

Interest Arbitration

Board of Trustees of
Community-Technical Colleges

Issues: Distance Learning

and

The Congress of Connecticut Community
Colleges, Local 1973, SEIU

Date: April 23, 2010

Arbitrator: Roberta Golick, Esq.

Hearings: October 17, 2008; October 29, 2008

Appearances: For the Board
Richard Voigt, Esq.
McCarter & English, LLP

For the Congress
Eric W. Chester, Esq.
Ferguson & Doyle

Introduction

The subject of distant learning is a familiar one to these parties and to me as arbitrator. A little over a year ago, I issued my rulings in the Interest Arbitration between this same Board of Trustees and the Federation of Technical College Teachers (AFT) in their reopener on Distance Learning. The current interest arbitration is in many respects a companion case, because, as the parties know intimately, 4C's bargaining unit members work side-by-side with AFT bargaining unit members, their membership in one unit or the other being in large measure a matter of old history or newer happenstance. When

the rulings in the Distance Learning Interest Arbitration came down in February 2008, it appeared to all involved that it was just a matter of time before the reopener on distance learning for the 4C's would fall into step with the AFT rulings.

By late April 2008, the Board and the 4C's had negotiated terms that would have applied my rulings in the AFT case to 4C's members. So, for example, the parties tentatively agreed that in the discretion of the Academic Dean, credit toward additional responsibilities could be given for *developing* a distance learning course. They tentatively agreed that in the discretion of the Academic Dean, credit toward additional responsibilities could be given for *teaching* a particular distance learning course *for the first time*. And they tentatively agreed that *subsequent* offerings of distance learning courses by faculty members would be weighted at 133% for the purpose of computing faculty workload.

Before a Memorandum of Agreement was finalized, however, economic conditions in Connecticut (as well as in the rest of the U.S.) began their steep decline. Though it had been the Board's oft-stated goal to bring the working conditions of the AFT and the 4C's into harmony, the Board in this instance determined that it was not financially able to fully harmonize the two units on the issue of distance learning. The Board did extend the AFT distance learning protocol to the 4C's for course development. It also extended the AFT distance learning protocol to the 4C's for the initial offering of a distance learning course.¹ However, unlike its final agreement with the AFT (as a result of my binding ruling in February 2008), which was that subsequent offerings of distance learning

¹ See Agreed upon Language attached to this decision as Appendix A and incorporated herein.

courses would be weighted at 133%, the Board departed (due to claimed necessity) from its philosophy of harmonization on this point. For “subsequent offerings” of distance learning courses, the Board is proposing to prospectively extend the “AR Credit” concept in place for the “development” and “first” offerings of distance learning courses. to “subsequent offerings” of distance learning courses. By agreement, the phrase “subsequent offering” refers to a fully online course taught by a faculty member after that course has been taught at least once by any principal bargaining unit member.

The parties could not resolve their differences through negotiations, and the matter proceeded to binding interest arbitration pursuant to Connecticut General Statute Section 5-276a.

The Statute

The arbitrator’s authority as stated in Connecticut General Statute §5-276a(e)(4) is as follows:

In making such award, the arbitrator shall select the more reasonable last best offer proposal on each of the disputed issues based on the factors in subdivision (5) of this subsection. The arbitrator (A) shall give a decision as to each disputed issue, (B) shall state with particularity the basis for such decision as to each disputed issue and the manner in which the factors enumerated in subdivision (5) of this subsection were considered in arriving at said decision, (C) shall confine the award to the issues submitted and shall not make observations or declarations of opinion which are not directly essential in reaching a determination, and (D) shall not affect the rights accorded to each party by law or by any collective bargaining agreement nor in any manner, either by drawing inferences or otherwise modified, add to, subtract from, alter such provisions of law or agreement.

In accordance with Connecticut General Statute §5-276a(e)(5), the factors to be considered by the arbitrator in choosing the more reasonable last best offers are:

the history of negotiations between the parties including those leading to the instant proceedings; the existing conditions of employment of similar groups of employees; wages, fringe benefits and working conditions prevailing in the labor market; the overall compensation paid to employees in the arbitration proceedings including direct wages, compensation, overtime and premium pay, vacations, holidays and other leaves, insurance, pensions, medical and hospitalization benefits, food and apparel furnished and all other benefits received by such employees; the ability of the employer to pay; changes in the cost of living; interest and welfare of employees.

The Issues

The “subsequent offerings” issue is divided into three interrelated questions at arbitration.

The questions are:

- I. Shall a principal bargaining unit member be given additional workload credit for teaching subsequent offerings of a distance learning course?
- II. When shall the award be effective?
- III. Shall the award sunset on June 30, 2010?²

² In their post-hearing briefs, each side phrased the issues a bit differently. I am using the 4C’s phrasing.

Issue #1 Compensation

Shall a principal bargaining unit member be given additional workload credit for teaching subsequent offerings of a distance learning course?

The 4C's LBO is:

For the purpose of computing faculty workload, offerings of distance learning courses shall be weighted at 133%. (For example, 3 contact credit hours equates to 4.)³

The Board's LBO is:

Where circumstances warrant, in the discretion of the Academic Dean, credit toward additional responsibilities, in increments of one hour per week to nine hours per week, may be given for the "subsequent teaching" of an online course.

The Parties' Arguments

The 4C's seeks to have its members who teach distance learning courses compensated in the same manner as their colleagues in the AFT. The Congress argues that at least three of the statutory factors strongly support its position. There can be no more similar employees to use as a comparator than the faculty in the Community College system who are members of the Federation. Employees who are identical in every respect except for their bargaining unit assignment must be compensated the same way for the same work. Also, the history of the negotiations on this issue provides a clear roadmap leading to the LBO of the 4C's. Finally, the interest and welfare of the employees compel an award

³ The parties acknowledge that the example included in the 4C's LBO (the same example used in the AFT LBO) is not precisely 133%.

that provides equitable wages and benefits for existing members and that will attract and retain faculty who will teach distance learning courses.

As for the Board's claim that it lacks the ability to pay for the 4C's LBO, the Congress maintains that the record evidence demonstrates that the Board does have a significant ability to pay the modest wage request of the Congress in this matter. There is no evidence that distance learning is no longer cost effective following the Federation's award and no evidence that it would become so should the Congress receive the same award.

The Board contends that the economy in the United States in general and in Connecticut, specifically, is in crisis. In these dire circumstances, the Board argues, it has no choice but to take a modified position on the issue of distance learning compensation. As of the time of the arbitration hearings, the State had already reduced the Board's budget by \$4.5 million, with an additional reduction of \$3.1 million anticipated. Given the budget reductions and already existing deficit, the Board has tapped into its Contingency Reserve Fund and that will soon be exhausted. The cost to fund the 4C's LBO is high, and in this economic crisis, something is going to have to give – either a reduction in the number of on-line courses or a reduction in the budget in other areas.

Separate from its economic crisis, the Board continues, the 33% premium for the subsequent teaching of an online course is not justified. The technology and training available to faculty members who teach online has substantially improved in the nearly two years since the hearing in the AFT Distance Learning Reopener. Accordingly, the

justification for awarding the high premium to the AFT for its distance learning instruction has diminished since that award was issued. As both the technology and technological support have evolved and continue to evolve, the subsequent teaching of online courses has fewer demands on faculty members' time. If subsequent teaching of distance learning courses was ever a burden, it is significantly less of a burden today. Therefore, the Board's LBO, which recognizes that some distance learning courses might be more labor intensive than others, is the more reasonable choice.

Discussion

As the parties can easily anticipate, the tension here is between, on the one hand, the powerful pull of the "equal treatment" argument advanced by the Congress, and, on the other hand, the weight of the "economic crisis" argument advanced by the Board. It would require something extraordinary to persuade me to do award something different for one set of faculty members from what I awarded to their equal counterparts in the AFT. The goal of harmonization is terribly important for many reasons, and the parties are wise to continue to work towards that goal. And it is unfair for one faculty member to receive less of a benefit than his or her counterpart doing the same work in the same institution.

There are five reasons, however, why I find that the Board's LBO on this Issue #1 is the more reasonable. First, one of the primary factors that led to my selection of the AFT LBO rather than the Board LBO on the issue of subsequent offerings was that the choice in that case was between "something" or "nothing" for subsequent distance learning

offerings. The position of the Board in the AFT case was that the subsequent teaching of distance learning cases warranted no premium at all; the Board did not offer the possibility of AR workload credit in that case. As I wrote in that decision, “the Board’s LBO does not acknowledge the additional burdens that are evident *today*.” In my judgment at the time, if the 33% premium was somewhat generous, it was still preferable to the alternative zero. The Board’s LBO in the present matter has remedied that perceived weakness by holding out the promise of AR workload credit where warranted.

Second, while I did knowingly select the AFT’s LBO on that issue, I pointed out the “potential anomaly” wherein faculty members either developing new online courses or teaching online courses for the first time could receive less in the way of workload credit than faculty members teaching subsequent offerings. I wrote:

Because of the statutory constraints upon my authority, I have no power to remedy this potential anomaly. In any event, the parties will be better positioned to consider reasonable options as they gain experience administering and participating in the distance learning program, and as the technology of distance learning evolves in the coming years.

The Board’s LBO in the present matter eliminates that potential anomaly.

Third, having a flexible workload premium for the subsequent teaching of distance learning courses makes more sense than a fixed premium. The record demonstrates that not all distance learning courses are alike. Some may be just as difficult to teach and time-consuming to manage with each subsequent offering; others become easier as the experience is repeated.

Fourth, advancements in technology and the availability of technological support should, in time, render the 33% premium sought by the 4C's (and enjoyed by the AFT) disproportionately high overall. A premium that allows for flexibility if and when conditions change is a better choice for this type of benefit.

Were there no dire economic crisis, the four reasons cited above would likely not be enough to justify an outcome that disadvantages 4C's faculty relative to their AFT peers. After all, bargaining will commence in the not-too-distant future for the successor agreements for both Unions, and the parties are well-aware of the difficulties posed by efforts to harmonize disparate benefits. In a different economic climate (as the Board itself acknowledged by its tentative agreement with the 4C's in April 2008), the goal to treat like faculty members alike would outweigh the interest in arriving at what might have been a better-balanced benefit.

I am persuaded, however, that the deterioration of the economy has placed financial limitations on the Board that cannot be ignored or reasoned away. State-imposed reductions in the Board's budget and other deficits have forced the Board into a posture of spending down its contingency reserves, which are rapidly becoming exhausted, even with cost-cutting measures in place. Shortfalls must be covered, one way or another, and the costs associated with a guaranteed 33% premium for all subsequent distance learning offerings add a burden that cannot be justified at this time.⁴ The record in this case compels a more conservative approach on this issue than was warranted even a short year

⁴ Notably, the 4C's bargaining unit is several times the size of the AFT bargaining unit because the 4C's represents 60% of the faculty on the five merged campuses and 100% of the faculty on the seven non-merged campuses in the college system.

ago. Loathe though I am to detour from the harmonization path, I find that the Board's LBO is the more reasonable under the circumstances.

Issue #2 Effective Date

When shall the award be effective?

The 4C's LBO is:

The effective date shall be the Fall semester of 2007.

The Board's LBO is:

The arbitrator's award shall be effective with the first academic semester following legislative approval.

The Parties' Positions

Consistent with its arguments relative to Issue #1, the 4C's seeks the same benefit for its bargaining unit members that was provided to the AFT bargaining unit members, namely a Fall 2007 start date. For all the financial reasons advanced by the Board for its position on Issue #1, it seeks a start date following legislative approval, which it expects to occur in advance of the Fall 2009 semester.

Discussion

This is a more complicated issue than it seems at first blush, because the Board's position on retroactivity (as well as its position on sunseting in Issue #3) is couched as a

contingency in the event the Congress's LBO is selected on Issue #1. The argument was that having to retroactively pay the 33% premium for all "subsequent offerings" of distance learning courses since the Fall of 2007 would make the Board's difficult budgetary situation even more precarious. One could, I suppose, argue that since the contingency that the Board was concerned about did not occur (the selection of the 4C's LBO), the effective date should by default become the Fall 2007 date urged by the 4C's.

I agree with the 4C's that the effective date of the distance learning benefit should be Fall 2007, but not because of any technical construction of the Board's LBO. The teaching of distance learning courses is optional. Going forward into the Fall 2009 semester and thereafter, 4C's faculty members interested in teaching "subsequent" courses will communicate with their Academic Deans in the same manner as they or their peers will have done in the context of developing and/or the first time teaching of an online course. Faculty can decide not to teach these courses if the amount of AR credit being offered does not meet their expectations. But looking backwards, the work has already been done, and it would be unfair (under the statutory criteria) to provide no retroactive compensation/credit, even in light of the budgetary crisis.

The Board stated at the arbitration hearing that it could not envision *how* to apply AR credit retroactively, but conceded that it could be done. The challenge is to provide a reasonable (all things considered) retroactive benefit for affected 4C's faculty while recognizing that to go back and attempt to assess what credit *would have been provided*

would be a burdensome and largely unreliable exercise at a time when the energies of all involved should be focused on the future.

As might be expected, absent an invitation from the parties to do so, the constraints of the LBO process leave me without authority to dictate a pragmatic solution. I would welcome an opportunity to either devise a formula for the application of retroactivity or to rule on a fourth issue in which the parties would each submit an LBO on how retroactivity should be applied. A third alternative is for the parties to agree on a methodology to be incorporated in this award.⁵ If all else fails, the Academic Deans will be asked to exercise their judgment with the care and sensitivity that is understood to accompany the grant of discretion.

⁵ The methodology for retroactivity subsequently agreed to by the parties is incorporated herein and is attached hereto as Appendix B.

Issue #3 Sunset

Shall the award sunset on June 30, 2010?

The 4C's LBO is:

There shall be no sunset.

The Board's LBO is:

The award shall sunset with the expiration of the existing collective bargaining agreement between the parties, which is June 30, 2010.

Discussion

Given my position on Issue #1, this is either a non-issue, or conceivably an issue where each party would now hope that I rule in the other party's favor. Clearly, the Board would no longer wish for a sunset provision⁶, but perhaps the 4C's would.

I find no compelling reason to have the award sunset at the expiration of the existing collective bargaining agreement. Both the 4C's and the AFT collective bargaining agreements expire on June 30, 2010. The two bargaining units have plans to bargain in coalition for the upcoming contract negotiations. There will undoubtedly be efforts on both sides to harmonize the distance learning benefit one way or another. As I indicated in my AFT award, distance learning is still an evolving field. By 2010, the parties will have had substantial experience in the distance learning program, which will serve them well as they revisit the issues.

⁶ As it did in connection with its position on Issue #2, the Board's position on sunsetting was expressly linked in its brief to the contingency of an award in the 4C's favor on Issue #1.

APPENDIX A

AGREEMENT BETWEEN THE BOARD OF TRUSTEES AND THE CONGRESS OF CONNECTICUT COMMUNITY COLLEGES Re: RE-OPENER FOR DISTANCE LEARNING

Agreed Upon Language

1. Scope of Re-opener

This re-opener deals with the delivery of courses via fully online instruction, which typically takes place in an asynchronous learning environment and involves faculty-student and student-student interaction in the online environment.

This Agreement applies to credit courses taught by principal bargaining unit members via fully online instruction. Those courses which may include an initial orientation or exams that take place on-ground are still considered distance learning courses and are within the scope of this re-opener.

2. Bargaining Unit Placement

The bargaining unit placement of faculty who teach distance learning courses will be consistent with existing practice for on-ground courses.

3. Workload Adjustment for New Course Development and Initial Offerings

The parties agree that the use and allocation of Additional Responsibilities may be appropriate to compensate principal bargaining unit members for the time and effort it takes to develop an online course and/or to teach an online course for the first time.

A. Course Development

For purposes of this Agreement, course development is defined as either (1) creating a new distance learning course, or (2) converting or adapting an existing on-ground course to an online format. New courses shall follow existing college course offerings, development and approval processes.

In the discretion of the Academic Dean, credit toward additional responsibilities, in increments of one hour per week to nine hours per week, may be given for developing a distance learning course.

B. Initial Offerings of Distance Learning Courses

In the discretion of the Academic Dean, credit toward additional responsibilities, in increments of one hour per week to nine hours per week, may be given for teaching a particular distance learning course for the first time.

4. Subsequent Offerings of Distance Learning Courses

The term “subsequent offering” refers to a fully online course taught by a faculty member after that course has been taught at least once by any principal bargaining unit member.

APPENDIX B

AGREEMENT BETWEEN THE BOARD OF TRUSTEES AND THE CONGRESS OF CONNECTICUT COMMUNITY COLLEGES Re: RETROACTIVE APPLICATION OF ARBITRATION AWARD IN DISTANCE LEARNING REOPENER

In fulfillment of Arbitrator Golick's award on Issue #2 in the Distance Learning Reopener between the Congress of Connecticut Colleges ("the Congress") and the Board of Trustees of Community-Technical Colleges ("the Board"), the parties agree to recognize faculty members who engaged in the subsequent teaching of a fully online course between the Fall 2007 and the Spring 2009 by providing a combination of cash compensation and credit toward future Additional Responsibilities, as described below.

- The dollar amounts and number of Additional Responsibilities hours to which eligible faculty members are entitled are described in a spreadsheet which is derived from a database of Congress full-time faculty members who taught subsequent offerings of fully online courses in one or more of the academic semesters covered by this Agreement. The Congress has reviewed the information on which the spreadsheet was based and waives any right to challenge the accuracy of the document in grievance or arbitration on the part of any individual or on the part of the union. The spreadsheet shall be incorporated by reference into this Agreement;
- The cash cost of this Agreement shall be taken from the Congress Contract Grievance/Change of Duties Account (A804);
- The hours to be credited against the Additional Responsibilities of any individual faculty member under this Agreement must be used before the expiration of the parties' current collective bargaining agreement on June 30, 2012. Cash shall not be an available alternative for this component of the retroactive compensation;
- The Additional Responsibilities credit shall be applied in accordance with the contractual Additional Responsibilities process for academic years 2010-11 and 2011-12. That is, the faculty member's June 1, 2010 and/or June 1, 2011 proposals may include some or all credit hours as a component of the 9-hour/week obligation. Consistent with the contractual Side Letter on Additional Responsibilities, the Academic Dean may approve or modify the proposal and shall make the final determination concerning the application of credit hours due. Management's decisions concerning the application of hours to be credited against Additional Responsibilities shall not be subject to the grievance or arbitration, unless the College fails to afford a faculty member all of the credit hours that are due to him/her under this Agreement;
- Any faculty member who would be entitled to retroactive compensation under this agreement who is no longer employed in the Community College System shall be entitled to receive the cash component of this resolution only. The payment will be made via payroll check which will be mailed to the last address that the college has on file for such former faculty member;
- This Agreement resolves all issues between the parties relating to Issue #2 in the Distance Learning Reopener referenced above.

SUMMARY OF RULINGS

The parties' Agreed upon Language is incorporated in this award and is attached to this decision as Appendix A.

1. Where circumstances warrant, in the discretion of the Academic Dean, credit toward additional responsibilities, in increments of one hour per week to nine hours per week, may be given for the "subsequent teaching" of an online course.
2. The effective date shall be the Fall semester of 2007. The methodology for retroactivity subsequently agreed to by the parties is incorporated herein and is attached hereto as Appendix B.
3. There shall be no sunset.



Roberta Golick, Esq.
Arbitrator

Date: April 23, 2010