

IN THE MATTER OF ARBITRATION BETWEEN

INTER FACULTY ORGANIZATION)	
)	ARBITRATION
Union,)	AWARD
)	
and)	
)	TUITION WAIVER FOR
)	APPLIED DOCTORATES
)	GRIEVANCE
MINNESOTA STATE COLLEGES)	
AND UNIVERSITIES,)	
)	
Employer.)	
)	

Arbitrator:	Stephen F. Befort
Hearing Date:	September 21, 2007
Post-hearing briefs received:	November 16, 2007
Date of decision:	January 4, 2008
	APPEARANCES
For the Union:	Connie L. Howard
For the Employer:	James G. Jorstad

INTRODUCTION

The Inter Faculty Organization (IFO or Union) is the exclusive representative of a unit of professional faculty instructors employed by Minnesota State Colleges and Universities in the State University system (MnSCU or Employer). The Union brings this grievance claiming that the Employer violated the parties' collective bargaining agreement by declining to recognize the tuition waiver provision contained in Article 27 of the agreement as applicable to otherwise eligible faculty and family members enrolled

in applied doctorate programs. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

- 1) Has the Employer violated the parties' collective bargaining agreement by refusing to apply the tuition waiver provision in Article 27 to courses in applied doctorate programs offered at MnSCU state universities?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 27

General Provisions

Section G. Courses, Tuition and Fees. Full-time Faculty members, and all probationary, non-tenure track, and tenured part-time faculty members shall be entitled to enrollment in courses at any university in the System without payment of tuition or fees except laboratory and special course fees. Such enrollment shall not exceed twenty seven (27) semester credits for a fiscal year. Effective fall semester 2004 such enrollment shall not exceed thirty (30) credits for a year. For purposes of this provision, a year begins the first day of fall semester and concludes the day before the beginning of the succeeding fall semester. Part-time fixed-term, adjunct and community faculty shall be entitled to enrollment in courses at any university in the System without payment of tuition or fees, except laboratory and special course fees. However, the number of credits available to part-time fixed term faculty, adjunct faculty and community faculty members for this tuition and fee waiver shall be equal to the number of credit hours taught by the part-time fixed term, adjunct or community faculty member within that year as described above. The tuition and fee waiver must be used in the period from the first day of fall semester to the day before the succeeding fall semester in which the faculty member is employed. The faculty member's spouse or dependent children may share this right within the limit, established above, with waiver of tuition only. Proof of financial dependency shall not be required. For purposes of this section, dependent children are financial dependents of the faculty member, defined as dependent on the faculty member for significant financial support. [Emphasis added.]

Section H. Continuation of Benefits. Insurance and tuition waiver

benefits for faculty employed in an academic year shall continue until the beginning of the next fall semester. This Section shall not apply if the faculty member resigns with an effective date prior to the end of the academic year.

Section I. Tuition Extension for Retrenched Faculty. Faculty identified in Section G who are retrenched in accordance with Article 23 shall be entitled to enrollment, on a space available basis, in courses at any university in the System without payment of tuition or fees, except laboratory and special course fees. Such enrollment is limited to a total of twenty four (24) credits within one year of separation. The faculty member's spouse or dependent children may share the right within the limits established above, with waiver of tuition only.

ARTICLE 28

Grievance Procedure

. . . The arbitrator shall not have the power to add to, subtract from, or modify in any way the terms of the existing Agreement.

ARTICLE 33

Complete Agreement and Waiver

Section A. Complete Agreement. The Employer and the IFO acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the applicable area of collective bargaining, and that the understandings are set forth in this Agreement, and shall constitute the sole Agreement between the parties for the duration thereof.

FACTUAL BACKGROUND

The MnSCU system consists of 32 public institutions of higher education within the State of Minnesota, including state universities, community colleges, technical colleges, and consolidated colleges. The IFO represents approximately 3,600 faculty members employed at the seven state universities operated by MnSCU. The Employer and the Union have been parties to a series of collective bargaining agreements dating back to the 1970's.

A longstanding provision of these collective bargaining agreements entitles faculty members to take courses without the payment of tuition and fees. In its initial form, this tuition waiver benefit entitled covered faculty members to take up to one course per quarter at the campus at which they were employed. In the 1981-1983 faculty contract, the pertinent contract language provided as follows:

Art. 27, Sec. G. Courses, Tuition and Fees. Faculty members, excluding those who are on part-time, fixed-term appointments and who are enrolled in any graduate degree program within the State University System, shall be entitled to enrollment, on a space available basis, in courses at any university in the System without payment of tuition or fees except laboratory and special course fees. Such enrollment shall not exceed one (1) course per academic quarter or summer session, not a total of three (three) courses per fiscal year. In the event the faculty member does not exercise this right, the faculty member's spouse or dependents shall be eligible to take a course within the limits, established above, with waiver of tuition only.

The parties gradually expanded the scope of the tuition waiver credit in subsequent agreements. In negotiations for the 1983-1985 contract, for example, the parties agreed to expand the tuition and fee waiver benefit from one course per quarter to eight credit hours per quarter. The parties in that negotiating round also addressed an ambiguity in the provision's first sentence which described those faculty members ineligible for the tuition benefit. According to testimony elicited from former faculty member and IFO President David Simpson, the IFO understood this language to preclude only part-time faculty members who were both fixed-term and enrolled in a graduate degree program from receiving tuition and fee waiver benefits, while the Employer contended that any one of the three listed items (*i.e.*, part-time or fixed term status or enrollment in a graduate program) was sufficient to disqualify a faculty member from receiving tuition and fee waiver benefits. The parties compromised by adopting the

following language which specified who was eligible, rather than who was excluded, from receiving the tuition waiver benefit:

Art. 27, Sec. G. Courses, Tuition and Fees. *Full-time* faculty members, *and all probationary, non-tenure track, and tenured part-time faculty members* ~~excluding those who are on part time, fixed term appointments and who are enrolled in any graduate degree program within the State University System,~~ shall be entitled to enrollment, on a space available basis, in courses at any university in the System without payment of tuition or fees except laboratory and special course fees. . . .

In successor agreements, the parties expanded the scope of the credit still further. The parties' most recent 2005-07 contract now entitles faculty members, their spouses, and dependents in combination to take up to 30 credits per year, tuition free, at any MnSCU university. Nonetheless, the basic eligibility language, as quoted above, has continued intact through the parties' current agreement.

The instant grievance was set in motion by the Minnesota Legislature's action in 2005 authorizing MnSCU to offer applied doctoral degree programs. Prior to that action, the legislature had authorized the state universities to offer only "undergraduate and graduate instruction through the master's degree." Minn. Stat. § 135.052, subd. 1(4). In addition, session laws adopted each biennium beginning in 1987 barred MnSCU from offering, or even developing, programs at the doctoral level.

The Union offered evidence at the hearing purportedly showing that, despite the legislative ban, MnSCU offered doctoral course work through collaborative arrangements with other institutions. Two examples were offered. First, between 1994 and 2000, St. Cloud State University partnered with the University of Minnesota to offer an applied Doctor of Education Degree in Educational Administration. According to the testimony, participating faculty received tuition waivers for doctoral courses bearing state university

course numbers. Second, faculty at Minnesota State University Moorhead for many years have received tuition waiver benefits for doctoral course work taken through the Tri College arrangement with North Dakota State University and Concordia College regardless of which school sponsored the particular course in question. Chris Dale, MnSCU Director for Labor Relations, testified that the granting of tuition waivers was appropriate for MnSCU courses that were part of doctoral programs sponsored by other institutions, but that the granting of tuition waivers for courses offered at other schools was not.

MnSCU undertook an active lobbying campaign to overturn the ban on doctoral programs. That effort achieved success in 2005 when the state legislature amended Section 135.052, subd. 1(4) to authorize state universities to “offer applied doctoral degrees in education, business, psychology, physical therapy, audiology, and nursing.” The amendment carried an effective date of June 30, 2007.

Unlike conventional Ph. D. programs which include a heavy dose of research theory, the applied doctorate program provides a streamlined professional education for practitioners. But, due to greater depth of specialization and relatively smaller faculty-student ratio, it is anticipated that the applied doctoral program will be more costly than most other MnSCU programs. According to the testimony of Manuel Lopez, MnSCU Vice Chancellor for Continuous Improvement, the legislature made it clear in enacting the 2005 amendment that any new doctoral programs had to be self-sustaining in terms of tuition revenues and that no additional legislative appropriation would be forthcoming. In the 2007-08 school year, MnSCU implemented three new applied doctoral programs with an enrollment of 53 students.

Shortly after the legislature's approval of the 2005 amendment, the parties began negotiations for the 2005-07 collective bargaining agreement. Although both parties were aware that MnSCU was planning to implement new applied doctoral programs, neither party asserted any proposal concerning how the tuition waiver credit should apply with respect to these new programs. As a result, the 2005-07 agreement executed on December 13, 2005 contains no language addressing this issue.

Union President Nancy Black testified that she began hearing rumors during the Spring of 2007 that the Employer had decided not to approve tuition waivers for the applied doctoral programs. Black called MnSCU Associate Vice Chancellor Mary Leary for clarification, and Leary replied that a letter setting out the Employer's position would be forthcoming. In a letter dated April 27, 2007, Leary explained the Employer's position on this issue as follows:

In the current agreement between the Minnesota State Colleges and Universities and the Inter Faculty Organization effective by its terms for the period from July 1, 2005 through June 30, 2007, the parties agreed that faculty shall be entitled to enrollment in courses at any university in the System without payment of tuition or fees, except laboratory and special course fees consistent with Article 26, Sections G through I.

To insure that there is no misunderstanding, the Minnesota State Colleges and Universities will not apply this provision to the proposed applied doctorate degrees schedule to be offered in September 2007. The 2005-2007 contract negotiations on behalf of the MnSCU system did not include these courses because state law prohibited the offering of applied doctorates at that time.

Pursuant to M.S.A. §135A.052, the legislature recognizes each type of public postsecondary institution as having a distinctive mission within the overall provision of public higher education in the state of Minnesota. During our last round of negotiations, this statute limited the mission of the state universities by providing that "the state universities shall offer undergraduate and graduate instruction through the master's degree, including specialist certificates, in the liberal arts and sciences and professional education."

At that time, M.S.A. §135A.052(5) further provided that “the University of Minnesota shall offer undergraduate, graduate and professional instruction through the doctoral degree, and shall be the primary state supported academic agency for research and extension services.”

After the conclusion of those negotiations, the state law expanded the ability of the Minnesota State Colleges and Universities to offer “applied doctoral degrees in education, business, psychology, physical therapy, audiology, and nursing” effective July 1, 2007. Because there was not contemplation of the application of the tuition waiver coverage to doctoral programs at the time it was negotiated and due to the high cost of the applied doctoral degree programs and the need to insure their financial viability, we will not provide tuition waiver for doctoral coursework.

The Union filed a grievance challenging the Employer’s decision on May 2, 2007.

According to the Union, four faculty members have now applied for, but been denied, doctoral tuition waiver benefits. The grievance has now advanced to this arbitration proceeding.

POSITIONS OF THE PARTIES

Union:

The Union contends that the unrestricted plain language of the parties’ agreement obligating the Employer to provide tuition waiver benefits for “courses at any university in the System” necessarily includes doctoral course work offered by MnSCU universities. The Union claims that this construction is further supported by the parties’ bargaining history and past practice. The Union finally argues that the Employer cannot suspend this contractually mandated benefit simply because it would be financially advantageous to do so.

Employer:

The Employer maintains that the language of Article 27 contains a latent ambiguity because the parties did not contemplate that the tuition waiver benefit

provision would be applicable to applied doctorate courses at the time it was negotiated. In addition, the application of the tuition waiver benefit to these higher cost courses would threaten the financial viability of the new applied doctoral programs. Given these circumstances, the Employer asserts that this dispute should be resolved at the bargaining table rather than in grievance arbitration.

DISCUSSION AND OPINION

The parties do not disagree as to the basic facts underlying this grievance. They also do not disagree with the fact that neither party sought to amend the language of Article 27 during the 2005 negotiations so as to address that provision's application to the newly authorized applied doctorate programs. The parties really only disagree on one crucial issue: which party bears the burden to alter the default tuition waiver provision of Article 27. The Union claims that Article 27 authorizes tuition waiver benefits for the applied doctoral programs unless the Employer negotiates a limitation on those benefits. The Employer, in contrast, argues that Article 27 should not extend to this new program unless the Union first negotiates an entitlement to the tuition waiver benefits.

The starting point for analysis is the language of Article 27. That provision states:

Full-time Faculty members and all probationary, non-tenure-track, and tenured part-time faculty members shall be entitled to enrollment in courses in any university in the System without payment of tuition or fees except laboratory and special course fees. . . .

It is axiomatic that clear and unequivocal language should be given the meaning expressed. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 482 (5th ed. 1997). In this instance, the plain language places no restriction on the type of courses for which faculty and dependents may claim the tuition waiver benefit. This language should be contrasted

with several other provisions in the agreement that restrict entitlement to benefits to certain specified circumstances.

On its face, accordingly, this language appears to obligate the Employer to provide tuition waiver benefits for all courses, including the newly-approved applied doctoral courses. As discussed below, this construction is bolstered by several other factors.

A. Past Practice

The parties agree that, as MnSCU has added new programs and courses over the years, the tuition waiver benefit has automatically been applied to cover those additional circumstances. This extension has occurred in the absence of any affirmative contract language. Of course, this is not surprising since labor contracts normally operate in this fashion. Under the “dynamic status quo” doctrine recognized under the National Labor Relations Act and by most public sector jurisdictions, an employer’s duty to maintain the status quo includes an obligation to apply past practices and existing contract language to new circumstances in a consistent manner. Steven J. Scott, *The Status Quo Doctrine: An Application to Salary Step Increases for Teachers*, 83 CORNELL L. REV.1974 (1997). When a new employee is hired, for example, the parties usually do not negotiate a new wage rate or a new job security provision. They, instead, simply apply the general contract provision already stated to the new hire. The parties here have done the same with respect to the tuition waiver benefit.

B. Bargaining History

The bargaining history of the parties also does not support the Employer’s contention that Article 27 was not meant to apply to doctoral course work. When this

provision was first adopted in the late 1970's, MnSCU was not subject to any legislative prohibition on the offering of graduate degrees. Accordingly, the parties could not have been operating under a belief that such programs were impermissible. Moreover, in the negotiations for the 1983-85 contract, the parties clarified that students enrolled in graduate programs generally were eligible for the tuition credit. This history, in short, does not support the conclusion that the parties intended to restrict the tuition credit to exclude any specific graduate programs.

C. Cost Considerations

One of the principal justifications articulated in Vice Chancellor Leary's letter for not applying the tuition waiver provision to applied doctoral courses was "the high cost of the applied doctoral degree programs and the need to insure their financial viability." Although evidence submitted at the hearing shows that some masters' programs offered by MnSCU are even more expensive than the new applied doctoral programs, the Employer's cost concerns are understandable. As a matter of labor law jurisprudence, however, it is well-settled that matters of economic need, at least short of bankruptcy, do not provide a basis for repudiating existing contractual commitments. *See, e.g., Oak-Cliff Golman Baking Co., 207 N.L.R.B. 1063 (1973), enforced, 505 F.2d 1302 (5th Cir. 1974).* Such matters, instead, should be addressed through the collective bargaining process.

In conclusion, the burden of avoiding the natural application of open-ended contract language falls to the party desiring an exemption from the operation of such language. In this instance, the unrestricted tuition waiver provision automatically applies to the new applied doctoral programs barring a modification secured by the Employer

through the collective bargaining process. Since the Employer did not secure such a modification, its unilateral action in declining to apply the tuition waiver credit constitutes a violation of the parties' agreement.

AWARD

The grievance is sustained. The Employer is directed to make tuition waiver benefits available to faculty, spouses, and dependents who otherwise meet the eligibility standards set out in Article 27. The Employer also is directed to make whole eligible faculty, spouses, and dependents denied tuition waiver benefits for the cost of applied doctoral courses taken during the 2007-08 school year.

January 4, 2008

Stephen F. Befort
Arbitrator