

IN RE ARBITRATION BETWEEN:

LAW ENFORCEMENT LABOR SERVICES, LOCAL 69

and

CITY OF MOORHEAD

DECISION AND AWARD OF ARBITRATOR

BMS 10-PA-0733

JEFFREY W. JACOBS

ARBITRATOR

February 21, 2011

IN RE ARBITRATION BETWEEN:

LELS,

and

City of Moorhead.

DECISION AND AWARD OF ARBITRATOR
BMS Case #10-PA-0733
Tuition reimbursement grievance

APPEARANCES:

FOR THE UNION:

Brooke Bass, Attorney for the Union
Thad Stafford, Union Steward
Scott Kostohryz, Union Steward
Ryan Nelson, Union Steward
Officer Shawn Carlson, grievant
Douglas Biehn, Business Agent

FOR THE CITY:

Brandon Fitzsimmons, Attorney for the City
David Ebinger, Chief of Police
Michael Redlinger, City Manager
Jean Thomson, Human Resources Director
Shannon Monroe, Deputy Chief of Police

PRELIMINARY STATEMENT

The hearing in the above matter was held on January 13, 2011 at the Moorhead City Hall, 500 Center Ave., Moorhead, MN. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated January 31, 2011.

ISSUES PRESENTED

The Union proposed the issue as follows:

Was the denial of Officer Shawn Carlson's tuition reimbursement benefit request a violation of CBA Article 28? If so, what is the appropriate remedy?

The City proposed the issues as follows:

Is the matter substantively arbitrable?

If the grievance is arbitrable, did the Employer violate the collective bargaining agreement, CBA, provision providing that: "The Employer shall provide full tuition reimbursement for courses approved by management. Financial assistance for reimbursement of tuition, fees, and required books may be approved for regular full-time employees not in probationary status." when it did not approve courses for tuition reimbursement requested by the subject employee?

The issues as determined by the arbitrator are as follows:

Is the matter substantively arbitrable?

If the matter is arbitrable, was the denial of the grievant's tuition reimbursement benefit request a violation of Article 28.1 of the collective bargaining agreement? If so what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

Article 5. Employer Authority

5.1 The Employer retains the full and unrestricted right to . . . establish . . . programs; to set and amend budgets . . . and to perform any inherent managerial function not specifically limited by this Agreement.

5.2 Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate

Article 7.1 Grievance procedure

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.

Article 28.1 - Tuition Reimbursement

The City shall provide full tuition reimbursement for courses approved by management. Financial assistance for reimbursement of tuition, fees and required books may be approved for regular full-time employees not in probationary status. Reimbursement for tuition will be made at the in-state rate of the local state universities, if a comparable class is offered. Books are to remain the property of the City unless the employee wishes to purchase them

Article 30. Waiver

30.1 Any and all prior agreements, resolutions, practices, policies, rules and regulations regarding terms and conditions of employment, to the extent inconsistent with the provisions of this Agreement, are hereby superseded.

30.2 The parties mutually acknowledge that during the negotiations, which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any term or condition of employment not removed by law from bargaining. All agreements and understandings arrived at by the parties are set forth in writing in this Agreement for the stipulated duration of this Agreement. The Employer and the Union each voluntarily and unqualifiedly waive the right to meet and negotiate regarding any and all terms and conditions of employment referred to or covered in this Agreement or with respect to any term or condition of employment not specifically referred to or covered by this Agreement, even though such terms or conditions may not have been within the knowledge or contemplation of either or both of the parties at the time this contract was negotiated or executed.

PARTIES' POSITIONS

UNION'S POSITION:

The Union's position was that the City violated the contract when it refused to pay tuition reimbursement to the grievant. In support of this position the Union made the following contentions:

1. On the question of arbitrability, a threshold question, the Union asserted that the matter is clearly arbitrable. The Union cited Article 7.1 above and noted that there is a good faith and legitimate dispute over the meaning of the first sentence of Article 28. A grievance is by definition a dispute about the "interpretation or application of the specific terms and conditions of this Agreement." Here it is clear that there is such a disagreement and this falls squarely within the purview of Article 7.

2. Moreover, the City's reliance on its management rights clause is misplaced. The term "management rights" is not even in the language of Article 28. The question is whether the City acted in violation of the CBA and/or arbitrarily or capriciously when it denied Officer Carlson's request for tuition reimbursement. This is exactly the sort of dispute that is contemplated by this and virtually all grievance procedures and the arbitrator has jurisdiction to hear and determine the merits of this issue.

3. The Union also relied on the Waiver clause set forth above and noted that if the City had intended that management rights would govern the question of tuition reimbursement it could have and should have inserted appropriate language in the provisions of Article. It did not and no such language is or ever has been found there.

4. Prior to the current contract, the City and the Union had agreed on language within the collective bargaining agreement regarding a tuition reimbursement benefit dated back at least from January 1, 1996 to December 31, 2007. The tuition reimbursement language incorporated the City's general tuition reimbursement policy for non-Union employees. Thus the contract language was tied to the City's policy.

5. The Union was concerned that since this tuition reimbursement language was tied to the Policy language, the City could change it unilaterally. During the negotiations for the current agreement the Union proposed language that clarified the City's obligations to provide tuition reimbursement to the officers. As part of those negotiations the parties discussed certain factors that the City could use to determine the appropriateness and compensability of courses, discussed below, but never discussed budgetary concerns as a factor to consider in denying tuition reimbursement.

6. The Union was aware that the City policy on tuition reimbursement had changed approximately one month prior to the negotiations, see Employer Exhibit 5, and the Union wanted to maintain the old policy in the 2008 collective bargaining agreement. See, Employer Exhibits 4 and 7. The Union was also aware that the AFSCME agreement with the City had a different benefit than the City policy. See, Employer Exhibit 7. The AFSCME contract specifically contains a sentence within the tuition reimbursement article making a tuition reimbursement request contingent on sufficient funds within the budget. Certainly if the City had wanted that to be a part of this Agreement it should have proposed it in negotiations; such language could easily be placed in this Agreement but of course it is not. Presumably it did not because the City knew well that the Union would not have agreed to such limitations within the collective bargaining agreement. All of this set the stage for the bargaining that took place over the 2008-2010 contract.

7. The Union asserted that one key sentence was left in the language of Article 28, which has been there since 1996, which reads as follows: "The City shall provide full tuition reimbursement for courses approved by management." The Union contends that this language has never been used to allow the City unfettered discretion to disapprove courses even though those courses are clearly job related. The Union further contended that the City has never used "budgetary constraints" as a reason not to approve a requested course.

8. The Union asserted most vigorously that that the term “approved by management” as used in the language of Article 28.1 does *not* mean that the City can deny a request for tuition reimbursement based solely on the fact that the City chose not to allocate any funds for a benefit that was negotiated in good faith into the labor agreement.

9. The Union asserted that during negotiations for this language in Article 28, the Union made it clear that the sole factors to be used to determine the appropriateness, and therefore whether a course would be reimbursed was whether that course, were the type of degree an officer was seeking; whether the course was offered at a private institution or was at in-state tuition rates; and relatedness to criminal justice and law enforcement. Specifically Union witnesses testified that the only factors discussed for tuition reimbursement had to do first with officers with two-year degrees so that they could earn bachelor’s degrees.

10. Second, there was considerable discussion regarding reimbursement only for in-state schools because the City no longer wanted to pay for private or out of state tuition rates. The Union contended that this was a reduction in benefits since those had been reimbursed in the past. The Union acknowledged that if an officer took a course from a private school or out of state the City would reimburse only at in-state rates. However there was never any discussion about nor agreement to allow the City to arbitrarily disallow a course due to budgetary reasons.

11. Finally, there was discussion regarding reimbursement for courses that related to criminal justice, as opposed to obtaining some unrelated degree, for example, in psychology or nursing. These factors were expressly agreed upon between the parties in negotiations and should be the sole determining factors now. The Union asserted that these facts show that the City was well aware of what the Union wanted and that there was never any agreement at all to allow budget to be even a determining factor in denying tuition reimbursement, much less the sole factor.

12. When Officer Carlson submitted his request for tuition reimbursement he chose a course that was clearly job related and that was from an institution that he had been led to believe was appropriate. There is no question that the City denial was based only on financial reasons.

13. The Union acknowledged that the City does intermix the funds in the departmental “training budget” with the funds for educational reimbursement but choose not to earmark any dollars in 2008, 2009 or 2010 for educational reimbursement. The City arbitrarily and capriciously denied Officer Carlson’s grievance based on a factor that was never mutually agreed upon or even contemplated by the parties with respect to Article 28.

14. The Union further asserted most vehemently that it would never have agreed to this language if the City had been straight with the Union negotiators and had told them the City interpreted the changes in the language of Article 28 to somehow grant to the City the right to unilaterally use budgetary reasons to deny tuition reimbursement.

15. Further, the Union noted that commentators and arbitrators alike adhere to the principle that the intent manifested by the parties *to each other* during negotiations is what must be considered in determining contractual intent. The City never communicated the meaning they attached to the first sentence of the collective bargaining agreement and never even intimated that it viewed the first sentence as granting total managerial discretion over the tuition reimbursement benefit. The City is attempting to gain through arbitration what it was not successful in gaining in negotiations, or worse, is attempting to play a game of “gotcha” by failing to disclose its underlying intentions and inducing the Union under false pretenses to sign off on this language. Neither can be allowed in rational labor relations.

16. The Union argued that this is simply arbitrary and capricious and that if the City is allowed to deny tuition reimbursement requests on that basis the entirety of Article 28 will be rendered meaningless. All the City will have to do is to “not fund” the portion of its budget for training and the clause will be rendered moot.

17. The Union cited a case it contended was almost on all fours with the instant matter in which the arbitrator found that the City's reliance on budgetary factors constituted an arbitrary denial of tuition reimbursement. See, *City of St. Mary's PA, and Officers of the City of St. Marys*, 113 LA 708 (Talarico 1999). There, the arbitrator specifically held that the City cannot deny all requests for tuition reimbursement by simply not budgeting any money at all." This is almost precisely what the City is contending here and should be similarly rejected.

18. The essence of the Union's claim is that the bargaining history of this language shows clearly that the Union never agreed to allow the City unilateral discretion to use financial reasons to deny tuition reimbursement. There was specific discussion about only three factors, set forth above, and the Union's understanding, based on the representations made to it by the City during bargaining, was that these would be the sole factors used. Budget never came up and was not the basis of the agreement for the new language of Article 28. Thus, the City may not hide behind this reasoning to deny a course that was clearly job related and should be reimbursed.

The Union seeks an award of the arbitrator ordering the City to reimburse the grievant's tuition and making him whole for the expenses he incurred in taking alternate classes.

CITY'S POSITION

The City's position was that there was no contract violation. In support of this position the City made the following contentions:

1. The City asserted that the matter is not substantively arbitrable and should not even proceed to the merits. The City asserted that the clear language of Article 28 provides that only those courses "approved by management" are to be reimbursed. Further, that same section provides that "Financial assistance for reimbursement of tuition, fees and required books *may* be approved for regular full-time employees not in probationary status." (Emphasis added by City) It does not say "shall" or other mandatory language.

2. The City then pointed to the language of the Management Rights clause and asserted that it retained the rights inherent to all public employers under both the language of the CBA and PELRA to determine its budget. The City asserted that unless that is a specific limitation or other obligation placed on a public employer per the terms of a collective bargaining agreement, it is free to fund or not fund any of its operations and programs.

3. The City asserted that the Union is essentially asked the arbitrator to do something he has no power to do under the clear terms of the CBA. The Union asks that the arbitrator ignore the management rights clause, ignore the clear provisions of PELRA reserving certain inherent rights to public employers, i.e. the determination of budget and what to fund and what not to fund, ignore the clear terms of Article 28 reserving to the City the right to approve courses, ignore the other clear term providing that financial assistance may be provided and to add a term and condition to the CBA requiring the City to provide tuition reimbursement for any course requested by a bargaining unit employee.

4. The City asserted that the issue of *whether* the Employer should approve a course for tuition reimbursement is *not* addressed in the CBA. Instead, the CBA provides guidance as to *when* and under what circumstances reimbursement will be provided if the course is approved and the *rate* of such reimbursement. The City argued that the Union's argument here has nothing to do with those matters but relates directly to the question, which is not covered by the CBA, as to the decision to approve courses in the first place.

5. On the merits, the City reiterated that the language of Article 28 is not mandatory nor does it require the City to approve any courses. The prior policy had been applied that way and nothing changed in that regard as the result of the negotiations for the 2008-2010 contract. The City again pointed to what it terms the clear language of Article 28 that provides for reimbursement only for "courses approved by management."

6. The City asserted that the discussions centered over the request by the Union to change the language so it would not be dependent on the City's policy for reimbursement and the need of the City to lower the cost for tuition reimbursement and the request to allow only in-state tuition rates for those courses. If there was any quid pro quo it was that – nothing more. There was never any agreement that the City would waive its inherent right to determine its budget.

7. The City asserted most vigorously too that it did not waive the right to determine its budget, it made it abundantly clear during negotiations that it intended to preserve it. The City pointed to several exhibits, some of which were drafted by the Union during bargaining, that clearly shows that the City's negotiators told the Union specifically that it needed discretion to determine which if any courses it would approve. See City Exhibits 10, 11, 12 and 13,. These exhibits all have clear references to management's negotiation position that it needs discretion. The Union even OK'd this proposal during bargaining. See e.g. Exhibit 12 and 13. Under these circumstances the City argued, it could hardly be clearer about what was intended – that management needed discretion and that it made that very clear during bargaining.

8. The City went through the bargaining session notes and provided testimony from its negotiators who indicated that the tuition reimbursement was not the main focus of the negotiations. After several rounds of bargaining where the issue was the amount of tuition reimbursement, the City agreed during the fourth negotiation session between the parties that it would agree to the Union's proposal on including wording from the Employer policy on tuition reimbursement in the CBA only if the Chief retained discretion on approving courses. The Union did not object to this statement made by the City and, as Employer exhibits 11, 12 and 13 show, indicated "OK." The City asserted that it was crystal clear in negotiations that it would not agree to anything that limited the Chief's discretion in this regard and that it made that clear to the Union. The City asserted most vehemently that both parties knew exactly what they were agreeing to during bargaining and that the Union is now attempting to gain something in addition to that.

9. The City further noted that during the life of this contract it has never acted in a manner inconsistent with the agreement that it retained the right to approve courses, or not, under the language of Article 28.

10. Turning to the specifics of this grievance, the City pointed out that the grievant made the first request for courses to be approved for tuition reimbursement under the current CBA. He intended to take these courses so he could be qualified to be a teacher at some institution other than the Employer and to advance his personal career goals. This request was made on a form to request tuition reimbursement that provided: "Request can be approved only if your department has unencumbered funds within the budget to accommodate request" The City asserted that this sort of admonition has been on these forms for years and that officers know up front that the course they want may not be approved for a variety of reasons, including that the City does not have the money to provide tuition reimbursement. The City denied the grievant's request based on both budgetary reasons and that one of the courses he sought reimbursement for was not job related.

11. There is no limiting language in the phrase "approved by management," nor has there ever been. The City has always reserved the right to deny a course based on job relatedness or other reasons within the discretion of the Chief. This case is no different according to the City and the new language of Article 28 did not change that existing relationship nor limit that inherent right.

12. The City noted that the tuition reimbursement policy has been in place since 1990. The policy was revised in 2003, 2007 and 2010 but never strayed from the underlying principle that the City retained the right to approve courses. In 2003, the policy, to which the language of the CBA was then tied, was revised to change reimbursement for tuition from "100 percent" to "the in-state rate of the local universities, if a comparable class is offered" and to limit eligible employees to "regular full-time employees not in probationary status." The only other substantive revision to the policy occurred in 2007 when employees who did not complete at least two years of employment with the Employer after receiving tuition reimbursement were required to repay the City on a prorated basis.

13. The City further asserted that it is faced with budgetary constraints, as are many Minnesota Cities, and that it only has so much money. The City must first fund mandatory training all officers are required to have in order to maintain their POST licenses and when the grievant made his request there simply was no additional money in the budget to approve the courses he wanted.

14. The City noted that the Union provided no evidence that the City was not facing cuts in funding from the State or that the City somehow was “hiding” funds to avoid payment of tuition to this officer. The City noted that it simply did not have the money to fund these courses. The City has left vacant positions unfilled and has undertaken a number of cost cutting measures to fund the required portions of their mission. There is no question that the City is facing severe budgetary constraints and must cut some discretionary funding – such as tuition reimbursement. This is an inherent right preserved to the City under both PELRA and the CBA and cannot be disturbed by the arbitrator.

15. The Chief further indicated that if he were “required” to provide funding for tuition he would be placed in the unenviable situation of having to chose between officers on a first come first serve basis or, worse, subject to the charge of favoritism for having to make a hard choice like that.

16. The City further argued that the arbitrator has no power under the terms of the language at hand to award what the Union is looking for. The clear language provides only that tuition reimbursement and financial assistance *may* be approved by the City – nowhere does it say “shall” be approved. To award what the Union wants would be to amend that clause to require reimbursement, which would of course be a violation of the grievance procedure and the arbitrator’s power.

17. The City further argued that the results sought by the Union lead to an absurd result since it would effectively require taking money from an already thinly stretched budget for mandatory training and reallocate it to a few people for discretionary training. At no point did anyone in the negotiations contemplate, discuss or agree that mandatory training would be compromised in favor of what is clearly discretionary training yet that is exactly what the Union’s request would do.

18. The City argued quite vehemently that there was no agreement to limit the factors on which the Chief could decide if courses would be approved or not and certainly no agreement to waive the City's inherent right to fund such programs. Such a waiver must be clear and unmistakable. Here, the language is clear and unmistakable in the other direction – the City clearly *reserved* that right.

19. The City also relied on comments from sources such as Elkouri in support of their position. They alleged that the statements made during negotiations by City negotiators gave a clear message to the Union that the City in no way intended to waive or limit its discretion to determine which courses to approve. This, as noted above, was clearly understood and acknowledged by the Union's negotiators at the bargaining table. The City gave every indication that it intended to reserve its managerial discretion and the Union not only raised no objection but also acknowledged their assent to it. See, Employer exhibits 11, 12 and 13. See also, Employer Brief at page 19 and citations therein.

20. The City introduced considerable evidence regarding the financial challenges it is facing. The City alluded to cuts in State Aid from the State of Minnesota along with rising employee, health care and fuel costs. The City noted that at a time when funding is flat or even being reduced their costs for virtually every operation the City provides is increasing – certainly few if any are going down. Accordingly, there was ample support for the notion that the City in fact does not have the money to fund discretionary training like this. There was no evidence from the Union to the contrary.

21. The essence of the City's argument on the merits is that the language is clear and retains to the City the right to determine if courses will be approved. There was nothing contrary to that in negotiations and in fact the evidence was quite to the contrary – i.e. that the City specifically advised the Union that it would not agree to any limitation on its inherent right to determine which courses if any to approve. Neither was there any agreement to limit the right of the City to determine those courses based on its budget. Public employers always retain the right to determine where and how their money is spent and there is nothing in the CBA or in PELRA that abridged that right here.

The City seeks an award of the arbitrator denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

ARBITRABILITY:

The threshold issue is whether the matter is substantively arbitrable. As with any such inquiry the grievance procedure itself and the clause under consideration must be examined to determine if the terms of the contract allow the matter to go forward at all.

Here the grievance procedure is fairly typical in that it provides a definition of a grievance as follows: “Article 7.1 A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.” That is of course quite broad but simply saying that a dispute has arisen does not end the issue. The question is whether the matter under consideration is barred by some other provision of the agreement¹ or by the operation of law.

The City relied most heavily on the provisions of the management rights clause set forth above and the provisions of Article 28, which it asserted conditioned tuition reimbursement on courses “approved by management.” The City asserted that this clause reserves to the City the right to approve the courses and is not mandatory in any sense. Such decisions are within management’s rights and may not be arbitrated under PELRA.

The City cited *City of Oakdale and Law Enforcement Labor Services*, BMS Case No. 99-PA-1781, (Jay 2000) where the grievance was found not substantively arbitrable where the Union grieved the employer’s amendment to a payroll policy and the contract provided that the Employer could establish or modify “Any term and condition of employment not specifically established or modified by this Agreement.” There was no provision covering the substance of the Union’s grievance in that case whereas here at least there is a specific term covering tuition reimbursement and a good faith dispute over the meaning of the term “approved by management” as used in that language.

¹ See e.g., *University Education Association and University of Minnesota*, BMS case #'s 09-PA-0142, 09-PA-0143, 09-PA-0144, 09-PA-0145 & 09-PA-0146, (Jacobs 2009). The contract had in it a specific provision prohibiting merit pay decisions to be arbitrated or processed past the third step of the grievance procedure. The dispute was over merit pay. The grievance was denied in part due to this provision and in part due to other factors. Here there is no such specific provision excising this substantive matter from the arbitration provisions of the grievance procedure.

Moreover, part of the Union's claim here is that there was a specific agreement during negotiations that provides context to the provisions of Article 28 and what the term "approved by management" means here. The Union also raised in a somewhat oblique way the notion that the City acted arbitrarily when it used budgetary constraints as the basis for its actions. As will be discussed below, there are situations where the employer's actions have been overturned on the basis of arbitrariness. Granted, these situations are rare but that is a question for the merits of the dispute not a question for determination as to whether the matter can even proceed to a determination of the merits.

Here, as in a motion to dismiss or a summary judgment motion in a Court setting the determination must be made by taking the facts in the light most favorable to the non-moving party to decide whether to dismiss the matter on arbitrability grounds. Note that this does not mean that those facts are accepted as in fact accurate nor will it mean that the non-moving party's case has merit. It is simply a way to determine if the matter should proceed to a determination on the merits rather than being summarily dismissed at this stage.

Here it is clear that the matter is arbitrable. The clause under consideration is subject to a good faith dispute about its meaning and interpretation here, especially in light of the claims made by the Union regarding the negotiation history. Further, the Union claimed that there was an agreement in the minds of its negotiators limiting the City's discretion to approve a course to only the three factors listed above and that the City agreed that it would not use financial reasons to determine whether courses were approved. As noted, whether that case had merit or not is not the question. The question is whether that is a dispute within the meaning of the grievance procedure. Here it clearly is.

Finally, there was the claim that the City acted arbitrarily in denying Officer Carlson's tuition reimbursement request. This is of course a fact specific determination and the Union bears a heavy burden of proof on that issue. As will be discussed later, whether there was sufficient proof of any of those claims is not the determinative question.

Likewise, whether the City is correct in its interpretation of the meaning of the language or on what was said during negotiations is a matter of probative value of the evidence and a matter for the merits. Here, the language at issue is amenable to interpretation especially in light of the claimed negotiation history and there is a dispute about whether the City acted arbitrarily. On this record, the matter is determined to be substantively arbitrable.

MERITS

As in any contract interpretation case the starting point for the discussion is of course, the contract. As commentators have noted throughout the years, if the contract clause under consideration is plain and unambiguous there is generally no need to resort to extrinsic evidence, past practice or other interpretative devices to determine contractual intent. The determination of contractual intent when the language was negotiated is at the heart of any such decision.

As Elkouri noted, “if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used.” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed, (Miles Ruben 2003) at page 434.

As Elkouri further notes, “the language of mathematics is precise. The English language is not. Even when the greatest of care is employed, ambiguity of meaning can result in draftsmanship and may employ terms of their contract that are inherently vague.” *Id* at page 441, n. 42. “It is a rare contract that needs no interpretation. It has been wisely observed that there is no lawyer’s Paradise where all words have a fixed, precisely ascertained meaning and where, if the writer has been careful, a lawyer having a document referred to him may sit in his chair, inspect the text and answer all questions without raising his eyes.” Elkouri at page 437, n. 24, citing, Thayer, *Preliminary Treatise on the Law of Evidence*, 428, which in turn cited Justice Oliver Wendell Holmes’ opinion in *Towne v Eisner*, 245 U.S. 418, 425 (1918). Contractual language is rarely so plain and unambiguous that it is immune from different interpretations depending on who is reading it and applying it. As the old saying goes, a place that cannot support one lawyer can oftentimes support two.

Simply because one party alleges that there is an ambiguity does not in and of itself create one. Some language really is plain and requires no further explanation or interpretation. The language must reasonably be read to have more than one interpretation.

Here the language on its face supports the City's view. The clause "approved by management" contains no limitation in its whatsoever and would seem to convey the clear meaning that the approval of courses that qualify for tuition reimbursement is subject to management's discretion. This is further supported by the use of the word "may" in the second sentence of Article 28.1. The remainder of the article refers to the rate at which the reimbursement is to be made but the initial decision about whether or not to even approve the course by a cursory review of the language rests with management.

The Union cited Honeywell and IBT 1145, FMCS #090402-5568-2 (Jacobs 2010) for the proposition that where "the parties' testimony diverges completely about what they assert they understood, it is the language that is actually negotiated and agreed to that provides the best and in many cases the only measure of intent." That notion holds true here as it did in the Honeywell matter however not in the way the Union asserted it should. Here not only does the language appear to support the City's view of what was agreed to but there is no limiting language of any kind in it that would lead the reader to believe that the City waived or limited its right to establish its budget and determine what to fund and what not to fund as the result of this language.

Had the language referred to specific factors that were to be used that of course would have been different. As will be discussed below, there was no agreement on this point and in fact the City negotiators made it abundantly clear that they intended to reserve all discretionary rights to approve courses. Certainly, had the parties intended to place a limitation of the right of the City to use budgetary reasons to limit the approval such language could have been included. Obviously it was not and the fact that it was not is significant since the Union claims that the parties discussed those factors in negotiations. Sometimes the absence of certain language speaks as much about contractual intent as language that does appear in the contract. This is one of those times.

Having said that however, there are instances where the contract negotiations show that despite what may appear to be clear language there was an agreement for something slightly different or where statements made in negotiations can have an impact on the application of certain language. The Union asserted that the parties discussed certain factors to be used to determine whether courses were to be approved and asserted that there was an understanding by the parties that only those factors would be used. The Union further asserted that budget or financial constraints was not one of those and that budget cannot now be used to deny a request for tuition reimbursement.

Several problems prevent this argument from carrying the day. First, PELRA is quite clear that matters of “overall budget” are within the City inherent managerial right. See M.S. 179A.07 section 1. While it is possible for a public employer to voluntarily negotiate away certain of the rights mentioned in that article, such a waiver would have to be clear and unmistakable and would require evidence of a much higher nature than was presented here. What the Union is in fact asserting is that the City had somehow waived its right to establish and determine its overall budget in the negotiations over tuition reimbursement. Without such clear and unmistakable language that argument falls for lack of evidence.

Moreover, while the Union asserted that the parties were clear in their negotiations over this subject and further asserted that the Union would never have agreed to the change in language reducing the reimbursement rate to in-state tuition rates if they had known of the City’s true intent, the evidence showed that the City’s negotiators were quite clear all along that they intended to preserve all discretionary rights to approve courses. See Employer exhibits 11, 12 and 13. The testimony of City negotiators was credible and quite persuasive in this regard. Further, it would seem entirely unlikely that a public employer would have negotiated away those rights at all and if they had that would have been placed in the clearest possible language in the agreement. Again, the evidence did not support the Union's claims in this regard. The evidence showed that the City made it clear several times at different bargaining sessions that the City intended to reserve all discretion.

More to the point, the Union acknowledged this and essentially OK'd that understanding several times. As was noted in *Metropolitan Council, and Pipefitters, Local 455*, BMS 09-PA-1019 (Jacobs 2009), cited by the Union, "if one party makes statements at the negotiating table that are designed to trick the other side or induce them to accept an interpretation of the language that the party proposing such language later says is different, that is a relevant factor in determining contractual intent." Again that is true enough. It is the outward manifestations made during negotiations or a statement made to induce a party to believe that a certain interpretation is what both agree to that are relevant. If, for example, one party states what they believe the language means and the other party does not object or assents in some fashion, that other party may well not be heard to object later or assert that it intended something different.

Here again, the facts did not support the Unions assertions. The City was amply clear with the Union that it needed to reserve full discretion, as it had in the past, over which courses it would approved and which it would not. The evidence showed that not all courses had been approved in the past for various reasons and that no grievances were filed on those. While the 2008-10 contract was different in some respects, there was nothing to demonstrate that the City had agreed to limit its right to use financial reasons to determine which if any courses would be approved. Certainly too there as no clear evidence that the Union insisted on such a limitation, in fact there was evidence as noted above that the Union acknowledged its assent to the City's proposal in this regard.

Finally, the Union cited *City of St. Marys and Officers of the St. Marys Police Department*, 113 LA 708, 711 (Talarico 1993) for the proposition that the City cannot hide behind a claim of budgetary constraints as a subterfuge for arbitrariness. A close review of that reveals a very different set of facts. Arbitrator Talarico made a specific finding that there was in fact money set aside for the courses at issue in that case and, significantly, that the City had acted arbitrarily under the facts presented in that matter to deny reimbursement.

The Union relied upon the statement by the arbitrator in that matter that “nor can the City deny all requests for tuition reimbursement for post-secondary-education classes by simply not budgeting any money at all. That would be an absolute abuse of discretion.” On its face that sounds like a blanket statement that would require a public employer to always fund such classes and that under no circumstances can a public employer simply fail to fund such a program where there was a clause in the labor agreement pertaining to it at all.

Two things are problematic. First, the arbitrator was faced with what he characterized as the “narrow” issue of “whether the City abused its discretion when it denied the grievant’s request for reimbursement for a course entitled ‘Society and the Law’ as part of the Administration of Justice program offered at the University of Pittsburgh at Bradford.” The arbitrator found that under the unique set of facts involved in that case the employer had acted arbitrarily for several reasons. He noted “there was ample money in the training budget at the time the request was made and that this budget is used for a wide variety of supplemental courses requested by officers.” 113 LA at p. 712.

The case was thus decided on very narrow grounds and involved the course itself and whether it was related to the officer’s law enforcement duties. The main reason for denial of the course was that it did not fit into what the City believed was “on more relative training to what is described in this course syllabus.” Id at 711. The case was limited to the specific facts of that case and as the arbitrator noted: “the denial of the grievant’s request under these particular circumstances was unreasonable. This is not to say that every course offered by an Administration of Justice program would automatically qualify for tuition reimbursement, or that under certain circumstances the lack of funds would not be a legitimate reason for denying the request. It is just that under these particular circumstances the grievant met all the reasonable criteria.” Id at page 712. It was clear that the arbitrator was not ruling that an employer must fund every course or that the City had waived its rights to determine the budget. It appeared that the City acted arbitrarily there, since there was ample money in their training budget for this purpose, in denying this particular grievant’s request.

It is important to note that the Union there was seeking something akin to what is being sought here, i.e. a “a firm requirement on the part of the City to pay for *any* post-secondary education courses officers may take.” *Id* at 711. He noted that the City rejected that and that the contractual language involved reflected that. The *St. Marys* case should not be read as a blanket pronouncement that any City anywhere abuses its discretion when it finds it cannot fund a discretionary program like this in times when budgets are stressed and cuts are being made to accommodate that.

Second, while that may or may not be the case in a case in Pennsylvania, that is not the law in Minnesota. As noted, PELRA reserves such decisions to the public employer and unless there is a clear contractual obligation requiring that certain courses be approved there is no absolute requirement that the City fund the program. Nor does a public employer act arbitrarily in such a case by showing that there is insufficient funds to provide the reimbursement. Obviously different facts may well yield a different result, but here, the City showed by persuasive evidence that their budget was limited and that the City made a decision based on that not to provide tuition reimbursement at this time.

Following the reasoning of *St. Marys*, if there had been evidence that the City acted in an arbitrary, discriminatory or capricious fashion in denying this particular officer’s request, the result may have been different but no such evidence was presented here. Quite to the contrary, the City showed that their budget really was tight and that there really was no money set aside for this by the City Council. There was no evidence that the City acted arbitrarily or capriciously here or that the Chief singled out Officer Carlson for some other discriminatory reason to deny his request.

Accordingly, based on the contractual language that is clear and reserved to the City the discretion to approve these courses, the bargaining history in this particular instance that demonstrated a clear reservation of those rights by the City and the lack of any agreement to require the City to fund tuition reimbursement or to waive or limit the right to establish its overall budget and the lack of sufficient evidence of any arbitrary, discriminatory or capricious action by the City directed toward Officer Carlson, the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: February 22, 2011

City of Moorhead and LELS award.doc

Jeffrey W. Jacobs, arbitrator