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-