

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OAK CREEK PROFESSIONAL POLICE OFFICER'S ASSOCIATION
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

and

CITY OF OAK CREEK

Case 133
No. 64025
MA-12780

Appearances:

Attorney Mark R. Hollinger,¹ Law Office, 2766 North 75th Street, Milwaukee, Wisconsin 53210, appearing on behalf of the Association.

Attorney Joel S. Aziere, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "City" or "Employer", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to a joint request of the parties to the Wisconsin Employment Relations Commission, Dennis P. McGilligan was asked to hear and decide a dispute as set forth below. Hearing was held in Oak Creek, Wisconsin, on January 25, 2005. The hearing was transcribed and the parties completed their briefing schedule on August 8, 2005.

Based upon the entire record and arguments of the parties, I issue the following decision and Award.

¹ Attorney Jeffrey D. Berlin appeared for the Association at hearing. However, due to medical reasons, Attorney Berlin was unable to submit briefs in the matter, and Attorney Hollinger filed the Association's briefs.

ISSUES

The parties were unable to stipulate to the issues. The City initially raises a procedural objection that the grievance was not timely processed to arbitration. It frames the issue as follows:

Whether the request for arbitration was timely filed when the Association failed to notify the WERC of its intent to process the grievance to arbitration within ten (10) days of the Step 3 denial, as required by Article 8 of the collective bargaining agreement?

The Association poses the following substantive issue:

Was Article 26 of the collective bargaining agreement violated when tuition reimbursement was denied to R. C.² for graduate level courses?

The City submits the following substantive issue:

Whether the City violated the terms of Article 26 of the collective bargaining agreement when, in exercising its reserved sole discretion, it denied Officer R. C.'s tuition reimbursement request for graduate level courses?

The parties stipulated that if the answer to either of the above substantive questions was yes, then the next question would be:

If so, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Is the grievance procedurally arbitrable?
2. Did the City violate Article 26 of the collective bargaining agreement when it denied tuition reimbursement to Officer R.C. for graduate level courses?
3. If so, what is the appropriate remedy?

FACTUAL BACKGROUND

Officer R.C. ("Grievant") is a police officer for the City of Oak Creek. He currently is in the drug unit full-time working in an undercover capacity.

² This Award will refer to the employee by his initials or "Grievant" rather than to his name to insure his privacy due to the sensitive nature of his police work.

In 2001, the Grievant took five undergraduate courses, all of which were reimbursed by the City: Introduction to Protective Services (\$540.95); American Constitutional Law & Environmental Studies (\$1,157.39 for both); Detective Literature & Introduction to Computers (\$1,206.61 for both). In 2002, the Grievant took two classes, both of which were reimbursed by the City: Introduction to Algebra (\$583.71) and Criminal & Drug Investigation (\$990.00).

By 2004, the Grievant had completed his undergraduate course of study and began taking courses to obtain his Masters Degree.

In January, 2004, the Grievant submitted a tuition reimbursement application for a course entitled "Research, Program Planning and Evaluation in Criminal Justice" to the Chief for approval, prior to commencing the course. The Chief denied the request on January 19, 2004 because it was not "related to the applicant's present position or reasonable promotional objective."

The Grievant filed a grievance over the denial on January 23, 2004. The Chief denied the grievance on January 27, 2004. In the denial, the Chief explained that he: "did not approve the course as stated in the grievance. The article in question clearly states officers may enroll in 'an educational (associate or undergraduate) program.'"

The Association appealed the grievance to Step 3 of the grievance procedure on February 4, 2004. The Personnel Committee denied the grievance on July 6, 2004. In the denial letter, Personnel Committee Chair Ann Lampe stated: "the Committee does not waive any procedural arguments it may have that the grievance is untimely or otherwise procedurally flawed."

On July 13, 2004, in accordance with Article 8, Section D, Step 4, Robert Pechanach, Association Bargaining Consultant, notified the Personnel Committee of the Association's intent to arbitrate the grievance denial.

On August 16, 2004, Pechanach requested a panel of five (5) arbitrators from the Wisconsin Employment Relations Commission ("WERC") to hear the above dispute.

In September, 2004, the Grievant sought tuition reimbursement for a Master Program course entitled "Nature of Cities." The Chief denied the request on September 15, 2004. The Grievant filed a grievance over this denial on September 20, 2004. The Chief denied the grievance on September 24, 2004, stating that he thought "requests regarding masters classes should be decided by the Personnel Committee."

The Grievant appealed the Chief's tuition application denial to the Personnel Committee on September 30, 2004. The Personnel Committee denied the Grievant's appeal on October 11, 2004. The Association and the City agreed that, with regard to the above grievance, the parties would add it to the January 2004 grievance scheduled for arbitration.

PERTINENT CONTRACTUAL PROVISIONS

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Article 8 Grievance Procedure

A. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this Contract.

B. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated, and the signature of the grievant and the date. All matters of discipline which are within the jurisdiction of the Police and Fire Commission under Section 62.13, Stats., shall not be subject to the grievance and arbitration procedure of this Article.

C. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing. All days referred to in this article shall be defined as working days, Monday through Friday, and shall exclude Saturday, Sunday and city holidays.

D. Steps in Procedure:

Step 1

If an employee has a grievance, the grievance shall be reduced to writing and signed by the employee and presented to the employee's immediate supervisor within ten (10) working days from the date the act or condition complained of occurred, or the employee with reasonable diligence could have known of the act or condition complained of. The immediate supervisor shall give his/her answer in writing within ten (10) working days from the receipt of the written grievance. In the event of a grievance, the employee shall perform his/her assigned work task and shall grieve his/her complaint later.

Step 2

If a grievance is not settled at the first step, the employee and/or his/her representative may appeal the written grievance to the Police Chief within ten (10) working days after receipt of the written decision of his/her immediate supervisor. The Police Chief will investigate the grievance and submit his/her decision to the employee and his/her representative in writing within ten (10) working days after receiving written notice of the grievance. If the Police Chief

is the immediate supervisor, Step 2 shall be bypassed and the employee may proceed to Step 3 of the Grievance Procedure.

Step 3

If the grievance is not settled at the second step, the employee or his/her representative may appeal the written grievance to the Personnel Committee or its designee within ten (10) working days after receipt of the written decision of the Police Chief. The Personnel Committee shall discuss the grievance with the Association representatives (no more than two (2)); one representative shall be designated as the spokesman. The grievant may be present if he/she so chooses. This conference shall take place within thirty (30) days after the Personnel Committee receives written notice of the grievance. Following said conference, the Personnel Committee shall respond within twenty (20) working days in writing.

Step 4

If a satisfactory settlement is not reached in Step 3, the Association must notify the Personnel Committee in writing within ten (10) working days of the response from the Personnel Committee that they intend to process the grievance to arbitration. The Union shall thereafter notify the WERC of its intent within ten (10) working days of the notice to the Personnel Committee.

E. Arbitrator Selection: Any grievance which cannot be settled through the above procedures may be submitted to a single arbitrator to be selected as follows: The parties shall within ten (10) working days attempt to agree on a single arbitrator. If the parties cannot agree on a single arbitrator then the Association will request the Wisconsin Employment Relations Commission to prepare a list of five (5) impartial arbitrators or withdraw the grievance within ten (10) days. The parties shall then choose an arbitrator by alternating strikes. The remaining arbitrator on the slate after the strikes shall then be notified of his/her appointment as arbitrator in a joint statement from the City and the Association.

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I. Decision of the Arbitrator: The decision of the arbitrator shall be final and binding upon the parties. The powers of the arbitrator are limited as follows: His/her function is limited to that of interpreting and applying the provisions of this Agreement; he/she shall have no power to add to, subtract from, or modify any of the terms of this Agreement.

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Article 26 Personal Development Program

A. Requirements: Any officer who enrolls in an educational (associate or undergraduate) program which is job related will, if such course is approved by the Chief, be reimbursed for 100% of the cost of registration, tuition fees, and course books required. The City will make payment upon presentation of proof that a Grade C or higher was achieved. Upon completion of the course, books purchased will become property of the Police Department. Such completion and reimbursement for course work shall not guarantee subsequent upgrading of the employee who took the course.

B. Tuition Reimbursement Allocation: Members of the bargaining unit are eligible to apply for funding under the guidelines above up to the amount established annually for the bargaining unit. The City will allocate \$285 per year per full time employee into an account for the entire unit's use. The unused funds shall not roll over from one year to the next. Graduate level course can be reimbursed if there are funds available from this unit's allocation at the end of each calendar year.

C. Any approval or decision under this Article is subject to the approval of the Personnel Committee and subject to the grievance procedure.

D. Personal Development Program – Service Restrictions
Employees who utilize the Education Incentive Development program shall repay the City for the cost of any class tuition if the employee does not remain employed with the City at least three (3) years. The repayment shall be based upon the timing of each individual class. The timing shall commence from the date of the completion of each class. Employees who leave other than for a duty or non-duty disability, before three (3) years shall repay the City based on the schedule below:

Less than 12 months 100%
Between 12-24 months 66%
Between 25-36 months 33%

POSITIONS OF THE PARTIES

Association's Position

The Association initially argues that it did not forfeit the right to arbitration by failing to notify the WERC of its intent to arbitrate on a timely basis.

The Association also argues that the Grievant is entitled to reimbursement for both graduate level courses because he satisfied all contractual elements necessary for tuition reimbursement.

The Association further argues that the City misinterprets Article 26 of the collective bargaining agreement in crucial respects. In this regard, the Association submits that the City misreads the clear intent of the parties when it asserts that the respective separation of associate and undergraduate from graduated level courses in Sections A and B of Article 26 somehow means that job related graduate courses are not subject to essentially the same reimbursement criteria as are job related associate and undergraduate courses. Pursuant to Article 26, Section B, according to the Association, all job related associate, undergraduate and graduate courses shall be reimbursed so long as the bargaining unit member receives a grade of C or better and the bargaining unit's reimbursement fund allocation of \$285 per year per full time employee is not exhausted. The Association believes that the sole distinction between job related associate and undergraduate courses, as opposed to job related graduate courses, is that the former courses apparently have reimbursement priority over the latter courses, which are reimbursed "[i]f there are funds available from this unit's allocation at the *end* of each calendar year. (Emphasis in the Original).

The Association next argues, contrary to the City, that the Chief does not have unfettered and final "sole and exclusive discretion" to approve or to deny graduate level tuition reimbursement requests.

The Association states that the City's sole argument for not reimbursing the Grievant is that it has decided not to pay for an employee to become educated with the potential for them to leave. The Association opines that this is not a valid reason for denying tuition reimbursement as it ignores the agreed upon criteria for reimbursement as provided for in Article 26.

Based on the facts of the case and the foregoing arguments, the Association requests that the Arbitrator grant its grievance and hold that the City must pay the Grievant's two reimbursement requests for graduate level courses.

City's Position

The City first argues that because the Union failed to timely file for arbitration, the grievance must be dismissed.

Secondly, the City argues that it did not violate the terms of the collective bargaining agreement when it exercised its reserved sole discretion in denying the Grievant's tuition reimbursement request for graduate level courses. In support thereof, the City notes that Article 26, Section A specifically requires that all courses must be "approved by the Chief." According to the City, this means that the parties have mutually agreed that the Chief retains sole and exclusive discretion to approve or deny tuition reimbursement applications, which

may then be appealed to the personnel Committee under Section C. The City opines that neither the agreement nor past practice impose any limitations upon the Chief's sole and exclusive exercise of this discretion. The City claims that the Chief properly exercised that sole and exclusive discretion when he denied the Grievant's tuition requests.

The City next argues that Article 26, Section B specifically provides that "Graduate level course can be reimbursed." (Emphasis in the Original). In the opinion of the City, this means that the parties have mutually agreed that the City retains sole and exclusive discretion to approve or deny tuition reimbursement applications for graduate level courses. The City states that it has historically maintained and exercised this sole and exclusive discretion and exercised this retained right when it denied the Grievant's aforesaid tuition requests.

The City adds that there is nothing in the agreement, bargaining history and/or past practice that in any way limits or modifies the City's sole and exclusive discretion to determine whether to reimburse tuition for graduate level courses. The City states that the Union has never challenged the City's position that it has sole and exclusive discretion regarding the approval of tuition requests for graduate level courses. Therefore, according to the City, when it exercised this retained right, it did not violate any provision of the agreement.

The City makes a number of arguments in response to the Association's initial brief.

One, by its own admission, the Association failed to timely file for arbitration; therefore, the grievance must be dismissed. Contrary to the Association's assertion, the contract is not silent of the consequences of failing to timely file for arbitration. The City did not waive enforcement of the time limitations by waiting until the arbitration hearing to raise the issue. The City never waived enforcement of the time limitations because it agreed to arbitration of both grievances.

Two, the Association's interpretation of Article 26 impermissibly fails to give effect to the clear language of the contract provision. In this regard, the City first points out that the Association argued that there were only three prerequisites for reimbursement of tuition for graduate level course. However, the City opines that the Association ignored two key provisions of Article 26: (1) "if such course is approved by the Chief" and (2) "Graduate level course can be reimbursed." Thus, contrary to the Association's assertion, there are actually five prerequisites – not three – that must be met before tuition for graduate level courses will be reimbursed. The City believes that the latter two prerequisites were not met.

Finally, the City argues that the Association seeks to have the Arbitrator modify the terms of the parties' collective bargaining agreement by finding in its favor in violation of Article 8, Section 1 of the collective bargaining agreement which provides that the Arbitrator "shall have no power to add to, subtract from, or modify any of the terms of this Agreement."

Based on the foregoing, the City requests that the grievance be denied.

DISCUSSION

Procedural Arbitrability

The threshold issue in this case is whether the grievance is procedurally defective.

The City asserts that the Association did not comply with the contractual grievance procedure when it failed to timely notify the WERC of its intent to arbitrate the grievance.

Article 8, Section D, Step 4 specifically requires the Association to file notice to the WERC of its intent to proceed to arbitration within ten (10) days of providing such notice to the Personnel Committee. The Association filed its notice of appeal with the Personnel Committee on July 13, 2004, but did not file notice with the Commission until August 16, 2004. The Association concedes that this is outside the ten (10) day time limit. However, the Association argues that it did not forfeit its right to arbitration by failing to notify the Commission of its intent to arbitrate on a timely basis for a number of reasons.

The Association first argues that the City was not prejudiced by the delay. That is true. However, where the parties have clearly agreed that grievances are to be filed within so many days of the action in question, arbitrators uniformly uphold these provisions, however harsh the result. *Labor and Employment Arbitration*, Volume 1, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 8, "Challenges to Arbitrability" by Harvey A. Nathan and Sara McLaurin Green, s. 8.03[1][a], 8-28 (1998). An untimely grievance will be rejected as nonarbitrable absent waiver or some unusual circumstance. *Id.* Lack of prejudice is not normally a reason to excuse an untimely grievance.

The Association also argues that the City has waived its right to raise a timeliness objection. In support thereof, the Association argues that the City has waived enforcement of such a consequence when it agreed to arbitrate and failed to raise the timeliness issue until the arbitration hearing. However, the City did reserve its right to raise a procedure objection at hearing when the Personnel Committee denied the grievance by stating: "the Committee does not waive any procedural arguments it may have that the grievance is untimely or otherwise procedurally flawed". (Joint Exhibit No. 6). Consequently, the Arbitrator rejects this argument of the Association.

The Association next argues that the collective bargaining agreement is silent as to the *consequences* of not strictly adhering to the time limits of the grievance procedure. (Emphasis in the Original). Consequently, according to the Association, the Arbitrator should not infer that the parties intended that processing of the grievance outside of the strict timelines of the grievance procedure constitutes a waiver of the right to arbitrate.

The City, on the other hand, contends that the contract is not silent of the consequences of failing to timely file for arbitration. In this regard, the City claims that the Association ignores the fact that Article 8, Section E states that, "If the parties cannot agree on a single

arbitrator then the Association will request the Wisconsin Employment Relations Commission to prepare a list of five (5) impartial arbitrators or withdraw the grievance within ten (10) days.” Thus, according to the City, the parties have expressly agreed to a ten (10) day limitation period for processing a grievance to arbitration and further agreed that failure to adhere to the ten (10) day limit shall result in withdrawal of the grievance.

Article 8, Section E, however, is not applicable to the instant dispute. The Association failed to comply with Article 8, Section D, Step 4, when it failed to notify the WERC of its intent to arbitrate within ten (10) working days of the notice to the Personnel Committee. Article 8, Section D, Step 4, is silent of the consequences of failing to timely file for arbitration with the WERC. (Emphasis added). Article 8, Section E, on the other hand, addresses arbitrator selection. It provides that if the parties cannot agree on a single arbitrator within ten (10) working days then the Association will request the Commission “to prepare a list of five (5) impartial arbitrators or withdraw the grievance within ten (10) days.” (Emphasis added). The parties did not offer any evidence or argument on this point. In addition, this is the only place in the grievance/arbitration procedure where the parties have expressly agreed that withdrawal or dismissal of the grievance is the consequence for failure to adhere to the time limits for processing a grievance to arbitration. Contracts that specify certain consequences (grievance withdrawal) only for one specific situation during the grievance processing imply that there are no such consequences in other circumstances where the grievance is not timely processed. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 6th Ed., 2003), p. 468.

This is particularly true where, as here, both parties have been lax in observing the time limits contained in their contractual grievance/arbitration procedure. Elkouri and Elkouri, *supra*, p. 222. In this regard, the Arbitrator points out that the City’s Personnel Committee failed to respond to the grievance on a timely basis at Step 3 of the grievance procedure. Article 8, Section D, Step 3, provides that if the grievance is not settled at the second step, the written grievance may be appealed to the Personnel Committee with ten (10) working days after the receipt of the written decision of the Police Chief. The Association complied with this requirement when it appealed the Chief’s denial of the grievance on January 27, 2004, to the Personnel Committee on February 4, 2004. Step 3 then provides that the parties shall discuss the grievance within thirty (30) days after the Personnel Committee receives written notice of the grievance. Following this conference, Step 3 next provides that the Personnel Committee shall respond within twenty (20) working days in writing. As pointed out by the Association, the Association asked the Personnel Committee to consider the Grievant’s grievance on February 4, 2004, yet received no reply from the Personnel Committee until July 6, 2004, more than five months later and well outside the time limits set forth at Step 3 for responding to a written grievance.

Based on all of the above, the Arbitrator finds that the answer to the issue as framed by the undersigned is YES, the grievance is procedurally arbitrable.

Merits of the Case

At issue is whether the City violated Article 26 of the collective bargaining agreement when it denied tuition reimbursement to Officer R. C. for graduate level courses.

The Association argues that there was such a violation while the City takes the opposite position.

The resolution of this dispute turns upon the meaning of Article 26 of the collective bargaining agreement.

Contract interpretation involves giving meaning to the words and conduct used by the parties in their collective bargaining agreement. *Labor and Employment Arbitration, supra.*, Chapter 9, “Contract Interpretation and Respect for Prior Proceedings” by Jay E. Grenig, s. 9.01[1], 9-3 (1998). Ideally, contract interpretation results in a determination of exactly what both parties in fact had in mind or intended. This ideal is seldom attainable:

In the first place, it is impossible to know exactly what the parties did have in mind. Moreover, even if this could be determined, it may be doubted whether very many cases would be found in which both parties did have exactly the same things in mind. The best we can do is to approximate that ideal by adopting as a goal something that is more nearly possible of attainment. That goal, must, however, be fair to both parties to the contract. 2/ *Labor and Employment Arbitration, Id.*, and the cases cited therein. (Footnote omitted).

Over the years, arbitrators have looked to the principles of contract interpretation for guidance in interpreting collective bargaining agreements. In the instant case, both parties utilize various standards of contract interpretation to support their position. However, the principles of contract interpretation serve only as guides and should not be used as rigid or undeviating rules to be followed as methodically as though labor relations were an exact science. *Labor and Employment Arbitration, supra*, 9-3 and 0-4.

In the instant case, the parties differ strongly as what is intended and provided for by the language of Article 26. Consequently, the Arbitrator will consider the purpose of the disputed contractual provision as a basis for its interpretation. The purpose may be ascertained from the language of the contract as well as evidence of bargaining history and the parties’ administration of the contract. *Labor and Employment Arbitration, supra*, 9-5.

The Association argues that when you view the disputed contract provision as a whole it is clear that the standard for reimbursing graduate level courses is the same as for associate and undergraduate courses, except the graduate level courses can be denied reimbursement if there are insufficient funds available. According to the Association, Article 26, Section A, provides for the two elements that when met are sufficient for a bargaining unit member to be reimbursed; namely, the course or program is job related and “a Grade C or higher was

achieved.” The Association adds that if the course is at the graduate level, Article 26, Section B adds a third element: “Graduate level course can be reimbursed if there are funds available from this unit’s allocation at the end of each calendar year.” The concept that the disputed portions of an instrument “must be read in light of the entire agreement” has received widespread acceptance. Elkouri and Elkouri, *supra*, p. 462. The Arbitrator is in agreement with the Association that when read in its entirety Article 26 articulates such a standard.

The City argues, however, that the Association’s interpretation of Article 26 improperly fails to give effect to the clear language of the contract provision because it ignores two key provisions of Article 26: (1) “if such course is approved by the Chief,” and (2) “Graduate level course can be reimbursed.” The City opines that it exercised its sole and exclusive discretion under these latter two contract provisions when it denied the Grievant’s tuition requests for graduate level courses.

However, this contractual authority to approve or to deny course work and reimbursement for graduate level courses does not operate in a vacuum. It is set forth in Article 26 which provides the aforesaid standard for the City to follow in approving or disapproving graduate level course reimbursement.

The City argues, contrary to the Association’s position, that the collective bargaining agreement does not place any restrictions or limitations upon the Chief’s or its exercise of discretion to approve or to deny tuition reimbursement applications for graduate level courses. Certainly, Article 26, Section A, provides that an officer “who enrolls in an educational (associate or undergraduate) program which is job related will, if such course *is approved* by the Chief, be reimbursed for” the cost of registration, tuition fees, and course books required. (Emphasis added). Article 26, Section B, provides that “Graduate level course can be reimbursed.” (Emphasis in the Original). However, nowhere in Article 26 does it expressly say that the City has sole, unfettered discretion to approve or deny tuition reimbursement applications.

The City’s position that it has sole and exclusive discretion to approve or to deny the Grievant’s tuition requests for graduate level courses means that it can say no to such requests for any or no reason. That position runs contrary to standard contract jurisprudence which holds that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” Elkouri and Elkouri, *supra*, p. 478. The implied covenant of “good faith and fair dealing” is similar to the principle of reason and equity, and is deemed to be an inherent part of every collective bargaining agreement. *Id.* In fact, this implied covenant is sometimes referred to as the doctrine of reasonableness. *Id.* The obligation prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, and it applies equally to management and labor. *Id.*

In the instant case, the parties’ own agreed upon contract language provides the standard of reasonableness. To qualify for graduate level course approval and reimbursement,

the Grievant's graduate level courses must be job related, a grade of C or higher must be attained and there must be funds available from the bargaining unit's allocation at the end of the calendar year. An officer who takes a graduate level course that meets these criteria will be reimbursed for that course. The Chief and the City are responsible for making all of these determinations but in a reasonable manner. Such an interpretation gives effect to all words and clauses of Article 26. Elkouri and Elkouri, *supra*, p. 463.

Such an approach is also consistent with the broad purpose of Article 26 as set forth in its title "Personal Development Program." In this regard, Article 26, Section A, clearly encourages officers to improve themselves by enrolling in job related educational programs at the associate or undergraduate level. In addition, Article 26, Section B provides that graduate level courses can be reimbursed if there are funds available from the unit's allocation at the end of a calendar year. Said contract provision also provides that the City will allocate "\$285 per year per full time employee into an account for the entire unit's use." According to Article 26, Section B, that money can be used to reimburse qualifying graduate and undergraduate courses. Contrary to the City's position, it is clear that Article 26 applies to both undergraduate or association education programs as well as graduate level courses.

The City's reason for not wanting to reimburse the Grievant for his graduate level courses was based on unilateral policy considerations. The City does not want to ". . . pay for an employee to become educated with the potential for them to leave, especially since a master's degree is not required for them to be promoted into another position." (Tr. p. 31). In other words, the City believes that it has "the choice," to deny a graduate level tuition reimbursement request simply because it was just that, a graduate level tuition reimbursement request." (Tr. p. 33).

However, a Master's degree would be considered "in a positive light" in a promotion. (Tr. pp. 31-32). Master's degree courses may also be related to a specific program that an employee is working on, (Tr. p. 28), or the job an employee is performing. (Tr. p. 16).

In addition, as noted above, the purpose of the Article is to broadly encourage "Personal Development" at both the graduate and undergraduate levels not promotion or advancement on the salary schedule. In fact, Article 26, Section A, specifically provides that "completion and reimbursement for course work shall *not guarantee subsequent upgrading* of the employee who took the course." (Emphasis added). Thus, for the City to take the position that it will not pay for a course simply because the employee will become better educated and enhance the potential for them to leave or because the course is not needed to be promoted not only runs counter to the expressed purpose of the Article but is irrelevant to the question of whether the Grievant satisfied the contractual elements sufficient for tuition reimbursement. (Emphasis added).

The City argues that past practice and bargaining history support its position that it has sole and exclusive discretion to approve or to deny graduate level course reimbursement. It is true that Ms. Marie Pellett, Personnel Specialist for the City, testified that in her ten years

experience working with the City, the City has always taken the position that it has sole and exclusive discretion regarding the approval of tuition requests for graduate level courses. (Tr. p. 34). However, the City only offered one example where a City employee (not necessarily a bargaining unit employee) applied and was possibly denied tuition reimbursement for a graduate level course, Sgt. Michael Berglund. (Tr. pp. 19-20). No one within the last two contract periods has applied for or been denied reimbursement for a master's degree course. (Tr. pp. 29-30). One possible example does not a past practice make. There is no past practice that supports the City's position that it has sole discretion to approve or to deny graduate level course reimbursement.

Nor is there any evidence of bargaining history to support the City's position. To the contrary, the only bargaining history offered indicates that the City recognized it had a problem with Article 26 as written because an employee could use the education paid for by the City and leave for greener pastures. In order to address this problem, the City successfully bargained language in Article 26 that required an officer participating in the tuition reimbursement program to stay with the City for a period of at least three years or repay the tuition reimbursement. (Joint Exhibit No. 1).

Based on the foregoing, the Arbitrator finds that the City is obligated to reimburse the Grievant for the graduate level courses he has requested reimbursement for. The courses (Research, Program Planning and Evaluation in Criminal Justice and Nature of Cities), on their face, are reasonably related to the Grievant's job and the urban environment in which he works. In this regard, the Arbitrator finds it is reasonable to conclude that the disputed courses will add to and/or enhance the Grievant's skills related to the performance of his duties as well as improve his understanding of the Employer's organization and operations. Such a conclusion is also consistent with the City's prior approval of the Grievant's undergraduate courses. For these reasons, the Arbitrator finds that the Chief acted unreasonably when he denied course approval to the Grievant on January 19, 2004.

The City has never asserted that the Grievant did not meet the minimum grade requirement, that he had not already paid the tuition himself, or that adequate funds were not available in the bargaining unit's allocation at year-end.

Based on all of the above, the Arbitrator finds that the answer to the issue as framed by the undersigned is YES, the City violated Article 26 of the collective bargaining agreement when it denied tuition reimbursement to Officer R. C. for graduate level courses.

In reaching the above conclusions, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

In light of all of the foregoing, it is my

AWARD

The instant grievance is sustained, and the City is ordered to reimburse Officer R.C. for the disputed graduate level courses.

Dated at Madison, Wisconsin, this 14th day of November, 2005.

Dennis P. McGilligan /s/

Dennis P. McGilligan, Arbitrator

