BEFORE GARY L. AXON, ARBITRATOR

In the Matter of the Arbitration Between INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL UNION 4121, Union, and THE UNIVERSITY OF WASHINGTON, Employer.	UNION'S RESPONSE TO UNIVERSITY'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

The University of Washington (University or UW) submitted a motion for reconsideration (UW Motion) on October 19, 2012 requesting that the Arbitrator reconsider and vacate the Arbitrator's Opinion and Award (Arbitrator Decision) dated May 24, 2012. The University's motion should be denied because there is no provision for reconsideration under the collective bargaining agreement, and, under well recognized law, reconsideration and modification of a binding arbitration award is not legally permissible absent mutual consent of the parties.[1] Furthermore, the arguments in the University's motion simply re-package and elaborate on arguments already made during the hearing and in its post-hearing brief, and thus provide no basis for the Arbitrator to vacate the decision.

[1] The Union has not and does not consent to reconsideration of the arbitrator's decision. The arbitrator's jurisdiction continues solely to resolve the remedial aspects of the case.

A. The Arbitrator does not have jurisdiction to reconsider his Opinion and Award

The collective bargaining agreement (CBA) provides that the arbitrator shall render a decision on the grievance within 30 days of the close of the hearing and that "the decision of the arbitrator shall be binding on all parties." (Article 8) The CBA does not contain any provision which authorizes or permits the arbitrator to reconsider or interpret an award. Consequently, the arbitrator has no authority under the CBA to reconsider a decision after it is rendered.

Under the common law doctrine of *functus officio*, an arbitrator may not redetermine an arbitration award. (*McLatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 733-34 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982))

> It is [a] fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is functus officio and can do nothing more in regard to the subject matter of the arbitration.

686 F.2d at 734 (quoting *La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967)).

The rule that an arbitrator has no power to reconsider or vacate an award after the arbitrator has issued his decision is widely accepted in labor arbitration. See, Elkouri and Elkouri, *How Arbitration Works*, pp. 387-390 (5th Ed. 1997).

> The authority and jurisdiction of arbitrators are entirely terminated by the completion and delivery of an award. They have thereafter no power to recall the same, to order a rehearing, to amend, or to "interpret" in such manner as may be regarded as authoritative. But they may correct clerical mistakes or obvious errors of arithmetical computation.

Id, p. 387 (quoting Updegraff, *Arbitration and Labor Relations*, 116 (BNA Books, 1970).

The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators, American Arbitration Association, and Federal Mediation and Conciliation Service (as amended and in effect September 2007) provides: "No clarification or interpretation of an award is permissible without the consent of both parties." Sec. 6(D)(1). Article 8 of the CBA stipulates that arbitrations be conducted in accordance with the rules of the American Arbitration Association standards.

The Ninth Circuit has recognized three limited exceptions to the general rule terminating the arbitrator's authority post-decision: an arbitrator can correct a mistake which is apparent on the face of his award, complete an arbitration if the award is not complete, and clarify an ambiguity in the award. *McClatchy*, 686 F.2d at 734 n.1 (citing *La Vale Plaza*, 378 F.2d at 573); *IBT v. Silver State Disposal Service, Inc.*, 109 F.3d 1409, 1411 (1997). None of these exceptions apply here. The University's request is that the arbitrator reconsider his decision and deny the Union's grievance (UW Motion at 2). This is not a request to correct a clerical mistake, to complete an award that is not complete or to clarify an ambiguity in the award. The University requests that the arbitrator change his decision. That request under well settled law is beyond the jurisdiction and authority of the arbitrator.

B. Assuming *arguendo* that the arbitrator decides he has authority to reconsider the Opinion and Award, the plain meaning of the CBA is unambiguous

The Union maintains that the Arbitrator does not have jurisdiction or authority to reconsider the Opinion and Award. But if, *arguendo*, the Arbitrator concludes that he has

such jurisdiction, the finding must again be that the CBA was violated when the University imposed the SFR and Universal U-Pass unilaterally on 50% ASEs.

Neither party disputes that Article 7 has clear meaning. As it had in its post-hearing brief, the University argues that the plain meaning of Article 7 of the CBA is clear and unambiguous, and permits the employer to unilaterally impose these new fees on ASEs with 50% appointments. The Union maintains that the plain meaning of Article 7 is unambiguous, and that waivers were not maintained at their current rates/level when these fees were so imposed. The Arbitrator has already addressed both of these arguments in his Opinion and Award, and ruled clearly in the Union's favor:

> Your arbitrator finds that when the two new fees were unilaterally imposed on 50% ASEs in September 2011, tuition and fee waivers were not maintained at current rates/level as required by Article 7. (Arbitrator Decision at 14)

Moreover, the arbitrator pointed out that when the parties stipulate that the meaning of a CBA is clear and unambiguous it is enforceable without resorting to extrinsic evidence:

> If the language of the agreement is clear and unambiguous, it will not be given another meaning and should be enforced without further analysis. Extrinsic evidence, such as bargaining history and past practice are considered only if the parties adopted language that is ambiguous. Both the Union and the Employer argue that contractual provisions before the Arbitrator in this case are clear and unambiguous. Your arbitrator agrees. (Arbitrator Decision at 13)

C. Assuming *arguendo* that the Arbitrator decides he has jurisdiction to reconsider the Opinion and Award, and that Article 7 is ambiguous, the parties' bargaining history supports the Union's interpretation

Again, *arguendo,* if the arbitrator assumes jurisdiction to reconsider the award, and concludes that the plain meaning of Article 7 is ambiguous, the bargaining history supports the Union's position. The evidence presented clearly shows that, from the beginning, the parties had agreement that three fees (Building, SAF and IMA) would be

paid by 50% ASEs, one fee would be waived voluntarily (U-Pass) and that the others (Operating and Technology) would be waived by the University. Each and every proposal by the Union to expand the waiver system after 2004 proposed expanding both the number of ASEs covered (hourlies or ASEs with less than 50% appointments) and the number of fees that would be covered by the waivers.

The University uses broad strokes characterization of the bargaining history to distort the evidence when it asserts: "In fact, the Union has tried and failed – repeatedly – to get a freeze of tuition and fees" (UW Motion at 1). This statement elides the group for whom the Union – repeatedly – attempted to negotiate a new benefit: ASEs with appointments not at 50%. As Union witness David Parsons testified, the Union has always believed that the language of Article 7 as ratified in 2004 applied to – and protected – only its members with 50% appointments. It is true that the Union has attempted for years to increase the compensation and benefits of its other members, including bargaining tuition/fee waivers for them. But there is not a single bargaining proposal between 2004-2012 in which the Union attempts to cover new fees for only its members with 50% appointments. This would have been unnecessary. The Union did propose waiving SAF, Building, IMA for 50% appointees, and the Union did propose waiving these and other new fees for ASEs with hourly or less than 50% appointments. But never did the Union propose waiving the SFR or the U-Pass for only its 50% appointees because the waiver scheme as it existed since 2004 already provided protection against the University imposing the cost of those fees on 50% ASEs.

The University correctly points out that "The Collective Bargaining Agreement expressly provides that tuition and fee *waivers* will be maintained at current levels – not

that *tuition and fees* will be maintained at current levels" (UW Motion at 1). The Union agrees with this assertion. Were the language of Article 7 interpreted to mean that "tuition and fees will be maintained at current levels," then bargaining unit members would have paid the same amount in unwaived fees for the life of the contract. This is contrary to fact. Union exhibit 8 – in addition to copious testimony and argument – demonstrates the Union's clear understanding that certain unwaived fees would increase: the SAF Fee, for example, was $291 per year when the CBA was bargained in 2004, and increased virtually every year thereafter (it was $354 the year the grievance was filed). And the Union acknowledges that, per RCW 41.56.203.2(ii), "The amount of tuition or fees at the University of Washington" is outside the scope of bargaining. Had the Union's position been that *tuition and fees* needed to be maintained at current (2004) levels, it would have so grieved long before 2011. It was not until the University unilaterally imposed the SFR and changed the U-Pass from voluntary to mandatory – thereby failing to maintain *waivers* at their current rates/ level – that the Union alleged a violation.

D. Nothing in statute relieves the University from its obligation to honor its commitments under the CBA

In its motion for reconsideration UW again cites RCW 28B.15, arguing that "The legislature's statutory framework for fees is very specific, and it only authorizes waiver of these two fees" (UW Motion at 6).

Neither of the key statutes cited by UW (RCW 28B.15.610 and RCW 28B.15.615) prohibit the University from waiving fees for ASEs, nor do they in any way restrict the University's authority to bargain waivers or remissions of tuition/fees as provided by RCW 41.56.203. Yet the University states several times in its motion that

the statutory framework of RCW 28B.15 supports the "non-waivability of student-imposed fees" (UW Motion at 8).

As the Union pointed out in its post-hearing brief, the University's position (emerging only after the grievance had been filed) that state law is the only mechanism by which fees may be waived is contrary to the evidence. UW writes, "To interpret the contract to allow the University to waive voluntarily imposed student fees for some students, and not others, is inconsistent with the language and purpose of the statute" (UW Motion at 8). But this would only be true if Academic Student Employees had not been granted collective bargaining rights by the legislature, with a provision specifically allowing the University to bargain fee waivers/remissions. UW tries to argue that 41.56.203 provides only for bargaining over "waivable" fees, but nothing in this statute defines this and nothing in the CBA demonstrates agreement over which fees are "waivable" under the bargaining statute.

Even if such terms had in theory been discussed, the University has always waived one of the "student imposed" fees: the Technology Fee. As established in unrebutted testimony by both the Union's witness, David Parsons, and one of the University's witnesses, former Graduate and Professional Student Senate President Charles Plummer, the Technology Fee was – like the Services and Activities Fee – student-imposed, and yet it is waived by the University. In 1996 student government helped introduce and lobby the bill creating the Technology Fee (SSHB 2993), and this authorized UW to establish and charge upon each student a Technology Fee, subject to approval by student government.

Despite this testimony and clear legislative history, the University makes the categorically false statement in its motion that "The Agreement does not expressly address student-imposed fees, and **those fees have never been waived by the University**" (UW Motion at 8, emphasis added).

E. Public policy requires the University to honor its commitments under the CBA

UW argues that the Arbitrator's decision contravenes public policy as enacted by the Legislature. As UW renders the Legislature's public policy position, "student self governance" trumps the University's ability to allow "some students" to opt-out of student imposed fees (UW Motion at Section 2). This mis-represents the provisions of the statute and the collective bargaining agreement, and obfuscates the employer/employee relationship so clearly identified by the Legislature, the Public Employment Relations Commission, and the University itself.

RCW 41.56, the chapter under which Academic Student Employees at the University of Washington were granted collective bargaining rights, states, "The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers." Under this statute the Legislature has made clear that Academic Student Employees at UW are subject to the rights, responsibilities and protections available to other public employees who also have chosen collective bargaining. Student Government provides an important mechanism for self-

governance, but collective bargaining is also a form of self-governance which public employees have the right to choose and which employers are bound to respect.

Despite the University's attempts to claim otherwise, there is simply nothing in statute which authorizes UW to opt out of its commitment in the CBA to maintain waivers at their current rates/level. The Arbitrator correctly summarizes thus: "Academic Student Employees do not lose their status as bargaining unit members, nor the protections granted by the CBA, merely because certain mandatory fees are assessed against the entire student body" (Arbitrator Decision at 13). Had "student approval" been a prohibition against waiving fees, UW would have never waived the Technology Fee, which was approved and continues to be managed by student government.

F. The Union's Motion addresses the calculation of monetary damages related to the violation of the CBA

In so far as Section B of the University's Motion can be read as a motion to resolve a dispute arising from the remedy, the Union's October 19, 2012 motion to resolve a dispute arising out of the remedy (UAW Motion) addresses the issues raised.

The Union requests that, retrospectively, the University reimburse those 50% ASEs who used the U-Pass fewer than 20 times per quarter. This concept, which was proposed by the University to the Union during settlement discussions, provides a monetary remedy for those ASEs who did not utilize the U-Pass. As for future implementation, the Union requests that the University reimburse those ASEs who elect not to use the U-Pass. Most ASEs will likely continue to purchase and use the U-Pass; however, in the unlikely event that does not occur, the Union's request establishes a cap on the total reimbursements to ensure that the program will not be subject to vagaries of

inconsistent enrollment. If the remedy is resolved in this manner the U-Pass will again be voluntarily waivable for 50% ASEs, while protecting the costs of the program.

As for the SFR the University asserts that no ASE should have the fee reimbursed because the student Husky Union Building (HUB) has already been opened, ASEs have presumably accessed and enjoyed it, and therefore should not receive a "free benefit." It states that a reimbursement of the fee "could also result in violations of the University's bond obligations and higher costs to all other students because the money for the renovations has already been spent and will need to be repaid by a smaller group of students" (UW Motion p13).

The University's statement of its fundamental problem - that it has committed itself to bond obligations that conflict with its commitments under the CBA - is duly noted. But this conflict does not obligate the Arbitrator to provide relief by ordering ASEs, or other students for that matter, to take a loss. The University's failure to anticipate such conflicts is not within the purview of any of the involved parties to remedy.

As for the argument that the Union is barred by laches from seeking reimbursement for the SFR, the Union reiterates that it was not until Fall 2011 that UW made it clear that ASEs with 50% appointments would be required to pay it. As established in testimony, the University had ample opportunity to make proposals on this matter, but never did.

II. CONCLUSION

The Union submits that the arbitrator does not have jurisdiction to reconsider his Opinion and Award. Assuming *arguendo* that the arbitrator decides that he has authority

to reconsider the award, the University's arguments in its Motion for Reconsideration do not provide grounds for the arbitrator to deny the grievance or vacate the award. The Union therefore respectfully requests that the arbitrator reject the University's Motion for Reconsideration, and resolve the dispute arising out of the ordered remedy as per the calculation of damages contained in the Union's Motion.

DATED this12th day of November, 2012.

Respectfully submitted,

By:

David Parsons, President

UAW Local 4121