-unit member holding a term appointment. In a unit without the appropriate committee, the unit administrator (chair, dean, director, or vice president) shall possess the authority and functions of the committee. In such units the unit administrator shall consult with the tenured faculty, or the tenured and employment-security-status-academic staff, as appropriate.

The bargaining-unit member shall receive at least two (2) weeks' notice prior to the annual review.

The appropriate unit administrator may concur and/or may add his/her comments to the committee's written review. The appropriate unit administrator shall discuss the review with the bargaining-unit member. The written review shall have been given to the bargaining-unit member at least five (5) days prior to the discussion. At the option of the appropriate unit administrator or the bargaining-unit member, the designated spokes-

the discussion. If the unit contains more than fifteen (15) persons requiring annual written reviews, the appropriate unit administrator may select a designee to conduct some of these discussions. In cases where the bargaining-unit member is not satisfied with the review performed by a designee, s/he may request review by the appropriate unit administrator. The written reviews shall be placed in the bargaining unit member's personnel file along with supporting or dissenting material provided by the bargaining-unit member and the unit committee. The failure to conduct an annual written review is grievable at Step One only. Neither the written review nor the discussion nor the failure to complete any annual written review shall imply any commitment to recommend reappointment, promotion, employment security status or tenure.

For bargaining-unit members with joint appointments, the annual review is to be carried out by the unit in which the major activity is carried out following the above procedures. The director/chair of the other unit(s) must contribute to the review conducted by the primary unit.

2. *Faculty Provisions*

For faculty on the tenure track, the annual review shall be based upon excellence in teaching and in scholarly achievement or, for a faculty member in the creative or performing arts, in creative professional achievement, and shall take into account such unit, School/College, and University tenure factors as are in force. Consideration shall also be given to non-instructional service to the department, School/College, and/or University and/or public and/or professional service which benefit the University. The annual review shall identify areas of growth and strength and areas of concern in teaching, scholarship or creative activity, and service.

For faculty not on the tenure track, the annual review shall be in relation to his/her professional performance and as it relates to appropriate unit, School/College and University factors as are in force except that lecturers and senior lecturers shall be reviewed primarily for teaching with secondary consideration for excellence in scholarly work and/or service if the letter of appointment has identified scholarly work and/or service as part of the bargaining-unit member's responsibility.

Article XXIV
Professional Duties

C. Professional Review and Development

1. Each faculty member's annual report should consist of (a) an updated professional record; (b) previous year; (c) a summary of the last three (3) years of the faculty member's activities, a presentation of current activities, and what results are expected from these activities. All faculty members are required to submit an annual report and to participate in this process. Failure to participate in the annual process shall result in no selective-salary increase, no travel support, and no credit toward sabbatical leaves. Failure to participate in the annual review process two (2) times or more in any five (5)-year period shall also result in the forfeiture of any across-the-board raise. The salary committee's recommendation may form a basis for an adjustment in workload.

2. Professional development of faculty is important throughout the many stages of a faculty member's career. Accordingly, each year seventy-five thousand dollars ($75,000) will be allocated to support professional development activities for tenured faculty. The Office of the Provost will administer these funds and will issue an annual report regarding their distribution.

3. Outstanding performance in one or another of the three (3) areas shall be rewarded through contractual salary increases as provided in Article XII.

4. Each unit salary committee will be charged with making recommendations for improvement when a faculty member falls short of expectations in research, teaching and/or administrative/University service.

5. If, in the course of the regular annual selective-salary review, the Salary Committee concludes that a faculty member has been performing in scholarly/creative activity and/or teaching at a level that is substantially below the unit's factors and norms, the Salary Committee may recommend to the chair/director/dean that a peer mentoring committee (see 5.a. below) be established to address the issues raised by the Salary Committee.

a. A mentoring committee shall be appointed and will consist of three (3) bargaining-unit members of the faculty of equal rank or higher: one (1) chosen by the unit salary committee; one (1) by the chair/director of the unit; and one (1) by the faculty member. The mentoring committee may consist of up to two (2) members from outside the unit in cases where there are not enough unit members who qualify or objections are raised to particular faculty members by the faculty member being mentored.

b. An improvement program shall be no shorter than one (1) year in length. At the end of each year of the improvement program, the mentoring committee will report progress to the unit salary committee. The unit salary committee shall make

in improving the performance of the faculty member in the area identified as deficient (teaching, research, or administrative/University service).

c. If the improvement program is judged not to have been effective in the view of the unit salary committee in any of the year-end reviews, a report of this assessment shall be sent to the mentoring committee, and it shall have the opportunity to respond. After considering the response, the unit salary committee shall recommend a continuation of the program or refer the matter to the chair/director of the unit for whatever action s/he chooses to take consistent with the terms of this Agreement and the Board of Governors' statutes.

d. In circumstances recognized as warranted by the chair (dean/director in non-departmentalized units) in consultation with the unit's policy and/or personnel committee, or other committee designated by the unit's bylaws, and with the faculty member, and with the approval of the dean, the chair may substitute authorized University activity for all or a portion of the teaching workload. Authorized University activity may include, but is not limited to, scholarly research, publication, or equivalent creative activity, and/or organized University or public service.

e. Faculty assigned a differential teaching load and willing to accept it in lieu of scholarly/creative activity are exempt from this review of scholarly/creative activity.

Board of Governors' Statute:

2.51.01 Appointments, Continuing Tenure, Termination and Dismissal Policies and Procedures for Faculty

2.51.01.010 Tenure - Faculty

Tenure is a means to certain ends; (1) Academic freedom and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. The Board of Governors recognizes that tenure is indispensable to the success of this institution in fulfilling its obligations to its students and to society. This statute shall be interpreted in light of these purposes.

2.51.01.020 Appointments for service with tenure in the University can be made only by specific action of the Board of Governors on recommendation of the President. Appointments for service with continuing tenure shall be made in the college(s) or school(s) or department(s) in which the individual concerned serves, or divisions or academic entities that are not attached to a college/school.

2.51.01.030 Effective August 1, 1983, appointments to the positions only of Instructor, Assistant Professor, Associate Professor, and Professor establish other positions, not on the tenure track, and may establish definitions for those positions

2.51.01.040 Tenure may be terminated by the University only for one of the following reasons: (a) adequate cause after opportunity for a fair hearing as provided in section 2.51.01.190 titled Dismissal Proceedings - Faculty with Tenure; (b) failure of the individual to return from a leave within the period specified in the rules and regulations of the University; (c) job abandonment; (d) reaching the age now or hereafter established by this Board as the age for mandatory retirement; (e) the substantial curtailment or discontinuance of a program which removes any reasonable opportunity for using a faculty member's services; (f) extraordinary financial exigencies. One year's notice of proposed termination will be given except in a termination for cause based on moral turpitude, failure to return from a leave, job abandonment, or upon retirement.

2.51.01.050 Administrative assignments do not carry tenure, nor may a person earn tenure in any administrative position. Continuing tenure once given will not be invalidated by accepting an administrative assignment, or by promotion to another rank.

2.51.01.060 Persons simultaneously holding administrative positions and tenure-track appointments may, at the discretion of the President, be retained in their administrative positions without regard to their tenure status.

2.51.01.070 Term Appointments

A "term appointment" is an appointment made for a designated period of time. Term appointments at this University shall be limited to a total of seven years of full-time service in tenure-track positions. Appointments are made for the precise term stated in the notice of appointments; otherwise, the appointment is limited to a single term or semester.

2.51.01.080 Nothing in this policy statement shall imply that tenure may not be recommended to and granted by the Board of Governors at an earlier point in time.

2.51.01.090 The power to make term appointments is vested in the President, and inasmuch as the Board has reserved to itself the power to confer tenure, the appointee has an obligation to inform the President by mail or in person when an appointment offered by the President would contravene these limitations; failure to do so will constitute an estoppel against any claim that such an appointment established any right or entitlement to tenure, and may be deemed cause for terminating the appointment. Acceptance of a term appointment is an acknowledgment of notice that service terminates at the end of the period for

2.51.01.100 Appointments under this section shall be in writing and each such appointment shall contain the provisions of the appointment.

2.51.01.110 Appointments in the next three categories carry no implication of tenure, and are strictly limited to the periods and upon the conditions explicitly stated. Unless otherwise expressly agreed, they will not be counted in determining years of service referred to in the provisions for term appointments.

2.51.01.120 Term Conditioned on Subsidy

Appointments, whether in instruction, administration or research, which are expressly related to a subsidy of limited duration, terminate with the cessation of the subsidy. Tenure once given will not be invalidated solely because the incumbent thereafter receives a limited duration subsidy.

2.51.01.130 Part-Time

An appointment for part-time service is made for the precise term stated in the notice of appointment; otherwise, the appointment is limited to a single academic term or semester.

2.51.01.140 Temporary

Appointments in such capacities as teaching or research fellows, research assistants, research scientists or research associates, lecturers, and other non-tenure-track positions established by the President, or with the designation of acting, adjunct, clinical or visiting are made for the precise term stated in the notice of appointment; otherwise, the appointment is limited to a single academic term or semester.

2.51.01.150 Definitions of Terms

UNIT - The college or school, or divisions or academic entities not attached to a college/school in which the individual concerned serves.

EXECUTIVE - The administrative head of the Unit.

RESPONDENT - The individual with reference to whom the proceedings are initiated.

UNIVERSITY COUNSEL - The person representing the President of the University or the Executive in the conduct of any proceedings hereunder. It is his/her duty to present all available relevant evidence so that the Hearing Committee shall be fully informed of the facts.

HEARING COMMITTEE - A committee comprised as provided in Section 2.51.01.220 authorized to review the grounds for the proposed dismissal and to make recommendations thereon.

EXECUTIVE SESSION - A meeting of the Hearing Committee which is limited to members of the Committee and its counsel.

JOB ABANDONMENT - Job abandonment is or surrender of an individual's employee status, but does not include absence from work due to circumstances beyond the individual's control (e.g., medical emergency, military service, etc.). An individual who is terminated for abandonment has the right to pursue a grievance. Such grievance will be limited to the sufficiency of the factual basis underlying the determination that job abandonment occurred as of the date on which the faculty member was given notice of termination. Termination shall be stayed during the pendency of such grievance.

2.51.01.160 Dismissal Proceedings - Faculty on Term Appointment

Faculty appointed under an agreement for a fixed term may be dismissed prior to the termination of the term for adequate cause as follows: (a) for acts involving moral turpitude which bear adversely on the ability to perform responsibilities to the University; (b) serious misrepresentation of fact relied upon in making the term appointment; (c) for serious violation of academic standards and principles; (d) failure to perform academic assignments competently.

2.51.01.170 A fixed-term faculty member who is terminated for adequate cause will have access to the grievance procedures. If the arbitrator finds that the grievant (a) did not engage in acts involving moral turpitude which bear adversely on the ability to perform responsibilities to the University, or (b) did not engage in serious misrepresentation of fact relied upon in making the term appointment, or (c) did not engage in serious violation of academic standards and principles, or (d) did not fail to perform academic assignments competently, the arbitrator shall have the authority to rescind the dismissal or suspension, and to award reinstatement with back pay through the end of the contract term.

2.51.01.180 Termination of services because of financial exigencies or the substantial curtailment or termination of the program are not dismissal, and are dealt with elsewhere. Job abandonment and failure to return from a leave result in automatic termination, and are dealt with elsewhere. Incompetency arising from physical and/or mental illness or disability is treated under "sick leave" regulations.

2.51.01.190 Dismissal Proceedings - Faculty with Tenure

Faculty with tenure may be dismissed for adequate cause as follows: (a) for acts involving moral turpitude which bear adversely on the ability to perform responsibilities to the University; (b) for serious violation of generally accepted academic standards and principles; (c) for failure to perform academic assignments competently. (Termination of services at mandatory retirement

with elsewhere. Job abandonment and failure to return from a leave result in automatic termination, and are dealt with elsewhere. Incompetency arising from physical and/or mental illness or disability is treated under "sick leave" regulations.)

2.51.01.200 Initiation of Dismissal Proceedings for Faculty with Tenure

Dismissal proceedings may be instituted by the President on his/her own initiative or on the recommendation of the Executive. Under normal circumstances, the basis for the proposed dismissal shall be reviewed by the Executive with the Respondent before the formal recommendation is made.

2.51.01.210 Upon receiving the recommendation, the President may make such further investigation as he/she deems necessary, including a review of the matter with the Respondent. When convinced that reasonable grounds appear to exist for initiating proceedings, the President shall notify the Respondent in writing of the proposed dismissal and of the reasons therefore with sufficient particularity to give the Respondent an adequate opportunity to answer the charges and recommendation. The notice shall expressly state that Respondent has the right to a review of the matter before the Hearing Committee, if the Respondent makes such a request within ten days of mailing or delivery of the notice, and that the Respondent has the right at his/her own expense to be represented and assisted by both academic and legal counsel of his/her choosing.

2.51.01.220 Hearings

The Hearing Committee shall be composed of seven members selected as follows:

- Three members picked by lot from a twelve-member panel elected by the Academic Senate. The panel shall be chosen annually as a standing committee.

- A 24-person slate shall be nominated by a ten-person nominating committee created in the following manner:

- Every year, the faculty councils of the Colleges/Schools of Liberal Arts, Medicine, and Science shall each elect one representative to the nominating committee. Every year, members of the academic staff shall elect one representative to the nominating committee. In even-numbered years, faculty councils of the Colleges/Schools of Business Administration, Education; Fine, Performing and Communication Arts; Law; Pharmacy and Allied Health Professions, and the Graduate School shall each elect one representative to the nominating committee. In odd-numbered years, faculty councils of the Colleges/Schools of Engineering, Lifelong Learning, Nurstan Affairs; and Library Science shall each elect one representative to the nominating committee.

- The 24-person slate shall be sent to the Academic Senate, which shall elect the twelve-member panel.

- Three members picked by lot from a six-member panel elected as a standing committee of the faculty of the Unit.

- The chair of the Hearing Committee shall be a retired federal, state, or administrative law judge who is mutually acceptable to the faculty member and the University. If the University and the faculty member cannot agree on a mutually acceptable chair, then they shall agree upon a neutral third party, who shall make the selection.

2.51.01.230 If a hearing is requested, the Respondent in person or through counsel shall meet with the University Counsel for the drawing of the members of the Hearing Committee. Members of the Academic Senate panel who are also members of the Respondent's Unit shall automatically be excluded from the drawing and from serving as the seventh member of Committee pursuant to the provisions above. Each side shall be entitled to one peremptory challenge from each panel, to be made before the drawing. At least a majority of the members whose names are drawn shall meet promptly on call of the President for the purpose of organization and to elect a chair. If any member whose name is drawn is unavailable or fails to attend, or is excluded by challenge, a replacement shall be drawn from the panels by the Hearing Committee. The Committee shall then select the Committee Counsel and with the assistance of the latter arrange for conducting the hearings as expeditiously as circumstances and the reasonable necessities of the parties permit.

2.51.01.240 The proceedings shall be recorded by a stenographer, and shall be reasonably available to the parties as well as the Committee. So far as possible, testimony on disputed fact shall be given in person and subject to cross-examination. Subject to adequate safeguards, statements may when necessary be taken outside the hearing and reported to it. Respondent is entitled to assistance of the Committee in securing attendance of University witnesses in his/her behalf. In general, the accepted rules of evidence and judicial procedure in civil proceedings (or administrative tribunals) shall be a guide, but departures which would not seriously and adversely affect Respondent's opportunity to a fair hearing shall be in the Committee's discretion. Others may be invited to attend as observers with the consent of both parties and the Committee.

The committee may consider any matter in executive session and normally will prepare its draft report in executive session. The report shall be prepared as expeditiously as possible, and shall include specific and clear-cut findings on all factual issues using the standard of preponderance of the evidence. The report shall include a statement by the Committee on the sufficiency of the evidence in establishing that the Respondent engaged in the conduct alleged as grounds for dismissal.

2.51.01.260 The report shall be forwarded to the President of the University and to the Respondent. If the President on the basis of this report decides to discontinue the proceedings, a notice to this effect to the Respondent will conclude the matter. If the President decides to recommend to the Board of Governors the dismissal of the Respondent, notice to this effect shall be sent to the Respondent by registered mail or hand-delivered by courier to the official University home address of the Respondent; and Respondent shall be entitled to a review before the Board of Governors, if he/she makes such a request to the Secretary to the Board of Governors within ten business days of mailing or delivery by courier of this notice. Such review shall be limited to the matters presented to the Hearing Committee.

2.51.01.270 Review by the Board of Governors

In reviewing the case, the Board of Governors will refer the matter to a Special Committee consisting of members of the Board. The Special Committee will receive from the Respondent and/or his/her counsel and the University Counsel such oral or written statements or arguments deemed appropriate to a full understanding of the case, and it may meet with the Hearing Committee in executive session either before or after hearing from Respondent if it believes that this will help clarify any point in issue. The review will be limited to the record made before the Hearing Committee, including the Committee reports, and to the report and/or recommendation of the President.

2.51.01.280 The Special Committee shall report its recommendations to the Board. If the Board believes that further evidence is desirable, the matter will be referred back to the Hearing Committee or to a consultant appointed by the Special Committee for this purpose, and the Hearing Committee or consultant shall receive such evidence and report back any supplemental findings or modifications in the previous reports resulting therefrom. In the event that a consultant is used, the consultant's report shall be sent to the Hearing Committee for any comments that they wish to make to the Board regarding the consultant's report. The Hearing Committee shall promake within ten business days and shall not undertake additional investigation during this time.

2.51.01.290 Upon concluding its review of the entire matter, the Special Committee shall report to the Board of Governors in executive session for such action as the Board deems justified and appropriate.

2.51.01.300 Emergency Suspension - Faculty

Whenever the continued service of a member of the faculty would in the judgment of the President threaten grave and immediate injury to the University or to its students, faculty, or staff, the individual may be relieved of part or all of his/her University duties and privileges without prejudice to the final disposition of the matter. Such action may be taken by the President's designee, if the President is not available. Such suspension in and of itself shall not affect the individual's compensation; and it shall be reported to the Board of Governors promptly for such action as the Board may wish to take with reference thereto. Such emergency suspension shall be limited to a maximum of 120 days if no further action is taken in that time, and the individual shall return to his/her regular duties.

2.51.01.310 The President will designate a competent legal and/or other appropriate member of his/her staff to conduct an appropriate investigation to determine the necessity for the continuation of the suspension. The investigation must include an opportunity for the Respondent to testify unless this is not feasible for reasons of physical or mental health or of behavior nullifying the usefulness of such an opportunity. The Respondent has the right at his/her own expense to be represented and assisted by both academic and legal counsel of his/her choosing. A report of the investigator shall be sent to the President and to the Respondent.

2.51.01.320 Conforming Provision

Any existing statutory provisions or University policies and regulations which are contrary to or inconsistent with the provisions of this Statute are hereby modified to make them conform to the Statute.

Legislative History

Adopted 6-0; Official Proceedings 6:916 (31 January 1962) Amended 4-0; Official Proceedings 8:1062 (16 January 1964) Amended 7-0, with one abstention; Official Proceedings 27:3831 (15 July 1983) Amended 7-0; Official Proceedings 33:4408 (9 December 1988) Amended 6-0; Official Proceedings 39:5112 (2 December 1994) Amended 5-0; Official Proceed-

Cross References

Sec. 2.50.03.020

Compiler Notes

(1) Added former Sec. 2.51.01.050 and republished, without change, former Sec. 2.51.01.070.

(2) Amended former Secs. 2.51.01.030, 2.51.01.050, and 2.51.01.060; added former Secs. 2.51.01.110 and 2.51.01.440; made former Sec. 2.51.01.040 a separate paragraph from former Sec. 2.51.01.030, and divided former Secs. 2.51.01.080 and 2.51.01.090 into separate paragraphs.

(3) Changes in the tenure statutes for faculty and academic staff were agreed to by the University administration and the AAUP during the 1988 negotiations, and it was recommended that the revised statutes be adopted by the Board (Official Proceedings 33:4408, 9 December 1988). Amended Sec. 2.51.01.010; repealed former Sec. 2.51.01.020; substituted Sec. 2.51.01.020 for former Secs. 2.51.01.030 and 2.51.01.040; amended Secs. 2.51.01.040 through 2.51.01.080; added Sec. 2.51.01.090, amended Secs. 2.51.01.120 through 2.51.01.170; amended Sec. 2.51.01.210; amended Secs. 2.51.091.230 through 2.51.01.250; amended Sec. 2.51.01.280; added Sec. 2.51.01.290; amended Secs. 2.51.01.300 through 2.51.01.370; added Sec. 2.51.01.380.

(4) The faculty tenure statute was significantly revised and restated in accordance with the agreements made during the 1994 collective bargaining negotiations; specifically, the changes address provisions for and definitions of job abandonment and modification of the hearing process.

(5) Section 2.51.01.220 was revised to change the procedure for appointing hearing panels, in accordance with the recently modified AAUP agreement.

Factual Outline

Précis

For many decades the CBA contained Art. XXIV which provided mentoring procedures for allegedly under-performing faculty. Outside of the CBA, the Employer has had BOG statute 2.51.01 which contains the exclusive method for dismissal of faculty. Neither Art. XXIV nor the BOG statute had been relevantly changed in decades.

During the 2012 negotiations, which resulted in the 2013-2021 CBA, the Employer proposed a new CBA provision to provide for faculty suspensions and terminations. The posal. This resulted in a high level Ad Hoc Committee on Tenure and Related Issues being appointed by the Union President and the University President. After the Ad Hoc Committee Report was issued, the Employer withdrew its proposal.

The parties then negotiated some changes in Art. XXIV concerning mentoring. These changes included some sanctions if the faculty member did not cooperate with the mentoring, and, if the improvement program were not effective, the situation could be referred to a possible action consistent with the CBA and the BOG statutes.

After the 2013-2021 CBA went into effect, the School of Medicine (SOM) allegedly required some mentoring of faculty that was not Art. XXIV mentoring and commenced BOG statute dismissal proceedings against faculty for performance reasons without first exhausting Art. XXIV. The Union grieved contending that (1) the Employer must exhaust Art. XXIV before it commences a BOG statute dismissal action for performance reasons, (2) the Employer cannot require mentoring that is different than that provided for in Art. XXIV, and (3) the BOG statute 2.51.01 is incorporated into the CBA. The Employer disagrees with the Union on all three of these contentions.

Background

This case involves the relationship between Art. XXIV and the BOG statute regarding dismissal of faculty. Art. XXIV provides for faculty mentoring. The BOG statute governs the dismissal of faculty. The Union argues that utilization of Art. XXIV is a mandatory predicate before the BOG statute dismissal proceedings can be brought for performance issues, that the Employer cannot use a mentoring procedure that is different than the mentoring process in Art. XXIV, and that BOG statute 2.51.01 is incorporated into the CBA. The Employer argues that Art. XXIV is not a mandatory predicate, that the Employer can use a mentoring procedure that is different than the mentoring procedure in Art. XXIV, and that BOG statute 2.51.01 is not incorporated into the CBA.

According to *Associate Provost John D. VanderWeg*, some version of Art. XXIV has been in the CBAs since 1974, and the BOG

According to *2013-2016 Provost Dr. Margaret E. Winters*, Art. XXIV contains a mentoring process, was in CBAs since at least the 2002 negotiations, and she does not know of any changes in Art. XXIV between 2003 and 2011. Provost Dr. Winters testified that some BOG statutes are incorporated into the CBA.

School of Medicine (SOM) Background

According to *Dr. Delaney-Black, Vice-Dean for Faculty Affairs and Professional Development at the School of Medicine since February 2014*, there are four tracks of faculty appointments in the SOM. They include research educator, clinician educator, clinician scholar, and research.

Associate Provost Vander Weg does not know of any SOM faculty that have been put on the Art. XXIV mentoring process. He indicated the purpose of the new Art. XXIV is to have mandatory sanctions, and, if below standards, where to go next. In his opinion, the Employer can bypass Art. XXIV and go directly to the BOG statute dismissal proceedings.

Union Testimony Concerning 2012 Negotiations

According to *Michelle Fecteau, Executive Director of the Union*, during the 2012 bargaining, the Employer did not say that without using Art. XXIV the Employer could dismiss a faculty member.

According to *Union President Dr. Charles J. Parrish*, post-tenure review and Art. XXIV were discussed during the 2012 negotiations. The Union focused on remedial actions to be put in Art. XXIV. The Employer's proposal concerning suspensions and terminations was ultimately rejected. It would have been a substitute for Art. XXIV post tenure review. Eventually there were negotiations through a "side-bar." Then things moved along quickly. The Union agreed to put some sanctions in Art. XXIV. According to Dr. Parrish, in the Employer's 2012 proposals, "peer review was key to Art. XXIV and it was this key that the Employer failed to follow in SOM."

Dr. Parrish testified that:

> "Q. Did [Employer negotiator] Mr. Greene ever represent to you that departments, divisions or schools could bypass Article XXIV and go directly to the Board of Governors' statutes?
>
> A. No, we didn't discuss it, but implicit in all the work that we went into in response to their termination and suspension proposal was all around how we substituted mentoring for this, and there are things that basically we would have no objection to, the administration proceeding directly to the Board of Governors' statutes if it was a question of other things than competently doing your academic job.
>
> For example, if you didn't show up for work, I know that back in the nineties they fired somebody under this, I think a physician in the Medical School who was in jail for Medicaid fraud and he didn't show up to work or job termination for moral turpitude or these other sorts of things." (Tr. 99-100)

Dr. Parrish further testified:

> "Q. Is it the Union's position with respect to those individuals that Article XXIV should have been applied as a condition precedent to proceeding under the Board of Governors' statute?
>
> A. Yes." (Tr. 108. See generally Tr. 114-115)

In addition, Dr. Parrish testified that:

> "Q. Does the Board statute 2.51.01 make any reference to Article XXIV?
>
> A. No.
>
> Q. Was the Board statute amended at any time since the ratification of your current collective bargaining agreement?
>
> A. No. (Tr. 123)
>
> Q. The Board of Governors' statute does not deal with alleged under-performance, lack of productivity, failure to meet expectations and so forth. Is that correct?
>
> A. It says what it says. One of the things is failure to do assigned academic assignments competently." (Tr. 125)
>
> Q. Was there, between you and Mr. Greene, any discussion of the Board of Governors' grounds for dismissal entitled "Failure to Perform Academic Assignments Competently?
>
> A. No." (Tr. 125)

Dr. Parrish further testified:

> "Q. Did Jim Greene or any other representative of the administration assert to you that they had the option of either following the mentoring of Article XXIV or going directly to the Board of Governors—
>
> A. We never discussed it. It was implied I think. It was not an item of discussion between Jim and me." (Tr. 198)

According to Dr. Parrish, Art. XXIV applies throughout the University. Only the SOM has

Professor Robert Arking, Contract Implementation Officer for the Union, was a member of the Union's negotiating committee in 2002, one or two negotiations after, and in 2012. He was present when Art. XXIV was discussed. This discussion concerning Art. XXIV was a major part of energies of the 2012 negotiations.

Professor Arking testified that:

> "When we went through the rounds of the initial talks on this and we finally reverted back to the original language and we changed it slightly to indicate that Article XXIV came before Board of Governors, there were no objections, no disagreements from the other side of the table when that was the sequence that was laid out, which is in that 5(C) portion of the contract.
>
> It was very clear, it was there. If they went through the mentoring process and it didn't work, then the option was to go to the Board of Governors." (Tr. 133)

Employer Testimony Concerning 2012 Negotiations

2013-2016 Provost Dr. Winters was on the Employer team in negotiations for the 2013 CBA. She testified that the Union committee interpreted the Employer proposal as a way to end tenure.

According to Dr. Winters,

> "Q. Were any promises or inducements made by the Employer that Article XXIV would be a precursor or a condition precedent to Board of Governors' dismissal proceedings?
>
> A. None whatsoever.
>
> Q. Was that proposed by either side in the negotiations?
>
> A. Not as far as I can remember." (Tr. 183)

Neither Associate Provost VanderWeg nor Vice-Dean Dr. Delaney-Black took part in the 2012 CBA negotiations.

2016 School of Medicine

Dr. Delaney-Black, testified that on March 23, 2016, letters were sent to approximately 37 SOM faculty members. The SOM Dean made the decision to send these letters and to whom to send them. A group of individuals had discussed faculty data. This group included consultants, a Provost representative, and a General Counsel representative. The SOM was experiencing financial difficulties in that had an impact. There had been auditing of faculty performance back to 2010. The Dean's review went back at least five years. Grant funding and applications were important. Publications were also important. The Dean ultimately did the judging of to whom letters would go. Dr. Delaney-Black was involved. The Chair and the Administration were the initial source.

The Dean's March 23, 2016, letter said:

> As you are aware, the School of Medicine has been reviewing information about the productivity of our faculty. I have been personally involved in this process, and have consulted with department chairs and others in an effort to be both accurate and fair. Unfortunately your lack of scholarly and research productivity over the last few years is of concern.
>
> Ultimately I shall be making recommendations to the President as to which members of our faculty could possibly face dismissal proceedings because of their failure to maintain sufficient level of productivity as the Board of Governors policy terms it, these faculty members show 'failure to perform academic assignments competently.' Before taking further steps, I would like to meet with you to review my information and to discuss whatever options there might be.
>
> Please call my office for an appointment by no later than Wednesday, April 6, 2016.

The Dean made his decision concerning the allegedly under-performing faculty members. Dr. Delaney-Black was not part of any discussions concerning this. The Dean asked the faculty member what the faculty member wanted. There were no other options offered to the faculty. The Dean did not initially give resignation options. Eventually the faculty members in question were offered a separation agreement.

There were "expectations meetings" with faculty members. Dr. Delaney-Black conducted some of them. Dr. Delaney-Black testified that:

> "Q. Were the expectations to be fulfilled within one year generally?
>
> A. Yes.
>
> Q. At the end of the year, they would be again reviewed as to whether they would be continued or subject to dismissal. Correct?
>
> A. It was not specific as to whether it would be dismissal or not.
>
> Q. During the expectation period, would there

A. Yes.

Q. Who would the mentors be?

A. It was referred back to the chair in the department.

Q. Would peers be involved in the mentoring?

A. Not specifically.

Q. Why not?

A. You would have to ask the Dean. (Tr. 64-65)

Q. How about the one year they had to turn their productivity around, what do you call that?

A. They were referred back to the department for mentoring." (Tr. 83)

During the expectations meeting, Dr. Delaney-Black handed the faculty member a document. The faculty member had to meet certain goals. These expectations included things such as getting a grant application or getting funded in a year. Consequences were mentioned during the expectations meeting, including possible termination.

Dr. Delaney-Black was involved in the preparation of charges concerning "productivity" to the University President.

According to Dr. Delaney-Black, there have been some Art. XXIV proceedings in SOM. They are not required to be reported to the Dean.

Dr. Delaney-Black testified:

"Q. What is the basis for your understanding that you are not required to apply Article XXIV?

A. There is nothing that says that it has to be applied.

Q. So is that your interpretation, or did someone tell you that?

A. There is nothing in the contract or the Board of Governors' statute that says that it must be applied.

Q. Equally, would you agree that there is nothing that says that it can be ignored and not applied? It's silent, isn't it?

A. There is not a requirement for it, no.

Q. So your testimony was it was your understanding, and I'm asking the basis for it, and apparently it is your personal interpretation.

A. That is a fair statement, and discussion with others would occur." (Tr. 81-82)

April and May 2016 grievances

On April 6, 2016, and May 17, 2016, the Union filed grievances concerning the SOM were consolidated. Associate Provost Vander Weg received the two grievances. He held a Step 1 meeting on August 30, 2016. The Employer denied the grievances and the matter proceeded to arbitration.

Contentions of the Parties

a. For the Union

The Union contends that the BOG statute on dismissal of faculty is incorporated into the CBA. Art. XXIV exhaustion is a condition precedent to dismissal charges for non-performance. Art. VII expressly incorporates key BOG statutes stating terms and conditions of employment such as academic freedom. The statutes remain unchanged for the life of the CBA unless a change or deletion is mutually agreed upon.

In cases of non-performance, lack of productivity or poor performance, Art. XXIV.C is a condition precedent to BOG dismissal proceedings. Art. XXIV. B, of the 2009-2012 CBA did not have an endpoint for faculty who failed to improve scholarly activity. By contrast, Art. XXIV.C.5.c, states in part:

> If the improvement program is judged not to have been effective in the view of the unit salary committee in any of the year-end reviews, a report of this assessment shall be sent to the mentoring committee, and it shall have the opportunity to respond. After considering the response, the unit salary committee shall recommend a continuation of the program or refer the matter to the chair/director of the unit for whatever action s/he chooses to take *consistent* with the terms of this Agreement and the Board of Governors' statutes. emphasis added.

Art. VII.A states that "Except as modified by this Agreement, the following actions formally approved by the Board of Governors shall remain unchanged for members of the bargaining unit." BOG statute 2.51.01 was modified by amended Art. XXIV. As requested by the Employer before it withdrew its proposal, Sec. 5.C provides BOG intervention for non-performing faculty. Where the mentoring process fails, the BOG has wide discretion to take appropriate action.

The Union does not claim that all personnel action is limited to Art. XXIV review or that "failure to perform academic assignments competently" cannot be applied in an appropriate case. For example, a faculty negligently fuses or fails to take corrective action. But, as in the instant case, where faculty performance ". . . is substantially below the unit's factors and norms . . .," the initial procedure and remedy is Art. XXIV.C.

After extensive negotiations, and recommendation of a joint committee, a procedure was developed to deal with the alleged problems in the SOM.

The Union requests that I grant the grievances and provide full relief.

b. For the Employer

According to the Employer, the Employer followed the appropriate process for dismissal of faculty, and did not violate the CBA in the Employer's initiation of dismissal proceedings. BOG statute 2.51.01 controls the "dismissal policies and procedures for faculty" without engaging any provision of the CBA. The CBA does not contain any language that supports the Union's position. There is no ambiguity that would allow for the introduction of extrinsic evidence. Even if such ambiguity were found, there is nothing in the bargaining history, nor was any other evidence or testimony, that supports a finding that the parties agreed that engaging Art. XXIV was a condition precedent to dismissal proceedings.

The BOG statute governing dismissal of faculty is not dependent upon any precedent or condition established by the CBA. The plain CBA language does not support the Union's claims. Art. VII does not incorporate, modify or amend the BOG statute governing dismissal proceedings. Art. XXIV does not establish a contractual precedent to dismissal proceedings. The Dean's letters to faculty and request for information do not violate the CBA. Where the CBA provisions are unambiguous, no outside evidence should be considered.

The Employer contends that the grievances should be denied.

Discussion and Decision

Introduction.

The instant case involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources

the meaning of various provisions of the CBA. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence of the award from the plain language of the CBA. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the CBA.

In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the CBA from the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

For the following reasons, I conclude:

1. The utilization of Art. XXIV is not a mandatory predicate before the Employer can bring BOG statute dismissal proceedings for alleged performance issues.

2. The Employer cannot use a mentoring procedure that is different than the mentoring procedure in Art. XXIV.

3. BOG statute 2.51.01 is not incorporated into the CBA.

Is Art. XXIV a mandatory predicate for a BOG statute dismissal proceeding?

The Union says yes.

According to the Union, in performance cases, Art. XXIV is a condition precedent to BOG dismissal proceedings. Art. XXIV of the 2009-2012 CBA did not have an endpoint for faculty who failed to improve scholarly activity. By contrast, Art. XXIV.C.5.c. states in part:

> If the improvement program is judged not to have been effective in the view of the unit salary committee in any of the year-end reviews, a report of this assessment shall be sent to the mentoring committee, and it shall have the opportu-

> the unit salary committee shall recommend a continuation of the program or refer the matter to the chair/director of the *unit for whatever action s/he chooses to take consistent with the terms of this Agreement and the Board of Governors' statutes.* emphasis added.

Where faculty performance ". . . is substantially below the unit's factors and norms . . .," the initial procedure and remedy is Art. XXIV.C.

The Employer says no.

According to the Employer, the BOG statute governing dismissal states that faculty may be dismissed only for certain reasons, including, for "adequate cause after opportunity for a fair hearing as provided in section 2.51.01.190. . . ." The statute provides for dismissal for adequate cause on the following bases:

> (a) for acts involving moral turpitude which bear adversely on the ability to perform responsibilities to the University; (b) for serious violation of generally accepted academic standards and principles; (c) for failure to perform academic assignments competently. *Id.*

The BOG statute provides the stand-alone dismissal process. Art. XXIV does not refer to the mentoring program being a condition precedent to the use of the BOG statute. These words could have been used by the parties to convey such a specific meaning to the provision. The plain language of Art. XXIV does not support the Union's position.

Art. XXIV is not a mandatory predicate for a BOG statute dismissal proceeding.

[1] I find that Art. XXIV is not a mandatory predicate for a BOG statute dismissal proceeding. There are several reasons for this.

1. The BOG statute has remained unchanged for decades. Art. XXIV remained largely unchanged during many CBAs until the present 2013-2021 CBA. There is no evidence that during these decades there was a practice or requirement that Art. XXIV was a mandatory predicate for a BOG statute dismissal action. Elkouri & Elkouri, *How Arbitration Works* (8th Ed.), pp. 12-21 to 12-24.

2. Some changes were made to Art. XXIV during the 2012 negotiations. These changes were mainly to provide some penalties if a XXIV process, and with a possible referral to BOG statute consideration utilization under certain circumstances at the end of the Art. XXIV process. This expanded, not contracted, the access to the BOG statute dismissal process. The fact that predicate exhaustion requirement language was not inserted by the parties supports the inference that Art. XXIV is not a mandatory predicate for a BOG statute dismissal action. Elkouri & Elkouri, p. 9-27.

3. There is no evidence that anyone said to anyone out loud or in writing during the 2012 negotiations that the exhaustion or utilization of Art. XXIV was a mandatory predicate to commencing a BOG statute dismissal proceeding. There is no evidence that the Union asked or told the Employer during the negotiations "Is Art. XXIV exhaustion a predicate for BOG statute proceeding?" or "Art. XXIV exhaustion is a predicate." There is no evidence that the Employer told the Union during the negotiations "Art. XXIV exhaustion is a predicate for a BOG statute proceeding." Pre-contract negotiations and bargaining history can be important indicia in determining the intent of the parties. If the parties had wanted to say "Art. XXIV is a mandatory predicate to the use of BOG statute for dismissal," they could have. They did not. Elkouri & Elkouri, pp 9-26 to 9-31.

4. The text of the proposals exchanged by the parties during negotiation provides important evidence. There has been no citation of any place in the documentary negotiating history that either party proposed language that in effect said "Art. XXIV is mandatory predicate to the BOG statute for dismissal." Elkouri & Elkouri, pp. 9-26 to 9-31.

Can the Employer use a mentoring procedure that is different than the mentoring procedure in Art. XXIV?

The Union says no.

According to the Union, the procedure employed by the SOM mirrors the Art. XXIV procedure. This includes the Dean's March 23, 2016 letter. Using SOM factors as the standard, the Dean and associates interviewed department chairs and other administrators regarding faculty who for the past five years allegedly did not engage in sufficient scholarly

with lack of scholarly and research productivity over the last few years. They were threatened with BOG charges of failure to perform academic assignments competently because they failed to maintain sufficient level of productivity. There was mentoring that should have taken place pursuant to Art. XXIV. The Employer attempted to replicate Art. XXIV procedures without faculty participation. Art. XXIV is preemptive of the conduct engaged in by the Employer. Some faculty received one year of probation. They had a year in which to publish and obtain grants. The expectations were a unilateral exercise. The Employer cannot unilaterally develop and apply a faculty performance review system to replace a negotiated procedure. The grievances challenge that conduct.

The Employer says yes.

According to the Employer, the SOM was engaged in an extensive review of the productivity of faculty to determine whether they were meeting the expectations established in the Promotion and Tenure Factors. Their teaching, scholarship, and service records were reviewed, including peer-reviewed annual Selective Salary materials. The Dean's March 23, 2016, letter was sent to faculty members who had been identified as not meeting expectations. The Dean consulted with Department Chairs and others in an effort to be accurate and fair.

The Employer can take any action that is not prohibited by the CBA. This management right is incorporated in CBA, Art. III entitled "Administration Rights." "All managerial and administrative rights and functions, except those which are abridged by this Agreement, are vested exclusively in the University's Administration."

The CBA does not prohibit an administrator's evaluation of a faculty member's performance outside of the annual selective salary review process provided in Art. XX.C. and the annual report process described in Art. XXIV. Neither provision says this is the "exclusive" method or time that a faculty member's performance can be reviewed.

The Employer cannot use a mentoring procedure that is different than the mentoring procedure in Art. XXIV.

Each faculty member's annual report should consist of (a) an updated professional record; (b) a summary of the teaching evaluations for the previous year; (c) a summary of the last three (3) years of the faculty member's activities, a presentation of current activities, and what results are expected from these activities. All faculty members are required to submit an annual report and to participate in this process.

Dr. Winters testified that:

> "Q. What was the intended purpose, again from the Employer perspective—what was the purpose of Article XXIV(1)(C)?
>
> A. *Article XXIV(1)C) was intended, is intended to help departments, including the faculty of the department, work with a colleague who has, in one way or another, not shown the level of productivity.* It may be in teaching, and teaching would be, defining productivity, failing widely with successful teaching or research, scholarship, creative activity where the faculty member had demonstrated a lack over time of reaching the agreed upon level in the department." (Tr. 183-184) emphasis added.

The Dean's May 31, 2016, e-mail to the faculty stated that:

> . . . meetings are beginning to take place between department Chairs and faculty members. The purpose of these meetings is to:
>
> 1. Review recent contributions of each faculty member to [] SOM's mission
>
> 2. Assign and/or redeploy faculty effort to activities that contribute most to [] SOM's mission
>
> 3. Establish specific *expectations* for faculty performance contributing to [] SOM's mission, going forward
>
> 4. Assist faculty in their efforts to succeed
>
> All of this will be documented by the department Administrator who will be in attendance at these meetings.
>
> We want to be clear that this process is separate from Annual Review for tenure-track and term-appointed faculty or Selective Salary for all represented faculty, both of which [] SOM leadership will continue to administer in compliance with the AAUP contract. It is reasonable for Chairs to set expectations for faculty, and this will be an integral part of managing the mission and financial performance of [] SOM. The overarching goal of this initiative is to increase support, resources, collaboration and *mentoring* to faculty members in assisting them to be successful contributors to the goals of the department and the School. emphasis added.

Dr. Delaney Black testified that:

"Q. *During the expectation period, would there be mentoring?*

A. *Yes.*

Q. Who would the mentors be?

A. It was referred back to the chair in the department.

Q. Would peers be involved in the *mentoring*?

A. Not specifically.

Q. Why not?

A. You would have to ask the Dean. (Tr. 64-65) emphasis added.

Q. *How about the one year they had to turn their productivity around, what do you call that?*

A. *They were referred back to the department for mentoring.*" (Tr. 83) emphasis added.

[2] To the degree that the SOM mentoring requirements were inconsistent with Art. XXIV, the inconsistencies violated Art. XXIV. Even though the exhaustion of Art. XXIV is not a mandatory requirement to the Employer commencing a BOG statute dismissal action against a faculty member, the Employer cannot use a mentoring plan different than the one bargained for in Sec. XXIV.

There is no past practice. There is no evidence of whether the Employer under prior CBAs used a mentoring process that was different from the Art. XXIV process.

The Employer's management rights are restricted by those "rights and functions . . . which are abridged by this Agreement. . . ." The mentoring process is in Art. XXIV. Art. XXIV is a CBA authorized "abridge[ment]" of management rights. Elkouri & Elkouri, pp. 13-27 to 13-28. Art. XXIV, in part, concerns mentoring. Art XXIV.C.5 says "mentoring." Art. XXIV.C.5.a says "mentoring" twice. Art XXIV.C.5.b says "mentoring" once. Art XXIV.C.5.c says "mentoring" once. Elkouri & Elkouri, pp. 9-34 and 9-36.

A lot of time and effort by both parties went into negotiating the new language in Art. XXIV during the 2012 negotiations. These negotiations created, improved and/or maintained a comprehensive mentoring process in Art. XXIV. This background precludes the Employer from creating a different mentoring procedure than the one provided for in Art. XXIV. The fact that the parties negotiated the Art. XXIV mentoring procedure raises an implication that the Employer cannot require ouri, pp. 9-25 to 9-26 and 9-40. Interpreting the CBA to authorize the Employer to create a non-Art. XXIV mentoring system, would provide for a forfeiture of the employee's prerogative to have Art. XXIV mentoring. *Id.*, pp. 9-54 to 9-56.

Is BOG statute 2.51.01 incorporated into the CBA?

The Union says yes.

The Union argues that Art. VII incorporates several BOG statutes pertaining to personnel matters. Sec. C provides as follows:

> C. Notice of Action to Delete
>
> If the Administration wishes to delete any of the statutes contained in this Article or referred to in a Letter of Agreement, the Administration must notify the Association at least sixty (60) days in advance of presentation to the Board of Governors. If the Association objects to the deletion, the statute must remain intact.

According to the Union, the term "contained in this Article or referred to in a Letter of Agreement" is the equivalent of "incorporated by reference."

Former Provost and member of the Employer 2012 bargaining team, Dr. Margaret Winters, Professor, testified:

> "Q. Are Board of Governors' statutes incorporated in the bargaining Agreement?
>
> A. Some are.
>
> Q. If you take a look at page 12, Article VII, those Board of Governors' Statutes are incorporated by reference, are they not?
>
> A. Yes, they are." (Tr. 194-195)

The Employer says no.

According to the Employer, it has not been alleged that the BOG has changed the relevant statute and applied these changes to any bargaining unit members.

Art. VII.A. is entitled "Continuation of Past Policies" and states:

> Except as modified by this Agreement, the following actions formally approved by the Board of Governors shall remain unchanged for members of the bargaining unit: . . .
>
> Statute 2.51.01 Appointments, Continuing Tenure, Termination and Dismissal Policies and Procedures

> This Article shall not prevent any change of an action, or part of a Board of Governors' action, to bring it into accord with the current contract; nor shall this Article prevent any changes by the Board of Governors to those actions not embodied in the Agreement.

The plain language of this provision only prohibits the Employer from changing the BOG statute and applying those changes to a bargaining unit member during the term of the CBA. If it were intended to be "incorporated," thereby including the statute in the CBA, that word would appear in the Article.

BOG statute 2.51.01 is not incorporated into the CBA.

[3] I find that BOG statute 2.51.01 is not incorporated into the CBA for the following reasons.

1. The Union has the burden of proof and there is not a preponderance of the evidence that the BOG statute is incorporated into the CBA. Elkouri & Elkouri, pp. 8-104 to 8-107, and 15-25.

2. If the parties had wanted the BOG statute to be incorporated into the CBA, the CBA would have said so. The parties know how to expressly incorporate a BOG statute into the CBA when that is the intent. In another CBA, the Employer and a different AFT local said:

> Any course materials or published works produced in the course of a PTF member's service at the University shall be governed by the University's statute on Patent and Copyright, BOG Statute No. 2.41.04, *which this Collective Bargaining Agreement incorporates*. emphasis added.

3. There is no evidence as to the consequences of the BOG statute being incorporated into the CBA. My decision is based on the language of the CBA. "With respect to the issue about whether or not an agreement is ambiguous, the typical standard is that words will be given their ordinary meaning unless the evidence shows the parties mutually agreed to some other meaning." American Arbitration Association, *References for Labor Arbitrators* (2005), p. 36.

Additional contentions.

The Union makes several serious arguments concerning the situation. I have seriously considered all of them. Most of these arguments have been previously discussed.

The Union argues that the Employer did not call Greene, as a witness, and I should apply the adverse inference rule to Mr. Greene's failure to appear and testify on the bargaining history. This argument does not control because there was no direct testimony for Mr. Greene to rebut. There was no testimony that any one at the 2012 negotiations either said "Art. XXIV is a mandatory predicate to the BOG statute" or responded affirmatively or failed to respond to the question "Does the Employer agree that Art. XXIV is a mandatory predicate to the BOG statute?"

Union President Dr. Parrish testified that:

> "Q. Did Mr. Greene ever represent to you that departments, divisions or schools could bypass Article XXIV and go directly to the Board of Governors' statute to—
>
> A. No, *we didn't discuss it*. . . . (Tr. 99) emphasis added.
>
> Q. Did Jim Greene or any other representative of the administration assert to you that they had the option of either following the mentoring of Article XXIV or going directly to the Board of Governors—
>
> A. *We never discussed it. It was implied I think. It was not an item of discussion between Jim and me.*" (Tr. 198) emphasis added.

From the Employer perspective, former Provost Dr. Winters testified that:

> "Q. Were any promises or inducements made by the Employer that Article XXIV would be a precursor or a condition precedent to Board of Governors' dismissal proceedings?
>
> A. None whatsoever." (Tr. 183)

There is no reason that Mr. Greene's testimony would have been substantially different from that of Dr. Parrish and Dr. Winters. I do not apply an adverse inference to Mr. Greene not being called to appear and testify. Elkouri & Elkouri, pp. 8-50 to 8-52.

The Union argues that Associate Provost Vander Weg was not directly involved in the 2012 negotiations or the review of faculty by the SOM and his testimony consisted of opinions and not facts. I agree with the Union that this witness was not at the 2012 bargaining table or directly involved in the 2016 SOM activities. Even though this witness was courteous and cooperative, I have made my findings concerning the negotiations and the SOM situation from the testimony of those witnesses who had direct in person knowledge. My findings of what was said or not said at

the bargaining table are based on the testimony of the witnesses who were at the bargaining table.

This decision neither addresses nor decides issues not raised by the parties.

All of the witnesses testified honestly and to the best of their recollections.

The important points in this case include:

1. the wording of the CBA provisions in question,

2. the evidence concerning the interaction, if any, between Art. XXIV and the BOG statute prior to the 2013-2021 CBA,

3. the evidence of what was expressly said and what was not expressly said during the 2012 negotiations,

4. the evidence concerning mentoring in the SOM,

5. clear and unambiguous language is interpreted consistent with the parties' intent as reflected by clear and explicit terms,

6. CBA language that is consistent with and supported by the negotiating history, and

7. the totality of the circumstances.

Remedy

[4] I have found that the Employer cannot use a mentoring procedure that is different than the mentoring procedure in Art. XXIV. The Union requested that I provide several types of remedy including a cease and desist order. The Employer requested that I deny the grievances in their entirety. My authority to fashion an appropriate remedy includes ordering a party to cease and desist from continuing to do the act that I have ruled to be in violation of the CBA. I may include injunctive-type relief in the award. Elkouri & Elkouri, pp. 18-11 to 18-13. The default remedy in a CBA violation case is an order directing the employer to stop doing what it is doing in violation of the CBA. Abrams, *Inside Arbitration*, p. 183. The Employer is ordered to cease and desist from using a mentoring procedure that is different than the mentoring procedure in Art. XXIV. This is consistent with Art. III which states: "All managerial and administrative rights and functions, *except those which are abridged by this Agreement*, are vested exclusively in the University's Administration."

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I partially grant and partially deny the grievances.

I DENY the grievances that utilization of Art. XXIV is a mandatory predicate before the Employer can bring BOG statute dismissal proceedings for alleged performance issues.

I GRANT the grievances that the Employer cannot use a mentoring procedure that is different than the mentoring procedure in Art. XXIV.

I DENY the grievances that BOG statute 2.51.01 is incorporated into the CBA.

The Employer is ordered to cease and desist from using a mentoring procedure that is different than the mentoring procedure in Art. XXIV.

I retain jurisdiction over this matter for the sole purpose of resolving any issue(s) pertaining to the order of rights and privileges contained in this Award:

(a) Such retention of jurisdiction shall be for a period of sixty (60) calendar days following the date of the Award. Absent a request for an extension of the sixty-day period, any request for the exercise of my jurisdiction over this matter shall be deemed untimely, and no further proceedings shall be had before me;

(b) My retention of jurisdiction may be extended by agreement of the parties and/or upon application to me made within the sixty-day period set forth in "(a)" above;

(c) A request to me to exercise jurisdiction shall be made in writing to me with a copy to the other party, and the request shall state the exact issue(s) in dispute; and

(d) It is within my sole discretion to determine whether the issue(s) presented by the party or parties is/are within the jurisdiction of this provision pertaining to the retention of jurisdiction. Elkouri & Elkouri, pp. 7-49 to 7-54.

Nothing set forth in the above "retain jurisdiction" portion of this Award shall prevent the Award from being final and binding for all purposes upon the execution of the Award by me.

Hope Inst. for Children & Families

Decision of Arbitrator

In re THE HOPE INSTITUTE FOR CHILDREN AND FAMILIES [Springfield, Ill.] and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) COUNCIL 31, LOCAL 2481

January 23, 2017

Arbitrator: Mark W. Suardi

DISCHARGE

[1] Work rules — Abuse and neglect ▶ 118.656 ▶ 118.640

Operator of residential home and school for children with disabilities had just cause to discharge three employees who failed to report incident involving violent physical contact between another employee and resident, despite claims that one of them called Illinois Department of Children and Family Services hotline, and that distance prevented instantaneous understanding of what occurred, where incident constituted "significant event" inasmuch as it resulted in criminal charges and impacted agency, grievants' "if I didn't directly see it, it didn't happen" approach to internal reporting requirements was "patently wrong," and grievants violated abuse/neglect of youth policy by failing to report incident to supervisors.

[2] Work rules — Violence ▶ 118.656 ▶ 118.640

Operator of residential home and school for children with disabilities had just cause to discharge three employees who failed to report incident involving violent physical contact between another employee and resident, despite assertion that staff may not have been trained in such situations, where workplace violence policy applies to "any employee who observes any incident" of violence or is made aware of such event, employee's striking of resident was violent event, and facts that resident's chair was toppled over, he appeared agitated after event, and one of grievants told occurred was outside norm and should have been reported to supervisors.

[3] Work rules ▶ 118.656

Operator of residential home and school for children with disabilities had just cause to discharge three employees who failed to report incident involving violent physical contact between another employee and resident, despite claims that two grievants were long-term employees, there was no serious discipline on any of their records, and there was no clear mandate to notify supervisors, where management's decision was reasonable as incident was serious and misconduct had been proven, chief operations officer credibly explained grievants' reporting requirements, and fact that one grievant was charged with additional violation of improper documentation indicates that employer performed individualized assessments of just cause.

For the employer—Ester J. Seitz and Charles R. Schmadeke (Hinshaw & Culbertson LLP), attorneys.

For the union—Susan Osthus, legal counsel.

SUARDI, Arbitrator.

Preface

This is a voluntary labor arbitration between *THE HOPE INSTITUTE FOR CHILDREN AND FAMILIES*, hereinafter referred to as "Employer" and the *AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) COUNCIL 31, AFL-CIO, LOCAL 2481*, hereinafter referred to as "Union." The arbitration pertains to three (3) grievances (Jt. 14A, Jt. 14B, and 14C) filed by employees B__, R__ and D__, hereinafter referred to individually by name or collectively as "Grievants." The grievances stem from corrective action notices (Jt. 15A, 15B, 15C, 16A, 16B and 16C) issued to each of the Grievants discharging them from employment, effective May 25, 2016, as the result of an incident which occurred during the breakfast period at the Employer's