

American Arbitration Association

Northeastern University

AAA # 01-17-0002-1413

And

Gr: ██████████ – Course ESLG 0550 Assignment

SEIU, Local 509

Date: December 28, 2017

Arbitrator: Roberta Golick, Esq.

Hearings: July 26, 2017; November 20, 2017

Appearances: For the University
Scott Merrill, Esq.
Senior Director of Labor Operations

For the Union
Patrick N. Bryant, Esq.
Pyle Rome Ehrenberg PC

The Issue

The parties agree that the issue is:

What shall be the disposition of the grievance?¹

¹ The University withdrew a substantive arbitrability challenge that it had earlier raised.

The Agreement

The February 26, 2016 to June 30, 2019 collective bargaining agreement between Northeastern University and Service Employees International Union, Local 509, provides, in relevant part:

ARTICLE 9 – COURSE ASSIGNMENTS

Section 1. All assignments of faculty covered by this Agreement shall only be made by the Provost and Senior Vice President for Academic Affairs or his/her designee or a Dean or designee. For the purposes of this Article, an assignment is the administrative action that specifies the class(es) to be taught or other academic work that comprises the faculty member's responsibilities. The listing of a course in the schedule of classes and/or designation or identification of a particular faculty member in the schedule of classes does not constitute an assignment. Assignments may include preparation, attendance at faculty meetings, course assessment, and resolution of incomplete or disputed grades.

Section 2. Faculty members entitled to good faith consideration shall be offered their course assignment in writing at least forty-five (45) calendar days prior to the start of the academic term except when the course was previously offered to another individual. Nothing in this Article shall preclude faculty members from being offered courses or sections of courses that are added to the schedule after the date of offer. A faculty member must notify the University of his/her acceptance of an offered course within ten (10) calendar days of receiving the offer. If the faculty member fails to respond within ten (10) calendar days of receiving the offered course assignment, the faculty member will be deemed to have declined the offer.

Section 3. Commencing on January 9, 2017, the University will give good faith consideration to a faculty member for a course assignment where (1) on the date of ratification of this Agreement or during the period between the date of ratification and January 9, 2017, or (2) on or after January 9, 2017 (a) the faculty member has not been subject to any disciplinary action issued by the University within the current year or the preceding three (3) years; (b) the faculty member has been assigned to teach the same course for which s/he seeks assignment during at least three (3) academic terms during the previous three (3) years; and (c) the same course is being offered within one (1) year of the faculty member's most recent assignment to teach that course.

The Union and the University acknowledge that this Agreement does not apply to online courses or any other course taught outside the Boston Campuses, and that such courses are not bargaining unit work. However, notwithstanding the definition of "same course" below, online courses taught by faculty members who were teaching during the academic term in which this Agreement was ratified shall be considered in the initial determination of good faith consideration in the assignment of a course with the identical course number but with a delivery method of on the ground, hybrid or blended on the Boston Campuses. With this one exception, online courses will not be considered in determining good faith consideration eligibility.

For purposes of this Section, in CPS, "year" shall mean September 1 – August 31. For all other Colleges/Schools, "year" shall mean July 1 – June 30.

For purposes of this Section, “same course” shall mean the identical course number and identical campus. The campus designations “Boston Main”, “Boston”, and “Broad Street” shall be considered an “identical campus” for purposes of this Section.

Notwithstanding the foregoing, the following groups of courses shall be considered the “same course” for purposes of this section:

In CSSH – English:

All on-ground, not online first year writing courses ENGW 1102, 1110, 1111. All on-ground, not online, Advanced Writing in the Disciplines section of the following courses: ENGW 3302, 3304, 3305, 3306, 3307, 3308, 3309, 3310, 3311, 3313, 3314, 3315.

During the term of this Agreement, the Union and the University may submit to the Labor Management Committee additional courses for the Labor Management Committee to review and make a recommendation as to whether they should be considered the “same course” for purposes of this section. The recommendation of the Labor Management Committee shall not be binding on the University.

Good faith consideration shall mean that the assignment to teach a specific course may be denied, reduced, or subsequently cancelled only in the following circumstances:

- (a) Elimination, suspension or downsizing of an academic unit or program and/or merging of an academic unit or program within another academic unit or program which impacts the course taught by the faculty member;
- (b) Creation of a full-time faculty position that absorbs an existing course taught by faculty members or any other circumstance in which a course previously taught by a faculty member will be taught by a full-time faculty member or non-bargaining unit member;
- (c) A reduction in the number of courses or sections offered in an academic term or the cancellation of a course or section which impacts the course taught by the faculty member;
- (d) Elimination or decrease in course offerings due to changes in core curriculum requirements, or major or minor program requirements, which impacts the course taught by the faculty member;
- (e) Unsatisfactory performance of a faculty member; as evidenced by facts and circumstances such as student evaluations, individual student commentary (both oral and written), faculty member self-evaluation, syllabi and applicable course materials, evidence of student learning, and classroom observations; provided, however, that student evaluations shall not be used as the exclusive basis to deny, reduce or cancel an assignment;
- (f) The faculty member’s failure to meet any of the responsibilities set forth in Article 5 – Academic Freedom and Teaching Expectations;
- (g) Availability of an alternative faculty member who, in the University’s discretion, has better credentials, qualifications and/or performance;
- (h) Serious misconduct of a faculty member that is outside the scope of his/her employment with the University but, in the reasonable judgment of the University, would adversely affect the faculty member’s ability to teach or be a member of the University community;
- (i) Where a faculty member is the only individual teaching a specific course in a college and/or department and the University has identified another faculty member, full-time faculty member or non-bargaining unit member who also is available to teach the course;

- (j) Where the assignment is not practicable due to an act of God, health and safety risk, emergency, injury, death or other similar circumstances; and
- (k) Where a faculty member is not qualified or competent to teach in a course's delivery method as determined by the academic unit. A faculty member's successful completion of the University's Instructor Certification Training or suitable alternative approved by the faculty member's academic unit within the two year- period immediately preceding the assignment to teach a hybrid or blended course shall be considered evidence (among other evidence) of a faculty member's qualification to teach in those delivery methods.

In the circumstances set forth in subparagraphs a, b, c, d, g, i, j, or k the University shall reasonably consider assigning the impacted faculty member to teach an available scheduled course that the faculty member is qualified to teach. In the event a faculty member has good faith consideration for a specific course and has taught more than one section of that specific course during at least three (3) academic terms during the previous three (3) years, the faculty member will only be entitled to good faith consideration for the number of sections for which the faculty member earned good faith consideration for that specific course up to a maximum of two (2) sections of that specific course per academic term.

Nothing herein precludes the University from offering additional sections of the same course to that eligible faculty member in the same academic term.

In the event more than one faculty member has good faith consideration regarding a specific course and there are not enough sections of that specific course to assign to all of those faculty members, the University shall determine, in its discretion, which faculty member will be assigned to teach the available courses.

If a faculty member entitled to good faith consideration is displaced by an alternate faculty member or by the creation of a full-time position that absorbs existing courses taught by a faculty member pursuant to subparagraph b or g above and is not offered another course, the affected faculty member shall receive a one-time payment equal to seventy-five percent (75%) of the amount the faculty member would have been paid had he/she taught a section of the course.

Section 4. Except for courses assigned pursuant to Section 3 above, the University shall exercise reasonable discretion in the assignment of courses to faculty members. The University's exercise of reasonable discretion in the assignment of courses to faculty members as provided in this section is subject to grievance, but is not subject to arbitration under this Agreement.

Section 5. In cases where a course or section assignment subject to good faith consideration is canceled after being offered to and accepted by a faculty member, the faculty member may be offered an available alternative course assignment that the faculty member is qualified to teach and that has not been assigned to another faculty member or full-time faculty member. If the faculty member has not been offered an available alternative course assignment, as described above, a faculty member assigned the course based on good faith consideration that is subsequently cancelled shall be given full compensation for the course(s) cancelled after the course was assigned and accepted by the faculty member. Failure to provide such notice as stated in Section 2 will not result in any obligation to pay the cancellation fees set forth in this Article.

If a faculty member accepts an assignment for a course that is not subject to good faith consideration and the course is subsequently cancelled, the faculty member shall be paid a cancellation fee equal to

fifteen percent (15%) of the amount the faculty member would have been paid had the faculty member taught the course if the course is cancelled within seven (7) calendar days prior to the start of the academic term or after the start of the academic term.

Section 6. The University will post and advertise open full-time non-tenure track faculty positions in accordance with University policies and procedures as they may be amended by the University from time to time. The University and the Union acknowledge that fulltime non-tenure track positions are outside the scope of the bargaining unit covered by this Agreement. Accordingly, this Agreement does not affect the University's rights to establish the qualifications for those positions. Faculty members may apply for open fulltime non-tenure track faculty positions. The University's decision regarding who to hire for an open full-time non-tenure track faculty position is not subject to grievance and arbitration under this Agreement.

Background

In November 2016, the Union filed a grievance on behalf of [REDACTED] a part-time lecturer in Northeastern University's College of Professional Studies. The complaint is described on the grievance submission as follows:

[REDACTED] has earned good faith consideration (GFC) for two sections of ESLG 0550 (Research and Writing for Grad). However, for the Spring 2017 semester, he was only offered one section of the course, while another section was offered to a faculty member without GFC. The University has claimed that they could not offer the additional section to [REDACTED] due to Article 9.3.j, in that the remaining section of ESLG 0550 would not fit the schedule of other course sections he was to be offered. Particularly considering that there were five additional sections offered to other part-time faculty, we argue that the University could have rearranged the schedule for this course so that two sections could have been offered to [REDACTED] and this situation is in no way a "similar circumstance" to "an act of God, health and safety risk, emergency, injury, or death" as outlined in 9.3.j. As further evidence that scheduling issues can be and have been resolved in the past, we contend that it has been common practice for GPAC administration to ask part-time faculty to swap sections or courses for scheduling purposes, even after course assignments have been offered and accepted.

As a remedy, the grievance proposed that "The University shall make the grievant and all similarly situated Faculty Members whole in every way and shall provide notice of the violation to bargaining unit members."

The current collective bargaining agreement is the first negotiated agreement between Northeastern University and SEIU, Local 509. The bargaining unit comprises all part-time graduate and undergraduate faculty (adjunct, lecturers or instructors) employed to teach at least one credit-bearing course in a degree granting program at Northeastern campuses.

As described at arbitration by faculty member [REDACTED] who participated on the bargaining team during negotiations, the Union's primary goal for their new agreement was to secure job stability. After many months of discussion, the parties reached a resolution of the issue based upon a concept the University introduced at the bargaining table as Good Faith Consideration. Good Faith Consideration, or GFC as it is now familiarly known, affords faculty members who meet certain threshold criteria priority status for assignments over other faculty who lack GFC. Article 9, Section 3 of the agreement provides:

Commencing on January 9, 2017, the University will give good faith consideration to a faculty member for a course assignment where... (a) the faculty member has not been subject to any disciplinary action issued by the University within the current year or the preceding three (3) years; (b) the faculty member has been assigned to teach the same course for which s/he seeks assignment during at least three (3) academic terms during the previous three (3) years; and (c) the same course is being offered within one (1) year of the faculty member's most recent assignment to teach that course.

Further in Section 3 the parties agreed that "In the event a faculty member has good faith consideration for a specific course...the faculty member will only be entitled to good faith consideration for the number of sections for which the faculty member earned good faith consideration for that specific course up to a maximum of two (2) sections of that specific course per academic term."

The parties also addressed in Section 3 the "only" circumstances under which an assignment to a faculty member with GFC may be "denied, reduced, or subsequently cancelled." Among the eleven enumerated circumstances, the single one at issue in this case is Section 3 (j) – "Where the assignment is

not practicable due to an act of God, health and safety risk, emergency, injury, death or other similar circumstances.”

During the Fall 2016 semester, Grievant ██████████ taught two sections of course ESLG 0550, Research and Writing (R/W). He also taught three classes in other courses that semester. Heading into the Spring 2017 semester, ██████████ had earned GFC in two sections of course ESLG 0550, as well as GFC in two sections of another course, ESLG 0510, Advanced Reading for Grad School, and GFC in one section of course ESLG 0230, Writing for Graduate School. In all, he had GFC in five classes.²

At the time, ██████████ was Director of Operations in the Global Pathways and American Classroom (GPAC) Program within CPS. Calzada oversaw academic planning, staffing, and student support. In this role she was responsible for building the assignment schedules for the Spring 2017 semester for approximately 60-70 part-time faculty in GPAC. The task began, ██████████ testified, in September/October 2016.

██████████ testified at arbitration that she was given no specific guidelines about how to apply the newly negotiated GFC provisions, but her goal was to be objective and equitable. So, she looked at a list of all part-time faculty who had earned GFC for specific courses. Then she started alphabetically by last name and built course assignments in schedules that fit. With respect to course ESLG 0550 (R/W), ██████████ had several email exchanges with ██████████ a full-time faculty member in GPAC and course coordinator for the R/W course. ██████████ had built the syllabus and curriculum for the R/W course.

² Classes and sections are synonymous.

On October 11, 2016, [REDACTED] replying to an earlier email from [REDACTED] that had apparently contained a couple of scheduling options for [REDACTED] wrote, in relevant part:

[T]he second schedule for my spring semester (one R/W and 2 sections of reading), although not the best, works better for me in the spring. You are right – I did not request two R/W sections. In fact, I would not recommend it to anyone unless these instructors focus only on this course.

[REDACTED] went on to discuss a “fabulous meeting with the PT faculty teaching R/W.”

Being cognizant of its importance and the complexity of its content, we discussed the current state of affairs with students and pedagogical tips. I understand that, in the spring, two more FT faculty will be teaching this course. Yet I hope to keep the current cohort intact. There is so much camaraderie and passion for what we are doing that I witnessed today that it is just impossible to ignore. I would like to remind you of their names: [REDACTED] (PhD), [REDACTED], [REDACTED] (PhD candidate), [REDACTED] (PhD). I invited [REDACTED] to join me and [REDACTED] to work on a second research project as well. [REDACTED] has had amazing experiences with qualitative data analysis software. Being new to the Program, she has quickly earned the reputation of an incredibly responsible instructor.

[REDACTED] responded on October 12. She wrote, in relevant part:

I’ll know more soon about spring teaching assignments. Note, however, that with GFC officially in swing, all currently Res & Writing faculty will not get a section. We have 10 sections on the books. You’ll be teaching 1, [REDACTED] will be teaching 2. The remaining 7 must be divided between the 7 instructors who have GFC for the course:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]
6. [REDACTED]
7. [REDACTED]

Some of the instructors – [REDACTED] and [REDACTED] – actually have GFC for 2 sections, but we can choose to offer them only 1 given the other instructors who also have GFC.

Of course, instructors do not need to accept the offer. [REDACTED] may refuse if he does not want to teach the course. We do, however, need to offer it to him per the union contract. (He has taught it in 3 separate semesters over the past 3 years ... In other words, anyone who had GFC for a course moving into the Summer 2016 semester has GFC for that course moving into Spring 2017.)

██████████ replied that day:

Thanks for the detailed message.

██████████ is not working here any longer. ██████████, with all due respect, cannot teach this course. I do not think he will accept the offer, and the class has changed so much from the very first year.

██████████ may not accept this offer either because she is on the other campus and prefers it now.

Yes, it would be great to think about the possibility of offering other courses to ██████████ and ██████████, not two sections of this one. ██████████ would like to return to the reading course as well.

I will advocate very strongly for ██████████ I have never seen such a responsible individual.

I will keep this information confidential.

On October 23, 2016, ██████████ forwarded to ██████████ and others who had apparently been consulted on the scheduling a proposed draft of course assignments for Spring 2017. The ten sections of Course ESLG 0550, R/W, were assigned as follows:

██████████	1 section
██████████	2 sections
██████████	1 section
██████████	1 section
██████████	1 section
██████████	1 section
██████████	2 sections
██████████	1 section

At the time, ██████████ had not yet earned GFC in the R/W course.

Teaching invitations based upon ██████████ course assignments went out to faculty on October 25.

The assignment to ██████████ for Spring 2017 was for 4 classes: the one R/W section, one section of Writing, and two sections of Advanced Reading. He had GFC in all three courses. The R/W course, being 5 credits, pays more than the Reading or the Writing course.

██████████ immediately responded:

Thank you for the invitation. I would like to teach two sections of research class instead of two reading classes. I think I earned good faith consideration for them. Is the reason for one research class that a full time faculty is teaching the other section?

I will be grateful for your consideration and answering my question. I have taught this class from the beginning.

I would like to kindly ask for fair consideration and trying to include the same number of hours as this semester.

██████████ also reached out to CPS Administrator ██████████ asking “if any of the full time faculty is teaching research class next semester.” An hour later he asked ██████████ and ██████████ again: “[W]ho took over my section of Research class? I would like to start a formal inquiry.”

On October 26, ██████████ wrote to ██████████

I am writing to ask for a change in schedule. Could you put my Friday classes on Thursday? This will allow me to have a better schedule.

This is in addition to my previous questions about my Research section. You may have overlooked the fact one teacher does not have good faith consideration and the research section should stay with me.

██████████ replied, apologizing for the delay, and asking ██████████ to be patient while they sort out the many requests regarding the spring schedule.

██████████ thanked ██████████ and ██████████ and apologized for his emails of the day before, explaining:

I sent them because I was scared about losing good faith consideration and of course source of income, and favoring a person without good faith consideration whose life does not depend on this course.

On October 28, ██████████ wrote to part-time faculty:

Many of you have emailed ██████████ or me with questions about your Spring 2017 teaching assignment and the interpretation of “good faith consideration.”

As you know, the good faith consideration system is complex and we are working to assess your questions and concerns as quickly as possible. We are working with your union representatives on these issues.

We have received a number of requests for schedule changes. Please understand that we will not be making any schedule changes at this time. In this regard, you are reminded that you have until Friday, November 4th to accept the offered course(s). If you do not accept the offered course(s), you will be deemed to have declined the offer.

On October 30, ██████████ accepted the four class offered to him, and added: "However, I am only concerned about one course that if not offered, I should receive compensation."

On November 17, 2016, the Union filed its grievance protesting the University's failure to offer a second section of R/W to ██████████ while offering one section to a faculty member without GFC.

In early December 2016, ██████████ alerted ██████████ that the GPAC program was adding a new section of R/W due to larger than expected enrollment estimates. She asked ██████████ for a "short list of recommended instructors" for her to assign to the course. ██████████ wrote:

Note that ██████████ has GFC for one section and will need to be offered the course or offered a buyout, with the buyout option extinguishing his GFC. Based on earlier conversations, I'm assuming that you do not believe ██████████ is well qualified to teach ESLG 0550. Please confirm that this is the case, and that the instructors you'll be recommending are better qualified.

██████████ reconfirmed that ██████████ was not qualified to teach the course.

The Union's grievance on behalf of ██████████ remained unresolved through the grievance procedure. The University's response to the grievance was:

[T]he University has the discretion to determine assignments under the contract. In this case, ██████████ could not be assigned an additional section of ESLG 0550 because it conflicted with his assignment schedule. This raises a question of arbitrability. Moreover, Article 9 does not give ██████████ right to be assigned courses of his choosing. Finally, exception (j) contemplates that assigning ██████████ the additional section of ESLG 0550 is "not practicable." For these reasons, the grievance stands denied.

At some point thereafter, ██████████ asked the Union to withdraw the grievance. The Union elected to press the contractual issue nonetheless, and the matter proceeded to arbitration.

Positions of the Parties

Union

The Union contends that the University violated Article 9 of the collective bargaining agreement by failing to offer ██████████ a second section of the R/W course in which he had GFC. ██████████ was plainly entitled to the class ahead of ██████████ who did not have GFC. The contract does not permit the University unfettered discretion to deny assignment of courses to faculty with GFC. Rather, an assignment can be denied, reduced or cancelled only in narrow circumstances, none of which were shown to apply in this case. The University deliberately denied ██████████ the two sections, never even considering offering him a second section.

The University's defenses to deny ██████████ two sections are without merit, the Union continues. With respect to the University's Section 3 (j) defense related to ██████████ health, that is a "red herring." His alleged "stress" was not cited as a basis for denying him the section until arbitration. Subsection (j) is inapplicable to mere scheduling conflicts, the Union contends, and in any event, ██████████ never considered whether she could resolve a possible conflict in order to offer ██████████ the second class of R/W for which he had GFC. Had she even tried, there were options that could have provided ██████████ the second section of R/W without wreaking havoc with faculty schedules. And even if there *had* been an irreconcilable conflict preventing the assignment of the section to ██████████, the University would then have been obligated to consider assigning him another available course.

The Union maintains that by its actions, the University, in effect, placed a “cap” on the number of R/W sections assigned to faculty members by preventing faculty with GFC in two sections of R/W to be offered more than one R/W class if the member was also being assigned other courses. While that was what ██████ plainly wanted, it was at odds with the requirements of the collective bargaining agreement.

Finally, the Union argues, the University’s alleged policy against reassigning courses did not prevent its compliance with Article 9. In the past, the University often reassigned courses at the request of faculty members. In any event, the University cannot be permitted to use its claimed policy as a shield against its own contract violation.

As a remedy, the Union seeks a ruling that the University violated Article 9 by refusing to offer two R/W classes to ██████, and requests an order making him whole for the second section of R/W that he was not offered to teach in Spring 2017.

University

The University argues that its decisions with regard to ██████ assignments for Spring 2017 were entirely consistent with the terms of the collective bargaining agreement. The University was not required to offer the Grievant all five classes in which he had GFC at the start of the assignment process. ██████ was not the only person with rights to ESLG 0550; other faculty also had rights. When ██████ learned that ██████ departure left an extra section of R/W to distribute to those with GFC, she properly exercised her discretion to assign it to ██████ who, like ██████, had GFC for two sections of R/W. As for the section that might have been assigned to ██████ who also had GFC, ██████ decided to wait until assignments had been completed and then revisit whether to assign the

section to [REDACTED] When she finally considered assigning the course to [REDACTED] the scheduled hours for the remaining section did not fit into either [REDACTED] or [REDACTED] schedules.

In any event, the University continues, [REDACTED] had determined that she would not assign a fifth class to [REDACTED] because of the risk to his health and safety. Under the plain language of Article 9, Section 3 (j), the mere fact that a risk existed was sufficient to justify [REDACTED] decision to withhold the assignment of a fifth class from [REDACTED]. The “health and safety risk” operated as a *de facto* cap on his right to five classes.

Finally, the University argues, there is no basis for the Union’s argument that [REDACTED] should have been allowed to decide which four classes he would teach among the five sections in which he had GFC. There is no right of first refusal under the contract. Nor was the Grievant entitled to a schedule change to accommodate his preferred four classes. The University did not change schedules or allow faculty to swap courses for Spring 2017 as it would have wreaked havoc on the scheduling process. Any schedule accommodations that were allowed prior to the parties’ collective bargaining relationship have no bearing in this unionized environment.

The University maintains that the Union has failed to meet its burden of demonstrating a contract violation. It urges that the matter be dismissed.

Discussion

[REDACTED] did not go into much detail about how she built the schedules for the Spring 2017 faculty assignments, but it is fair to suppose that with the injection into the process of the new GFC requirements, the task was complex, as it involved many moving parts. Nonetheless, [REDACTED]

email exchanges with ██████ indicate that ██████ (though not, evidently, ██████ understood the GFC mechanism and understood what her obligations were when it came to assigning courses/classes to faculty who had earned GFC.

The issue before me, as agreed, is confined to the question of how the grievance as submitted should be decided. In essence, the complaint is that ██████ was entitled under Article 9 to be offered a second section of the R/W course in October before it was offered to a faculty member without GFC. Although ██████ emails to the administration in October 2016 touched upon other matters such as a request to substitute one section in which he had GFC for another, the Union has not argued here that he had a right to choose which courses he wanted to teach from among those in which he had GFC. Nor does the Union here assert a binding practice whereby the University is compelled to permit faculty members to switch around their teaching assignments after the assignments are made.

The spotlight in this case falls upon one period of time – the September/October time frame when ██████. ██████ was building the schedules of part-time faculty members. The critical moment, for purposes of determining whether the University violated the terms of Article 9, is when ██████ decided to offer one section of R/W to ██████ a faculty member without GFC, rather than to ██████ ██████ who did have GFC. A close look at that decision reveals a contractual breach.

To see it, I back up to October 12 when ██████ explained (correctly) to ██████ her contractual obligation regarding the distribution of the R/W sections among faculty with GFC. “We have 10 sections on the books,” she wrote. “You’ll be teaching 1. ██████ will be teaching 2. The remaining 7 must be divided between the 7 instructors who have GFC for the course...Some of the instructors – ██████ and ██████ – actually have GFC for 2 sections, but we can choose to offer them only 1 given the other

instructors who also have GFC.” ██████████ plain goal was to distribute the classes equitably among the faculty entitled to GFC. So far, so good.

██████████ learned later on October 12 that ██████████ one of the 7 part-time instructors with GFC for R/W, was no longer working at the University. That left 6 part-time instructors for 7 sections.

██████████ exercised her reserved discretion to assign ██████████ two sections of R/W, since ██████████, like ██████████, had GFC for two sections. Still, so far so good.

██████████ also learned that day that ██████████ another one of the seven with GFC, was not, according to ██████████ qualified to teach the course. ██████████ apparently took that into account and decided not to offer ██████████ one of the sections. The record indicates that she decided instead to assign one section of R/W to ██████████ a member without GFC.³ As of October 25, when schedules went out to part-time faculty, all seven sections of the R/W course were assigned: One to ██████████ one to ██████████ one to ██████████ one to ██████████ two to ██████████ and one to non-GFC holder ██████████

The problem is that Article 9 requires that faculty with GFC be afforded priority in course assignment. And that means that as ██████████ was building the assignment schedules prior to the October 25 invitations going out, ██████████ had preference over ██████████ for that seventh section of the R/W course. ██████████ was fully aware of what Article 9 required. Certainly, her October 12 email to ██████████ explaining the GFC process indicated as much. And her email to ██████████ in December, when

³ The contractual propriety of the University’s conduct vis-à-vis ██████████ is not before me. To the extent ██████████ testimony is accurate that she “held on” to the seventh section of R/W while the concerns about ██████████ qualifications were sorted out, she had plainly decided before completing faculty members’ schedules that she would not offer him a R/W section.

a new section of R/W was added to the roster, reiterated the requirement:⁴ Referring to ██████ who, though having GFC, had not been offered a section of R/W in October, ██████ advised, “Note that ██████ has GFC for one section and will need to be offered the course or offered a buyout, with the buyout option extinguishing his GFC.”

The University advances Section 3 (j) as justification for its decision to deny ██████ five classes for Spring 2017. Read together with the introductory phrase, the provision states:

Good faith consideration shall mean that the assignment to teach a specific course may be denied, reduced, or subsequently cancelled only in the following circumstances:

- j. Where the assignment is not practicable due to an act of God, health and safety risk, emergency, injury, death or other similar circumstance.

██████ testified that after she built the schedules for the part-time faculty with GFC in R/W and still had one section to assign (by virtue of having refrained from offering a section to ██████), she saw that she could not assign it to ██████ despite his having GFC for two sections because “it did not fit together” with the schedule she had already compiled for him. Pressed, she added that she would not have given him five classes anyway because ██████ had mentioned to her after a faculty meeting that he was struggling with his heavy course load. He had told her, she recalled, that the teaching load was stressful and having a negative impact on his health.

The words “health and safety risk” in Article 9 Section 3 (j) are not ambiguous, but the application of those words to a specific set of circumstances may be debatable, and must therefore be assessed on a

⁴ Whether the University had any duty to offer that late-added R/W section to ██████ is not before me. The grievance was filed in November, and the extra class was added later. I make no findings as to what the University’s contractual rights/obligations are under Article 9 after assignments are already distributed.

case by case basis. In this case, the professed basis for denying ██████ the second section of R/W in October does not withstand scrutiny.

First, alleged concern about ██████ health did not emerge as a reason to deny him five classes until arbitration. Despite ██████ repeated requests to ██████ for an explanation as to why he was not assigned the second section of R/W, at no point did she communicate that she limited his class assignments out of concern for his well-being. What he received for an answer was an email reminder (sent to all GPAC faculty) that the deadline for accepting offered courses was coming up. And though the University cited Section 3 (j) in its rejection of the Union's grievance, its claim was simply that assigning ██████ the additional class was "not practicable." There is no evidence that ██████ health was mentioned as a factor during the grievance procedure. Rather, the discussion at the grievance meeting centered on the scheduling conflict that the additional section would have posed, thereby making the assignment not practicable. Had "health and safety risk" been the basis for denying ██████ a fifth class, the scheduling conflict would have been irrelevant.

But more importantly, ██████ formed her ostensible concern based on one offhand remark by ██████ after a faculty meeting on some indeterminate date, when he made a comment that teaching five classes that semester was stressful and was impacting his health. Without more to substantiate a legitimate basis for denying ██████ an assignment to which he was otherwise entitled, ██████ conclusion that a fifth class was impracticable because it posed a health and safety risk was an inappropriate reach. There is no suggestion that ██████ was missing classes or failing to perform to the full expectations of the University. ██████ never said he would not accept an assignment of more than four classes. He did not request that his load be limited in the future. He did not elaborate in any way about symptomology, duration, or gravity of the stress he was under. For ██████ to have

elevated ██████ passing remark to the status of a Section 3 (j) basis to deny him an assignment to which he was plainly entitled was, in these circumstances, an improper application of Article 9. It was improper for ██████ to impute a Section 3 (j) health and safety risk exclusion based on her private perception that a fifth class would be too much for him. That her perception was not shared by ██████. ██████ is reflected in his multiple pleas, immediately upon receiving his course assignment, to have that second R/W class added to his schedule and to have the same number of hours as he taught in the fall.

That ██████ health was more of an afterthought than it was the impetus for denying him the additional R/W class has roots in the email exchanges between ██████ and ██████ in October. ██████, the course coordinator, expressed the view in no uncertain terms a) that she did not want faculty to be assigned two R/W sections if they would be teaching other courses as well; b) that ██████ had never seen such a “responsible individual” as ██████ a person who “quickly earned the reputation of an incredibly responsible instructor,” and one for whom ██████ intended to “advocate very strongly,” and c) that ██████ was not qualified to teach R/W. ██████ denied at arbitration that ██████ exhortations were determinative when she distributed the R/W sections to the part-time faculty, but it cannot be ignored that when the assignments went out on October 25, a) ██████ had one R/W section and three classes in other subjects; b) ██████ had two R/W sections and no other courses; c) ██████ was assigned a section of R/W; and d) ██████ was not assigned any sections of R/W.

In colloquy at arbitration, the University asserted that the collective bargaining agreement does not contemplate the assignment to someone of more courses than they can possible teach. I replied that I would agree that the collective bargaining agreement must be construed within the realm of reasonable

possibility. The evidence in this case does not establish that incorporating the second R/W class into [REDACTED] schedule prior to October 25 was outside the realm of reasonable possibility, or even, for that matter, particularly burdensome. While it might have been tedious to attempt to fit a second R/W class into a schedule for [REDACTED] *before the assignments were finalized*, [REDACTED] made no attempt whatsoever to do so. Nor did she explore the possibility of assigning [REDACTED] an alternative class in a scheduled course he was qualified to teach. And as discussed, the record falls far short of demonstrating that assigning [REDACTED] a second section of R/W would have been impracticable under Section 3 (j).

Accordingly, I find that the University breached Article 9 when it assigned one section of R/W to [REDACTED] [REDACTED] for Spring 2017 without first offering it to [REDACTED]. As of October 25, when the assignments were distributed, [REDACTED] had superior rights to [REDACTED] for the remaining R/W section.

Remedy

[REDACTED] testified at arbitration (pursuant to subpoena by the University) that he had asked the Union to withdraw the complaint on his behalf because he did not want to follow up. As party to the contract, however, the Union exercised its right to seek an arbitrator's answer to the contractual question posed. This award provides that answer in the form of a declaratory judgment. Inasmuch as [REDACTED] effectively dropped out of the case of his own volition, there is no remedy available to him personally.

Award

Northeastern University violated Article 9, Section 3 by assigning one section of ESLG 0550 (R/W) to [REDACTED] in October 2016 for Spring 2017 without first offering the assignment to [REDACTED] who had GFC in the course.

For the reason stated above, no remedial compensation is due [REDACTED]



Roberta Golick, Esq.
Arbitrator

Date: December 28, 2017