IN THE MATTER OF AN ARBITRATION

BETWEEN:

TORONTO POLICE SERVICES BOARD

- AND –

TORONTO POLICE ASSOCIATION

(GRIEVANCE RE: REIMBURSEMENT OF OPC COSTS
TO SELECTED MEMBERS)

Before: Susan Tacon, Sole Arbitrator

Appearances:

For the Association: Michael Mitchell, Counsel
Lindsay Lawrence
Larry Molyneaux, TPA Board of Directors

For the Employer: Michael Hines, counsel
Maria Ciani, Manager, Labour Relations
Eugena Kosziwka, Labour Relations Analyst

THIS MATTER WAS HEARD IN TORONT ON THE FOLLOWING DATES:
FEBRUARY 12 AND MAY 21, 2008

SUPPLEMENTARY AWARD

This decision concerns the appropriate remedy in respect of my earlier award dated August 28, 2007. It is helpful to recount the conclusions therein in outlining the context in which the current dispute arises.

The policy grievance concerned the reimbursement of tuition costs associated with attendance at the Ontario Police College (the "OPC") for certain members of the Toronto Police Association (the "Association"). Since 1996, the OPC tuition costs have been borne by the cadets. In May of 2002, the Toronto Police Services Board (the "Board") unilaterally adopted, as a measure to retain members of its police force, a policy providing for the reimbursement of the tuition after designated periods of time. Specifically, after three years of service, the constable would be reimbursed 40% of the tuition costs, with the balance of 60% reimbursed after the completion of five years on the force. Accordingly, the first payments would be due three years later, starting in 2005.

In March 2004, the policy was unilaterally discontinued, effective April 2004. The last class of recruits eligible for reimbursement would have started at the OPC in early 2004; payment to those meeting the qualifying periods would be in 2007 for 40% and 2009 for the remaining 60% of tuition costs. Cadets are members, amongst others, of Unit C, one of the five Units represented by the Association; once they become constables, they fall under the Uniform Unit and the Uniform collective agreement. Thus, the actual reimbursement of tuition, for those qualifying, would occur while they are members of that Uniform Unit.

Negotiations for the 2002/03 and 2003/04 collective agreement were ongoing from late 2001 and into 2002, culminating in a Memorandum of Settlement in June 2002. The term of that collective agreement was January 1, 2002 to December 31, 2004 and thereafter, until replaced by a new collective agreement, decision or award. The policy grievance challenging the Board's initiative was filed on December 22, 2004,

approximately nine months after the Board's initiative was discontinued and over two and a half years after the adoption of the initiative.

Counsel for the Association had asserted that the Board's initiative breached the recognition clause, the duty to bargain in good faith, the management rights provision of the collective agreement and the remuneration scheme of the collective agreement as a whole. Counsel for the Board had rejected those assertions, arguing that the OPC tuition reimbursement fell exclusively within management rights and did not undermine the Association's status as the sole and exclusive bargaining agent since the OPC tuition reimbursement program was not inconsistent with the express provisions of the collective agreement. Further, Board counsel had contended that the Association was estopped from claiming a violation of the collective agreement given its failure to file a grievance for such an extensive period of time following the introduction of the Board's policy.

For reasons which need not be reiterated herein, I concluded that the Board's tuition reimbursement policy contravened the collective agreement in several respects, including the retention/service provision, the remuneration provisions more generally and the clause recognizing the Association as the sole and exclusive bargaining agent. A declaration issued to that effect. The contention that the Board's policy was tantamount to bargaining in bad faith was rejected. The position of the Board in the alternative that the Association be estopped from relying on its rights under the collective agreement was also rejected.

The question of any further relief was remitted to the parties for their discussion. That interaction did not resolve the matter and, hence, the hearing was reconvened to address that issue. Before proceeding further, it is helpful to set out the following excerpt from my initial award.

"Although I have rejected the estoppel argument, that is not to say that the extensive delay involved in filing the grievance is irrelevant. In my view, the delay is a significant factor to consider in fashioning a remedy appropriate to the breaches of the collective agreement which I have found. The Association is not seeking the repayment of the tuition costs by those who did receive tuition reimbursement pursuant to the policy. The Association's position is certainly understandable but it does not necessarily follow that

the appropriate remedy is the reimbursement of 'OPC costs to all past and future members of the Association who have incurred such costs, with interest', as claimed in the grievance. In that regard, I note that Association counsel did sketch a series of narrower alternative bases for relief."

In that context, I next turn to the submissions of counsel which may be summarized in a highly abbreviated form.

SUBMISSIONS

Counsel for the Association outlined the various remedies sought, including those in the alternative, as follows: 1) tuition reimbursement for those in various OPC classes; 2) if damages should not comprise tuition reimbursement, then whatever other flat amount was considered appropriate; 3) damages for the Association itself in respect of the breach of the recognition clause and its status as exclusive bargaining agent in the amount of $100,000.00; 4) interest on the above amounts; 5) an order prohibiting the Board from discontinuing certain payments (dealt with infra on agreement); and, 6) in addition to the declaration, a cease and desist order. The classes are specified later in counsel's argument. The submissions were divided into two categories: the appropriate relief absent the delay involved and the impact of the delay on the relief otherwise appropriate.

Counsel asserted that the Association was placed in an invidious position of having to seek the stoppage of a financial benefit. Counsel reviewed the jurisprudence in detail in support of his several submissions. It was contended that the breach of the collective agreement as a whole and the recognition clause resulted in the loss of opportunity to bargain the tuition reimbursement program. He stated that the Association would undoubtedly have bargained for the inclusion of 01-02 and 01-03 classes within the tuition reimbursement policy and no end date for the policy or, at least, continuation for the duration of collective agreement, i.e., to December 31, 2004. In the further alternative, a wider remedy would be appropriate since the Board actually breached the 1998-2001 collective agreement as that was the agreement still in force at the time the policy was adopted, i.e., prior to the entering into of the Memorandum of Agreement, notwithstanding that the resultant collective agreement was retroactive to January 1, 2002. Under that earlier collective agreement, the Board would have breached the

recognition clause, albeit there would not also have been a loss of opportunity to bargain; damages should cover the previous collective agreement and the classes affected, although perhaps in a different financial basis.

Counsel argued that the case law supported a conclusion that, in calculating damages, the decision-maker must cope as best possible with the information available and the party causing the breach should not benefit by any resultant uncertainty of calculating losses. In the instant case, the Board should not be allowed to breach the collective agreement with impunity, even if the Board acted in good faith.

With respect to the Association's claim for damages, counsel submitted that the figure requested was reasonable, given the seriousness of the breach, the size of the organization and the fact that the union had advised the Board that the issue of tuition reimbursement had to be bargained. The quantum should be proportionate to the breach and not simply amount to a license to breach the collective agreement. As to the cease and desist order, counsel agreed that such a direction only followed persistent violations but herein the Board's breach was more serious in view of the parties' previous litigation and the Keller interest award.

As to the impact of prejudice and delay, counsel argued that the resulting damages should be fair and equitable in all the circumstances. The quantification of the impact should not be a mechanistic exercise and should first focus on the appropriate calculation of damages. Further, the governing statute did not embrace a time limited approach to filing a grievance and, thus, that legislation prevailed over any time limits in the collective agreement. Counsel rejected any limitation of damages to the period following the filing of the grievance. He submitted that, even if the Association was blameworthy in some way, the delay did not cause any prejudice to the Board. Also rejected was the contention that the delay increased those eligible to receive the tuition reimbursement; counsel argued that the Association's position was based on the broad impact on the bargaining unit caused by the Board's breach of the collective agreement. The speed in proceeding to arbitration would not have mattered with respect to that impact or the invidious position in which the Association was placed. At arbitration, the Association would have

sought the continuation of the tuition reimbursement initiative at least for the duration of the collective agreement. Essentially, counsel stated that the nature of the remedy arises from the nature of the breach, not from the timing of the filing of the grievance.

As to the additional delay post the Board's termination of the initiative, counsel submitted that there was no evidence the Association had actual knowledge of the Board's decision in that regard. Even if the Association ought to have known, it was asserted that the delay was immaterial to the issue of remedy. Finally, if delay was considered to have some relevance, Association counsel argued that some minimal discount to the damages otherwise due may be appropriate.

Cases cited: Canada Safeway, [1999] A.G.A.A. No. 88 (Taylor); Canada Safeway Ltd. v. United Food and Commercial Workers, Locals 312A, 373A and 401, [2001] ABQB 120; Porti Construction Inc. (2006), 150 L.A.C. (4th) 155 (McKee); West Park Health Care Centre (2005), 138 L.A.C. (4th) 213 (Charney); Gateway Casinos G.P. Inc. (2007), 159 L.A.C. (4th) 227 (McFetridge); Inco Ltd. (2006), 153 L.A.C. (4th) 183 (Rayner); Motor Coach Industries Ltd., [2007] M.G.A.D. No. 19 (Peltz); United Food and Commercial Workers Union Local 280P and Pride of Alberta Meat Processors Co. et al. (1998), 159 D.L.R. (4th) 35 (Alta.C.A.) ("Pride of Alberta"); Inland Aggregates Ltd. (2002), 106 L.A.C. (4th) 62 (Sims); Consolidated-Bathurst Packaging Ltd. (Hamilton Plant) (1980), 28 L.A.C. (2d) 230 (Brunner). Also cited: Wadham's Law of Damages; Mitchnick and Etherington, Leading Cases on Labour Arbitration.

Counsel for the Board focused on the chronology of events, asserting that timeline was critical to assessing the appropriate remedy. He contended that the Association was not powerless in the face of the adoption of the tuition reimbursement initiative: the Association could have negotiated the issue or could have grieved before the eve of the expiry of the 2002-04 collective agreement. It did neither. The Association called no evidence to explain the failure to so act and, hence, a negative inference could be drawn from that failure. Counsel noted that there was no impediment to grieving at the point the tuition reimbursement initiative was adopted by the Board and, in that regard, the initial award rejected the Association's position that the grievance had to await actual payments

under the program. Further, at that stage, the current bargaining unit members were not affected and, thus, the Association did not risk a negative reaction if the grievance was filed. By waiting until December 2004, months after the termination of the initiative, the Association had maximized the number of new hires who would be covered by the tuition reimbursement policy.

Counsel argued that there was no evidence the Board refused to bargain. Rather, the Association had noted the issue in bargaining documentation but, it was submitted, withdrew that item from the table in favour of notice to the Board that a grievance would be filed. In counsel's view, this was not a loss of opportunity to bargain but an opportunity foregone by the Association. Given the context of interest arbitration, Board counsel argued that the Association could have compelled bargaining on that issue but chose not to submit a proposal. Board counsel stated that the Association was content to allow the Board to embark on a policy which would see over $1,000,000.00 per year spent on the bargaining unit without having to cost the item in the Association's proposal. That is, it was asserted that, had a proposal been tabled to increase the retroactive application of the policy or guarantee its continuation, the Association would have had to include those costs in its proposal and risked the Board withdrawing the initiative or reducing other benefits or wage increases.

As to the Association's claim for damages should be viewed in comparison to the sums spent on the initiative, counsel for the Board asserted that proposition ignored the fact that the monies were spent only because the Association failed to grieve in a timely fashion. The collective agreement stipulated a twenty-five day period for the filing of a grievance; the Association was in flagrant violation of that provision. While conceding that the governing statute would override that collective agreement restriction, Board counsel argued that the Association did not come with clean hands to this grievance. The collective agreement provision was a normative guide, expressing the parties' legitimate expectations as to the appropriate time frame for filing grievances. Again, counsel stated that there was no evidence that the Association had been demeaned in the eyes of its members. Essentially, the only breach of the collective agreement by the Board, as found in the initial award, was the recognition clause; there was no loss of opportunity to

bargain, nor was that included in the grievance. From a remedial standpoint, the Association, in reality, was asking the arbitrator to act as if the context was an interest arbitration and to speculate as to what might have resulted if the tuition reimbursement program had been negotiated at the time.

Counsel asserted that the cases dealing with a breach of recognition clause sustained two remedies: a cease and desist order or the nullification of the employer's improper arrangement, where practical. He added that, where the arrangement conferred a positive benefit, unions seldom sought to unwind that benefit. In the instant situation, the Board had not entered into individual negotiations and, hence, nullification was not an issue. Further, the violation of the recognition clause was a "derivative" breach in that the tuition reimbursement program was inconsistent with the retention provisions and the compensation scheme as a whole. A cease and desist order was the remedy the Association should have sought immediately but chose not to do so. The delay was designed to maximize a claim for damages. To grant the relief sought by the Association in respect of expanding the classes of individuals entitled to reimbursement would be exacerbating the breach of the collective agreement, not remedying the breach. As well, such an approach would be punitive, not compensatory. Counsel conceded that, to a limited extent, some arbitration awards contemplated a partly punitive remedy but argued that the rationale in those instances was not applicable herein.

Counsel commented on the jurisprudence and text excerpts cited by Association counsel. In particular, those involving bad faith were said to be distinguishable. Counsel also reviewed in detail the cases he tendered in support of his submissions that damages should only be awarded to a union for actual monetary loss; declaratory relief was the usual remedy. Herein, there was no proof of actual loss and, thus, the jurisprudence dealing with difficulties in the calculation of monetary losses was not relevant. Even where a right was violated, that breach did not necessarily require a monetary award as opposed to a cease and desist order or nullification. In the instant case, there was no bad faith, no pattern of breaching the recognition clause, strike breaking or violation of the Association's freedom of expression. Hence, it was submitted, no monetary award to the

Association was appropriate. This was an ordinary dispute about the scope of management rights.

Finally, counsel noted that the extensive delay in filing the grievance was regarded as a "significant factor" in the initial award with respect to assessing the relief appropriate to the breach of the Association's recognition rights. A declaration was helpful in clarifying the respective rights of the Association and the Board but, it was contended, monetary relief should not be awarded to the Association itself or to any of the classes of cadets enumerated by the Association.

Cases referred to: Miracle Food Mart Canada (1994), 45 L.A.C. (4th) 209 (Dumoulin); Inco Ltd., supra; Motor Coach Industries, supra; General Electric Co. Ltd. (1950), 2 L.A.C. 587 (Laskin); H.J. Heinz Co. of Canada Ltd., [2004] O.L.A.A. No. 609 (Brandt); Falconbridge Ltd., Sudbury Smelter Business Unit (2002), 112 L.A.C. (4th) 243; ADT Security Services Canada Inc. (2007) 163 L.A.C. (4th) 363 (Surdykowski); Alberta Government Telephones (1990), 11 L.A.C. (4th) 113 (Ponak); ABB Asea Brown Boveri (1991), 22 L.A.C. (4th) 314 (Craven); Hawkesbury General Hospital (1992), 24 L.A.C. (4th) 329 (Roach); Eastern Ontario Health Unit (1993), 39 L.A.C. (4th) 120 (Eberlee); Ontario (Ministry of Community, Family and Children's Services) (2004), 131 L.A.C. (4th) 63 (Leighton) and [2003] O.G.S.B.A. No. 20 (Leighton)*; Associated Toronto Taxi-Cab Co-operative Ltd. (1996), 44 C.L.A.S. 333 (Davie); Famous Players Ltd. (1987), 31 L.A.C. (3d) 97 (Bird); British Columbia Hydro and Power Authority, [2006] B.C.C.A.A.A. No. 79, (2006), 150 L.A.C. (4th) 281 (Larson); Toronto Hospital, [1998] O.L.A.A. No. 729 (Stanley); Travelaire Canada Ltd. Production (2005), 136 L.A.C. (4th) 406 (Sims). *The 2004 decision deals with the remedy and the 2003 award the merits. The latter decision was tendered by Association counsel for completeness.

In reply, Association counsel contended that the question of the quantum of damages and the impact of delay must be kept separate. The critical facts were that the Board, prior to mediation, unilaterally decided to adopt the tuition reimbursement policy and proceeded without the Association's consent. That, in counsel's view, constituted a refusal to bargain the issue. The Association was not obliged to put forward a proposal during the

negotiations beyond the provisions dealing with retention which the Association sought and obtained. The Association notified the Board that tuition reimbursement must be bargained; the Board declined to do so. This constituted a loss of opportunity to bargain, as distinct from bad faith bargaining, a finding rejected in the initial award. What the Board did resulted in massively undermining the Association's role as exclusive bargaining agent. That the Board subsequently terminated the initiative was doubly offensive to the Association's rights. If the remedy was solely a declaration, that was tantamount to a license to violate the collective agreement. Counsel commented on the jurisprudence cited by Board counsel. Finally, counsel argued that the delay should not be used to punish the Association; the damages claimed were compensatory, not punitive towards the Board. The impact of delay must be assessed in a meaningful, policy oriented and rational way. In essence, the delay had no impact on the Board's decisions to adopt and, subsequently, terminate the tuition reimbursement initiative.

DECISION

The case law which was thoroughly and cogently addressed by both counsel in their submissions has been carefully considered. Counsel differed markedly in their respective views of the cases which should inform my analysis. Association counsel noted the line of cases wherein monetary damages were awarded: see, generally, Canada Safeway, supra; West Park, supra; Porti Construction, supra; Gateway Casinos, supra. Board counsel cited those where the remedy was confined to declarations, nullification and cease and desist orders: for example, Motor Coach, supra; Inco, supra; Heinz, supra; ABB, supra.

Before proceeding further, it is critical to again focus on the breach of the collective agreement at issue. I concluded that the Board's tuition reimbursement policy contravened the collective agreement in several respects, including the retention/service provision, the remuneration provisions more generally and the clause recognizing the Association as the sole and exclusive bargaining agent. The Association's assertion that the Board's policy was tantamount to bargaining in bad faith was rejected.

The redress sought by Association counsel was fleshed out, including monetary remedies in the alternative. Broadly speaking, there were two categories: damages to the Association and damages to various other classes of cadets, whether that took the form of a continuation of the tuition reimbursement or some lesser figure. Before dealing in more detail with the relief sought by category, some initial comments are warranted.

Excerpts from the text by Mitchnick and Etherington, supra, were noted by counsel for the Association with respect to the issue of damages. The principles expressed therein are not controversial and I accept them as a basis for considering the relief requested in this matter. The inherent authority of an arbitrator to award compensatory relief, also termed the "make-whole principle", is of long standing acceptance. The redress must be commensurate with the wrong and the purpose of relief is remedial not punitive. Monetary damages may be warranted for non-monetary losses if such is appropriate to ensure the breach of the collective agreement is adequately addressed and other remedies are insufficient. In some instances, where there have been persistent breaches of a particular provision of the collective agreement, damages may be suitable as a deterrent against future violations. Damages may be awarded to the union for violation of its rights under the collective agreement, independent of any contravention of the rights accruing to individual employees. A collective agreement is fundamentally different from an ordinary commercial contract or contract of employment and that gives rise to different approaches and policy considerations in addressing remedy. It is in that jurisprudential context that I have approached the submissions of both counsel in respect of the question before me at this juncture, namely, what remedies should issue herein.

Association counsel, inter alia, contended that the Board's conduct represented a lost opportunity for the Association to negotiate the tuition reimbursement initiative. He characterized this loss of opportunity as flowing from the Board's refusal to bargain the issue. With respect, while this argument is attractive at first blush, I cannot agree that the Association, in fact, lost that opportunity. It is accurate to note that the Association raised the tuition reimbursement initiative during negotiations in its written submissions to the mediator. During the mediation process in a written proposal, the Association also

asserted that the tuition reimbursement initiative had to be negotiated or a grievance would be filed. I return to the delay in filing the grievance infra.

At this juncture, it must be noted that the Association made no formal proposal to the Board regarding the initiative. The Board's view was that the matter fell within management rights. That assessment ultimately proved incorrect. However, it must be emphasized that, in this sector, recourse to a strike is not an option. Should the parties be unable to conclude a collective agreement on a voluntary basis, the resolution route, mandated by legislation, is interest arbitration. In the bargaining leading to the 2002-04 collective agreement, the parties, with the assistance of the mediator, did conclude a Memorandum of Agreement. Nonetheless, had the Association insisted on dealing with tuition reimbursement at the bargaining table, it could have forced the issue through tabling a proposal but did not. The Association had to have known the details of the Board's tuition reimbursement policy; the Association clearly objected to the unilateral nature of the initiative. The Association could simply have tabled a proposal to extend the application of the policy backwards in time to cover those classes of cadets for which it seeks coverage now and, likewise, sought a guarantee of the continuation of the initiative for at least the duration of the collective agreement, to sweep in other classes for which it also seeks coverage now. Certainly, if a tuition reimbursement proposal had been tabled, the associated costs would have had to be included in the Association's position. The Association did achieve gains in respect of retention/service pay in that round of bargaining. The Association's decisions in prioritizing its bargaining demands are unknown: there was no evidence in that regard. As well, the submission that the Board engaged in bad faith bargaining was expressly rejected in the initial award. I have serious concerns that the "loss of opportunity" or "refusal to bargain" argument is really recasting a claim that the Board bargained in bad faith. In the circumstances, I am persuaded that, as Board counsel submitted, what happened was not an opportunity to bargain lost but an opportunity to bargain foregone.

This conclusion has implications for some of the assertions of Association counsel in support of his claim for damages, in particular, the models sketched in the extract from Wadham regarding awards measured by the defendant's benefit of a breach. I am not

satisfied that these approaches should be imported into a labour relations context. Generally, one should be cautious about transposing doctrines arising in context far removed from the policy considerations underpinning the case law formed in connection with a collective bargaining relationship. In this instance, the remedies developed within the arbitral setting are sufficient for addressing the Board's breach of the collective agreement.

A number of the cases referred to dealt with what could be termed "extra" payments to employees beyond that stipulated in the collective agreement. Such payments were found to contravene the union's exclusive status as bargaining agent. In Inco, supra, incentive payments to certain employees to delay retirement until the closure of the refinery were challenged by the union which sought the extension of those payments to others on the grounds of "fairness and deterrence". The arbitrator found that the payments were initiated for sound business reasons to facilitate the orderly closure of the refinery. He concluded that there was no bad faith, the parties had a long collective bargaining relationship and there was no attempt to undermine the union. The sole appropriate remedy was a declaration. Motor Coach, supra, also concerned payments in excess of the collective agreement rates intended to retain certain skilled employees. The arbitrator rejected the requested extension of those payments to others. The union had not shown that a declaration, together with a cease and desist order, was inadequate and the remedy was confined.

Relief was restricted in David Thompson Health Region, supra, as well. The hospital, in a reorganization, moved several positions out of the bargaining unit. The senior nurses in those positions were offered severance packages rather than forcing them to choose between leaving the bargaining unit or returning to a staff nurse position; none of the packages was accepted. The arbitrator was satisfied the offers were made out of compassion; there was no downsizing mode and, thus, the hospital would never have been willing to offer the packages at large. Moreover, there was no deliberate intent to undermine the union's rights; to order that the severance packages be offered to others would constitute a punitive response. The hospital's actions did comprise a violation of the collective agreement and, thus, infringed upon the union's recognition rights. The

remedy included nullification of the targeted severance packages, a declaration and a cease and desist order.

Association counsel cited Port Construction, supra, as an instance of "extra" payments which should persuade me to award monetary damages in this grievance. The arbitrator in Porti, supra, concluded that, while additional payments were made to individual employees, he was left with no satisfactory explanation as to their purpose. Further, as the employer was bound to a provincial agreement, such unilateral payments had broader repercussions for the union's status as bargaining agent since the rationale for a provincial agreement in the construction industry was to ensure that all employers were competing on the same basis. The ability of the union to maintain and enforce a uniform wage rate was regarded as critical to its bargaining strength. In these circumstances, the arbitrator determined that a declaration together with a cease and desist order was insufficient. What he did was focus on testimony from a union official that the additional sums would have been acceptable if the corresponding benefit payments were also made; he ordered those amounts to be forwarded to the union in trust for its members.

The instant grievance differs markedly. Herein, there was no subterfuge in the payments: the initiative was adopted at a public meeting. There is no corresponding province-wide agreement at issue. There was also a legitimate business purpose in the tuition reimbursement program, that is, the retention of trained officers. As noted, the Board was incorrect in its reliance on its management rights to justify a unilateral initiative. But, the reasoning in Porti, supra, does not support damages here. I deal with the other monetary award cases referred to by Association counsel later.

Several other cases involving a breach of the recognition clause need be mentioned only briefly. In Hawkesbury General Hospital, supra, the employer altered an employee's classification from full- to part-time at her request but without involving the union. The relief ordered was nullification of the move pending discussions with the bargaining agent. See also, Alberta Government Telephones, supra; Eastern Ontario Health Unit, supra. A damage award was rejected in Toronto Hospital, supra, as the union had not pursued the possibility of having certain work performed in house at a meeting with

management. The failure of the employer to enter into meaningful discussions about this issue did warrant a declaration of the contravention of the union's recognition rights.

Arbitrators have also been innovative in tailoring remedies to the specific circumstances. For example, in Famous Players, supra, the employer had managers trained to operate projectors contrary to the collective agreement; such training would enable the employer to better withstand a strike by projectionists. The arbitration panel ordered the employer not to use those managers to operate the projection equipment in the case of a strike. In the arbitrator's view, this remedy adequately responded to the loss of union bargaining strength occasioned by the breach. The situation in ABB, supra, was unusual. The company closed one plant and offered employment to those displaced but on condition that they waived their right to severance at the shuttered facility, contrary to the collective agreement. Making the grievors "whole" required the offending condition be removed from the offers of employment. As well, the offers of employment were directed to be renewed and the grievors were given a time period in which to indicate their acceptance. The union, however, was only entitled to a declaration as no specific damages, on its own behalf, were proved.

Associated Toronto Taxi-Cab Co-operative, supra, involved an increase in fees charged without the requisite discussion with the union. The arbitrator concluded that a mere declaration was insufficient to remedy the loss of opportunity to enter into such discussions about fee increases, a loss felt by both the union and its members. She was satisfied that the necessary discussions would have at least delayed the implementation of the increase for two months; the differential was to be remitted to the drivers affected. The next excerpt captures her reasoning (at par. 101).

"This award of damages reflects the loss to the drivers caused by [the employer's] failure to discuss this matter with the union prior to implementation… The trade union however could not have delayed indefinitely the inevitable. An order of damages of this type will also be a more effective deterrent to brokerages and indicate that a brokerage can't merely increase rates without expending the type of best efforts discussed herein. A failure to consult with the union before implementing such a fundamental change to the economic relationship of drivers in the bargaining unit will result in an award of monetary damages."

Arbitrators have also awarded monetary damages where no other remedy was feasible. The grievors in Ontario (Ministry of Community, Family and Children's Services), supra, lost the opportunity of employment with the protection of seniority for lay-off and promotion. While acknowledging the calculations were difficult, the arbitrator was satisfied that compensatory damages based on seniority were appropriate since those more senior employees lost the most; damages were calculated on a formula involving salary and years of service.

Another issue joined by counsel was the proper approach to the calculation of damages. Board counsel stressed that such an award must be grounded in evidence and proof of actual monetary loss, citing Miracle Food Mart, supra. To similar effect is the reasoning in Heinz, supra, where the arbitrator found that there was no actual loss to the employees affected. In the latter decision, the employer had eliminated a shift but had redeployed those persons to positions which paid more but without consulting the union, as required by the collective agreement. The arbitrator issued a cease and desist order, pending discussions with the bargaining agent. The arbitrator was influenced by the fact that there was no pattern of such breaches and no compromise to the integrity of the bargaining unit. While the union sought monetary damages, it was determined that a declaration was sufficient since there were no actual losses suffered: see also David Thompson Health Region, supra. Board counsel also argued that there was no evidence before me which substantiated any damage award to the Association as bargaining agent. Counsel cited the decision in Associated Toronto Taxi-Cab, supra, as affirming the obligation of the union to prove, on a balance of probabilities, that the losses for which it seeks compensation were suffered: see also ABB, supra. As a general approach this assertion is not controversial, although, as has been noted in the earlier comment on this case, the arbitrator in Associated Toronto Taxi-Cab, supra, did find a basis for awarding damages which appropriately reflected the collective agreement breach.

With respect, the assertion that the union has an obligation to prove, on a balance of probabilities, actual loss is stated too broadly. In Associated Toronto Taxi-Cab, supra, it was noted, at par. 86, that "[t]he uncertainty of the loss of this benefit doesn't prevent an award of damages" even though recreating the results which would have followed if the

obligation to consult had been fulfilled may be problematic. In the instance case, as held earlier, there was no loss of an opportunity to bargain. I am of the view that a damage award can flow from the contravention of the recognition rights of a union. It is implicit in such a breach that the union's status as exclusive bargaining agent is weakened. It would also be difficult to adduce evidence of actual loss in such instances. On the other hand, the quantum of damages in such cases must reflect the particular circumstances. That question, specifically in the respect of the instant grievance, is dealt with later in this award.

It is next appropriate to consider three cases, in addition to Porti Construction, supra, which were cited by Association counsel in seeking monetary damages: Gateway Casinos, supra; Canada Safeway, supra; and West Park, supra. I am of the view that this line of jurisprudence is readily distinguishable from the instant case.

In West Park, supra, the employer deliberately disregarded the union's right under the collective agreement to be consulted and involved in the staff reduction process. It was held that the hospital's actions could not be characterized as an error; the steps were taken with full knowledge that it was a violation to proceed as it did. Moreover, the union was not even advised of the reductions before the announcement to the residents, patients, family members, staff and volunteers. The employees affected lost the benefit of union representation and the union was denied its right to represent the employees in the Staff Planning Committee as well as suffering injury to its reputation as an effective bargaining agent. To quote from the decision at p. 218: "The union was not only marginalized; to all intents and purposes, it was ignored." The remedy ordered included $10,000 to the union and $1,000 to each of the employees (with two exceptions not here relevant).

Quite simply, the situation herein is not akin to that in West Park, supra. The Board, in view of the silence of the collective agreement with respect to the issue of tuition reimbursement, adopted that policy in the exercise of its management rights. In West Park, supra, the hospital acted in the full knowledge that it was contravening the collective agreement. In the instant grievance, the Association and the Board disagreed

about the reach of the management rights clause. While the Association's position in that regard has been upheld, the Board acted for a legitimate business purpose and the policy was adopted at a public meeting. Such disagreements are not sufficient, of themselves, to warrant damages, otherwise monetary awards for breach of the union's recognition rights would be commonplace rather than sparse.

The nature of the offence in Gateway Casinos, supra, and Canada Safeway, supra, was discrimination on the basis of union membership and/or participation in lawful union activities. The Gateway Casinos, supra, case involved a prohibition on the wearing of union identification pins during the critical period leading up to certification. Both the collective agreement and the labour relations statute were contravened. As the arbitrator commented, the arbitral jurisprudence in that area has been settled for over two decades: there was simply no prospect that the employer's prohibition would succeed. The next passage, at pp. 247-8, is illustrative.

"I find that the company's breach was committed intentionally to prevent employees from exhibiting support for the UFCW. I believe that this was done in the hope that it would discourage Union membership and increase the likelihood that the Union's certification bid would fail. Although it did not cause any direct monetary loss to individual Union members or to the Union itself, it constituted an unlawful interference with a statutorily protected right and made it more difficult for the Union to achieve its lawful objectives. A declaration would allow the Employer to escape from the consequence of its discriminatory conduct. By denying Union supporters their fundamental right to participate in lawful Union activity the Employer impaired both the efficacy of the Union to represent the interests of employees and also the dignity of the individual employees whose right not to be discriminated was violated."

The compensatory damages were ordered as $1,000 to each employee required to remove a union pin, $500 to each employee who did not wear a union pin because of the employer's dress code policy and $10,000 to the union, as the union proposed, as a modest measure of its own damages.

Canada Safeway, supra, concerned the crediting by the employer of employees who crossed the picket lines during a prolonged strike with hours worked during the strike, in contravention of the Return to Work Agreement. These credits materially affected the placement of those individuals on the wage scales: those crossing the picket lines

obtained a financial advantage over those who did not and were placed on the pay scales at levels in accordance with the collective agreement. It was agreed by the parties that it would be unfair to have that former group of employees repay the additional sums. However, the arbitrator ordered the employer to correct the career hours and wage placement of those employees on a going forward basis. As well, the employer was directed to pay to each employee discriminated against the sum of $300 as compensatory damages. Given the thousands of employees involved, the total sum was considerable.

On judicial review, the decision was upheld. The following excerpts are helpful.

"46 ...I conclude that a remedy which is compensatory in nature but has a punitive aspect to it is not necessarily patently unreasonable.

...

48 While it is clear that, to some extent, the Arbitrator intended the award to be punitive in a deterrent sense, it is clear that the main purpose of the award was to compensate the employees for the breach of their contractual right not to be discriminated against for exercising their statutory right to strike.

49 The company seems to be arguing that an arbitrator may only grant damages in a case where there is clear monetary loss. The result of this argument would be that any damage suffered which was not mathematically calculable in terms of monetary loss would be incompensable by an arbitrator, and would merely result in a declaration. This cannot be so, particular in light of Supreme Court of Canada decisions which have broadened the remedial jurisdiction of an arbitrator [citations omitted]. The arbitrator properly relied on principles from human rights law which contemplate general damages as compensation for the intrinsic value of the right not to be discriminated against."

I concur with the sentiments expressed to the effect that damages need not be limited to instances where there is clear monetary loss and have stated that position earlier. But, the foundation of the awards in both Gateway Casinos, supra, and Canada Safeway, supra, was the employer's discrimination amongst employees on the basis of union membership and/or participation in lawful union activity. Such breaches strike at the heart of the employees' right to union representation and collective bargaining. Such invidious distinctions warrant atypical relief. There is no comparable offence in the circumstances before me. Some classes of cadets were entitled to tuition reimbursement provided the requisite service was completed while others were not. But entitlement or otherwise did not flow from union membership and/or participation in lawful union activity. In short, I

am not persuaded that the reasoning in the cases cited by Association counsel is helpful in determining the appropriate relief in this case.

Throughout his submissions, Board counsel reiterated the chronology of events in support of his position that no monetary damages were warranted given the significant delay in filing the grievance. Before proceeding further to consider the issue of delay, it is appropriate to deal briefly with one other decision, that in B.C. Hydro, supra. There, the employer had failed to give the union proper notice of a reorganization prior to its implementation. The union conceded that the reorganization could not be reversed as a practical matter but sought damages in the amount of $100,000 to deter future breaches. It was determined that the employer had erred in regard to the scope of the obligation to give notice. There was no evidence the union suffered a loss of reputation or integrity as an effective bargaining agent amongst members of the bargaining unit. The arbitrator concluded that there was no need, in the circumstances, to award damages as a deterrent to future breaches and, as the union had itself contributed to the loss of opportunity, the damages should be nominal. The sum of $1,000 was awarded and, pursuant to the union's stated intended assignment of those monies, was to be paid to the grievor.

Several cases were cited addressing the impact of delay in filing a grievance. For example, delay resulted in the rejection of monetary relief in Falconbridge, supra, as the arbitrator concluded that the grievor had "sat on his rights" rather than proceeding expeditiously. In ADT, supra, while the grievance was upheld and the pre-hire agreement with respect to use of a company car was nullified, the delay involved was considered relevant and grounded the decision that compensation only run from the date the grievance was filed. This concept has found favour since the early decision in General Electric, supra, where it was concluded that the employer had paid wages to certain employees in the honest belief its classification was correct. The grievance was not filed until some years later: compensation was restricted to the period following the filing and retroactive payments rejected. Delay in contesting the divestment of services in Ontario (Ministry of Community, Family and Social Services), supra, together with the absence of any explanation for that delay, persuaded the arbitrator to reject the unwinding of the divestment process, especially since there was no evidence that the employer

knowingly and deliberately breached the collective agreement in the tenders. Monetary damages to the grievors were ordered, as indicated above. Delay in filing the grievance of some eleven years after the introduction of the pension plan entitled the union only to declaratory relief: Consolidated-Bathurst, supra. The arbitrator rejected the request that employees who joined the pension plan on a non-voluntary basis be given the option to withdraw and have their contributions dealt with as provided by the plan and the governing legislation.

Association counsel pointed to two decisions considering the impact of delay in seeking relief which was retroactive to an earlier collective agreement: Pride of Alberta, supra; and, Inland Aggregates, supra. I consider each in turn.

Pride of Alberta, supra, was an award of the Alberta Court of Appeal overturning an arbitration decision which limited the refund of money wrongfully deducted from the employees' pay cheques on the basis the grievance was out of time. The Court remitted the grievance to a newly constituted arbitration panel. The sums involved were considerable: $200,000 in overpayments for life insurance premiums. The court cited the reasoning in General Electric, supra, in its reaching its conclusion as follows (at pp. 39-40).

"[9] Whether a delay is or is not unreasonable will depend upon a multiplicity of factors including:
a) Whether the Union misconceived its rights or those of its employees and thereby failed to press them.
b) Whether the Union understood its rights or those of its employees and either deliberately chose not to press them or neglected to do so.
c) Whether, in all of the circumstances, it can reasonably be concluded that extant issues relating to the grievance have been satisfactorily settled between the parties.
d) Whether, in all of the circumstances, transactions have been completed in reliance upon the premise that the engaged issues have been satisfactorily settled between the parties.
e) In this latter regard, whether detrimental reliance or prejudice to the employer has been established.
f) Whether the subject matter of the grievance can still be rectified despite the passage of time – i.e. money disputes.
[10] The record is clear that the Board [of arbitration] did not address its mind to at least some of the foregoing considerations in concluding that the grievance was 'stale' or 'out of time'. The Board rejected the grievance without consideration of its merits.

...

[12] It must be remembered that the Union members were deprived of funds that are clearly identifiable and definitively traced...."

That decision was followed in Inland Aggregates, supra, where it was determined that certain premiums should have been included in the base pay rate when calculating overtime. The details need not be recounted. The arbitrator held that, as the violation comprised a continuing breach, compensation was due retroactive to the commencement of the breach. Critical to the conclusion were the facts that the union was unaware of the method of calculation being employed and the grievance was filed forthwith once the true state of affairs was discovered.

The same arbitrator in Inland Aggregates, supra, later heard the grievance in Travelaire Canada, supra, an award cited by Board counsel herein. The issue in that latter case concerned a situation where vacation pay was incorrectly calculated for a fifteen year period and where the collective agreement contained no time limit for filing a union grievance. The decisions in Pride of Alberta, supra, and Inland Aggregates, supra, were considered. Nonetheless, the arbitrator rejected the notion that there is no limitation period to damages whatsoever. It was held that the ultimate limit was a matter of arbitral discretion, based on what the arbitrator, considering all the circumstances, including a balancing of interests, concluded was reasonable. As the union was less than vigilant on behalf of its members to ensure the proper benefits were paid, that failure contributed to the employees' loss. The damage claim was allowed retroactive to two years prior to the effective date of the contract preceding the negotiations in which the error was discovered.

These three cases arise in the Province of Alberta. I need not decide the extent to which a decision of the Alberta Court of Appeal should be given weight in this grievance since the circumstances in the instant grievance are fundamentally dissimilar. Accordingly, the analyses are not particularly helpful. I am not persuaded that it would be appropriate to reach back earlier than the collective agreement under which this grievance was filed nor to extend the reach of any remedy beyond the nominal expiry of this collective agreement pending finalization of its successor. Indeed, my assessment of the relief which should

be awarded in this case is informed by my views of the unique situation before me. What is next necessary is the application of the various principles and approaches outlined in the jurisprudence to the context of this grievance. And, it is to that assessment which I now turn.

Association counsel urged me to keep separate in the analysis the question of the quantum of damages and the impact of delay. He argued that, if the delay involved was considered to have some relevance, a minimal discount to the damages otherwise due may be appropriate. Notwithstanding counsel's able submissions in this regard, I am not enamored of this approach and cannot agree that the issue should be bifurcated as he contends. In my view, that approach is artificial and mechanistic. Rather, I prefer an assessment of damages which integrates the impact of delay into my determination of the relief which is warranted in all the circumstances.

Association counsel also argued that the impact of delay must be assessed in a meaningful, policy oriented and rational way. With that characterization of the process which must be carried out, I do concur. The following list of factors relevant to that assessment is not exhaustive but provides useful indicia in considering the question before me in this award:

1. the nature of the breach of the collective agreement, including whether the contravention was deliberate and/or motivated by an anti-union animus;

2. whether the conduct at issue was carried out openly or with subterfuge, including whether the union knew or reasonably ought to have known of the breach;

3. the duration of the delay in filing the grievance;

4. whether there was a satisfactory explanation from the union for the delay in filing the grievance;

5. the impact of the delay on the union, the employees and the employer; and,

6. whether there is a time limit in the collective agreement for filing a grievance.

These factors are also not amenable to rigid compartmentalization but, rather, are inter-related to a greater or lesser degree.

In the instant case, the collective agreement does contain a twenty-five day time limit for filing a grievance and the Association is in flagrant violation of that period. But, as Board counsel conceded, the governing statute would override that restriction and, for that reason, the grievance was not challenged by him as untimely. While there is, in consequence, no formal barrier to the filing of the grievance, nevertheless, the timeline in the collective agreement does express the sentiments of the parties that disputes be dealt with in an expeditious manner and, therefore, should be given some weight in the damage calculus.

To reiterate my finding of the Board's contravention of the collective agreement, the gravamen of the offence was the violation of the clause recognizing the Association as the sole and exclusive bargaining agent, the retention/service provision and the remuneration provisions more generally. The Association's assertion that the Board's policy was tantamount to bargaining in bad faith was rejected. Moreover, I was not persuaded that the Association suffered a loss of opportunity to bargain the tuition reimbursement policy for reasons which have been delineated earlier and need not be repeated. Although the adoption of the initiative was clearly deliberate, the tuition reimbursement policy was grounded in a legitimate business purpose, namely, the retention of trained personnel. The Board wrongly relied on its management rights clause to sustain the decision. On the other hand, it cannot be said that the decision was in any way motivated by anti-union animus. There was no individual bargaining with employees as occurred in several of the decisions cited. The Board simply disagreed with the Association's position that the policy initiative could not be implemented unilaterally.

There was likewise no subterfuge or attempt to conceal the initiative from the Association. The policy was adopted at a public meeting. The Association agreed that the Agenda for, and later the Minutes of, the Board meeting were forwarded to the Association. Conclusive on this point is that the Association referred to the matter in its mediation brief. The parties also agreed that the TPA Board Director, Larry Molyneaux, who commenced his position in October 2004, had no actual knowledge of the Board's

reimbursement policy prior to the period immediately preceding the filing of the grievance in December 2004. That agreed fact is of no assistance to the Association as the bargaining agent clearly possessed actual knowledge at the relevant times.

The delay in filing the grievance was not brief, to say the least. The policy was adopted in May 2002. The Board approved the termination of the initiative in March 2004, effective April 2004. The grievance was not filed until December 2004, on the eve of the expiry date of the collective agreement. The total period of delay approximated two and a half years. As a general proposition, the longer the period of delay in bringing a grievance forward, the less compelling is a claim for damages. The presence of specific factors, including anti-union animus or subterfuge or difficulty in discerning a violation such as may exist where a miscalculation of a benefit was not readily apparent, may well ground exceptions to that usual approach. None of those types of considerations are reflected in the situation before me.

In the instant case, as well, the Association communicated to the Board, in June 2002, its intention to file a grievance if the tuition reimbursement initiative was implemented unilaterally. The Association then did not act on that statement for an extended period of time. In my initial award, I rejected the assertion of Association counsel that the grievance was timely in that it was filed shortly after the first officers to receive the initial portion of the tuition reimbursement were notified of their entitlement. The jurisprudence make clear that a union need not await actual implementation of a policy in order to grieve. Additionally, in the parties own relationship, the Association did not delay in grieving the early retirement incentives which were the subject of the Picher award. The Association did not wait until actual payments were made pursuant to the policy to file a grievance challenging the Board's actions.

Coupled with the lengthy delay is the dramatic absence of any explanation from the Association to justify that extraordinary period of inaction. It is not necessary to draw a negative inference from this fact; it is simply that there is no evidence whatsoever on which I can conclude there was any acceptable justification for the delay in filing the grievance. An extensive delay which remains unexplained must weigh heavily on any

subsequent assertion that relief should extend beyond the typical declarations and cease and desist orders into a claim for monetary damages.

Next to be evaluated is the impact of the delay on the Association, the bargaining unit members and the employer. I deal with each, albeit not in that order.

Association counsel argued for the extension of the tuition reimbursement initiative to various classes of cadets pre- and post- the Board's termination of the policy. In part, that argument flowed from his contention that, had the matter been bargained, there would have been such extensions, the precise parameters of which, including those in the alternative, need not be detailed. With respect, since I have determined that there was no bargaining in bad faith or loss of opportunity to bargain, the proper question is what would have happened had the grievance been filed in a timely fashion. To some extent, this assessment is problematic but I am satisfied that, in a broad brush fashion, certain conclusions are warranted. What is also unusual about these circumstances is that the first payments pursuant to the tuition reimbursement policy would not have occurred for three years. In this situation, it is reasonable to conclude that, had the grievance been filed in a timely fashion, the matter would have been concluded well before any officers would have become entitled to the initial portion of the tuition reimbursement. The Board would have been subject to a declaration and cease and desist order; the tuition reimbursement initiative would have been nullified.

Instead, what happened as a consequence of the extensive delay is that many officers did become entitled to tuition reimbursement. At the initial hearing, the Association did not seek the repayment of the tuition costs by those who received tuition reimbursement pursuant to the policy. As observed in my initial award, while the Association's position in that regard may well be understandable, it does not necessarily follow that the appropriate remedy is the reimbursement of OPC costs to others. Indeed, by delaying the filing of the grievance until the eve of the expiry date of the collective agreement, the number of officers who gained that benefit was maximized. Whether that was the Association's calculated decision, I do not know and have no need to speculate; the result is the same. The delay has provided for an extension of the benefit of access to the

tuition reimbursement program to many officers who would never have received that entitlement had the Association acted as it should have done to enforce its rights. That the termination of the initiative may now result, from the Association's viewpoint, in unwelcome distinctions amongst members of the bargaining unit with respect to the benefit is a direct result of the Association's inaction. In these circumstances, there is no acceptable rationale, in my opinion, for further extension of the benefit. In effect, the Association is seeking to have the Board estopped from terminating the initiative as the Board did in March 2004, effective April 2004. I see no compelling basis for such a finding or result.

The impact of the delay on the Board is as contended by Board counsel – the Board proceeded to pay out monies on the not unreasonable assumption that the Association, despite its initial assertions, had decided not to grieve the matter only to be faced with a claim for continued payments months after the policy had been terminated. The sums involved are considerable. Again, as noted in the earlier award, there were not grounds for an estoppel, given the elements critical to establishing the applicability of that equitable doctrine. However, the absence of detrimental reliance in the context of an estoppel argument does not necessarily mean that there was no prejudice associated with the Association's delay in filing the grievance. I have already termed the delay a "significant factor" in fashioning an appropriate remedy. I recognize that it may not be usual to consider the impact of delay on an employer who, after all, committed a contravention of the collective agreement. But, in the instant case, particularly given the three year delay before individuals were entitled to the first portion of tuition reimbursement under the initiative and roughly thirty month delay in filing the grievance, a delay entirely unexplained, the consequences for the employer of the Association's inaction should not be entirely disregarded.

Finally, I turn to the Association's claim for $100,000 in damages for the violation of its recognition rights. That quantum is not reflected in the cases cited. The only sizable damage awards to which I was directed occurred in quite dissimilar contexts. Without repeating my comments with respect to Canada Safeway, supra, West Park, supra, and Gateway Casinos, supra, those decisions are not apposite to the situation herein.

Association counsel argued that the Board's misconduct resulted in massively undermining the Association's role as exclusive bargaining agent and the Board's subsequent termination of the initiative was doubly offensive to the Association's rights. He continued that, if the remedy was solely a declaration, that was tantamount to a license to violate the collective agreement. Delay should not be used to punish the Association. With that last sentiment, I agree but cannot otherwise concur with counsel's argument.

The court in Pride of Alberta, supra, cited the reasoning in General Electric, supra, in respect of factors to be considered in assessing the impact of delay. Included amongst those were whether the union misconceived its rights and thereby failed to press them and, also, whether the union understood its rights and either deliberately chose not to press them or neglected to do so. Whether the Association failed to file the grievance in a timely fashion through deliberate decision or through neglect, there is no doubt that the Association "understood its rights". There was no misconception. There was simply inaction to protect those rights for approximately thirty months. Such an extensive delay in filing the grievance fatally undermines the argument of Association counsel that there was a "massive undermining" of the Association's representation rights. For whatever reason, the Association chose not to promptly enforce its rights or neglected to do so, despite having given written notice in June 2002 that the tuition reimbursement initiative would be grieved if the Board continued with its view that its management rights sustained a unilateral adoption of the policy.

The Association is a sophisticated organization engaged in a long-standing collective bargaining relationship. In these circumstances, it can reasonably be concluded that, had the Association regarded the injury to its representational rights as seriously as I am urged to find, there would have been no delay in seeking to enforce those rights. In determining that only nominal damages are appropriate, I am not extending to the Board a "license to violate the collective agreement". Rather, I am tailoring the remedy to the seriousness of the breach, in light of the various considerations which have been

recounted. Having weighed and assessed those factors, the sum of $1,000 is considered suitable in all the circumstances.

One other remedy remains to be addressed. Counsel for the Association requested an order be issued prohibiting the Board from discontinuing payments to those individuals who were entitled to such in the period during which the initiative was in place, i.e., from the classes of 02-01 to 04-02 inclusive, but who may not have, as yet, the requisite number of years of service to have that tuition reimbursement paid out. Counsel for the Board agreed to that order. Given that agreement, the typical cease and desist order is inappropriate but, absent this unusual feature, a cease and desist order would otherwise have issued.

In conclusion, the relief which I have determined is appropriate in all the circumstances is summarized as follows. The declaration which issued in the initial award is again noted for completeness. The Board is to compensate the Association in the amount of $1,000 in respect of its violation of the Association's recognition rights. As mentioned in the preceding paragraph, an order issues, on agreement, prohibiting the Board from discontinuing tuition reimbursement payments to those individuals in the classes of 02-01 to 04-02, inclusive, who complete the appropriate levels of service. Apart from this group, I decline to award tuition reimbursement payments to others, as sought by the Association. Finally, I retain jurisdiction to resolve any issues concerning the implementation of this award.

DATED this September 4, 2008

Susan Tacon, Sole Arbitrator