BEFORE THE ARBITRATOR

In the matter of the Arbitration of a Dispute Between

OUTAGAMIE COUNTY PROFESSIONAL EMPLOYEES UNIT, LOCAL 2416, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

OUTAGAMIE COUNTY

Case #302
No. 70076
MA-14853

(Grievance 2010-06 – Jennifer Cornette)

Appearances:

Wisconsin Council 40, AFSCME, AFL-CIO, by **Mr. Joseph Guzynski**, Staff Representative, appearing on behalf of the Union.

Davis & Kuelthau, S.C. by **Mr. James Macy** and **Mr. Chad Wade**, appearing on behalf of the Employer.

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement, Local 2416 of Wisconsin Council 40, AFSCME (hereinafter referred to as the Union) and Outagamie County (hereinafter referred to as the Employer or the County) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as arbitrator to hear and decide two grievances over suspension issued to Social Workers Erin Marsh and Jennifer Cornette. The undersigned was so designated. A hearing was held on November 3, 2010 at the County Courthouse in Appleton, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted briefs and reply briefs, the last of which was received by the arbitrator on February 11, 2011, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the arbitrator makes the following Award.

I. ISSUE

The parties could not agree on a precise framing of the issue, and agreed that the arbitrator should frame the issue in his Award. The issues may be fairly stated as:

> Did the County have just cause to impose a five day suspension on the Grievant, and to require her to pay back the sums she had received as tuition reimbursement? If not, what is the appropriate remedy?

II. RELEVANT CONTRACT LANGUAGE

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ARTICLE VI - GRIEVANCE PROCEDURE

6.01 The parties agree that only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

6.02 Any grievance which may arise between the Employer and an employee (employees) or the Employer and the Union, shall be handled by Union officials and representatives. A grievance not initiated within fifteen (15) calendar days of the date the incident occurred shall be considered invalid.

Step 1. The aggrieved employee, Union official and/or the Union representative shall present the grievance to the Division Manager. All such grievances shall be in writing. The Division Manager shall respond in writing within five (5) working days of receipt of said grievance.

Step 2. If the grievance is not satisfactorily resolved in Step 1, the aggrieved employee, Union official and/or the Union representative shall submit the grievance in writing to the department head. Such appeal shall be made within five (5) working days after receipt of the Division Manager's response or last date such response was due the aggrieved employee, Union official and/or Union representative. The department head shall respond in writing within five (5) working days of receipt of said grievance.

Step 3. If the grievance is not satisfactorily resolved at Step 2, the Union shall submit the grievance to the Human Resources Director. Such appeal shall be made within ten (10) working days after receipt of the department head's response or last date such response was due the aggrieved employee, Union official, and/or Union representative. The Human Resources Director, aggrieved employee, Union official and/or Union representative shall meet and discuss said grievance within ten (10) working days after receipt of the appeal by the Human Resources Director. The Human Resources Director shall respond in writing within five (5) working days of such meeting.

Step 4. If a satisfactory settlement is not reached at Step 3, the Union shall notify the Human Resources Director in writing of its intent to submit the grievance to arbitration within ten (10) working days of receipt of the Step 3 responses or last date said response was due. The parties shall each select three (3) arbitrators from the Wisconsin Employment Relations Commission staff. From those six (6) arbitrators, five (5) names will be drawn. The parties shall then proceed to alternately strike names from that panel until an arbitrator is selected. The striking order shall be determined by a coin toss. Arbitration proceedings shall be implemented in a manner prescribed by the arbitrator. The decision of the arbitrator shall be final and binding on both parties, subject to judicial review. The cost of the arbitrator shall be divided equally between the Union and the Employer. In rendering his or her decision, the Arbitrator shall neither add to, detract from nor modify any of the provisions of this Agreement. The arbitrator shall be requested to render his or her decision within thirty (30) days after close of hearing or receipt of briefs, whichever is later.

6.03. Any employee may process his or her grievance as above outlined, up to and including Step 3, but the Union shall have the right to be present and act in support of its position in the matter of the grievance.

6.04. Any employee shall have the right of the presence of a union official when his or her work performance or conduct or other matters affecting his or her status as an employee are subject of discussion for the record.

6.05. The Union representative referred to in this Agreement is an employee of the International Union or of the Wisconsin Council of County and Municipal Employees. Union officials referred to in this Agreement are employees of Outagamie County elected or appointed to an office in Local 2416. The names of Union officials shall be filed with the Human Resources Director.

6.06. The Employer agrees that time spent in the presentation of grievances at meetings or hearing by up to two (2) designated Union officials and the grievant during working hours shall not be deducted from the pay of such employees. The grievant, in class grievances, shall be the designated officials of the Union. Any wage loss to any other employee or witness for time spent in such presentation of grievances shall be the responsibility of the party desiring to produce such other employee or witness.

6.07. "Working day" shall not include Saturdays, Sundays or holidays. Any time limit provided for in the Article may be extended by mutual agreement of the parties.

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ARTICLE XXVI - DISCIPLINARY PROCEDURE

26.01 The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.

26.02 Any employee may be disciplined, suspended or discharged for just cause. The sequence of disciplinary action shall be oral reprimands, written reprimands, suspension or discharge. A written reprimand sustained in the grievance procedure or not contested shall be considered a valid warning. A valid warning shall be considered effective for not longer than a six (6) month period.

26.03 The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge, for example, theft of personal or public properly, drinking intoxicants during working hours, being drunk on the job, willful dereliction of duty and other similar offenses.

26.04 Any discharged employee may appeal such action through the grievance procedure and shall initiate grievance action by immediate recourse to Step 3 within ten (10) days of notice of discharge.

26.05 Any suspended employee may appeal such action through the grievance procedure and shall initiate grievance action by immediate recourse to Step 2.

26.06 Suspensions shall not be for less than one full work week increments. No suspension shall exceed thirty (30) calendar days. Notice of discharge or suspension shall be in writing and a copy shall be provided the employee and the Union.

III. BACKGROUND FACTS

The County provides services to its citizens through a variety of Departments, including the Department of Health and Human Services. The Union is the exclusive bargaining representative of, among others, Social Workers in the Department. Jennifer Cornette is a Social Worker who has been employed by the County since 2000, and Erin Marsha has been employed in that same capacity since 2005.

The County provides a tuition reimbursement benefit to employees, to encourage their continued professional development. This benefit is unilateral, and is available to any qualified employee. In 2005 and 2006, Cornette applied for tuition reimbursements for graduate courses at the University of Wisconsin-Green Bay (UWGB). Her application was approved, and she received tuition reimbursement in the amount of $1,633 for the Fall semester of 2005 and $1,735 for the Spring semester in 2006. Marsh also applied for the reimbursement program, for graduate courses at UWGB. Her application was approved, and she received tuition reimbursement in the amount of $1,735 for the Fall of 2006 and $1,841 for the Spring of 2007. Both employees also received reimbursement for books.

UWGB and the University of Wisconsin-Oshkosh (UWO) jointly administer a federally funded Child Welfare Stipend program. This program pays tuition and fees for students taking qualified social work courses. Students approved for the Stipend are credited for the cost of tuition and fees. While they receive a Student Cost Summary Report from the school showing the nominal cost of tuition and fees as "Charge Activity", the Report includes an identical amount as "Financial Aid Activity." The Stipend is not actually a form of financial aid, but is listed as such because of limitations in the University's accounting program.

Students who wish to participate in the Stipend program must sign a contract, agreeing to certain terms. If they fail to abide by the terms, they are subject to being found in default and having to repay the stipend, plus any costs of collection. The principal commitment is to seek employment within the child welfare field with a governmental or tribal agency within a 60 miles radius of the student's residence, and to remain employed by that agency for at least one year for each year that stipend funds are received.

Both Cornette and Marsh applied for and received stipends for the same periods for which they had received tuition reimbursement from the County. Neither informed the County that the she was participating in the Stipend program.

In preparation for the Department's Budget in 2010, Melissa Blom, the County's Manager of Youth and Families, did a review of tuition reimbursement costs. She decided to encourage employees to make use of the Stipend program instead. As part of this, she requested a list of past Stipend participants from the Department. When the University provided the list, she saw the names of Cornette and Marsh, both of whom she knew had received tuition reimbursement.

Blom informed the Department's Director, and had an accounting done of employees who had received funds from both the Stipend program and the County's reimbursement program. Twelve employees were identified, between the Fall semester of 2004 and the Spring semester of 2010. All except Cornette and Marsh claimed reimbursement from the County for books, but did not seek reimbursement for the tuition and fees.

Blom interviewed both employees separately. Both agreed that they had received both the Stipend and tuition reimbursement from the County for the same courses.

Cornette and Marsh were each assessed five day suspensions, and required to repay the tuition money the County had paid to them. Neither has any prior discipline. Grievances were filed, protesting the suspensions. They were not resolved in the lower stages of the grievance procedure and were referred to arbitration. The grievances were consolidated for the purposes of hearing and argument.

At the arbitration hearing, in addition to the facts recited above, both Cornette and Marsh testified on their own behalf. Cornette explained that she regarded the tuition reimbursement program as a completely separate matter from the Stipend program, even though both paid for the same tuition costs. Cornette testified that she had accurately filled out all of the required forms for both programs and had fulfilled the obligations of both programs. She noted that the Stipend program is a contract with the University and has requirements beyond those imposed by County employment,

including an obligation to remain in her job for at least a year after graduation. Without that requirement, she would have been free to leave the County's employment at any time. On cross-examination, Cornette stated that she had informed Marsh of the possibility of using both the Stipend program and the County reimbursement program for the same credit hours.

Marsh testified that she considered the Stipend to be a separate agreement with the University, and to be unrelated to the County reimbursement program. She note that the Stipend carried with it obligations that were distinct from the County's rules for reimbursement, including an obligation to stay in her job for a year or else repay the Stipend. On cross-examination, she said she understood that her tuition had been paid for by the Stipend program at the time she put in for tuition reimbursement from the County. She agreed with counsel that she had not offered this explanation to Blom at the time of her interview, and had told Blom she now realized that it was wrong, and made an offer to repay the County.

Additional facts, as necessary, will be set forth below.

IV. POSITIONS OF THE PARTIES

A. The Position of the County

The County takes the position that both employees knowingly filed for reimbursement for monies that they had never actually expended, and submitted false claims in violation of the clear Rules of the County: "Dishonesty or Falsification of records." The cited rule calls for either a suspension or discharge for a first offense. They also violated the National Association of Social Workers' Code of Ethics: "Social Workers should not participate in, condone, or be associated with dishonesty, fraud, or deception." The County considered discharging both employees, but in light of their otherwise positive work records, decided to require repayment and impose the minimum possible suspensions under the labor agreement.

The wrongfulness of their conduct is obvious on its face. The County offers to reimburse expenses that an employee incurs in continuing their professional educations. These employees sought and received money, even though they never incurred the expenses. There was nothing to reimburse, and these employees instead manipulated the system to receive a windfall.

The Grievants' claims that these were separate contracts simply strains credulity. This claim was never made prior to the arbitration hearing. It is an argument to excuse their actions rather than a reason they took the action. Had they actually felt there was nothing wrong with what they were doing, they would have been open about it. Had there been nothing wrong with it, presumably one of the other ten Department employees who had participated in both programs would have sought both the Stipend and the tuition reimbursement. The "separate agreement" argument cannot be accepted, if only because it would sanction all types of double dipping, so long as the employee "contracts" in some fashion with the duplicate source of income.

The County's decision to impose suspensions on these employees was completely consistent with the principles of just cause. Common sense and common experience would tell them that reimbursement of expenses not incurred is wrong, and is inconsistent with the County's reimbursement policy. The conduct of all of the other employees who participated in the programs illustrates the common understanding that it is not intended to permit double payments. In short, their conduct was wrong, and they knew it was wrong.

The County conducted a full and fair investigation prior to imposing discipline, and that investigation conclusively established the employees' misconduct. Even though their conduct could have warranted discharge, the County opted for a lesser penalty. The labor contract requires that suspensions be no less than one work week in duration, and thus the five day suspension each received was the minimum significant penalty available.

B. The Position of the Union

The Union takes the position that the County has absolutely no disciplinary interest in the conduct of Ms. Cornette. The letter of discipline alleged that she "withheld information regarding the receipt of this stipend, and in this way falsified records and [was] dishonest in [her] transactions with the County." Given the nature of these allegations, the County must provide clear and convincing evidence of her guilt. It cannot meet that burden, since Ms. Cornette was under no obligation to inform the County of her participation in the Stipend program, and there is no evidence that she ever failed to provide the information.

The County's tuition reimbursement policy contains nothing that requires an applicant to disclose her participation in the Stipend program. Ms. Cornette complied precisely with the requirements of the tuition reimbursement application, and provided all of the information required. All of the information she provided was accurate. Her fee receipt showed that there was no balance due, because there was no balance due. There is no falsified record in this case, and thus the employee cannot be guilty of falsification.

The County claims that it is simply a matter of common sense that an employee cannot seek reimbursement for tuition where the tuition is already paid through the Stipend program. This ignores the fact that the Stipend program creates a contractual relationship, under which the recipient undertakes a series of obligations to the University. She was obligated to accept employment in a public or tribal child welfare agency, within a specified geographical area, and remain in that job for a period equal to the period covered by the stipend. These are material limitations on her legal rights, and they have nothing to do with her obligations to the County. The Stipend is, in operation, a loan. It must be repaid in full, through either monetary repayment or work obligations. Ms. Cornette lived up to her work obligations, and the loan was thereby

paid in full. The fact that the University chose to accept her work in Outagamie County as sufficient repayment is a matter between her and the University, and it no more implicates the County's interests than would a loan from a relative.

The County could, presumably, put in place a rule prohibiting employees from accepting loans such as this, which allow repayment through work obligations. They have not, and it is fundamentally unfair for the County to discipline this employee for a rule that exists only in minds of its administrators.[1] An employee cannot be expected to conform her behavior to an unstated expectation. The principles of just cause require advance notice of rules before they may be enforced, and since this rule did not exist, the employees of the County cannot have had notice of it. As such, it cannot be enforced.

The charge of falsification flows from a false premise – that Ms. Cornette somehow misled County officials. On the contrary, she provided a receipt plainly showing that her tuition had already been paid through financial aids, and her supervisors reviewed that document before approving her reimbursement request. They knew she had not paid her tuition upfront, and they cannot now complain that they were somehow deceived. She acted in an open and honest manner throughout this transaction, and the County cannot possibly establish that she had any evil intent in her conduct.

There is nothing to show that the expenditure of personal funds is a prerequisite to receiving reimbursement under the County's policy. The County concedes that an employee may secure a loan to cover the costs. The County also concedes that an employee may receive a gift from a relative to cover the costs. The Stipend contract imposes many more obligations on the employee than would an outright gift, and it makes no sense for the County to claim a disciplinary interest in the Stipend program, but not in personal gifts to an employee. As noted, an employee participating in the Stipend program must enter into a legally binding agreement to forego important legal rights – the right to refuse employment, and the right to quit employment. There is absolutely nothing about receiving consideration for these agreements that is inconsistent with the County's policies.

Finally, the Union argues that the County should be barred from disciplining Ms. Cornette by the equitable doctrine of laches. The County had all of the information related to this reimbursement application in the 2005-2006 school year. Ms. Cornette provided a receipt showing no tuition was due, which was accepted by her supervisors. The County waited for four years to bring these charges. Promptness in imposing discipline is a fundamental element of just cause. "Promptness" is an imprecise term, but no reasonable interpretation of it would include the County's conduct in this case.

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[1] In this regard, the Union dismisses the County's claim that employees generally understand this "rule" based on the conduct of other employees. The County's claim that those employees all personally paid for their tuition is mere supposition. None of them testified about the source of the money.

For all of these reasons, the Union asks that the grievance be granted, that the discipline be expunged from the Grievant's record, and that she be made whole for both the wages lost by reason of the suspension and the tuition reimbursement funds to which she was entitled, but was forced to pay as "restitution" to the County as part of the discipline.

V. DISCUSSION

The Grievant, Jennifer Cornette, was suspended for five days in 2010 for applying for and accepting reimbursement of tuition costs from her employer, when those costs had already been paid by a University Stipend program. There is no dispute that she did so. The arguments focus on whether the case should be barred by the equitable doctrine of laches, whether the Grievant's conduct in any way violated the tuition reimbursement policy as it existed, and whether there was dishonest intent, i.e. whether a reasonable person in the Grievant's position would have understood that there was anything improper about seeking the reimbursement.

The Union argues that this discipline should never have been brought, as it is untimely and barred by the doctrine of laches. Some four years passed between the acceptance of the tuition reimbursement and the County's realization that the Grievant never paid any tuition. The Union asserts that the County had ample notice of the potential problem, since the Grievant presented them with a receipt showing that her tuition had been covered by "financial aids." The doctrine of laches typically requires that the passage of time has in some way prejudiced a party, and here it is not clear what prejudice the Grievant has experienced. That being said, it is true that discipline under a just cause standard is viewed as being corrective in nature, rather than punitive, and that this corrective purpose is lost if discipline is not imposed in a reasonably prompt fashion. If the County was in possession of all of the facts in 2005 or 2006, and waited until 2010 to react to them, I would find considerable merit to the Union's argument. However, the County had no reasonable basis to suspect that the Grievant had no tuition obligation at the time it agreed to pay her for her alleged claimed costs. The fact that she produced a receipt stating that her tuition was covered by financial aids would not give her supervisors notice that she, in fact, did not owe tuition. Financial aids cover a wide variety of programs, including many student loan programs. Perhaps her supervisors should have inquired more closely, but to suggest that this notation provided the County with everything they needed to know to launch an investigation is simply inaccurate.

The Union argues passionately on her behalf that there was nothing dishonest or false in her pursuit of these funds, since there was no express rule against it, and she complied with every aspect of the tuition reimbursement application process. This is true, as far as it goes. However, the County is correct in arguing that a reimbursement

policy, by its very title and very nature, operates to reimburse employees for the costs they have incurred. The purpose of the policy is stated thusly: "Tuition Reimbursement is intended to provide assistance to the employee for continuing education for the mutual benefit of the employee and Outagamie County." In the case of the Grievant, no assistance was needed in covering the cost of tuition, since she incurred no cost. It is not the specific content of the application that is false – it is the submission of the application itself. The Grievant held herself out as having expended funds for her further education, when in fact she made no such expenditure. The ingenuity of the Union's argument cannot overcome what actually happened here.

All of this assumes, of course, that the Grievant knew or should have known that she was not entitled to the reimbursement she sought. The Union argues that a reasonable person could easily have understood that the University Stipend was not relevant to the County's reimbursement program, since the County has no interest in the source of an employee's funds to cover upfront tuition costs, whether they be the Stipend program or a cash gift from someone's grandmother. The Union also argues that the University Stipend program was a separate contract, with separate obligations that effectively operated as a loan program.

The comparison of the Stipend to a cash gift from one's grandmother as the means of covering the upfront tuition costs is a false analogy. A cash gift may be spent in any way a person chooses, and is part of his or her personal resources. It may well be that the grandmother in question would be upset at later discovering that it was spent on something other than tuition, and that the County had reimbursed the granddaughter for the tuition costs. In that case, it would be the grandmother who might feel she had been ill-used, but the County would have no complaint. The County has no legitimate interest in the source of the employee's personal funds. Here, the Stipend was not paid to the employee, and never became part of her personal resources. It was paid directly to the University by the program. It could not be directed to any other purpose than tuition, and had no value outside of that.

The Union asserts that the Stipend program required a contract, under the terms of which she was obliged to forego the exercise of certain rights. She could not turn down employment with a public or tribal child welfare agency, and she was required to remain employed for a minimum of twelve months. For these services she was compensated with the cost of the tuition, and if she did not perform these services, she would have had to repay the loan. This too is a flawed argument, since as the Grievant structured the transaction she had nothing to lose. She was already employed in a public child welfare agency. The requirement that she remain so employed for twelve months may or may not have caused her to make a decision she did not wish to make, although there is no evidence that she had plans to leave the County's employ. She remained with the Department for years after her obligation to do so was satisfied. More to the point, however, if she did decide to quit her job within twelve months, her only obligation was to repay the tuition costs. Had she done so, she would in effect be repaying the University with the County's money. She would have lost absolutely nothing of her own.

I agree with the Union that the standard to be applied in this case is whether the evidence is clear and convincing. I find it to be so. It is not fair to characterize the Grievant as a thief or to label her with other pejoratives. It is fair, though, to say that her application for the reimbursement of tuition under the County's program was false, in that it proceeded from a false premise – that she had in fact incurred the expense she was asking to have reimbursed - and that she knew at the time that County officials would accept that false premise in reviewing the application. In this manner she misled her supervisors, and realized a windfall at the County's expense. This constitutes just cause for discipline.

Turning to the issue of penalty, the contract requires that any suspension be for a minimum of five days. That is what was imposed on the Grievant. Given the nature of the violation, I cannot say that the County abused its discretion in selecting a time off penalty, and given the contract language I cannot say that five days is excessive. The requirement that she also return the amount of the tuition reimbursement to the County is reasonably intended to place the parties in the positions they would have been in had she not engaged in the misleading behavior, and avoids what would manifestly be an unjust enrichment of the Grievant.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The County had just cause to suspend the Grievant, Jennifer Cornette, for five days and to require her to pay restitution of amounts received from the County's tuition reimbursement program for the 2005-2006 school year. The grievance is denied.

Signed this 4th day of October, 2011 at Racine, Wisconsin.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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