

IN THE MATTER OF ARBITRATION BETWEEN

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

Arbitrator:	Stephen F. Befort
Hearing Date:	November 30, 2007
Post-hearing briefs received:	December 21, 2007
Date of decision:	January 4, 2008
	APPEARANCES
For the Union:	Anne F. Krisnik
For the Employer:	James G. Jorstad

INTRODUCTION

The Minnesota State College Faculty (MSCF or Union) is the exclusive representative of a unit of professional faculty instructors employed by Minnesota State Colleges and Universities at its technical and community colleges (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 24 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 24 to courses in applied doctorate programs offered by MnSCU state universities?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 24

MISCELLANEOUS PROVISIONS

Section 3. Tuition Waiver at Minnesota State Colleges.

Subd. 1. General Provisions. Faculty members holding unlimited full-time, unlimited part-time, temporary full-time and temporary part-time (temporary part-time must be in accordance with Subd. 2 below) appointments shall be entitled to enrollment on a space available basis in courses at any Minnesota State College without payment of tuition. Such enrollment shall not exceed a total of twenty-four (24) credits per year. The faculty member may use the twenty-four credits at any Minnesota State College and Universities institution. In the event the faculty member does not fully exercise this right, the faculty member's spouse or dependents shall be eligible to take a maximum of sixteen (16) credits per year with waiver of tuition only at any Minnesota State College. "Space available" shall be interpreted to allow the faculty member, spouse, or dependent to register for classes through the normal registration process. However, individuals enrolled in a class under this provision shall not be included in the class tally count in determining maximum class size. . . .

ARTICLE 27

GRIEVANCE PROCEDURE

Section 9. Arbitrator's Authority. The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the provisions of this contract. The arbitrator shall consider and decide only the specific issue submitted in writing by the Employer and the MSCF, and shall have no authority to make a decision on any other issue not so submitted. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws, and rules and regulations having the force and effect of laws. . . . The decision shall be based solely upon the interpretation or application of the express terms of this contract and to the facts of the grievance presented. . . .

ARTICLE 30

COMPLETE AGREEMENT AND WAIVER

The parties agree that during the negotiations which resulted in this Contract, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not prohibited by law. The understandings and agreements arrived at by the parties are set forth in this Contract. Therefore, during the life of this Contract, the Employer and the MSCF each voluntarily and unqualifiedly waives the right or obligation to bargain collectively with respect to any subject or matter referred to or covered in this Contract.

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 MSCF represents approximately 5,400 faculty members employed at the 25 community and technical colleges operated by MnSCU.

The Employer and the Union's predecessors have been parties to a series of collective bargaining agreements over several decades. A longstanding provision of these collective bargaining agreements entitles faculty members to take courses without the payment of tuition and fees.

Prior to 2001, separate bargaining units existed for MnSCU faculty at the technical colleges and the community colleges. Faculty at the technical colleges

were represented by United Technical College Educators (UTCE), while faculty at the community colleges were represented by Minnesota Community College Faculty Association (MCCFA). The labor agreement between UTCE and MnSCU allowed for the use of tuition waiver at any MnSCU two-year institution, but not at MnSCU state universities. The labor agreement between MCCFA and MnSCU allowed for the use of tuition waiver at any MnSCU community or consolidated college, but not at MnSCU state universities.

The two bargaining units were merged in 2001 due to a statutory change with the MSCF serving as the new exclusive representative. The 2001-03 collective bargaining agreement negotiated by MnSCU and the MSCF expanded the tuition waiver credit so as to allow unit faculty members (but not spouses and dependents) to use the credit at any MnSCU institution, including the state universities. The tuition waiver language incorporated in the 2001-03 agreement continues to the present and provides as follows:

Faculty members holding unlimited full-time, unlimited part-time, temporary full-time and temporary part-time (temporary part-time must be in accordance with Subd. 2 below) appointments shall be entitled to enrollment on a space available basis in courses at any Minnesota State College without payment of tuition. Such enrollment shall not exceed a total of twenty-four (24) credits per year. The faculty member may use the twenty-four credits at any Minnesota State College and Universities institution. In the event the faculty member does not fully exercise this right, the faculty member's spouse or dependents shall be eligible to take a maximum of sixteen (16) credits per year with waiver of tuition only at any Minnesota State College. . . .

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.

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 November 7, 2005 contains no language addressing this issue.

In a letter dated April 27, 2007, MnSCU Associate Vice Chancellor Mary Leary informed Union President Larry Oveson of the Employer's decision not to approve tuition waivers for the applied doctoral programs. That letter stated 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 decision on May 24, 2007. 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 Minnesota State College" necessarily includes doctoral course work offered by MnSCU universities. The Union claims that this construction is further supported by the parties' past practice of extending the tuition waiver provision to newly established programs. 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 24 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 24. The Union claims that Article 24 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 24 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 24. That provision states:

Faculty members . . . shall be entitled to enrollment on a space available basis in courses at any Minnesota State College without payment of tuition.

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 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. This construction is bolstered by the parties' past practice in applying the tuition waiver benefit. 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.

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.

January 4, 2008

Stephen F. Befort
Arbitrator