STATE OF MICHIGAN
VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

THE EASTERN MICHIGAN UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Association,

-and- Grievance No. 2017-08

EASTERN MICHIGAN UNIVERSITY,

Employer, University.
_____/

OPINION AND AWARD

APPEARANCES:

ARBITRATOR: Mario Chiesa

FOR THE ASSOCIATION: Nacht & Roumel, P.C.
By: Joseph X. Michaels & Adam Taub
101 N. Main Street, Suite 555
Ann Arbor, MI 48104

ALSO PRESENT: Charles Cunningham, EMU-AAUP
Judith Kullberg, EMU-AAUP
Natosa Kovacevic, English Department
Jake Altman, EMU-AAUP Staff
Pamela Speelman, EMU-AAUP
Ken Rusiniak, EMU-AAUP.

FOR THE UNIVERSITY: Butzel Long, P.C.
By: Craig Schwartz
41000 Woodward Avenue
Stoneridge West
Bloomfield Hills, MI 48304

ALSO PRESENT: Gloria Hage, EMU General Counsel
Jim Carroll, Associate Provost
Rhonda Longworth, Provost, Exec. Vice President
Dave Woike, Asst. Vice President, Academic Affairs
Julie Berger, Academic Collective Bargaining Administrator

THE CASE

It seems that on February 13, 2017, Professor Judith Kullberg, who is the EMU-AAUP President, sent a correspondence to Interim Provost Longworth and Associate Provost Carroll. A copy was cc'd to Dr. David Woike. Pertinent portions of the communication read as follows:

RE: Calculating Faculty Workloads

Dear Provost Longworth and Associate Provost Carroll,

On February 2, Professor Ken Rusiniak and I met with Associate Provost Jim Carroll and Assistant Vice President David Woike to discuss a variety of issues, including workload. In the course of that conversation, Associate Provost Carroll stated that it was the administration's intention to begin calculating maximum faculty teaching loads as twenty-four (24) credit hours across both the Fall and Winter semesters. This method of calculating workloads is in violation of Article IX, Section B(1) of the collective bargaining agreement, which states that twelve (12) hours each semester is how credit hour loads are apportioned. Moreover, the enforceable past practice of the parties indicates that credit hours over twelve (12) in a semester are overload.

The EMU-AAUP formally demands that the administration cease and desist from advising administrators and faculty members that this violative method of calculating faculty workloads is acceptable. It is not.

Kindly respond to this letter in writing on or before the close of business on Friday, February 17, 2017, to give the EMU-AAUP your assurances that all appropriate administrators will be notified by the University that the twelve (12) credit hour per semester limit is to be maintained. Your failure or refusal to do so shall be interpreted as a statement of intent to violate our agreement and the Union will file the necessary grievance pursuant to Article VII of the contract.

Written grievance number 2017-08 was dated and executed March 17, 2017. It reads as follows:

PURSUANT TO THE PROVISIONS OF ARTICLE VII OF THE AGREEMENT BETWEEN EASTERN MICHIGAN UNIVERSITY AND EASTERN MICHIGAN UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, A GRIEVANCE IS FILED AGAINST
Dean Kathy Stacey, College of Arts and Sciences, and Interim Provost Rhonda Longworth and a STEP II HEARING IS REQUESTED.

Facts and Allegations:
On Feb. 13 2017 the EMU-AAUP sent Interim Provost Rhonda Longworth and Associate Provost Jim Carroll a letter titled "RE: Calculating Faculty Workloads." The letter states that the administration's intention to begin calculating maximum faculty teaching loads as twenty-four (24) credit hours across both Fall and Winter semesters is in violation of the EMU-AAUP agreement and enforceable past practice. The letter formally demands that the administration cease and desist from advising administrators and faculty members to use this violative method of calculation faculty workloads. The letter notes that failure of the administration to respond to the letter in writing by Feb. 17, 2017 shall be interpreted as a statement of intent to violate our agreement. The administration has not responded.

During the Department of English Language and Literature Coordinators' meeting on March 10, 2017, Department Head Mary Ramsey indicated that she had been instructed by the administration to calculate faculty workloads in the department across the Fall and Winter semesters at twenty-four (24) hours, and that this would mean that faculty could and would be assigned a load of over twelve (12) credits in some semesters. In the Department of English Language and Literature faculty meeting on March 17, 2017, DH Ramsey told the faculty that it was specifically the Dean of the College of Arts and Sciences, Kathy Stacey, and members of her office, who had given her these instructions on how to calculate workload. Her statements are evidence of a clear violation of the EMU-AAUP cease and desist letter referenced above.

By ignoring the demands in the Union's letter and directing department heads to apply the twenty-four (24) hour credit load across Fall and Winter semesters, the administration has effectively stated that its intention to violate the EMU EMU-AAUP agreement is a *fait accompli.*

Contract Provisions Violated: *Inter alia:*
Article IX. Section B Work Load

MP 208 "... it is assumed that a twelve (12) credit hour teaching load is the norm of the Fall and Winter semesters...

Enforceable Past Practice:
The administration has paid faculty members overload pay for course loads over twelve (12) credit hours for more than a decade.

Remedies Sought:
1) Cease and desist from using this violative method to calculate faculty workloads.
2) Reaffirm our agreement in writing not to calculate faculty workloads by this violative method.
3) If this cease and desist demand is violated, make all affected bargaining unit members whole.

By a response dated April 7, 2017, the University answered the Association's grievance. Its reply reads as follows:

The University responds to the merits of the grievance as follows:

Lack of Evidence of a Violation
It its totally(sic), MP 208 states:

"It is recognized that a full-time faculty position includes many professional duties and responsibilities in instruction, scholarly/creative activities, and service. ***While it is not possible or desirable to establish the same load or credit hour production for each Faculty member,*** it is assumed that a twelve (12) credit hour teaching load is the **norm** for the Fall and Winter semesters and that a six (6) credit hour teaching load is the norm for the summer term (total in all summer sub-terms)."

Academic Departments at EMU, particularly in the College of Arts and Sciences, have courses that are 1, 2, 3, 4, 5, and even 6 credit hours. MP 208, particularly the section in bold, clearly allows flexibility in assigning faculty teaching load due around a norm of twelve (12) credit hours to accommodate the differences in courses in the various departments.

In some departments, there are only three (3) credit hour courses and reaching a norm of 12 credit hours in the Fall and 12 credit hours in the Winter, for a total of 24 hours across the Fall and Winter, is easy. Typically in those departments, a teaching load greater than 12 in a given semester would indicate an overload because there would be no way to assign a load less than 12 in the following semester. In these cases, the assignment of an additional course resulting in the overload was at the discretion of the Department Head and the College Dean. The faculty member was then compensated for the overload per the contract.

In departments with 3, 4, and 5 credit hour courses (or courses where contact hours are used to determine the teaching load, for example science labs and art studio courses in CAS) reaching a 12 hours norm has been accomplished by assigning a teaching load of 13 hours one semester and 11 in the other semester. Another possible combination is 14 hours one semester and 10 in the other. In both cases, the total of 24 hours expectation across the Fall and Winter is met and an overload has not occurred.

The University is properly following MP 208.

The grievance is denied.

As displayed in the foregoing, the initial allegation which led to this dispute, and hence arbitration, is based on the Association's contention that the University violated the Collective Bargaining Agreement when it gave notice and then

followed up by balancing the total number of hours worked over an academic year to determine the appropriateness and amount of overload pay. The Association submits that overload, and hence overload pay, must be calculated at the end of each semester. It relies on the language appearing in Article IX PROFESSIONAL RESPONSIBILITIES OF FACULTY MEMBERS, Section B Work Load, paragraph 1, which states:

ARTICLE IX. PROFESSIONAL RESPONSIBILITIES OF FACULTY MEMBERS

* * *

B. Work Load

1. It is recognized that a full-time faculty position includes many professional duties and responsibilities in instruction, scholarly/creative activities and service. While it is not possible or desirable to establish the same load or credit hour production for each Faculty Member, it is assumed that a twelve (12) credit hour teaching load is the norm for the Fall and Winter semesters and that a six (6) credit hour teaching load is the norm for the summer term (total in all summer sub-terms).

Dr. Judith Kullberg, the current Association President and a professor in the Political Science Department, testified that each and every time that a bargaining unit member in her department was assigned a workload of more than 12 credit hours, inclusive of equivalencies, they were paid overload. She went on to explain that no representative from either of the parties indicated that there were changes in the employment relationship which would allow the University to balance overload over the two semesters in an academic year. She did relate that in some

situations, bargaining unit members would voluntarily forego overload pay and some departments would not take overloads.

Dr. Kullberg was not on the bargaining committee for the current contract and not a member of what became known as the equivalency committee, which was created as a result of the last round of negotiations. The equivalency committee was tasked with the responsibility of clarifying, establishing and dealing with many aspects of equivalencies.

Kenneth Rusiniak is a psychology professor and Vice President of the Association. His testimony fortified that given by Dr. Kullberg. Professor Rusiniak testified that a semester's assignment would never go over 12 credit hours without overload pay being made available.

Dr. Natosa Kovecevic, an English professor teaching in the English Department related that English Department professors are paid overload for their overload work in a semester and also pointed out that she had utilized banked overload hours in relation to independent studies.

In addition to the testimony referenced above, the Association introduced a multitude of documents which it suggests support its position. Among those documents are dozens of Memorandums of Understanding between individual members of the bargaining unit and the University which outline what could fairly be described as overload assignments and payments. The documents reference the 2010 fall and winter semesters. Indeed,

there is one memorializing an understanding between then Professor Carroll, now Associate Provost Carroll, regarding a half credit hour overload he taught in the fall of 2008.

Among the documents submitted by the parties is an extensive compilation of overload payment information which appears to cover the period from the fall of 2012 to the fall of 2017.

Associate Provost Jim Carroll, who has taught physics and astronomy, was the chief negotiator for the round of bargaining which led to the current Collective Bargaining Agreement. Carroll related that prior to negotiations and the establishment of what is known as the DID Committee regarding equivalencies, the creation and utilization of equivalencies was "all over the place." He explained that the various department heads determined release time and numerous aspects of overloads, including use of banked hours, decisions regarding overload payment after the assignment of 12 credit hours or 24 credit hours in the academic year. As to his own experience, he indicated there were four occasions when he was paid overload after being assigned twelve credit hours in a semester and three when the overloads were balanced over the academic year.

Carroll went on to relate that Julie Berger, who currently is the Academic Collective Bargaining Administrator, was, during the negotiations for the current contract, employed by

and on the bargaining committee for the Association. He related that everyone agreed that the *quid pro quo* for the establishment of the DID Committee was a clear understanding that the Employer could utilize the academic year and the 24 credit hour limit in determining whether overloads would be paid. He went on to state that everyone at the bargaining table felt that the language being adopted in the new Collective Bargaining Agreement recognized and provided that the Employer could balance credit hours over the academic year to determine whether there were overloads to be paid.

Rhonda Longworth, Provost Executive Vice President, testified that prior to the negotiations for the current contract, there was no uniformity regarding the payment of overloads or even the calculation of overloads. She went on to testify that the University would not have agreed to reduction in teaching loads and yet utilize additional equivalencies to support payment of overloads. She went on to explain that it was clearly understood and articulated by both parties that the University possesses the right to balance workloads to 24 credits annually for determining and paying any overload. According to her, this was the *quid pro quo* for negotiating equivalencies.

Julie Berger, who currently is the Academic Collective Bargaining Administrator, was at the time that the current

contract was being negotiated, a member of the Association's bargaining team. She had been employed by the Association for about 12 years and in relation to the 2015 negotiating team, she was negotiating alongside nine Association executive committee members. She related that during negotiations, there was extensive discussion regarding overloads and the diverse practices which existed in various departments. She was aware that some departments balanced overloads while others did not. She explained there was banking of overload time. Furthermore while there were complaints from members of the bargaining unit, no grievances were filed regarding the administration of, and payment of overloads. In her mind, it was quite clear that the parties agreed that there could be overload balancing over the academic year period with 24 credit hours being the standard.

Dave Woike, the current Assistant Vice President Academic Affairs, was a member of the University's bargaining team. His testimony essentially paralleled that given by other University witnesses. Woike also authored the University's step 3 response to the grievance and while he testified that the University did not claim the grievance was untimely until counsel became involved, his step 3 response is extensive and detailed and contains an analysis of why the University's position regarding balancing is correct. Portions of that response read as follows:

> Academic Departments at EMU, particularly in the College of Arts and Sciences and College of Health and Human Services, have courses that are 1, 2, 3, 4, 5, and 6 credit hours. MP 208 clearly states the

need for and allows flexibility in assigning faculty a teaching load other than the norm of twelve (12) credit hours to accommodate the differences in course in the various departments.

In some departments, there are only three (3) credit hour courses and reaching a norm of 12 credit hours in the fall semester and 12 credit hours in the winter semester for a total of 24 credit hours across the fall and winter semesters is easy. Typically in those departments a teaching load greater than 12 credit hours in a given semester would indicate an overload because there would be no way to assign a load less than 12 in the following semester. In these cases, the assignment of an additional course resulting in the overload was at the discretion of the Department Head and the College Dean. The faculty member was then compensated for the overload per the contract.

In departments with 3, 4, and 5 credit hour courses (or courses where contact hours are used to determine the teaching load), reaching a 12-hour norm has been accomplished by assigning a teaching load of 13 hours one semester and 11 in the other semester. Another possible combination is 14 hours in one semester and 10 hours in the other. In both cases, the total of 24 hours expectation across the fall and winter semesters is met and an overload has not occurred.

* * *

By definition, a "norm" is something that is usual, typical, or standard; it can also be a standard or <u>pattern</u>." Evidence suggests that the University has routinely employed the <u>pattern</u> of balancing workloads across fall and winter semesters, leaving any payment of overload (or banking of hours over the 24-hour total for the fall and winter semesters combined) to the end of the winter semesters in each academic year. This practice of load balancing further suggests that the pattern can result in credit hours above or below the "norm" in a single term - resulting in the 24-hour total in an academic year.

Numerous witnesses have referenced the creation of the DID Committee and its effect on and involvement with establishing equivalencies. The Memorandum creating the DID Committee is contained at Appendix C of the current Collective Bargaining Agreement and reads as follows:

MEMORANDUM OF UNDERSTANDING
BY AND BETWEEN EASTERN MICHIGAN UNIVERSITY
AND THE EASTERN MICHIGAN UNIVERSITY CHAPTER OF
THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

It is hereby understood and agreed between Eastern Michigan University and the Eastern Michigan University Chapter of the American Association of University Professors that the Assistant

Vice President for Academic Affairs (and their designees) and the President of the EMU-AAUP (and their designees) will form a temporary DID committee to:

- Review and approve the Department Input Document changes based on the addition of equivalencies to Department Input Documents.
- The term of this committee will be effective September 1, 2016 to August 31, 2016.
- This committee will ensure the consistency and fairness of equivalencies across departments and will have final approval.

It is further specifically understood and agreed by the parties to this Agreement that the provisions stated above are consistent with the Collective Bargaining Agreement between EMU and the AAUP, and therefore, that the provisions herein will not alter, modify, or otherwise establish precedent for future interpretation or application of that Agreement.

EASTERN MICHIGAN UNIVERSITY	EASTERN MICHIGAN UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS
James Carroll, III Chief Negotiator	Susan Moeller Chief Negotiator

The foregoing is a mere snapshot of an extensive record and additional aspects will be displayed and analyzed as appropriate. The dispute was processed through the grievance procedure and presented to me for resolution.

DISCUSSION AND FINDINGS

There was a full and complete hearing with both parties given every opportunity to present any evidence they thought was necessary. In addition, both filed extensive and helpful post-hearing briefs. It should be understood that I have carefully analyzed the entire record, even though it would be impossible and probably inappropriate to mention everything contained

therein. This dispute was extremely well litigated and I have carefully analyzed every aspect of the record.

Paragraph 1 of Section D of Article IX of the prior Collective Bargaining Agreement reads as follows:

ARTICLE IX PROFESSIONAL RESPONSIBILITIES OF FACULTY MEMBERS

* * *

226 **D. Work Load**

> 1. It is recognized that a full-time teaching position is a full-time job. While it is not possible or desirable to establish the same load or credit hour production for each Faculty Member, it is assumed that a twelve (12) credit hour load is the norm for the fall and winter semesters and that a six (6) credit hour load is the norm for each 7.5 week (or 6 week) sub-term of the summer term. Department Heads, in consultation with their Dean (consistent with subsection D.5 below), are responsible for structuring schedules to take into account factors for which equivalency credit [toward meeting the twelve (12) credit hour norm] may be considered, such as:

Portions of the current Collective Bargaining Agreement read as follows:

ARTICLE VII. GRIEVANCE PROCEDURE

79 A. Scope

> 80 Nothing in Article VII shall prevent informal adjustment of any complaint and the parties intend that, so far as reasonably possible, such complaints will be resolved between the Faculty Member and the administrative agent of EMU immediately involved.
>
> 81 A grievance is defined as a written allegation that there has been a breach, misinterpretation, improper application, or failure to act pursuant to this Agreement.

* * *

87 C. Basic Provisions

* * *

> 92 5. Failure to initiate any grievance within the time limits specified herein on the part of the

Association or the grievant(s) shall bar further processing of the grievance. Failure to appeal any grievance within the time limits specified herein on the part of the Association or the grievant(s) shall cause the grievance to be resolved on the basis of the last administrative decision concerning the matter(s) at issue and bar further processing of the grievance. Unless extended by mutual consent of the parties' representatives at the respective steps of the grievance procedure, the time limits specified herein shall be the maximum time allowed. Failure to comply with the time limits on the part of any administrative agent shall permit the grievance to proceed to the next step.

* * *

94 D. Procedure and Time Limits: Initiation

95 Either a Faculty Member or group of Faculty Members may initiate a grievance by serving signed written notice of it at Step One to the Department Head or other designated administrative agent. Such notice shall concisely state the facts upon which the grievance is based, the provisions of the Agreement which have been violated, and specify the relief and remedy sought. Notice shall be filed within twenty (20) working days after the Association or the Faculty Member(s) on whose behalf the grievance is filed became aware, or reasonably should have become aware, of the action complained of. If no notice is served in that time, the grievance is barred. In no event will monetary adjustment of a grievance cover a period prior to ninety (90) working days before filing of written notice of the grievance.

96 Except as otherwise stipulated in this Agreement, a grievance may bypass Step One and be initiated at Step Two, provided that neither the Assistant Vice President for Academic Affairs nor the Association's Grievance Officer, or their respective designees, serve notice to the other party of an objection to bypassing Step One. Further, a grievance may bypass Step Two and be initiated at Step Three, provided that neither the Assistant Vice President for Academic Affairs nor the Association's Grievance Officer, or their respective designees, serve notice to the other party of an objection to bypassing Step Two.

* * *

ARTICLE IX. PROFESSIONAL RESPONSIBILITIES OF FACULTY MEMBERS

* * *

203 Furthermore, EMU and the Association agree that the primary professional responsibility of Faculty Members

is instruction (including academic advising) or professional library service, supported by active participation in Scholarly/Creative Activity (e.g., research) and Service. It is recognized that instruction entails a number of particular obligations which Faculty Members are expected to fulfill, including, but not limited to, such obligations as meeting assigned classes, assigning and submitting grades in accordance with established University schedules, and providing such information as corrected class lists as may be required by EMU. Further, EMU and the Association agree that Faculty Members shall have the professional responsibility of reporting all absences from regularly scheduled duties to their Department Head, participating in committee activities, keeping posted office hours which are scheduled at times most beneficial to students, participating in activities such as orientation and registration, and participating in ceremonial academic functions such as convocations and commencement.

* * *

207 **B. Work Load**

208 1. It is recognized that a full-time faculty position includes many professional duties and responsibilities in instruction, scholarly/creative activities and service. While it is not possible or desirable to establish the same load or credit hour production for each Faculty Member, it is assumed that a twelve (12) credit hour teaching load is the norm for the Fall and Winter semesters and that a six (6) credit hour teaching load is the norm for the summer term (total in all summer sub-terms).

209 a. Equivalencies: The established credit hours of a course are used to determine teaching load. The Departmental Input Document (DID) indicates exceptions to this rule, such as, but not limited to:

210 (1) large sections of a single course;

211 (2) supervision of special learning activities when such activities and/or projects are a significant part of the Faculty Member's workload (e.g. composition or writing intensive courses, supervision of independent studies and/or thesis/final projects, chairing or serving as a member on a preliminary and/or dissertation committee) and selection and supervision of graduate assistants, coordinator, selection, and placement of cooperative education students;

212 (3) graduate courses where the nature of the instruction requires significantly greater preparation than an undergraduate course;

213 (4) supervision of field activities such as practice teaching, clinical affiliation, internship, and cooperative education;

214 (5) courses for which mandated contact hours exceed credit hours;

215 (6) team-taught courses

* * *

ARTICLE XVIII. COMPENSATION

* * *

821 H. The Base Academic Year

822 1. The base contract year shall consist of two (2) semesters for a total of thirty-two (32) weeks. Further, Faculty Members will make themselves available for advising and department and/or college meetings, the week prior to the beginning of each semester except in those cases where Faculty Members are not required to be on campus as specified in Article IX.E.

* * *

845 L. Salaries for Teaching Overload Courses

846 1. The minimum salaries for teaching overload courses shall be $1,700 per credit hour.

847 2. The maximum number of overload courses in the Fall and Winter semesters is three (3) credit hours per semester. Non-traditional courses (Article IX.C) do not count against this maximum. In extraordinary circumstances, one (1) additional overload course may be allowed with approval of the Dean.

848 3. With exception of non-traditional courses (Article IX.C.), there is no overload in the Summer. In extraordinary circumstances, overload may be allowed with approval of the Dean.

849 4. Faculty may be paid at rates in excess of those set forth in K.1 above in those instances where market factors require higher rates of pay, which shall be determined by EM in its sole discretion. Additionally, the foregoing compensation schedule may be increased at the discretion of EMU.

I have previously displayed Appendix C and I am not going to display it again at this point.

The University has taken the position that the grievance is untimely, and thus based on the language in the Collective Bargaining Agreement, it must be denied. It maintains that the grievance was not filed within 20 working days of the time the Association or a faculty member became aware or reasonably should have become aware of the action complained of. It maintains that since the 20 working day limit was not met, "the grievance is barred."

The Association takes the position that the grievance was timely. It points out that the University never raised the timeliness issue until January 4, 2018. It suggests that the University did not take any formal steps to load balance prior to the March 10, 2017 meeting. It suggests that as a result of the February 2 meeting, there was only an indication of an intent to take further action which had not been taken up to that point. The Association goes on to argue that the University, in essence, caused a significant delay by insisting that the grievance begin at step 1, and further, that its actions amount to a waiver of the time limits. Additionally, the Association takes the position that the grievance may be considered timely because it is addressing a continuing violation.

Numerous arbitrators and commentators have stated the proposition that if there is any question that a grievance is

timely, it should be litigated on its merits. Some suggest that the health of the relationship between the parties is enhanced when grievance issues are addressed on their merits, rather than being dismissed by failing to meet a procedural deadline. Thus, the observation that if there is any question, the matter should be fully arbitrated.

Having stated the above, it must also be understood that in many aspects the governing law defining the relationship of the parties is expressed by the mutual agreements they have reached and displayed in their Collective Bargaining Agreement. In this respect, the language contained in the grievance procedure, including various time limits and the consequences for failing to meet time limits, is as much an expression of mutual intent as are the provisions regarding salaries, vacation, health care, etc. These provisions cannot be ignored because the parties' clear expectation is that what they have bargained and incorporated into their contract will be enforced and each will receive the benefit of their bargains.

It's certainly true that up until January 4, 2018, the University never articulated a proposition that the grievance was untimely. Indeed, it spent extensive effort, as did the Association, in processing the grievance through the grievance procedure. The issue of timeliness arose in the January 4, 2018 correspondence which the University's counsel had forwarded to

counsel for the Association. That correspondence reads as follows:

January 4, 2018

In the course of discussing this matter with my client EMU in preparation for the hearing on January 19, 2018, it became evident to us that the grievance in this matter, G2017-08, was untimely filed. The Association was well aware of the Administration's intention to adopt a balanced 24 credit annual work load (with equivalencies) uniformly throughout all academic departments at the latest as of February 2, 2017, but no grievance was filed until March 17, 2017. Please be advised that it is the University's intention to present the position before Arbitrator Chiesa that this grievance is untimely and barred pursuant to MPs 92 and 95 of the Collective Bargaining Agreement.

Please feel free to contact me should you have any questions.

I have displayed the language in Article VII GRIEVANCE PROCEDURE which outlines the time limits the University is relying upon. I agree with the University that the language is clear and, as such, should be enforced as written.

Paragraph 95 establishes a standard that the grievance "shall be filed within twenty (20) working days" after either the Association or the faculty member in question "became aware, or reasonably should have become aware, of the action complained of." So certainly there is a 20 working day time limit which must be observed and enforced.

The Association has suggested a number of reasons why the grievance is timely. For instance, it argues that the grievance is continuing. I respect and have utilized the principle of continuing grievance in the past, but I am also convinced that in this case, that principle does not apply. If there is a decision regarding the appropriateness of balancing, or if the

Association's ability to challenge that decision comes about because a grievance is not timely, that's the end of the story. I do not find that the principle of continuing grievance applies in this dispute.

The Association has also suggested that the Employer waived its ability to challenge timeliness. The principle of waiver has been suggested in our judicial system wherein, if I recall correctly, the Michigan Court Rules require that initial objection based on timeliness of an action must be raised at the first possible response. However, we are not dealing with a statute of limitations, but with express contract language. In this situation, I understand that the University may waive its ability to challenge a grievance based on timeliness, but given the clarity of the language, that waiver must be clear and unequivocal. To state otherwise would mean that I would be writing out of the contract the time limits when there is no specific provision indicating when an objection to timeliness must be raised. Thus, I can find no waiver.

Nevertheless, what does cause me concern is the language in paragraph 95 which establishes a time limit in relation to "the action complained of."

At the February 2, 2017 meeting, the University stated its intention to begin calculating maximum faculty teaching loads across both the fall and winter semesters. It did not take any

action to do so, but merely indicated what it was going to do. The actual "action complained of" would have been when the University implemented its intention. The grievance is not grieving a statement of the Employer's intention, but is clearly challenging the action of balancing. Arguably, and I believe unsuccessfully, the University could have argued the grievance was premature. However, given the clear language in the contract, I believe it could be successfully argued that the grievance would have been timely if it were filed within 20 working days of the first instance wherein the University balanced credit hours to determine whether overload payments were warranted.

I'm not trying to split hairs. In this case, the University at the February 2 meeting indicated what it intended to do. At that point, it did nothing. That's much different than the circumstances which existed in the arbitration decision the University attached to its brief. In that case, I was convinced that because the Employer made a statement of what it was not going to do, absorb costs beyond the physical exam, the action complained of was mature at that point, and thus, that triggered the running of the time periods in question.

Given the circumstances in this dispute, the Association could have filed its grievance at any time before 20 working days after the first incident of the University balancing

workload over the academic year. Thus, the grievance is arbitrable.

The Association argues that the unambiguous language in MP208 provides for the calculation of faculty workloads on a semester basis. It submits that the language references the assumption that a 12 credit hour teaching load is the norm for the fall and winter semesters. It argues that anything beyond that norm is an overload. Further, the Association argues that the provision at MP827(sic)is not ambiguous and establishes that the norm is to be calculated by semester and overload is to be paid when that norm is exceeded in a particular semester. According to the Association, even if MP208 were ambiguous, the Union's interpretation is far more reasonable. It suggests the University's interpretation leads to a clearly harsh, absurd and nonsensical result. Furthermore, the Association relies upon past practice which it contends confirms its interpretation of the language. The MOUs the Union introduced are, in the Union's view, supportive of the position that overloads are paid after every semester. The Association maintains that the testimony of an unwritten handshake deal during 2015 negotiations is irrelevant and not credible. It argues that the language in MP208, regarding the semester based workload, did not change in the 2015 negotiations. It questions why experienced negotiators would reach an agreement suggested by the University without

reducing it to writing. It goes on to argue that the University's testimony about the basis for the unwritten agreement is contradicted by the timeline of negotiations. As a result, the Association requests that the grievance be sustained and its proposed remedy be granted.

The University argues that that it did not violate the Collective Bargaining Agreement by announcing its intention to pay overload pay as agreed to by the parties in the 2015 negotiations and the DID Committee discussions. It maintains that MP208 only refers to a 12 credit hour workload as the norm and goes on to recognize that it is not possible or desirable to establish the same load or credit hour production for each faculty member. Thus, it reasons that if 12 credits is only the norm, some faculty members will have a load of more than 12 credits in a particular semester and some will have less. Further, it submits there's no language in MP208 requiring the payment of overload pay after 12 credits in a semester. Thus, it concludes that the reference to fall and winter semesters could easily be interpreted as a combined norm of 24 credits annually. It submits that if the faculty members' salaries are viewed as determined on an annual basis, why couldn't overload pay be viewed as determined annually as well, especially when there is no clear language requiring that it be paid after 12 credits in the semester?

It argues that there is no language prohibiting it from balancing and paying overload after 24 credits annually in the fall and winter semesters, which explains why a grievance was never filed when multiple departments adopted that practice. It argues there's no unequivocal or consistent past practice and the evidence establishes that there is an array of procedures implemented regarding overload pay. Some departments paid after 12 credits a semester; some after 24 annually; some banked overload hours which could have been used to reduce workloads without any loss of annual base salary. While the University recognized that a practice may be uniform in a department, it does not necessarily mean that it is uniform within the bargaining unit. It goes on to argue that there is an express agreement with the Association to adopt certain enhanced equivalencies University-wide and utilizing the principle that overload would be 24 hours over an academic year. The University maintains that the Collective Bargaining Agreement, both current and historically, always permitted it to determine overload based upon 24 credits in an academic year. Further, it points out that the testimony clearly establishes that the University's ability to balance workloads for the purpose of payment of overload pay was a *quid pro quo* for the Association's agreement to negotiate and enhance equivalencies. Furthermore, it maintains that adoption of its interpretation is much more

reasonable, while application of the Association's position would lead to incredible results. It submits that in the final analysis, the bargaining unit only obtained the uniform, enhanced equivalencies implemented in the fall semester of 2017 because the Association promised the University that the University would have the right to pay overload pay after 24 credit hours, including the new equivalencies, in an academic year. Thus, it concludes that the grievance should be denied in its entirety because there is no violation of the Collective Bargaining Agreement.

In disputes of this nature, it is the arbitrator's, and hence my, responsibility to carefully analyze the record, hopefully arriving at the parties' mutual intent and apply that intent to the factual scenario. Parties often spend considerable energy negotiating contract provisions and agreements and they have every expectation that they will receive the benefit of their bargains.

As can be seen from the summary of the extensive arguments that have been presented above, there are a number of propositions and senerios which the parties have presented for analysis.

Starting with the language in the current Collective Bargaining Agreement, it is noted that there are alterations to prior contract language and addition of new agreements. For

instance, the Association has suggested that MP208, in relation to the designation of defining a normal teaching load for the fall and winter semesters, has been carried over from the prior contract. If we confine the analysis to just those provisions, I agree with the Association's characterization. However, there has been substantial changes which are reflected in the current Collective Bargaining Agreement provision at MP208.

The language in the prior contract deferred the structuring of schedules to take into account factors for which equivalency credit may be considered, to the department heads, in consultation with their respective Dean. Before analyzing the evidence regarding the establishment and utilization of prior equivalencies, it is apparent that the language itself could promote practices which may be unique to different departments. There doesn't necessarily need to be any uniform standards.

MP208 and MP209 in the current contract alters how equivalencies will be established. Under the current contract, a department input document provides for equivalencies and that document would be the result of the application of the language in Appendix C, which establishes and outlines the membership and duties of the DID Committee. This is a significant change, for now equivalencies will be established by a committee comprised of representatives from both parties. A simple reading of Appendix C suggests one of the goals in establishing the

provision was to provide uniformity in decision-making and the establishment of one source for equivalencies, rather than the numerous Department Heads and Deans that were involved under the prior Collective Bargaining Agreement at MP227. This is a substantial change and certainly must be kept in mind.

The Association has suggested that the controlling language is unambiguous and thus must be applied as written, which, in its view, mandates calculation of faculty workloads and overloads on a semester basis. The University does not accept the characterization.

The precise language in MP208 seems to clearly establish that the normal teaching load for fall and winter semesters is 12 credit hours. I note that the language speaks of "teaching load." The reference to equivalencies in the language and what has transpired in the past between the parties suggests that even though the term "teaching load" is utilized, equivalencies are factored into the formula.

Moving on to paragraph L in Article XVIII, which equates with MP845-MP849, it is noted that at MP846, the parties agree that the minimum salary for teaching overload courses is $1700 per credit hour. In 847, the parties have mutually agreed that the maximum number of overload courses in the fall and winter is three credit hours per semester. Again, the terms used in the two provisions are "teaching overload courses" and "overload

courses in the fall . . ." The language specifically relates to teaching courses. Of course, as I indicated above, the utilization of equivalencies can fulfill the requirement to reach a normal workload and can be utilized under appropriate circumstances to calculate overload and overload payment.

In all fairness, a simple reading of this language would suggest that the Association is holding higher cards than the University. Nevertheless, there is much more to this dispute and I cannot resolve this dispute on the basis that the language is unequivocal and unambiguous and thus clearly demands adoption of the Association's interpretation of the current contract.

The concept of past practice has been referenced by both parties. Simply put, the Association submits that the past practice supports and confirms its interpretation. To the contrary, the University takes the position that there is no past practice and there are other elements which make it clear that its interpretation must be applied.

There are a multitude of arbitration decisions and articles by commentators addressing the concept of past practice. Some have pronounced that past practice can only exist in relation to a benefit. Some have suggested that past practice should never be imposed when the event being dealt with is nothing more than the Employer's way of doing things. It has been suggested that a practice must be consistently applied in every relevant

circumstance. It has also been related that the practice can be altered or eliminated if the underlying reason for the practice changes, etc. I'm sure there are other offered bits of wisdom that arbitrators and commentators have hung their hats on.

In my view, a binding past practice, whether used to interpret ambiguous contract language, fill gaps and create elements of the relationship which do not appear in writing, or on the very rare occasion, to alter clear and unambiguous language, is nothing more than a mutually acceptable agreement reached by the parties which is expressed by conduct, rather than by a written provision in the Collective Bargaining Agreement. Not every consistent response to a set of circumstances develops a past practice. Practices are agreements not merely an employer's way of doing things.

There is an abundant amount of record evidence, both by way of documents and testimony, dealing with establishing how the parties administered the payment of overloads in the past. Most of the documents speak for themselves. In relation to the testimony, even though there is some suggestion that portions of it are not credible, I believe, after carefully analyzing the entire record, that the witnesses have related what they believe to be true. There is no probative evidence suggesting that any of the testimony should be discounted.

I find that the record does not establish a binding past practice which is applicable across the board to all departments regarding the establishment, payment and other considerations regarding overloads. The evidence establishes that in the past there were several different and distinct approaches to dealing with overloads.

For instance, there is much testimony and documentation suggesting that overloads were calculated and paid on a semester basis. Yet, there is additional evidence, although perhaps not as extensive, establishing that other departments calculated and paid overload as now suggested by the University. There is also testimony establishing that in addition to payment of overloads, there was banking and, in some instances, faculty outright declined overload payments.

The foregoing makes it impossible to conclude that there was a binding past practice regarding any particular procedure to calculate and pay overload. To the contrary, it seems that there were a multitude of approaches to calculating and paying overloads utilized by various departments over substantial periods of time.

There are numerous Memorandums of Understanding contained in the record which the Association suggests support its position that overloads were calculated and paid on a semester basis. The content of the MOUs standing alone does suggest that

on numerous occasions overloads were calculated and paid on a semester basis. Nevertheless, since the MOUs memorialize an understanding between a faculty member and the University, some would suggest that if there were a binding past practice, MOUs would not have been necessary. I recognize that some of the testimony suggests that the MOU is necessary to set the amount due the faculty member. Be that as it may, I do not believe that the existence of the MOUs establish a binding past practice.

What the record does establish is that there were numerous approaches used to calculate and pay overloads. Apparently, given the fact there were no prior grievances, the parties, and more significantly the Association, recognized the flexibility that was demonstrated by the various methods of addressing overloads. One would think that if the Association concluded that all overloads should have been calculated on a semester basis, grievances would have been filed for the numerous occasions when overloads were not calculated or paid on a semester basis.

This brings us to the negotiations for the current Collective Bargaining Agreement. The changes in the language and the involvement of the Association in dealing with equivalencies has already been displayed and discussed. The point is that involving the Association in characterizing, defining and creating equivalencies allowed the exclusive bargaining

representative to have input into a procedure which, according to prior contract language, was addressed by Department Heads and "their Dean." This is a significant change. Testimony from University witnesses suggests that during negotiations the parties recognized that the existing language and the new language allowed the University to calculate overloads utilizing the balancing method and 24 credit hour yardstick.

Given the diverse approach to calculation and payment of overloads which existed prior to negotiations for the current Collective Bargaining Agreement, as well as the state of the language, representations made by the Association's bargaining team during negotiations in the presence of and directed to the University's bargaining team, become extremely significant.

The testimony, which is essentially unrebutted, establishes that both parties knew how the University intended to calculate and pay overloads and the universal adoption of its method which was not universally utilized in the past was the *quid pro quo* for the formulation of Appendix C to the Collective Bargaining Agreement which, *inter alia,* involved the Association in the development and administration of equivalencies. It is significant that Julie Berger, the current Academic Collective Bargaining Administrator, who at the time of negotiations for the current contract was on the Association's bargaining team and had been employed by the Association for 12 years, testified

that the Association agreed with the University in the calculation and payment of overload pursuant to the University's view. Yet, Berger's testimony is not the only testimony on point and each of the University's witnesses testified that the University relied upon the discussions and the Association's position that the University could utilize its method of determining and paying overloads across the board in every department.

After carefully reviewing and analyzing the entire record, I am persuaded that the grievance must be denied. The Association has failed to establish that the University has violated the Collective Bargaining Agreement or a binding past practice when it instituted its method of calculating and paying overloads. Certainly, this entire issue may be revisited and addressed during the next round of collective bargaining. Nevertheless, based on the record before me, I must deny the grievance.

AWARD

The grievance is denied.

Dated: April 25, 2018

Mario Chiesa