BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FOND DU LAC EMPLOYEES LOCAL 1366, AFSCME, AFL-CIO

and

CITY OF FOND DU LAC

Case 141
No. 56815
MA-10423

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 639 West Scott Street, #205, Fond du Lac, Wisconsin 54937, appearing on behalf of the Union.

Mr. William G. Bracken, Coordinator of Collective Bargaining Services, Godfrey & Kahn, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of the Employer.

ARBITRATION AWARD

City of Fond du Lac and City of Fond du Lac Employees Local 1366, AFSCME, AFL-CIO are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union by request to initiate grievance arbitration, received by the Commission on September 17, 1998, requested that the Commission appoint either a Commissioner or a member of its staff to serve as Arbitrator. The Commission originally appointed Coleen Burns to act as Arbitrator. After settlement attempts failed, and due to Ms. Burns' schedule, the Commission appointed Paul A. Hahn as Arbitrator. Hearing in this matter was held on November 20, 1998 in Fond du Lac, Wisconsin. The hearing was not transcribed ; the parties filed post-hearing briefs which were received by the Arbitrator on January 7, 1999. The parties agreed not to file reply briefs and the record was closed on January 7, 1999.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

Union

Did the City of Fond du Lac violate the collective bargaining agreement, its written policies on educational reimbursement and/or its verbal and written guarantees to employes receiving such reimbursement that they would continue to receive it until they completed their course work when it denied Sue Kaiser payment of $442.35 for the final two courses of a supervisory management degree program from the Moraine Park Technical College? If so, what is the remedy?

City

Did the City of Fond du Lac violate the collective bargaining agreement when it denied the educational reimbursement to Sue Kaiser?

The parties agreed that I could frame the issue after considering their positions.

Arbitrator

Did the City violate the collective bargaining agreement when it denied the Grievant payment of $442.35 for courses in a Supervisory Management degree program the Grievant took from Moraine Park Technical College? If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1

RECOGNITION

Section 1 – The City recognizes Local 1355, AFSCME, AFL-CIO, as the exclusive bargaining representative in the bargaining unit consisting of all permanent full-time, permanent part-time, in the Public Works Department (Waste Collection, Sewage Treatment, Electrical, Construction & Maintenance, Parks and Water Utility (field and plant) Divisions), the Department of Community Development (Transit, Inspection Services and Parking Meter Utility Divisions), Fire Department (Fire Records Clerk), Departments of Administration, Engineering, and Water Utility (office), located in City Hall, Police Department, and seasonal employees of six (6) months or more duration in the Parks Division of the City of Fond du Lac, excluding elected and

appointed officials, department heads, professional employees, confidential employees, and supervisors as defined in the Act, on all matters concerning wages, hours and other conditions of employment in keeping with Section 111.70, Wisconsin Statutes, pursuant to an election conducted on October 4, 1967, by the Wisconsin Employment Relations Commission and as certified on October 20, 1967, pursuant to a declaratory ruling regarding Transit Employees issued by the Commission dated May 8, 1973, and pursuant to an election conducted on October 23, 1981, by the Wisconsin Employment Relations Commission regarding employees of the Police Department and as certified on November 10, 1981 (Case XLI, No. 28674, ME-2055, Decision No. 19037).

ARTICLE II

COOPERATION

Section 1 – The City and the Union agree they will cooperate in every way possible to promote harmony and efficiency among all employees. The City agrees to maintain certain amenities of work (e.g. coffee breaks, etc.) not specifically referred to in this Agreement.

. . .

ARTICLE XXV

GRIEVANCE PROCEDURE

A. Grievances to be processed within the grievance procedure shall involve only matters of interpretation, application or enforcement of the terms of this Agreement and, as such, only those items may be processed under the grievance procedure.

. . .

D. Grievances which may arise shall be processed in the following manner:

. . .

Step 4 - . . . The arbitrator in arriving at his determination shall rule on only matters of application and interpretation of this Agreement. . . .

. . .

ARTICLE XXVII

MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Fond du Lac and the direction of the work force, including but not

limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, (no employee shall be laid off due to subcontract provisions) together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

STATEMENT OF THE CASE

This grievance arbitration involves the City of Fond du Lac and Fond du Lac City Employees Union Local 1366, AFSCME, AFL-CIO representing the employes set forth in Article I, Recognition. (Jt. 1) The Union alleges a contractual violation by the City for refusing to reimburse Grievant, Sue Kaiser, for tuition expense incurred by her for three courses taken in 1998. (Jt. 2)

The City has a written policy providing for tuition reimbursement for employes who voluntarily take courses related to their job with the City. The most recent policy was in effect from January 1, 1995 through December 31, 1997. That policy required that the class and course work had to be approved by the Department Head, Human Resources Director and the City Manager. (U. 10) Tuition reimbursement for these courses is not covered in the collective bargaining agreement. Article XXIII covers reimbursement for the cost of training and education that the City specifically requires an employe to take. (Jt. 1) There is no argument by the parties that the issue before the Arbitrator is covered by Article XXIII.

The Grievant is one of several employes who have been pursuing a course of study under the City's Educational Incentive Policy. The Grievant has taken several classes within that course of study toward a degree in Supervisory Management. The Grievant started her coursework in the Spring of 1994 when the Supervisory Management course was approved by the City Clerk for whom the Grievant works as a recording and agenda secretary.

In 1995 Human Resources Director Ben Mercer met with local Union officers and stewards on a grievance unrelated to this grievance. At the end of the meeting, Mercer advised the Union Committee that because of tightening of funds only those employes, including the Grievant, who were currently in a program of study would be allowed to continue to receive tuition reimbursement. The parties disagree as to the exact statement by Mercer: the Union claims that Mercer promised that the Grievant and other similarly situated employes would be allowed to complete their programs of study; Mercer claims that he told the Union that those employes, including Grievant, would be allowed to complete their courses of study provided that funding continued and new employes would not be placed under the tuition reimbursement program. Funding for these tuition reimbursement programs was received through the Human Resources Department, which previously had $5,000 to allocate for tuition reimbursement under the Educational Incentive Policy. (U. 10). The Grievant and two other employes received tuition reimbursement for 1995, 1996 and 1997. (U. 11)

On December 4, 1997 Stephen T. Nenonen, City Manager for the City of Fond du Lac, issued a memorandum stating there would be no funds allocated in the 1998 Human Resources budget to fund tuition reimbursement. (U. 9) Recognizing that some employes, like the Grievant, were already in a program the City Manager would allow City Departments to fund tuition reimbursement from their own department education and training accounts for 1998. (U. 9) On December 2, 1997, Human Resources Director Mercer issued a memorandum to Grievant and other employes involved in the tuition reimbursement program that the tuition reimbursement account in the Personnel Department was unfunded and there would be no funds budgeted for 1998. Mercer's memorandum stated that the Personnel Department would not be able to reimburse Grievant or any other employe for classes taken in 1998 and advised them to make other arrangement for their classes. Mercer concluded the memorandum by stating that he expected this funding situation to only last for one year and that the policy would be reviewed in 1998 by the City Council. (Er 7)

In Spring of 1998, the Grievant took a course entitled Legal Issues which had a tuition cost of $174.35. One hundred dollars of this was reimbursed out of the City Clerk's Education and Training account for 1998 for which the Clerk had budgeted $300. The $74 remaining is part of the $442.35 for which the grievance has been filed. (U. 4) The Grievant on June 30, 1998, in a memorandum to Personnel Director Mercer, requested tuition reimbursement approval in advance for two classes, Ethics in America and Problem Solving/Team Building. The tuition for each class was $184 for a total cost of $368. These were the final two courses required for completion of Grievant's degree in Supervisory Management. (U. 5) Mercer responded to the memorandum on July 1, 1998 by writing on a copy of the memorandum returned to the Grievant that the request was denied as no funds were budgeted for 1998. (U. 5) The Grievant earlier had requested tuition reimbursement forms from the Personnel Department but received an e-mail from Mercer dated March 6, 1998 stating that based on his December 2, 1997 memorandum no funds were available in 1996 and that the Grievant should not complete any reimbursement forms because they would not be approved. (U. 6) Grievant took and completed the two courses in 1998.

The Union, on July 23, 1998, filed a grievance on behalf of the Grievant for the City's refusal to reimburse her for the tuition cost for the three courses she took in 1998. (Jt. 2) The grievance was denied by Mercer on August 20, 1998 and moved to the arbitration step of the grievance procedure. (Jt. 3) During 1998 the City Council adopted a new Educational Incentive policy to be effective June of 1999 for the 1999 budget year. (Er. 12)

The parties processed the grievance through the contractual grievance procedure and were unable to resolve the grievance. The Union, at the arbitration hearing and in its brief, specified that the arbitration related only to the grievance of the Grievant, Sue Kaieser. No issue was raised at the hearing as to the arbitrability of the grievance. Hearing on this matter was held by the Arbitrator on November 20, 1998. The hearing closed at 3:26 p.m. The hearing was not transcribed. The parties were given the opportunity and filed briefs. The briefs were submitted to the Arbitrator on January 7, 1999. The parties agreed not to submit reply briefs. The record was closed by the Arbitrator on January 7, 1999.

POSITION OF THE PARTIES

Union's Position

The Union primarily argues that promissory estoppel will sustain the grievance in this matter. The Union also argues past practice. The Union points out that the initial Educational Incentive policy provided tuition reimbursement and the "ground rules" as to how that reimbursement could be received by employes. The Union pleads that several employes, including Grievant, entered into courses of studies which had been approved by their Department management as being appropriately related to their work for the City. Upon completing each successful class under that program the employes have been reimbursed if they applied for the cost of tuition. The Union outlines three factors to support its promissory estoppel position:

1. The Union was promised in 1995 that those employes (Grievant) who were enrolled in programs of study at the time would continue to receive tuition reimbursement even though the City was considering limiting or eliminating tuition reimbursement in the future.
2. Those employes relied on that promise by continuing to take courses.
3. When Grievant was not reimbursed for her class work in 1998 she suffered a monetary loss that can be directly attributed to the actions of the City in unilaterally eliminating the tuition reimbursement policy for the 1998 calendar year.

The Union offers that the failure to continue paying tuition reimbursement in 1998 violated a longstanding past practice in making these payments; this practice was well-established at the time of the 1995 meeting between Mercer and a Union grievance committee where Mercer on behalf of the City made its promise to continue reimbursing those individuals already enrolled in a tuition reimbursement course of study as long as they continued to be enrolled.

The Union submits that it is reasonable to discuss promissory esstopel in terms of contract negotiations. While admitting that the situation is not exactly the same as the instant arbitration, arbitrators, the Union argues, have held employers to a promissory estoppel standard where one, the employer has made a promise which was the type of promise which would foreseeably induce the promisee to rely or take some action based on the promise, two, that the promissee reasonably relied upon the promise, three, that as a result of the reliance on the promise the promisee suffered some detriment and four, that injustice can only be avoided by enforcing the promise. 1/

1/ WATAUGA INDUSTRIES, INC., 95 LA 613, 616 KILROY 1990.

The Union argues that this is exactly what happened in this case; the promise to Grievant by Human Resources Director Mercer was made on behalf of the City, the Grievant relied on that promise and suffered monetary loss and, as a result of the reliance on that promise, the injustice can only be corrected by making Grievant whole for the tuition she paid in the amount of $442.35. Lastly, the Union contends that the ony way to avoid an unjust result is to uphold the Greivant's grievance and make her whole. The Union requests the Arbitrator to find in favor of the Union and sustain the grievance.

City's Position

The City initially makes a substantive arbitrability argument stating that because the tuition reimbursement policy is not found in the collective bargaining agreement that the Arbitrator does not have any jurisdiction to address the grievance in this matter. The City states that neither Article I, Recognition, nor Article II, Cooperation, have been violated as neither Article has anything to do with the City's Educational Incentive policy. The City states that the grievance procedure, Section A, defines grievance as only involving matters of interpretation, application or enforcement of the terms of the Agreement and that only those "items" may be processed under the grievance procedure. The City goes on to state, quoting Section D, Step 4, of the grievence procedure, that the Arbitrator in arriving at his determination shall only rule on matters of application and interpretation of the Agreement. (Jt. 1, Article XXV) The City concludes this argument by stating that the Arbitrator should dismiss the grievance as not meeting the definition of a grievance.

The City's second argument is that even if the Arbitrator finds that a grievance does exist, that since the tuition reimbursement policy is solely within the discretion of the City, the City could not violate the policy and/or the collective bargaining agreement. The City makes a case that the policy is not contained in the master agreement and therefore the City is free to change the policy, as it has in the past, without contest from the Union. The City points out that even under the policy all requests for tuition reimbursement must be approved by the Human Resources Director. (Er. 4 and U. 10) The City advances that because the educational incentive policy is separate and distinct from the master labor agreement that the City possesses unfettered management discretion in managing this particular policy. It cites case law to that effect. 2/

2/ NEW BRITAIN MACHINE COMPANY 45 LA 993 MCCOY (1965).

It also argues that even if the Arbitrator has the authority to determine whether the City's denial of the Grievant's tuition violated the agreement, the Union has the burden to prove that the City acted in bad faith or that the City's decision was arbitrary, capricious or discriminatory.

The City takes the position that the Grievant admitted to receiving the December 2, 1997 memorandum from Human Resources Director Mercer stating that there would be no tuition reimbursement for 1998. (Er. 7) This memorandum placed the Grievant on notice that she would not receive tuition reimbursement through the City. Despite this warning the Grievant went ahead and took three courses in pursuit of her Supervisory Management degree. None of these courses were approved by the City. Because the courses were not approved because of lack of funds, the Grievant is not entitled to reimbursement. Such action by the City is neither arbitrary nor capricious.

The City puts forth another argument that approval of coursework is by individual class and there was no guarantee that the Grievant or any other employe would have a course of study, in this case Supervisory Management for the Grievant, approved on a whole course basis rather than on class by class. The City argues that it alone has the discretion to approve classes on an individual basis despite the fact that the classes might be part of a course of study. The fact that the courses the Grievant was taking were needed for the Supervisory Management degree does not mean that the individual classes must be automatically approved each time for tuition reimbursement. The City advances that nowhere in the policy or in the tuition reimbursement request form does it state that if an employe is in a degree program all courses or credits taken toward the degree will be approved; each single course must be evaluated and judged on its own merits. (U. 10, 4)

Lastly, the City discusses the meeting that Mercer held with the Union grievance committee sometime in 1995 wherein the Union testified regarding Mercer's alleged promise to the Grievant. The City points out that Mercer testified that the City would maintain tuition reimbursement for the three bargaining unit employes, including Grievant, only as long as funds were available. The City argues that Mercer was only guaranteeing that funds would be approved for tuition reimbursement in 1996, not forever, and certainly not for 1998. Tuition reimbursement is always subject to funds being available and the City always has had the option to disapprove classes. Further the City argues that the Arbitrator should not grant a remedy which the Union never bargained. The Union and City agreed at the arbitration hearing that the Union has never demanded to bargain tuition reimbursement. The City states that it acted properly when it denied Grievant's request for tuition reimbursement because no funds were available. Therefore the City requests that the Arbitrator deny the grievance.

DISCUSSION

The first issue that I must address in this decision is the City's argument that the Arbitrator does not have jurisdiction to issue a decision in this matter. The City postulates that under the grievance procedure of the parties' labor agreement I am only allowed to consider matters that deal with a specific term of the labor agreement. 3/ It is the City position that the Educational Incentive policy is totally separate from and not a term of the Agreement. I have carefully reviewed the hearing record and find that this position was not manifested by the City either before the hearing or at the hearing; it was raised for the first time in the City's post hearing brief. A position that a grievance is substantively not arbitrable cannot be raised for

the first time in the City's post hearing brief. For me to consider such an argument now denies the Union in this case any effective means to respond. 4/ There is substantial arbitrable precedent that an arbitrability argument must be raised during the grievance procedure or at least at the arbitration hearing. 5/ I also find that there was nothing presented on the record which would have affected the ability of the City to make this argument on a timely basis. Therefore I will not consider the merits of this City argument that the grievance is not arbitrable.

3/ Joint Exhibit XXV, Section D, Step 4.

4/ CONOCO INC. 104 LA 1057, 1059 NEIGH 1985 "By raising the issue for the first time in its post hearing memorandum, the Company has effectively precluded the Union from responding to this issue, an unacceptable denial of due process."
CITY OF WYANDOTTE 74 LA 2, 4, MCDONALD 1980.

5/ WESTERN RESERVE CARE SYSTEM 109 LA 984, 986 DUFF 1977

> ***". . ., a new issue cannot properly be raised at the Arbitration Hearing that has not been advanced during the lower steps of the grievance procedure. Arbitration is to settle disputes, not to develop new ones that have not been previously considered."***

The City postulates that even if arbitrable the grievance should be denied because the policy is not a term of the agreement, and the City had total flexibility to approve or not approve the Grievant's request for tuition reimbursement at any point during the pursuit of her degree including in 1998, when the City denied Grievant's request for reimbursement for three courses taken in 1998.

Based on the record and the applicable case law, I find that the policy is not a term of the agreement. 6/ As the case law makes clear, the City had the right to make unilateral changes in the policy because the policy is separate from the labor agreement between the City and the Union. I find that the City in this case has the right to make unilateral changes in the policy based on this record and has, at this point and in the case of the Grievant, the right to approve classes or courses on an individual class basis. This is true unless the City made some guarantee to the Grievant that she would be reimbursed for all courses leading to her degree; this is the Union's promissory estoppel argument. But first I address the Union's argument that the City is bound to approve the Grievant's courses leading to her degree based on past practice.

6/ GAVIN SCHOOL DISTRICT NO. 37 98 LA 417, 418-421 (STALLWORTH, 1991).

In a case involving reimbursement for expenses related to additional education for a District teacher, the District challenged the grievance on substantive grounds. The District argued that the grievance was not covered by the terms of the collective bargaining agreement. In that case, although the grievance procedure did not specifically exclude a grievance about tuition reimbursement, the policy was not incorporated into the agreement and the grievance procedure only covered violations of the agreement. The agreement covered expenses for attending training at conferences and conventions, but the arbitrator found that if reimbursement for tuition for additional college work had been intended the parties would have stated so directly. The arbitrator held that the association had not established that the grievance was an issue "legitimately arising under the collective bargaining agreement." The arbitrator dismissed the grievance as inarbitrable.

OHIO VALLEY FEDERAL CREDIT UNION 82 LA 805, 808 DUDA 1984.

In this case, the contract was silent as to the employer's right to subcontract and the issue had never been a subject of collective bargaining negotiations. Subcontracting was covered in a manual as to which employes could sign up new credit union members. The union argued that the manual and the subcontracting language became part of the parties' collective bargaining agreement. The arbitrator found that such was not the case. The arbitrator held that management had changed the manual in the past and it was subject to further change in the future. Further the policy was developed without input from the union and there was no evidence that management intended to surrender its unilateral right to manage the policy as it wished. He further found that there was nothing to prove or show the intent of the policy would be read into the collective bargaining agreement. The arbitrator dismissed the grievance as inarbitrable.

In the Spring of 1994, the Grievant submitted her first request for tuition reimbursement for a course(s) leading to the aforementioned degree. Such request was approved. As discussed above, during a grievance meeting sometime in 1995, Mercer told Union representatives that no new funds would be available for tuition reimbursement for employes that were not already pursuing a course of study. There is a dispute as to what Mercer said next but suffice it to say that some statement was made that the Grievant and other employes already on a course of study would be allowed to complete that program and have their tuition reimbursed. The City position is that Mercer then added the qualifier for Grievant and similarly situated employes "if funds continued to be available even for them." The Union disputes that this qualifier was made. For purposes of the Union's past practice argument it does not matter; it matters for the Union's estoppel argument.

The Union did not argue past practice strongly but stated in its post hearing brief that

past practice is shown because the Grievant received tuition reimbursement in 1996 and 1997.... " affirming a past practice that had been in existence for many years." (Union brief pg. 9). While I may be willing to accept that the tuition reimbursement policy was in effect before 1995, there is scant evidence of this in the record. Past practice is normally used by the parties to interpret a provision of a labor agreement or to confirm a custom or practice of the parties that is not in writing; the practice to be honored to bind the parties must meet several well accepted standards. 7/

7/ CHICAGO-DUBUQUE FOUNDRY 109 LA 393, 397 NEIGH (1997)

". . . for a past practice to be binding on both parties, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable for a reasonable period of time as a fixed and established practice accepted by both parties."

CITY OF NORTH ROYALTON 110 LA 747, 751-752 FULLMER (1988)

Citing Arbitrator Shulman in FORD MOTOR COMPANY 19 LA 237, 241-242, 1952

"A practice that is based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based."

Based on those standards the past practice argument in this case must fail. If an employer, as the City in this case, has complete discretion on approval of courses and if the employer, like the City, can change a policy at its unilateral discretion, that policy cannot and does not meet the past practice standards of a fixed and established practice accepted by both parties. A past practice cannot be changed by just one party and significant arbitration litigation concerns just that, whether a practice is a binding past practice which to be so can only be modified or acted upon by mutual agreement of the parties. I do not find the policy to be a past practice requiring the City to continue to grant the Grievant tuition reimbursement for classes within her course of study.

I now turn to the Union's promissory estoppel argument. Four Union witnesses testified that (at a meeting in either summer or fall of 1995) Mercer, Director of Personnel for the City, promised that Grievant and any similarly situated employes would be allowed to complete their course or program of study; no new employes would be admitted to the program. Mercer, on direct examination in response to the first question as to what he said testified that Grievant and other employes who were receiving tuition reimbursement would

continue to receive it. In response to an immediate follow-up question, Mercer then testified

that this was true only if funds remained available even for employes like the Grievant; the Union witnesses disputed that Mercer at the meeting, ever told them of the qualifier regarding available funds. Union witnesses, acting on behalf of the Grievant, and Mercer, acting on behalf of the City, have an interest in having their version of this brief exchange credited. Whose recollection was most accurate would be critical except for intervening events that followed two years later.

Grievant received tuition reimbursement under the policy in 1996 and 1997 along with two other employes. (U. 11) In December of 1997, Grievant received a memorandum from Mercer stating that the City Council had approved the 1998 budget and that as part of that budget the Tuition Reimbursement account in the Personnel Department did not have any funds for tuition reimbursement in 1998. The memorandum went on to advise Grievant that she should make other arrangements for any classes that she intended to take in 1998 and that funds would probably be restored in 1999. (Er. 7) Two days after Mercer's memorandum to Grievant, on December 4, 1997, the City Manager sent a memorandum to department heads advising them of the change for 1998 and that if they wanted to fund programs for employes like the Grievant it had to be from their own department budget under Education and Training. While there is nothing in the record that would indicate the Grievant or the Union saw this memorandum from the City Manager, it confirms the accuracy of the memorandum sent by Mercer to the Grievant. (U. 9) Despite this memorandum or in spite of it, the Grievant submitted a Reimbursement Request Approval form for a course for which she eventually received partial reimbursement from $300 in funds the City Clerk, made available for education in 1998. (U. 4) (Other departments budgeted more funds and at least one other employe in a different department completed her course of study). The Grievant also, in early 1998, requested additional Approval forms and, in response, received an e-mail from Mercer stating that Grievant did not need the forms as no funds were available so the approval forms would not be approved, referencing his December 1997 memorandum. (U. 6) The Grievant took the last two courses needed to complete her degree in 1998 and, in a memorandum to Mercer, requested tuition reimbursement for them which was denied by Mercer leading to the instant grievance. (U. 5)

The Union argues strongly that Mercer made a promise on behalf of the City in 1995 to provide tuition reimbursement to Grievant until she completed her degree and that the concept of promissory estoppel requires that Grievant be reimbursed. The Union correctly points out the necessary legal requirements for promissory estoppel to be upheld.

> A promise by one party—in this case Mercer
> Reliance by the other party—in this case the Grievant
> Injury as a result on the reliance—Grievant paid the tuition and was not reimbursed. 8/

8/ KEEBLER COMPANY 86 LA 963, 966 (NOLAN, 1986).

CITY OF GREAT FALLS 88 LA 396, 398 MCCURDY 1986.

ESTOPPEL

"Each party to a contractual labor relationship has the duty to object within a reasonable time if other parties to the contract act in such a manner as to assume, abbreviate, redefine or terminate their rights. They duty to protect one's rights exists if the offended party whose rights are being compromised knows the facts or has a clear obligation to know the facts. If the offended party attempts to reclaim its rights, or to void actions taken by other parties at the expense of those rights, then neither the rights being reclaimed nor the benefits that might have arisen from them can be reinstated retroactively to the prejudice of any other party. Similarly, if the offended party knowingly misled other parties to believe their actionswere acceptable and failed to correct its position within a reasonable time, then the offended party is barred from later reasserting its rights to the disadvantage of the misled party."

Arbitrators also add to the legal standard a fourth: that injustice can be avoided only by enforcing the promise. 9/

9/ ARMCO, INC. 86 LA 928, 929 (SEIDMAN, 1985).

Assuming that Mercer in 1995 made an unqualified promise and assuming that Grievant relied on it 1996 and 1997, was it reasonable for the Grievant to rely on it for tuition reimbursement for courses taken in 1998? I do not believe it was reasonable for the Grievant to rely on that promise for 1998 given the several warnings given to her personally that there were no funds available for tuition reimbursement in 1998. While Mercer had the authority to commit the City in 1995, he clearly did not have that authority in 1998; his memorandum to Grievant made clear that his "boss" the City Council was not going to fund tuition reimbursement in 1998. Neither the Union nor the Grievant grieved the decision of the City Council or requested to bargain over the decision. I find that the Grievant had to have known at the time that she took the courses in 1998 that they would not be reimbursed. Union and Grievant may have been upset at what they considered a broken promise by the City but they did not grieve that; they grieved the failure to reimburse. A party cannot rely on a promise to its detriment when that earlier promise has been modified or withdrawn as it was in this case. Therefore, I do not have to decide whether Mercer told the Union committee in 1995 that his

guarantee depended on funds being available and whether "funds being available" meant the money was available or there might be modifications to the program.

It was reasonable for Grievant to want to complete her course of study in 1998. It is also apparent that some departments budgeted enough funds in their training accounts to allow other employes to continue to receive reimbursement. Unfortunately for Grievant the Clerk's office did not budget adequate funds. Again, even if the City did in 1995 make a guarantee to Grievant, she could not, given the notice she received in 1997 and 1998, bind the City by taking the courses and use promissory estoppel; such a finding would be untenable and tantamount to telling employes to go ahead and disobey the direction of their supervisor and then argue the legitimacy of the order. In this case, Grievant and Union could have first litigated the change in policy or the "breaking of the promise" before the Grievant took the courses. This is particularly so based on what I believe is evident that the City owns the policy and can change it as it wishes and that the policy at least at this point is not a term of the Agreement.

Therefore, based on the record, the briefs of the parties and applicable case law, I must deny the grievance of the Grievant.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 1st day of February, 1999.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

rb
5810.doc