IN THE MATTER OF ARBITRATION	**OPINION & AWARD**
-between-	**Grievance Arbitration**
THE GRADUATE EMPLOYEES' ORGANIZATION, IFT/AFT 6300	**F.M.C.S. Case 10/092960**
-and-	**Re: Tuition Waivers**
THE UNIVERSITY of ILLINOIS CHAMPAIGN, ILLINOIS	**Before: Jay C. Fogelberg Neutral Arbitrator**

Representation-

For the Union: Gilbert A. Cornfield, Attorney
Jon Nadler, Field Service Director

For the University: Shig W. Yasunaga, Associate Counsel
Joe Bohn, Asst. Director Employee Relations

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides in Article XVIII, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the grievance procedure. A formal complaint was submitted by the Union on behalf of the Grievants on or about July 13, 2010, and thereafter appealed to arbitration when the parties were unable to resolve

this matter to their mutual satisfaction. The under-signed was then selected as the Neutral Arbitrator from a panel provided to the parties by the Federal Mediation & Conciliation Service, Office of Arbitration, and a hearing convened on July 18, 2011 in Champaign, Illinois, and continued the next day. Following receipt of position statements, testimony and supportive documentation, each side indicated a preference for submitting written summary arguments. These documents were received by the Arbitrator on August 18, 2011, at which time the hearing was deemed officially closed.

At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and although they were unable to agree upon a statement of the issue, the following is believed to fairly represent the matters to be resolved.

The Issue-

Did the University violate the parties' Master Contract when they unilaterally altered the tuition waivers for those bargaining unit members who became Graduate Assistants or Teaching Assistants during the 2010-11 academic year? If so , what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that the Graduate Employees' Organization, Local 6300 (hereafter "Union," "Local," or "GEO") represents the Teaching and Graduate Assistants "in good standing"...."and who hold a total appointment between .25 FTE and .67 FTE, or who receive a tuition and fee waiver from an assistantship appointment" (Joint Ex. 1). In 2003, they negotiated and executed their first collective bargaining agreement with the University of Illinois ("University," "Administration," or "Employer") covering terms and conditions of employment (Joint Ex. 3). In 2006, a successor agreement was negotiated and put into place. That contract expired in August of 2009 (Joint Ex. 2).

There are approximately 2700 Assistants in the bargaining unit, a vast majority of whom are from out-of-state. Prior to the current 2009-12 Agreement, there was no provision in the Contract addressing tuition waivers – a means of compensating the Grievants who perform teaching or other duties for the University at the same time they are working toward an advance degree. Rather, they were under the jurisdiction of the University's Board of Trustees' "General Rules" (Union's Ex. 23; *infra*) which established waivers for both in and out-state Assistants who were

appointed for a minimum time of service.[1]

In February of 2009, a member of the bargaining unit found information on the web from the Provost's Office addressing the economic crisis that was affecting the University, and exploring various cost-savings options (Union's Ex. 1). The published information included consideration of a "provisional recommendation" that would raise the minimum tuition threshold from 25% to 33% for all assistantships (*id.*). In a subsequent Q & A, the University indicated that the proposed changes would not apply to students already holding a "25% to 32% assistantship appointment" (Union's Ex. 2). According to the Union, this created considerable concern among its members as its adoption would have a considerable impact in terms of the loss of subsidies – particularly for out-state Assistants who were charged a higher tuition rate.

Two meetings between the parties followed in advance of the pending negotiations over a new contract, at which time the GEO expressed their displeasure with the proposed changes. Thereafter, the Administration indicated that they were no longer proceeding with the idea of adjusting the tuition waivers due to the adverse reaction from the

[1] Under the established General Rules, the term "graduate assistants" applied to those engaged in teaching as well.

Local. According to the Provost's office, it was simply "...not feasible to proceed with the provisional recommendation" at that time (Union's Exs. 2 and 19).

The parties began negotiations over a new 2009-12 Labor Agreement in April of 2009. At that time, the Local proposed new language which addressed the issue of tuition waiver (Union's Ex. 6). Thereafter a number of proposals and counter proposals were exchanged through the summer and into the fall of that year (*id.*). On November 14, 2009, the Employer proposed that the Local drop its tuition waiver proposal and that a "Side Letter" be appended to the new contract to read:

> "During the term of this Agreement, the University will bargain the impact of any change by the Board of Trustees of the University of Illinois to the graduate assistant tuition waiver policy set forth in Article IV, Section 5 of the General Rules Concerning the University Organization and Procedures. The University acknowledges that the term "graduate assistant" as used in Article IV, Section 5, of the General Rules includes Teaching Assistants" (*id.*, at tab 11).

The Local countered that same day rejecting the Administration's proposal relative to tuition waivers and substituting language that any changes relative to the waivers that might be considered by the University during the life of the new Labor Agreement would require the

Employer to "bargain in good faith" to reach an agreement or until impasse (*id.*, at tab 12).

Two days later the GEO went out on strike over the issue of the Employer's proposed side letter.[2]

On November 17th the parties met again and eventually agreed upon new language to be included in the Master Contract in the form of a side letter that addressed the issue of tuition waivers (Union's Ex. 6; tab 15, *infra*). Thereafter, the Contract was ratified by the membership and executed by the parties.

During the first academic year of the new 2009-12 Agreement, there were no changes put into effect which pertained to the issue here under consideration. However, in the summer of 2010 the College of Fine & Applied Arts announced changes in the tuition waiver policy which effectively raised the minimum waiver-generating appointment to 33% FTE (Union's Ex. 20). Subsequently, the GEO filed a formal class-action grievance with the University on July 13, 2010, alleging that the action constituted a violation of the parties' Master Agreement and Side Letter on Tuition Waivers (Joint Ex. 4). In September of that same year they also

[2] All other matters had essentially been agreed to with the exception of changes in tuition waivers.

filed an unfair labor practice complaint with the Illinois Educational Labor Relations Board ("Board") alleging a violation of Section 14(a)(5) of the Illinois Education Labor Relations Act ("Act") (Joint Ex. 5). On April 29, 2011, the Board deferred the matter to binding arbitration for resolution (*id.*).

Relevant Contractual and Policy Provisions-

From the Master Agreement:

> II
> Recognition
>
> Section 2.1. The University hereby recognizes the Graduate employees' Organization, IFT/AFT, AFL-CIO ("Union") as the exclusive representative for wages, hours, terms and conditions of employment for all employees within the bargaining unit as certified by the IELRB.....
>
> * * *
>
> X
> Management Rights
>
> A. Except as specifically abridged by this Agreement, all powers, rights and authority of the University are reserved by the University, and the University retains sole and exclusive control over any and all matters in the operation, management and administration of the University, the control of its properties and the maintenance of order and efficiency of the workforce, and complete authority to exercise those rights and powers by making and implementing decisions

with respect to those rights and powers. Such rights and powers include, but are not limited to, the exclusive right and power:

* * *

(12) to adopt and enforce policies, rules and regulations, including rules and regulations governing tuition waivers and the work, training, and conduct of assistants and to comply with state and federal law;

* * *

Side Letter

During the term of this Agreement, Graduate Assistants and Teaching Assistants will not have their tuition waivers reduced while they hold qualifying assistantships, are in good academic standing, and are making proper progress toward graduation in the program in which they began.

This commitment is consistent with longstanding and ongoing practice.

From the University's Board of Trustees General Rules:

Article IV
Employment Policies

* * *

For graduate assistants, waiver of base-rate tuition, i.e. the in-State graduate (not professional) tuition rate, is granted for all university graduate assistants on appointment for at least 25 per cent but not more than 67 percent of full-time service; a waiver of service fees is granted to those graduate assistants on appointment for at leas 25 percent of full-time service.

Positions of the Parties-

The **UNION** takes the position in this matter that the Employer has violated the parties' Labor Agreement – and more particularly the Letter of Agreement appended to it – by unilaterally altering the tuition waivers for those who have been awarded an assistantship since the effective date of the contract in the College of Fine and Applied Arts. In support of their claim, the GEO maintains that the Administration made their intentions known in 2009 when they considered altering the tuition waiver rates for all colleges within the University. However, when that proposal was met with resistance from the Union's membership, they retreated from their recommendation. Throughout the negotiations over the current agreement, the Local asserts they made it clear that they sought language in the contract that would shield the Grievants who received appointments to assistantships both prior to the implementation of the current contract, and during its term, from any unilateral change in tuition waivers. Indeed they contend, it was enough of a "hot-button" issue that it resulted in a strike for the first time ever by the GEO when the Employer refused to include protective language addressing the subject. The

Union further contends that eventually, when the parties agreed to the Letter of Agreement and the strike was settled, the language contained in the appendix was lifted from the email authored by the (then) acting Chancellor of the University in November of 2009, and nearly identical to it word-for-word. The provision does not specify who might be "grandfathered" under the prior formula, or that it would only affect new appointees during the term of the agreement. That language is clear on its face, according to the Union, disallowing any tuition waiver reduction for either in or out-state Assistants working for the University. Indeed, if it is to be interpreted as the Employer now asserts, then there would have never been an agreement reached in the first instance ending the work stoppage in November of 2009. Accordingly, they ask that the grievance be sustained and that the Administration be directed to restore full tuition waivers to assistants whose waivers have been reduced to the base rate, and to otherwise make the Grievants whole.

Conversely, the **UNIVERSITY** takes the position that there has been no contract violation as a result of the change in the tuition waiver that was instituted within the College of Fine & Applied Arts during the course of the 2010-11 school year. As support for their claim, the Administration

contends that the Letter of Agreement is clearly the language that lies at the center of this dispute. It cannot logically be interpreted to include new-hires into assistantships as the GEO would seem to argue. According to the Employer, the letter did nothing more than memorialize a long-standing past practice whereby those already receiving a tuition waiver at the designated rate would be grandfathered at that rate. In essence, it preserved the status quo which is precisely what the Local claimed they were seeking at the bargaining table. Further they claim that during the final round of bargaining, the Administration made it abundantly clear to the Union's negotiating team that the side letter of agreement would not apply to newly appointed assistants during the life of the contract. The genesis for the change was the relatively dire economic situation the University of Illinois was facing in the fall of 2009, and the fact that they were looking for ways to conserve expenditures, not unlike nearly every other public institution across the country. Thus, each college in the system was challenged to look at their respective budgets and make changes as they saw fit. Particularly, the College of Fine & Applied Arts, which is known for the comprehensiveness of its programs and its longstanding commitment to maintaining excellence in its graduate

programs, was facing a relatively sever budget reduction for the academic year 2010-11 of nearly 8% and needed to make changes. Indeed, the Administration argues that the Union was well aware of this at the bargaining table. Additionally they maintain that inasmuch as this is a contract interpretation dispute, the burden of proof lies with the Union to demonstrate through clear and convincing evidence that the applicable language in the contract – and specifically the LoA – supports their position. That however, has not been accomplished here in the University's estimation, as the clear language in the supplement plainly expresses the intent of the parties which is most consistent with the position taken by the Administration. For all these reasons then, they ask that the GEO's grievance be denied in its entirety.

Analysis of the Evidence-

A review of the record demonstrates that there are a number of uncontested salient facts that are not in dispute:

- Currently, there are approximately 100 graduate programs among the various colleges within the University, employing approximately 2700 Graduate or Teaching Assistants.

- Beginning in 2008 and continuing through last year, the Employer (like so many other public universities through

out the country) began to experience financial difficulties in part due to reduced state and federal appropriations.

- That prior to the execution and implementation of the current (2009-12) Master Agreement, the University's practice was to establish and/or alter tuition waiver support in the colleges, guided by the Board of Trustees' General Rules.

- That the management right's language contained in the current contract, reserves with the Administration the right to adopt and enforce policies and regulations governing tuition waivers (at Article IX; Section A(12).

- During the first year under the new collective bargaining agreement, there were no amendments to the tuition waiver policies for Assistants. However that changed with the advent of the 2010-11 academic year within the College of Fine and Applied Arts ("CFAA").

- That the Assistants who received reduced tuition waivers effective with the 2010-11 year, were all members of the bargaining unit and therefore covered by its terms.

The foregoing serves as a backdrop to this matter and reveals the fundamental issue which is whether the Side Letter appended to the parties' labor agreement is applicable to all members of the bargaining unit serving as Assistants regardless of when they were appointed (Union's position), or limited to those who were already appointed to an Assistant position as of the start of the 2009-10 academic year (Employer's position).

The Union maintains that the reduction in the amount of tuition waivers

within the College of Fine & Applied Arts during the term of the new Agreement, violates the Side Letter inasmuch as full tuition waivers, including the out-of-state charges, have been part of the compensation for Assistants prior to the execution of Joint Exhibit 1, and during the first academic year which commenced in mid-August of 2009 as well. To that end, as the Administration has accurately observed, the Local bears the initial burden to proof to demonstrate via clear and convincing evidence that a contract violation occurred beginning in the fall of 2010, when the CFAA first sought and then obtained adjustments to the tuition waiver support levels within a number of its educational units. It is estimated that their decision affected approximately one hundred graduate students (Tr. p. 251).[3]

Following a careful review of the evidence placed into the record and the accompanying arguments of the parties as well, I conclude that the Local has met their evidentiary obligation in this instance.

The University takes the position that the tuition waiver reductions that were imposed for the 2010-11 academic year were not in contravention of the Side Letter nor the long-standing practice it effectively memorialized which allowed them to alter tuition waivers for newly appointed Assistants

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[3] All references to the transcript of the arbitration hearing are noted as "Tr." followed by the page number.

while grandfathering the existing ones. The plain language of the Side Letter, they assert, "grandfathers" existing Graduate and Teaching Assistants from such changes to a unit's waiver level so that they may continue to receive the waiver level they were offered at the time they entered the program - so long as they maintain the three conditions enumerated therein (i.e. good academic standing, adequate progress toward graduation, and remain in that program).

Distilled to its essence, this contract interpretation dispute clearly is centered on the Letter of Agreement. Consistently, the Employer has maintained that the language contained therein is clear and unambiguous on its face, and I would agree with their assessment.

The axiom often referenced in contract interpretation disputes such as this, holds that if the reviewer can determine the meaning of the language in question without any other guide than a knowledge of the simple facts on which, from the nature of the language in general, it depends then it is not ambiguous. See: 13 *Corpus Juris, Sec.*, 481, p. 520. Similarly, in their well-respected treatise on labor arbitration, the Elkouris have observed that contract language should be given its plain meaning; i.e. the meaning that would be attached by a reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and

contemporaneous with its making. Elkouri & Elkouri, *How Arbitration Works*, BNA 6th Ed.; p. 431. At times referred to as the "Elkouri" rule, and championed by Professor Williston in his treatise on contracts, this objective approach to the interpretation of a parties' agreement, holds that if the language conveys a distinct idea, then there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by the reviewing neutral. This would hold true even if the parties themselves disagree as to the meaning of the provision in question (*id*). This rule is based upon the presumption that understandable language means what it says, despite the contention of one of the parties that something other than the apparent connotation was intended. It is also practical as it brings order to contract construction by excluding the clear language contained in the contract as a subject eligible for dispute. In addition, it is equitable: if language is clear and unambiguous, both parties should understand its meaning clearly and unambiguously and, thus, know how and when they are obligated once they execute the document.

Breaking down the single sentence that comprises the Side Letter, supports the conclusion reached here. it begins by identifying the life span of the document as being coincident with "...the term of this Agreement"[4]

[4] The word "Agreement" is in direct reference to the title of the document: "Side Letter to

follows is critical. It identifies the subject of the sentence in plain and clear language as being the: "Graduate Assistants and Teaching Assistants." The Letter contains no other subject modifier. The document then identifies the gravamen of the agreement reached by the parties when it provides that these Assistants, "...will not have their tuition waivers reduced while they hold qualifying assistantships," provided they meet the criteria thereafter enumerated. That is, they are holding "qualified assistantships, are in good academic standing, and are making proper progress toward graduation in the program which they began."

Significantly, nothing contained in this brief paragraph limits its application solely to those already holding such a position at the time the new Contract was agreed to and thereafter implemented. No descriptor is found which might otherwise qualify the Letter's application.

Article II of the parties' Labor Agreement recognizes the Local as the exclusive representative for all:

> "....assistants who are graduate students in good standing at the University's Urbana-Champaign campus, *and who have appointments as either Teaching Assistants...or Graduate Assistants*; and either hold a total appointment between .25 FET and .67 FTE, *or who receive a tuition and fee waiver from an assistantship appointment*" (Joint Ex. 1; emphasis added).

There is no argument but that this language covers both those Graduate

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the 2009-2012 *Agreement...*" (emphasis added).

and Teaching Assistants who held such positions prior to the implementation of the new Collective Barging Agreement and who continued to do so after August 16, 2009, as well as those who receive appointments as Graduate Assistants or Teaching Assistants after that date. Similarly, the Side Letter makes no distinction as well. Indeed, there is no dispute but that all terms of the contract, other than the Side Letter, apply to all the members of the bargaining unit whether they were pre-existing Assistants or newly appointed during the term of the Agreement.

A well-recognized rule of construction holds that a word used by the parties in one sense is to be interpreted in the same sense throughout the document, absent strong evidence to the contrary (*id.*, p. 452). The conclusion arrived at here, is in harmony with that principle. The wording used to identify the bargaining unit in Article II is most consistent with the language identifying those covered by the Letter of Agreement.

I have also been guided in my analysis of the evidence by yet another commonly applied axiom of contract interpretation which maintains that the sections or portions of an agreement cannot be isolated from the balance of the document and given independent construction. The agreement must be considered as a whole and interpreted in a manner that supports consistency throughout. Viewing the Master Agreement in this

light, reveals that the parties have consistently employed modifiers where they deemed it necessary. Examples abound. In Article IV ("Eligibility for Assistantship Appointments"), Section "D" begins: "All *newly appointed and re-appointed* TAs and GAs...." (emphasis added). Had similar distinguishing language been woven into the Side Letter, there would be little dispute concerning its limited application, as the Administration has argued here. Further, in Article XVII ("Leaves and Holidays"), Section A, the final sentence differentiates the more general term "Assistantships" by including identifying language regarding Assistants, "...on a 9-month or semester-by-semester basis..." as those excluded from the vacation benefit.

Perhaps most revealing is the language found in Article XIV ("Wages"). In the final two paragraphs of this section of the Contract, the parties have crafted language which specifically identifies "*continuing* Assistants," and those who hold "*continuing* assistant appointments" (Joint Ex. 1, p. 15; emphasis added). The use of such modifiers demonstrates clearly that when the parties sought to distinguish between someone other than a newly-appointed Assistant, they knew full well how to express it. The evidence further reveals that this language was also found in the predecessor agreement. Under direct testimony, the Union's Field Services Director, Jon Nadler, who has been assigned to

this bargaining unit since 2005, and who participated in negotiations over the current Labor Agreement offered uncontested testimony regarding this portion of the Contract:

> Union: "At any time in the (2009-2012) negotiations, did the Administration negotiators ever condition their assurances about the levels of tuition waiver, that it would only affect the so-called "continuing assistants?'"
>
> Nadler: No, no" (Tr. p. 370).

To conclude that the Letter of Agreement applies solely to those Assistants who received their appointments as TAs and GAs prior to the effective date of the new contract or in advance of the altered waiver support levels sought by the CFAA, would effectively isolate the supplemental bargain (indeed the singular bargain that ultimately resulted in the settlement of the strike) from the balance of the parties' Master Agreement. In essence it would assign the Side Letter a meaning inconsistent with the wording used throughout the rest of the document. No evidence was proffered indicating that such was the parties' intent.

The foregoing analysis is believed to be dispositive of this dispute. However, two other facts adduced by the evidence placed into the record, warrant mention. The first concerns the Employer's argument that the Side Letter was nothing more than a codification of a past practice

whereby previously existing Graduate and Teaching Assistants were routinely grandfathered in order that they would continue to receive the waiver level offered at the time they entered the program. However, the plain and unambiguous language in the Side Letter itself fails to make such a distinction. Without it, the "Scope of Agreement" provision found in Article XXI of the Contract applies. Commonly referred to as a "zipper clause," it too states in clear and unambiguous terms that "no past practice, course of conduct, or understanding prior to the date of ratification which varies, waives or modifies any of the express terms or conditions contained herein shall be binding upon the parties...." While the University aptly demonstrated the existence of a past practice favoring their position, it was nevertheless altered with the agreement to and execution of, the clearly-worded Side Letter and its appendage to the new Master Contract.

The Employer further argues that the language in issue was proposed by the GEO at the final November 17, 2009 bargaining session which ultimately became the substantive part of the Side Letter of Agreement. Thus, it follows, according to the Administration, that if the Union wanted a broader application of the supplemental agreement, it

was incumbent upon them to formulate language which more clearly conveyed their intent. This assertion however, ignores the unrefuted fact that the language suggested by the Union was lifted nearly verbatim from the November 16, 2009 e-mail authored by the University's Provost and widely distributed among the University's staff – both instructional and otherwise (Union's Ex. 8). Moreover, as already discussed, I find the language that ultimately found its way into the Side Letter is in fact unambiguous in its application to all members of the bargaining unit, rather than merely to those who the University sought to "grandfather."

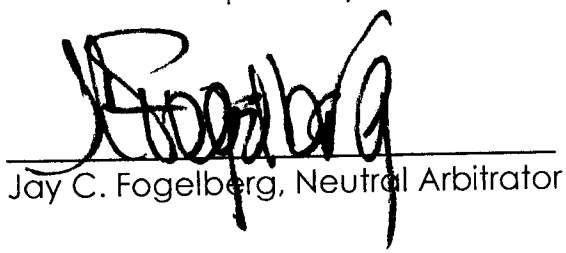
Finally, while it is accurate to characterize the rights reserved to management as set forth in Article IX as being "broad" in scope, as maintained by the University, the argument ignores the conditional phrasing found in the first paragraph of Section A. It states: "*Except as specifically abridged by this Agreement*" (emphasis added). As the wording of the Side Letter has been found to be clear on its face, its application necessarily places a limitation on the managerial prerogatives otherwise reserved with the Board in regards in connection with tuition waivers.

Award-

Based upon the foregoing analysis, I conclude the Union's grievance has merit and that the Employer's actions violated the plain terms and conditions of the 2009-12 Letter of Agreement executed by the parties. Accordingly, it is sustained and the Administration is forthwith directed to make the Grievants who have been adversely affected by the unilateral elimination of full tuition waivers whole, restoring them to the levels that were in place prior to the summer of 2010 when they were amended.

I will retain jurisdiction in this matter for the sole purpose of resolving any dispute that may arise in connection with its implementation.

Respectfully submitted this 18th day of September, 2011.



Jay C. Fogelberg, Neutral Arbitrator