

BEFORE THE ARBITRATOR

In the Matter of the
Arbitration between

Law Enforcement Labor Services, Inc.

And

City of Roseville, Minnesota

BMS Case No. 13-PA-0022
(Officer Joe Cox)

Appearances:

Attorney Scott Higbee on behalf of Law Enforcement Labor Services, Inc.

Attorney Mark F. Gaughan, Erickson, Bell, Beckman & Quinn, P.A., on behalf of the
City of Roseville.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the LELS and the City respectively, are parties to a collective bargaining agreement providing for final and binding arbitration. The undersigned was selected from a panel provided by the Minnesota Bureau of Mediation Services pursuant to said agreement. Hearing was held in Roseville, Minnesota on June 24, 2013. No stenographic transcript was made. Briefs were filed and the hearing was declared closed on July 19, 2013. All parties were given the opportunity to appear, present evidence and testimony, and to examine and cross-examine witnesses. Now, having considered the evidence, the positions of the parties, the contractual language and the record before her, the undersigned issues the following Award.

ISSUE:

The parties framed the issues as follows:

Did the Grievant fail to timely file the Grievance under Article VII (Section 7.4) of the collective bargaining agreement? If so, what is the appropriate remedy?

Did the City correctly calculate grievant's educational incentive supplementary pay rate under Articles XXIV (Section 24.3) of the collective bargaining agreement? If not, what is the correct calculation of grievant's educational incentive supplementary pay rate?

RELEVANT CONTRACT PROVISIONS:

ARTICLE VII – EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE

7.4 PROCEDURE

Grievances as defined by Section 7.1, shall be resolved in conformance with the following procedure:

STEP 1 – Any employee claiming a violation concerning the interpretation or application of this Agreement shall, within twenty-one (21) calendar days after such alleged violation has occurred, present such grievance to the employee’s supervisor as designated by the Employer...

7.6 WAIVER

If a grievance is not presented within the time limits set forth above, it shall be considered “waived...”

ARTICLE XXIV – LONGEVITY AND EDUCATIONAL INCENTIVE

January 1, 2012 – December 31, 2013 the following terms and conditions are effective:

24.1 The employee shall choose to be paid monthly longevity or supplementary pay based on educational credits as outlined in 24.3 of this ARTICLE.

24.3 Supplementary pay based on educational credits will be paid to employees after twelve (12) months of continuous employment at the monthly rate of

Education Credits stated in terms of College Quarter Credits

	<u>1-1-12</u>	<u>1-1-13</u>
45-89	\$141.08	\$143.90
90-134	\$242.87	\$247.73
135-179	\$344.67	\$351.56
180 or more	\$451.82	\$460.86

Not all courses are to be eligible for credit. Courses receiving qualifying credits must be job-related. (Thus, a 4 year degree is not automatically 180 credits—or a 2 year certificate is not automatically 90 credits.) Job related courses plus those formally required to enter such courses shall be counted. If Principles of Psychology (8 credits) is required before taking Psychology of Police work (3 credits) completion of these courses would yield a total of 11 qualifying credits. C.E.U.’s (Continuing Education Units) in job-related seminars, short courses, institutes, etc., shall also be counted.

The EMPLOYER shall determine which courses are job-related. Disputes are grievable based on the criteria outlined in the award of Minnesota Bureau of Mediation Services. Case No. 78-PN-370-A.

Notwithstanding anything in this paragraph to the contrary, no supplementary pay based on educational credits will be paid for education which the employee is required by law to have in order to be eligible for hire for all employees hired after November 4, 1988.

ARTICLE XXXVI – WAIVER

- 36.1 Any and all prior agreement, 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.
- 36.2 The parties mutually acknowledge that during the negotiations which resulted in the AGREEMENT, each had the unlimited right and opportunity to make demands and proposals with respect to any term or conditions 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. The EMPLOYER and the UNION each voluntarily and unqualifiedly waives 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.

BACKGROUND:

The grievant, Patrolman Joe Cox, hereinafter referred to as the grievant, was hired by the City in 2011. After one year of employment, the grievant opted for supplemental pay based upon educational credits pursuant to the provisions of the parties' collective bargaining agreement. He assumed that his extensive educational background (the credits he earned for both a BA and a JD degree) would put him beyond the top tier of pay as set forth in Section 24.3. The City, upon review of the grievant's undergraduate and graduate transcripts, CLE and other credit listings, granted him 56.24 quarter credits, far less than the credits to which the grievant believed he was entitled. The specific courses and credits upon which the grievant was relying will be set forth in the course of the argument and discussion sections set forth below.

The grievant submitted his post-secondary transcripts and requested the educational incentive pay on February 18, 2012. There were some discussions between the grievant and the human resources director, Eldona Bacon, following this submission. On April 16, 2012, Bacon informed the grievant that the City was taking the position that the grievant was entitled to the supplemental pay based on 56.24 credits. He then received the supplemental pay for the first time in his May 15, 2012 paycheck.

As a result, the Grievant filed the instant grievance on May 17, 2012.

POSITION OF THE PARTIES:

LELS

Timeliness

LELS claims that the grievance was timely because Section 7.4 Step 1 requires that a grievance be filed within twenty-one calendar days after such violation has occurred. The violation did not occur until the grievant was issued pay under Article 24 and the first time that he received pay under Section 24.3 was on May 15, 2012. Because the grievant submitted his grievance to his supervisor on May 17, 2012. The Grievance was timely.

With respect to the City's argument that the time began tolling from August 16, 2012, when the City informed the grievant that he would receive credit for only 56.24 credits, LELS cites arbitral precedent finding that the "occurrence" for purposes of applying time limits is the date the employer actually performs or commits the act. Here, the culmination of the City's credit calculation first occurred when the Grievant received his first paycheck under the calculation. Until that time, there was the possibility that the City might reconsider its determination. In fact the City, when notifying the Grievant of its calculation, indicated a willingness to meet on the matter which suggests that its decision had not been finalized at that time.

LELS also maintains that the violation is continuing in nature and should be deemed timely from any pay period in which the grievant was denied the appropriate supplemental pay, although backpay would only accrue from the date of filing. Here, however, the grievance was timely filed from the point at which the grievant was first denied the appropriate education supplement and his damages would include all damages commencing with his first payment of the educational supplement.

Merits

LELS maintains that the overriding issue in this case is to what extent the grievant is entitled to have credits earned in college and law school recognized for the purposes of supplementary pay. In its view, the City is seeking an extremely narrow definition of qualifying credits. Under the City's narrow construction, the grievant's undergraduate degree qualified him for 4 quarter credits. Such a restrictive application of Section 24.3 is unreasonable.

While LELS acknowledges that the language states that not all college credits apply, it contends that Section 24.3 must be read more broadly. The express language fails to provide much clarity other than to state that the qualifying credit must be job-related. The case referenced in the agreement, Case No. 78-PN-370-A, provides little

more definition than what is quoted in Section 24.3. The logical interpretation of the language is that while not all courses will be credited, a reasonable number will be, subject to a determination that the courses are job-related. The mere fact that the educational supplement tiers are based upon increments of 45 college quarter credits (which equates to a full load for a year by a college operating under a quarter system), and that the top tier is set at 180 college quarter credits (which equates to a graduation requirement under the quarter system) strongly implies that a four year college degree would likely satisfy the requirement to be eligible for pay at the top tier.

Consistent with this construction, LELS maintains that all 180 credits earned by the grievant as an undergraduate should be considered since they were a prerequisite for him to be admitted to Law School which studies are related to the job of a police officer. Assuming the arbitrator declines to adopt this theory, LELS argues that the breakdown provided by the grievant of undergraduate courses which he found particularly beneficial and related to his job should be adopted. The grievant provided compelling testimony regarding the value and benefit of these courses in his law enforcement career.

Specifically, insofar as police work requires documenting and accurately reporting events, it is difficult to comprehend how such undergraduate courses as College Writing, Public Affairs Reporting, Advanced Reporting, Publications Editing and Advanced Writing: Social Sciences could not be considered job-related. The same rationale is true for such courses as Algebra, General Psychology, Public Speaking, Acting: Fundamentals, Logic and Introduction to Women's Studies, Karate and a Government Internship. The fourteen courses listed, at a minimum, should have afforded an additional 52.0 credits pursuant to Section 24.3. Even if the grievant's entire undergraduate coursework does not count, a total of 56.0 credits for his undergraduate education is inherently more logical and reasonable than the City's tally of 4.0.

Comparing the City's previous actions with respect to Lt. Erika Scheider, finding that the grievant is entitled to 56.0 credits is conservative because Scheider was credited with 92.0 credits for her undergraduate education. Many of the courses for which the grievant seeks credit are similar to the courses for which Scheider was granted credit. They include Principles of Psychology, Effective Writing, Mass Communications in Society, Research Methods I and II, and Public Speaking. Placing Scheider on the second tier based upon her undergraduate classes alone suggests that the grievant with his Juris Doctorate should be placed at an even higher level. Notwithstanding that the determination with respect to Scheider was made several years ago, that determination was made pursuant to the same language and no reason has been advanced as to why the same standards should not apply.

With regard to the grievant's legal education, LELS insists that it is all related to his job as a police officer. The benefits of a legal education extend beyond the ability of one to recite case holdings. A legal education encourages one to think analytically to view issues from a variety of perspectives. The grievant testified that he utilized the skills learned in law school on the job on a daily basis. Even assuming that the arbitrator does not agree that the grievant should receive credit under Section 24.3 for his entire law

school education, many more courses should be credited than the 19.0 permitted by the City. The grievant has established that 55.0 semester credits, such as Contract and Torts Law and Family Law directly relate to his job. His calculation is conservative because it did not include Property.

The City has not explained what type of educational record would merit placement at the upper tiers of Section 24.3. There are no officers receiving the benefits of either of the upper two tiers. Granting 180 quarter credits from the grievant's undergraduate studies and 132 credits from law school and another 49.5 quarter credits for his other college coursework totals 361.5 quarter credits. If an officer with the grievant's educational background only qualifies for 56.24 credits, it is difficult to see how any officer could reach the top tier. The City is receiving the benefit of the grievant's advanced education and Article 24 provides that he be compensated for it.

In addressing the City's argument that the language in Section 24.3 concerning Principles of Psychology makes most undergraduate courses ineligible for credit, LELS notes that the City's treatment of Scheider indicates that it does recognize that Psychology relates to the job of a police officer. Given the way the tiers were set up, logically a four year degree plus extensive graduate work would easily satisfy the top tier and that is where the grievant should be placed.

LELS alleges that the City added to the adverse impact of failing to credit the grievant for law school courses reasonably related to his police officer job by applying a 1.33 multiplier to the semester credits it did consider. It also applied the same erroneous multiplier to the semester credits which it allowed from North Hennepin Community College, Normandale Community College and Century College. On cross-examination, the City inadvertently acknowledged that the appropriate multiplier is 1.5. Thirty semester credits multiplied by 1.5 is the equivalent of 45 quarter credits. Computer searches routinely recognized a 1.5 multiplier. While the City implied that it used the 1.33 multiplier on the advice of St. Cloud State University, it submitted no documentary evidence to that effect.

There is no contractual basis for the City to discount the grievant's continuing legal education credits and the City did not cite any precedent for such a discount. The City counted only 1/10 of the grievant's 111.0 qualifying CLE credits. CLEs are advanced legal education seminars for practicing attorneys. It is logical to assume that these advanced seminars would be credited at the stated amount and not subject to discount.

In sum, LELS requests that the arbitrator sustain the grievance and award back pay at the top tier rate.

CITY

Timeliness of Grievance

According to the City, generally contractual limitations on the time periods within which grievance must be filed are strictly enforced. Based upon the express language of Article VII, Section 7.6 of the parties' agreement, the instant grievance should be considered waived, and denied as such. In the alternative, the City argues that any conclusion that the matter is a continuing violation and should result in a back pay award limited to the pay period immediately following the date of the filing of grievant's grievance.

Merits

According to the City, the substance of the parties' contractual dispute is this: the City's interpretation of Section 24.3 results in Officer Cox beginning his first anniversary of employment with a wage supplement as if he had been on the police force for 4 years; LELS demands that this one-year veteran be paid the same as a sixteen-year veteran of the department. Neither common sense nor the contract support LELS' position.

The City relies upon the phrase in Section 24.3 that qualifying courses "must be job-related." The contract defines "job-related" courses by way of an example: "Job related courses plus those formally required to enter such courses shall be counted. If Principles of Psychology (8 credits) is required before taking Psychology of Police Work (3 credits), completion of these courses would yield a total of 11 qualifying credits." Without question, then, the contract distinguishes between courses that generally may be useful to a patrol officer (Principles of Psychology) from courses that are much more specifically designed for and narrowly tailored to actual police work (Psychology of Police Work.) The City therefore interprets Section 24.3 to intend that qualifying courses, at a minimum, are those that are more than merely useful in police work.

Section 24.3 dictates that educational courses that are required for law enforcement employment do not qualify for educational incentive supplementary pay. The grievant's educational courses at Minneapolis Community & Technical College, his POST/OSHA mandated courses and his Anoka County Sheriff's Office training courses are required for his employment as a peace officer in Minnesota and therefore, cannot be counted.

The City looks to the same transcripts as relied upon by LELS. Noting that the grievant completed a variety of political science, journalism, philosophy and other liberal arts courses at the University of Minnesota, the City insists that the only course that could arguably be labeled as more than merely useful in police work is American Constitutional Law II, which the City credited. LELS, on the other hand, provides a list of undergraduate courses that it argues qualify, such as General Psychology, Advanced Reporting (although the grievant failed the course and earned no actual graduation credit); Government Internship (in which reading unemployment compensation appeal

hearing transcripts somehow “has direct applicability to law enforcement duties”); and the theater course Acting: Fundamentals (because sometimes you have to lie to someone on the street). On this record, the City submits that it has correctly reviewed the University of Minnesota transcript and granted 4.0 quarter credits to qualify for the educational incentive supplementary pay credit.

With respect to the Hamline University School of Law, the City credited several courses that could arguably be labeled as more than merely useful in police work, i.e., Criminal Law, Constitutional Law I and II, Criminal Procedure I, Prosecution and Defense of White Collar Crime, Law of Juvenile Delinquency, and Evidence. These add up to 19.0 total semester credits. Under the commonly accepted semester to quarter credit multiplier (1.33 to 1), the City granted 25.27 quarter credits. LELS claims that the grievant was entitled to credit for such courses as Contracts, Practicum in Administrative Law, or Interviewing/Counseling/Planning as directly applicable to law enforcement duties. Studying the contours of the Statute of Frauds, Observing an Administrative Law Judge in action, or Practicing Client Counseling is not what Section 24.3 contemplates when it demands that all qualifying course work must be “job-related.” The City insists that it properly credited the grievant for 25.27 quarter credits from Hamline University School of Law.

Looking at transcripts from Normandale Community College, Century College and North Hennepin Community College, the City maintains that it fully credited all courses which were not requisites for employment as a peace officer. The sole issue in dispute involves the semester to quarter credit conversion factor. The City argues that 1.33, based upon the testimony at hearing is the more credible conversion factor in this case and the City’s crediting 15.87 quarter credits is correct.

LELS’ dispute regarding the CLE, or CEU, coursework also involves the appropriate conversion factor. The City relies upon testimony by Human Relations Director Bacon that these credits should be converted into quarter credits using a 10-to-1 conversion factor. LELS believes that there should be no conversion factor. In LELS’ view, a 2-day criminal justice seminar (15.0 CLE credits) should be considered equal to a full quarter of undergraduate courses. LELS is simply flat out wrong. They are not equivalent. The 11.10 quarter credits it granted for the CLE coursework is appropriate.

Under a rational and responsible interpretation of the parties’ contract the 56.24 quarter credits granted to the grievant is the correct figure.

In addressing testimony provider by Scheider, the City notes that this occurred too many years ago for Scheider to recall and that the City’s actions in that case do not constitute a binding past practice in this case. At hearing, Scheider was unable to recall the coursework that was actually credited by the City as qualifying under the parties’ contract. Bacon testified that there was considerable confusion regarding the operation of the educational incentive provision in the parties’ contract at the time. The provision has basically been dormant and unused for many years since its inception and Scheider’s case is the only known instance where credits were awarded without the need of a negotiated

settlement between the parties. No past practice exists because there is nothing unequivocal, clearly enunciated or readily ascertainable with respect to the City's action regarding Section 24.3.

Even if the evidence did suggest the existence of a past practice, Article XXXVI, contains a specific waiver, or "zipper clause," that eliminates any potential past practices. Therefore, the experience by Scheider in which she received qualifying credit of 109 credits for her graduate coursework nowhere near the level demanded by the Union in this case does not impact the present case.

Finally, the City stresses that the Grievant's performance as a police officer has never been the question in this case because it does value the grievant and agrees that his educational background should be rewarded. To that end, the City has accelerated his pay by a full three years, compared to his time-in-service or longevity under a correct interpretation and application of Section 24.3. Because the City correctly interpreted and applied Section 24.3 in this case, the Union's grievance should be denied.

DISCUSSION:

Timeliness of the Grievance

The City argues that because the grievant was aware of its determination on April 16, 2012, his grievance dated May 17, 2012, is untimely and should be considered waived pursuant to the time requirements set forth Article VII, Section 7.4 and 7.6. The City, however, did not actually take any action with respect to paying the grievant educational supplementary pay until the May 15, 2012 paycheck. It is the actual payment of the supplementary educational credit pay, a firm action on the City's part, that triggers the time for filing the grievance, and not the mere announcement of how the City intended to credit the courses. Accordingly, it is concluded that the grievance was timely filed.

Merits

LELS and the grievant argue that the entire course of study for both the BA and Juris Doctor degrees should be credited for supplementary pay purposes because both degrees are job-related. They cite the tier definitions as support for this proposition. This argument is rejected. The express language of Section 24.3 and BMS Case No. 78-PN-370-A, p. 23, makes it clear that each course taken is to be considered independently on its own merits and evaluated by the City utilizing the standard of whether or not the course is job-related. Section 24.3 and Case No. 78-PN-370-A, which is incorporated into the contract by specific reference, provide for a course-by-course determination as to when credits are to be granted for course-work. Unfortunately, only the grievant's transcripts and not synopses of the various courses were available for review. Without more, the City and ultimately the undersigned are reduced to reviewing the course title and making an evaluation as to whether the course should be credited.

In reviewing the transcripts to ascertain whether the course is job-related, based upon the title of the course alone, some courses appear to be obviously unrelated, others appear to be clearly related to the performance of law enforcement duties, and a third category of course may or may not be related to the patrolmen's duties.

The City argues that the Section 24.3 phrase "job-related" must mean "more than courses which generally may be useful to a patrol officer." It maintains that "job-related" at a minimum applies only to those that are more than merely useful in police work. This argument is also rejected as adding a term or condition to the language at issue which does not exist. The test is whether or not the courses are related to the performance of a patrolman's job as a law enforcement officer, nothing more and nothing less.

Applying this standard, it is concluded that the City's determination as to courses for which credit should be granted was unduly and unreasonably restrictive. It is difficult to see how the City could find courses like Dispute Resolution Practices and Karate as unrelated to the duties of a police officer.

Then there are courses for which the grievant and LELS seek credit that, on their face, would not warrant credit for supplementary pay. The City is correct in its assessment that a Government Internship comprised of reading unemployment compensation hearing transcripts and courses with titles such as the Fundamentals of Acting, General Biology, Intermediate Algebra, Astronomy, and Philosophy, have little or nothing to do with the performance of grievant's law enforcement duties.

The third category of courses are those listed in the transcripts for which credit could arguably be denied or granted. The City is entitled to make the determination with respect to these courses, but it must use the appropriate standard, and not the restrictive standard that it has applied. For example, with respect to the University of Minnesota undergraduate course, Fundamentals of Photography, this course may be job-related if it assists the grievant in photographing or analyzing a crime scene. On the other hand, if the course involved instruction on developing film and general aesthetic principles of photography, it would not be job-related.

In reviewing, the University of Minnesota undergraduate transcript, it is reasonable to conclude that Public Speaking, Public Affairs Reporting, Logic, and Advanced Reporting (p. 2, second column, where the grievant earned an A) should all have been credited as directly relating to the grievant's job as a patrolman.

Similarly, looking at the grievant's law school transcript, the City has once again applied the standard too narrowly. The City is entitled to deny credit for those cases where job-relatedness is debatable and some of the courses which the grievant cites as entitling him to credit, such as Contracts and Administrative Law, are debatable. On the other hand, the following cases appear to be reasonably related to the performance of his position in law enforcement and should all have been credited as job-related: Civil Procedure, Family Law, Moot Court, Dispute Resolutions and Seminar on the Second Amendment.

The contract is silent regarding the appropriate conversion formula to be utilized in converting semester credits to quarter credits. This affects the credits from Normandale Community College, Century College, and North Hennepin Community College. Although Bacon testified that she checked with one institution, St. Cloud State, no evidence was introduced to establish that this is how St. Cloud converted credits. From a simple mathematical perspective, and based upon Bacon's testimony under cross-examination, the 1.5 multiplier is more reasonable than the 1.33 multiplier. These credits should be calculated utilizing the 1.5 multiplier formula conversion.

The contract is not silent regarding the crediting of CLE credits. LELS requests a one-for-one credit for each CLE unit, or CEU. The collective bargaining agreement and BMS Case No. 78-PN-370-A provide that C.E.U.'s or CLE's shall be counted. Neither document, however, specifies how they are to be counted for purposes of the Supplemental Pay. The undersigned finds that the City's rationale for how they are to be credited is reasonable, especially given comparisons to other types of coursework. Utilizing the City's proposed conversion make more sense than crediting the grievant's CLE's, one credit for one unit as LELS argues, given the number of credits offered for a course extending throughout an entire quarter. Under the circumstances, it cannot be concluded that the City's decision to use a 10-to-1 conversion factor for these courses is unreasonable.

LELS and the grievant point to the City's grant of credit to Scheider utilizing a much more liberal standard some years ago in the past. Evidence suggests that this is the case but that other past instances resulted in disputes between the parties. A single instance does not make a past practice. Moreover, the evidence was unclear as to exactly what courses the City had and had not granted credit for the supplemental pay in Scheider's case.

As a remedy, the City is directed to re-compute the grievant's credits based upon the above findings. He should, at a minimum, receive credit for the courses so noted above as reasonably job-related on their face based upon the title of the courses, and the conversion factor for the Normandale and North Hennepin Community Colleges as well as Century College courses should be calculated at a rate of 1.5.

Jurisdiction is retained for 60 days solely with respect to any problems which may arise with this remedy. Accordingly, it is my decision and

AWARD

1. The grievance was timely filed.
2. The City did **not** correctly calculate grievant's educational incentive supplementary pay rate under Articles XXIV (Section 2.4) of the collective bargaining agreement.

3. The City is directed to re-compute the grievant's credits based upon the above conclusions. He should, at a minimum, receive credit for the course so note above and the conversion factor should for accepted semester credits should be 1.5.
4. Jurisdiction is retained with respect to remedy only for 60 days in the event that additional problems arise.

Dated this 29th day of July, 2013, in Madison, Wisconsin.

A handwritten signature in cursive script that reads "Mary Jo Schiavoni".

By _____
Mary Jo Schiavoni, Arbitrator