STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MAYVILLE EDUCATION ASSOCIATION and BETSY HOLLAND, JOHN BULLIS, and STEPHEN G. JOAS, Complainants, vs. MAYVILLE JOINT SCHOOL DISTRICT NO. 5 and the BOARD OF EDUCATION OF MAYVILLE JOINT SCHOOL DISTRICT NO. 5, Respondents.	:	Case IV No. 15894 MP-155 Decision No. 11186-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Bruce Ehlke and Ms. Jean Helen Lawton, for the Complainants.

Melli, Shiels, Walker & Pease, Attorneys at Law, by Mr. James K. Ruhly, for the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having authorized Robert M. McCormick, a member of the Commission's staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.70(4)(a) and 111.07(5) of the Wisconsin Statutes, and hearings on said complaint having been conducted by the Examiner on September 7 and October 24, 1972; and the parties having filed briefs and reply briefs by June 1, 1973; and the Examiner having considered the evidence and briefs and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Mayville Education Association, hereinafter referred to as the Association, is a labor organization and has its mailing address at the residence of the Local President, William Preston, 415 Janssen Avenue, Mayville, Wisconsin 53050.

2. That Betsy Holland, John Bullis and Stephen G. Joas, hereinafter referred to as Complainants, were employed as classroom teachers in the Mayville Joint School District No. 5 for the academic year 1971-1972 and were employes occupying positions included in the bargaining unit represented by Complainant Association.

3. That Respondent Mayville Joint School District No. 5, hereinafter referred to as the District, is a Municipal Employer as defined in Section 111.70(1)(a) of the Municipal Employment Relations Act (MERA) and is a public school district organized under Wisconsin law, operating elementary and secondary schools, and has its main office at the District Administrator's office, Robert L. Deetz, Mayville, Wisconsin 53050; that Respondent Board of Education, hereinafter referred to as the Board, is a public body charged under the Wisconsin Statutes with the management, operation and control of the Respondent District.

4. That at all times material herein, and at least from 1964, the Association has been the certified exclusive bargaining representative of the non-supervisory teaching personnel employed by the District; that at least from the 1963-1964 school year, the Association and the District did negotiate successive agreements covering salaries, benefits, and certain conditions of employment of teachers employed by the District including such an agreement for the school year 1965-66, which contains among its provisions the following material herein:

"PROVISIONS:

. . .

16. Each teacher is entitled to a single Wisconsin Physicians Service surgical and major medical benefit provided by the district. Those having dependents who qualify for coverage by the benefit plan will be entitled to the same insurance coverage on a family plan basis. This family coverage will not be available, at district expense, to a married woman unless her husband is totally disabled.";

that said insurance provision did not substantially change through the 1966-67 and 1968-69 agreements except for changes in room rate coverage and that as early as the 1962-63 school year, the parties negotiated for a District financed hospital surgical plan, the District absorbing premium cost for the "single person for each teacher."

5. That on or near April 15, 1969, the parties negotiated and executed a comprehensive collective bargaining agreement for the contract year 1969-70 containing provisions governing wages, hours and conditions of employment of teachers employed in the certified unit, including certain provisions relating to health insurance, a savings clause, summer school compensation and sick leave benefits, which terms in material part read as follows:

"ARTICLE V.
Compensation

. . .

SUMMER SCHOOL

. . .

Summer school teachers shall be paid at the rate of $5.00 per hour and shall receive their payment at the conclusion of the summer school session.

. . .

HEALTH INSURANCE

Each full time teacher shall be eligible for a single or family Wisconsin Physicians Service Surgical and Major Medical Insurance including Oral Surgery, provided by the Board of Education. This said coverage shall provide for a semi-private room at the maximum of $34 per day and maternity benefits not to exceed $150. The M.E.A. and School Board request that teachers covered by a comparable policy will make arrangements to prevent unnecessary and unwarranted payments by the Mayville School District. Part time teachers shall receive proportionate coverage based upon their employment.

. . .

ARTICLE VIII. ABSENCES

SICK LEAVE

Sick leave in the amount of ten (10) days per annum shall be granted. Such sick leave will be cumulative to 90 days.

Extended sick leave will be granted beyond 90 days on each individual case with Board approval.

. . .

ARTICLE XIII. SAVING CLAUSE

. . .

This written agreement supercedes (sic) and cancels all previous agreements, verbal or written or based on alleged past practices or tradition between the Mayville Board of Education and the Mayville Education Association and constitutes the entire written agreement between both parties.

. . ."

6. That the District at least from 1963-64 through the 1969-70 school year and summer session, paid the health insurance premiums for the teachers in the bargaining unit (single, and later family coverage) who had completed their teaching duties in the respective school years, including the premium cost of insurance coverage for the summer months of July and August in said years for both returning teachers and for teachers who may have retired or terminated their employment with the District in June; that the District, in negotiations for a 1969-70 agreement, proposed a sick leave earning plan for new teachers which would have reduced accrual of sick leave for the first year on a month-by-month earning basis; that the District later dropped said proposal which never became an item of impasse in said 1969-70 negotiations; that thereafter the District continued to treat all teachers on the same accrual basis of 10 days per annum.

7. That on or near May 1, 1969, an Association bargaining committeeman, Francis Stiglbauer, was advised by the District's Business Manager, Ney, that the District planned to cease paying for health insurance premiums for those teachers who would be terminating their contracts or retiring and not returning in the fall of 1969; that Stiglbauer spoke to Superintendent Deetz and called Deetz' attention to Board policy which had existed through to the duration of the 1968-69 agreement, pursuant to which insurance premiums had been paid by the District covering the summer months for teachers leaving the District at the end of the school year; that Stiglbauer further advised Deetz that continuation of the aforesaid policy of District payment of such premiums was also required by the then recently executed 1969-70 master agreement; that shortly after the aforementioned Stiglbauer-Deetz conversation the Business Manager advised Stiglbauer that Deetz had instructed that the District should continue making payments of health insurance premiums for the summer months in 1969 for those teachers retiring or leaving the District that June.

8. That over the period from at least the 1963-64 contract negotiations through the negotiations between the parties for the 1969-70 collective bargaining agreement, neither District negotiators nor Association bargainers advanced any proposals at the bargaining table which would have expressly modified the aforementioned Board policy of some seven years' standing.

9. That in January 1971, as a part of the 1971 negotiations leading to the 1971-72 collective bargaining agreement, District negotiators presented a contract proposal in writing to Association bargainers, which provided in material part:

"MAYVILLE DISTRICT SCHOOL BOARD

PROPOSED

PROFESSIONAL AGREEMENT

. . .

ARTICLE VI - CONDITION OF EMPLOYMENT

. . .

8. TERMINATION OF CONTRACT

. . .

c. Teachers who resign at the end of a school year will have their insurance benefits and any other district granted benefits terminated as of their last contract day."

10. That on or near May 18, 1971, the parties met in negotiations for the 1971-72 contract which resulted in a continuing impasse on items relating to wages and conditions of employment; that the District did not drop or alter said proposal as of a subsequent June 17 meeting; that the terms of the 1970-71 master agreement, beginning August 25, 1970, in fact covered the 1971 summer months as did prior collective bargaining agreements cover such conditions.

11. That on June 21, 1971, the Board met and took formal action to deny District payment of health insurance premiums covering the months of July and August 1971, for some six (6) teachers who were not returning for the fall-1971 term, including the premiums for Don Christensen, a former Association bargainer and officer, who had terminated his employment with the District as of the completion of the 1970-1971 school year; that Christensen first learned of the Board's action in reviewing the published Board minutes in the Mayville news of June 24, 1971; that on June 23, 1971, the District, by its Superintendent, sent Christensen a letter advising him of the Board's action resulting in the "discontinuance of all insurance benefits at the time of termination of contracts of certified personnel"; that the District afforded the six (6) teachers affected the opportunity to pay premiums for July and August in order to maintain their coverage.

12. That on July 15, 1971, Christensen mailed a written grievance, in letter form, to Deetz wherein he confirmed his payment of $69.56 for the summer-months premiums, made request that the Board return to its previous policy by paying such premiums and further requested a reimbursement of the sum paid; that Christensen, further alluded to the Board's "moral obligation to those of us who have faithfully served the educational needs of the children of the Mayville area" as the basis for his claim.

13. That Christensen's grievance was processed thereafter to the final step in the grievance procedure under the master agreement, namely to the Board level; that in the course of the processing of said grievance, Mr. William Preston, then Vice President of the Association, appeared on behalf of Christensen before the Board on August 16, 1971, at a meeting called for another purpose and advised the Board that its change of policy and the District's action on Christensen's insurance coverage constituted a violation of the agreement.

14. That on August 12, 1971, after having received an Association petition for Fact Finding based upon a deadlock in negotiations with the District over the terms of a 1971-72 agreement, the Wisconsin Employment Relations Commission issued an Order finding that a deadlock did exist and appointed a fact finder to recommend a solution to the unresolved issues; that included among such issues in deadlock was the District's contract proposal relating to the termination of insurance benefits for those teachers resigning at the end of a school year.

15. That on or near September 14, 1971, the Board formally denied Christensen's grievance; that Deetz so advised him in writing on October 19, 1971; that sometime on or shortly before October 14, 1971, the parties resumed bargaining over the issues previously in deadlock in an effort to reach an accord over a 1971-72 master agreement, in the course of which the District negotiators dropped the contract proposal relating to the termination of health insurance coverage for teachers quitting in June; that the parties thereafter reached an accord on a 1971-72 collective bargaining agreement which was ratified on October 18, 1971; that the health insurance provision in the 1971-72 agreement remained substantially the same as the 1969-70 and 1970-71 provisions except for improvements in room-rate coverage and refinements in the definition of eligibility; that said Article V, K provides in material part:

> "Each primary wage earner [rather than each full-time teacher] shall be eligible for a family or single Wisconsin Physicians Service . . . Insurance . . . provided by the Board of Education."

that the 1971-72 master agreement contained essentially the same language in the provisions covering Sick Leave (Article VIII) and Savings Clause (Article XIII) as contained in the 1969-70 and 1970-71 agreements.

16. That on May 2, 1972, the District sent a memo to five teachers, including the three Complainants, advising them that their health insurance coverage would expire as of June 30, 1972 and, further advised said teachers that extended coverage was available at their expense by paying July-August premiums to the District; that on May 19, 1972, Complainant Betsy Holland made written reply which reads as follows:

> "I do desire coverage through the summer but I feel I am entitled to it without pay deductions. Therefore I request that deductions be made from my June 30 and July 31 checks under protest that the School Board is not paying me my full salary for a full school year's work."

that Complainant Joas also elected to pay July-August premiums for continued coverage while Complainant Bullis declined to continue coverage at his own expense; that the 1971-72 master agreement generally covered wages, fringes and conditions of employment from August 24, 1971 through the summer months of 1972 as did prior agreements.

17. That on July 13, 1972, the Association, by its counsel Ms. Jean Helen Lawton, advised the Board, in writing, that its declinations to pay both the 1971 summer insurance premiums for Christensen and 1972 premiums for Complainant-teachers and other constituted a "refusal to adhere to . . . a past practice" and therefore was violative of the 1970-71 and 1971-72 collective bargaining agreements; that Association's counsel further stated therein:

". . .

During these years, the provisions of the collective bargaining agreement dealing with health insurance did not specifically provide for such summer payments. However, the Board had adhered to the practice of making the summer payments on behalf of teachers leaving the system for a period of at least ten years.

. . ."

18. That as of the dates of the instant hearing, the Christensen grievance remained unsettled, and that the unresolved grievances of the Complainants prompted the Association to file complaints of prohibited practices on July 27, 1972.

19. That the Association, through its grievance committeeman and Vice President, Preston, and through its contact with the Board on behalf of Christensen in the summer and early fall of 1971, at a time contemporaneous with its collective bargaining with District negotiators over a prospective 1971-72 master agreement did have actual notice by August of 1971 that the District intended to terminate as of June 1971, its previous practice of paying health insurance premiums on a 12-month basis for teachers leaving the District in June at the end of a school year; that the District did not drop its 1971-72 contract proposal with respect to termination of insurance benefits for teachers who resign at the end of a school year until the ultimate resolution of the impasse over a 1971-72 contract in early October 1971; that District negotiators in dropping the aforementioned insurance proposal and by reaching an accord over terms of a 1971-72 master contract did not expressly or impliedly indicate to Association bargainers that its bargaining-table conduct and the 1971-72 accord would alter its June 1971 change of policy, which prompted the Christensen grievance; that in the concluding stages of 1971-72 bargaining to the time of an agreement in early October, 1971, Association negotiators did not expressly or impliedly condition a 1971-72 accord for a new master contract on the basis that the District return to its practice existing prior to June, 1971 with regard to health insurance premiums.

20. That the District, by its conduct at the bargaining table, in the course of negotiating a 1971-72 agreement and by its actions in June through September 1971 on the Christensen grievance and the Board resolution of June 21, 1971 and its denial of the Christensen grievance in September, 1971 did effectively terminate its previous practice existing through the summer of 1970 so that the Association and the teachers in the bargaining unit were placed on notice in May-June of 1972 that the District's policy would not provide payment for July-August health insurance premiums for any teachers leaving the District at the end of the school year.

Upon the basis of the above and foregoing Findings of Fact the Examiner makes the following

CONCLUSIONS OF LAW

1. That the 1971-72 collective bargaining agreement between Mayville Joint School District and Mayville Education Association, Article V, K - Health Insurance, is silent with respect to any District obligation to pay health insurance premiums for those teachers leaving the school district in June at the end of the regular school year, covering the premium expense for the months of July and August; that the aforementioned provisions V, K - Health Insurance, by its general provision to wit: "Each primary wage earner shall be eligible for a family or single WPS Surgical and Major Medical Insurance . . . provided by the Board" is not susceptible of a construction that such insurance is to be provided on a 12-month basis for all teachers who complete their duties through to the end of a school year.

2. That the only existing practice regarding District payment of health insurance premiums for teachers leaving the District as of a given June, which may be deemed to be an aid in interpreting a possible ambiguous contract term, Article V, K Health Insurance is that practice existing as of October 14, 1971, as set forth in Findings of Fact #20, namely, that the premiums for July and August for such teachers are not paid by the District.

3. That Mayville Joint School District No. 5 did not violate the terms of its 1971-72 collective bargaining agreement by declining to pay July and August 1972 premiums for the named individual Complainants and, therefore, did not commit and is not committing any prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law the Examiner makes the following

ORDER

IT IS ORDERED that the complaint of prohibited practices filed in the instant proceeding be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 7th day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pleadings

The Complainants, in material part, alleged the following in their complaint:

". . .

Starting with the 1962-1963 Agreement, each Agreement [successive collective bargaining agreements] has provided for payment by the District of health and accident insurance premiums by the District on behalf of the teachers.

4. Each agreement has been silent on the question of whether the health and accident insurance premiums of teachers leaving the employment of the District would be paid for all twelve months of their last year of teaching for the District, or for only the nine months of the year when they actually taught. From the 1962-1963 school year through and including the 1969-1970 school year, it was the practice of the District under the successive Agreements to pay the health and accident insurance premiums of the teachers leaving employment of the District for all twelve months of their final year of teaching, including the summer months immediately following their departures.

5. At the end of the 1970-1971 school year, all teachers leaving the employment of the District were informed that if they wanted coverage for the summer months of 1971 they would have to pay the District for the cost of the premiums. This action by the Board was grieved by Don Christensen, one of the leaving teachers. On October 19, 1971, as the final step in the grievance process, the Board informed Mr. Christensen that his claim for reimbursement for the premiums he had paid was rejected.

. . .

6. At the end of the 1971-1972 school year, all teachers leaving the employment of the District, namely, Betsy Holland, John Bullis, Stephen G. Joas, and John W. Santas, were informed that if they wanted health insurance coverage for the summer months of 1972 they would have to pay the District for the cost of the summer premiums.

. . .

7. A letter was sent to the Board on July 13, 1972, on behalf of the four complainant teachers, setting forth the Complainants' position and demanding that the District reimburse the Complainants for the expenses incurred by them as set forth in paragraph 6. The Board rejected this demand at its meeting on July 18, 1972, and the District continues to refuse to reimburse the complainant teachers for the amounts owed them under the Agreement.

8. The actions of the District and the Board set forth at paragraph 7 herein constitute violations of the 1971-1972 Agreement, and therefore constitute prohibited practices in violation of sec. 111.70(3)(a) 5, Wis. Stats.

. . ."

The Respondent District, in its Answer, denied that it was the practice of the District, under collective bargaining agreements, "to pay the health and accident insurance premiums of the teachers leaving employment of the District for all 12 months of said teachers' final year of teaching including the summer months immediately following their departures." The Respondent further alleges in material part as follows:

> ". . . that on or about June 21, 1971, Respondent Board of Education voted to cease paying health and accident insurance premiums effective July 1, 1971, for personnel who would not be returning to the District the following year.
>
> . . .
>
> that all teachers leaving the employment of the District at the end of the 1971-72 school year were advised in writing that the District provided health and accident insurance through the last day of the month in which said teachers were employed by the District;
>
> . . .
>
> that the 1971-1972 school year ended on June 1, 1972; that pursuant to District policy, the subject insurance premiums for those teachers resigning as of the end of the 1971-1972 school year were paid by the Respondent District for the month of June 1972;
>
> . . ."

The District denies that it has refused or failed to reimburse the Complainants for any amounts owed them under the 1971-72 collective bargaining agreement. The District further alleges by way of an affirmative defense that its 1971-72 collective bargaining agreement with the Association provides:

> "This written agreement supercedes [sic] and cancels all previous agreements, verbal or written or based on alleged past practices or tradition between the Mayville Board of Education and the Mayville Education Association and constitutes the entire written agreement between both parties."

The Respondent further alleges that said 1971-72 agreement was ratified by the Association on October 18, 1971. Respondent requested that the complaint be dismissed.

In the course of hearing, the Complainant was permitted to amend its pleadings so that John Santas was removed as a party and individual Complainant and its prayer for relief was further amended with respect to the total amount of monies allegedly due and owing from the District for premiums paid by the individual Complainants.

The Complainants, in pleading and on the record at the outset of the hearing, requested in its prayer for relief that the District be ordered to reimburse the individual Complainants for the expenditures each made for the premiums paid by the Complainants in June of 1972, and in their brief further requested that the District be ordered to cease and desist from their unlawful actions.

BACKGROUND AND ULTIMATE FACTS:

There does not appear to be any substantial disagreement as to the facts surrounding the actions of the District in May and June of 1971 and with respect to its actions in June of 1972 regarding the

individual Complainants that are parties to this action. There is, however, disagreement as to the significance of such facts and an underlying issue created by the District's denial of the existence of any practice of the District's paying the health insurance premiums for all 12 months of a teacher's final year of teaching including the months of July and August for those teachers leaving the District in June.

There would also appear to be a difference over the proposition as to whether or not the successive collective bargaining agreements from 1963 forward were silent with respect to any obligation of the District to pay for July-August premiums for teachers retiring or leaving the District in June after having completed their teaching duties for the school year. The pleadings would indicate that both parties agreed that the master agreement was silent. However, the District, in its brief, draws a tacit assumption from its allegation and from the proof in the record that the Association cannot properly advance a theory of contract interpretation, namely, that the collective bargaining agreement provides for a general insurance benefit to all teachers and therefore the past practice of the parties under preceeding agreements should not be resorted to by the Examiner as an aid in interpreting the 1971-72 contractual provisions in dispute.

The undersigned has concluded, and has made findings of fact in support thereof, Findings of Fact #6 that the parties did, in fact, operate under such a practice from at least 1963 pursuant to which the District paid 12 months of insurance premiums for those teachers leaving the District in June, namely for the months of July and August without any reservation on the part of the District, at least up to May-June of 1969, when Superintendent Deetz had first given the Association the impression that the District was about to terminate its policy regarding paying premiums for teachers leaving the District beginning in July-August of 1969.

There being no outright denial by Deetz, and the testimony of Stiglbauer having been credited, the undersigned has found, as indicated in Findings of Fact #7 that Deetz rescinded his planned action of the summer of 1969 and the District continued to pay health insurance premiums for teachers retiring or leaving the District in June through to the duration of the 1969-70 master agreement.

There also may be a disagreement as to the significance which should attach to the contemporaneous nature of 1971-72 negotiations in late May and June of 1971 with the timing of the Board's action of June 21, 1971, when it first advised the Association and certain of its teacher-members of the new policy affecting terminating teachers. Washa's testimony indicates that the Association met with the District on May 18, 1971 and on June 17, 1971 for less than an hour after which a number of issues relating to wages, fringes and conditions of employment did remain at impasse; and that Washa further testified that the Association filed a fact finding petition after said meeting. If the Association is arguing that there is some significance to bargaining meetingsbetween the parties in May and June, 1971 1971 in the course of which no formal notice was given by District negotiators to Association bargainers, that the District intended not to pay summer premiums for teachers who terminate in June, the undersigned has found in Findings of Fact #10 that as of the May or June, 1971 bargaining sessions for a 1971-72 contract, the District's proposal relating to its desire to terminate insurance coverage at the end of the school year for those teachers leaving the District in June remained on the bargaining table as an unresolved issue. Sometime after that date pursuant to an Association petition filed in late June 1971, the Wisconsin Employment Relations Commission ordered the matter to fact finding, in August of 1971.

The testimony of James Washa, Association bargaining committee member in the spring and summer of 1971, conflicts with the plain meaning of a 1971-72 contract proposal made by the District which was submitted as Respondent's Exhibit No. 6. The latter document, together with Deetz' testimony, clearly indicates that District negotiators did submit language in early 1971 (See Findings of Fact #9) which, if adopted, would have clearly relieved the District of any obligation to pay health insurance premiums for teachers leaving at the end of a school year. The undersigned would discount Washa's recollection that the District had proposed that all teachers would have their benefits terminated at the end of a school year. There is no support for Washa's version of the District's 1971-72 contract proposal in the record.

The District suggested through testimony, written exhibits and arguments that from July to September, 1971, the grievant, Christensen had never indicated to District representatives that the District had violated the collective bargaining agreement by its failure to pay Christensen's 1971 summer months' premiums. Though Christensen did dwell on the Board's moral obligation to pay the July-August 1971 premiums and the fact that it had paid same for others in previous years, the undersigned finds that the District was constructively placed on notice that the grievant and the Association were protesting the District's 1971 change of a previously accepted practice, as a contract violation. Such a conclusion is further supported by the credited testimony of William Preston, Vice President of the Association, who appeared at a Board meeting on August 16, 1971 and advised the Board that the Association viewed the Board's declination to pay July-August insurance premiums as a violation of the master agreement. It is also apparent from Preston's testimony that the Association was a co-advocate in the Christensen grievance and that it possessed knowledge, in its role as the exclusive bargaining representative, that the Board had in fact rescinded its policy of paying summer month health insurance premiums for those teacners leaving the District at the end of a school year. (See the ultimate facts set forth in Findings of Fact #19).

Though the parties, in written argument, both alluded to the Association's having made a proposal in the course of bargaining for a 1971-72 agreement, (Respondent's Exhibit No. 7) wherein it sought language to make clear that "health insurance would be provided on a 12-month basis" the record discloses that the Association made said proposal in the 1972-73 negotiations. The Examiner has concluded that such evidence is not material to the issue joined herein as to the meaning of the 1971-72 health insurance provision.

POSITIONS:

The Association points to the accepted practice over eight years of successive collective bargaining agreements where the District paid the health insurance premiums of resigning teachers who had completed their duties for the school year. The unilateral change in June of 1971, which prompted the Christensen grievance, constituted a violation of the 1970-71 agreement. The mere existence of negotiations for a 1971-72 agreement at a time coincident with the District's action to deny payment of Christensen's premiums in June of 1971, does not authorize violation of the 1970-71 agreement. The Association argues that it maintained its challenge of the Board's action on the 1971 change of practice through a period when a subsequent 1971-72 agreement became viable which contained essentially the same language on Health Insurance coverage.

The Association urges that it does not rely upon an implied maintenance of standards clause to preserve the past practice exist-

ing prior to 1971, but merely asserts that the issue involves a contract interpretation problem and that the practice manifests that the parties intended that the language of Article V, K provides for insurance coverage for all teachers completing their duties to the end of a school year.

The Association argues that the so called "zipper clause", Article XIII, B was not intended to eliminate practices accepted by the parties over the period of a number of agreements, including a time extending beyond the adoption of said zipper clause; that in any event the record supports the proposition that said clause only bars agreements or practices outside of the current contract, or those inconsistent with its provisions.

The Association points out that dropping its proposal for the 1971-72 agreement relating to insurance coverage on a 12-month basis and the District's drop of its proposal which would have terminated benefits for teachers quitting in June should not prompt any inferences, since there is no evidence of any quid pro quo involved in either drop.

The District contends that its policy up to 1971 of paying the July-August premiums of resigning teachers was established unilaterally by the Board. The District points out that the salary-schedule agreements through 1968-69 and the master agreements through at least the 1971-72 contract are silent with regard to the matter. The District contends that in early 1971 it made a proposal for the 1971-72 contract that teachers resigning at the end of a school year would have their insurance benefits terminated; that said proposal remained outstanding and at impasse in June of 1971 and throughout negotiations at least through the last meeting prior to a fact finding petition, through mediation and finally dropped in October 1971, in an accord reached just before a scheduled fact finding; that at time of such impasse, the Board took final action on June 21, 1971 to terminate insurance benefits for teachers leaving in June 1971; that said action of the Board was communicated to the teachers affected and the minutes published in the local newspaper; that Christensen and the Association pressed the former's grievance basing their challenge on the Board's change of a practice; that the Board at a hearing in September, 1971 denied the Christensen grievance and continued its new policy through 1972 of denying benefits to teachers who quit at the end of a school year.

The Respondent points out that both the 1970-71 and 1971-72 contracts contained no arbitration, and that in October 1971 the State Act, Section 111.70 contained no provision proscribing a violation of contract. Respondent argues that the 1971-72 agreement contains no maintenance of standards provision which can be said to persevere Board policies, and that nothing in the MERA requires it to reinstate its pre-1971 policy, absent such a "standards" clause, once impasse had been reached in 1971-72 negotiations and after it had made its 1971 change regarding teachers who no longer would be employes after their terminations.

The Respondent asserts that its action in May of 1972 regarding five teachers (three being Complainants) came after the Association had executed a 1971-72 agreement, which contained no provision negating the District's 1971 change of policy. Its action regarding Complainant's premiums was no different than its application of the policy in the summer of 1971.

The Respondent urges that Article XIII, B supersedes all agreements based upon all past practices, not merely those practices which may be inconsistent with the agreement, as argued by the Association. Deetz' testimony reinforces that proposition, indicating that the Board wanted all maters involving an "expenditure" set forth in the agreement, and if not "nothing was to be paid".

The Respondent, in summation, contends that the 1971-72 agreement, even according to the Association, is silent with respect to the District's obligation to provide insurance coverage for teachers who have terminated; and that its 1972 policy of denying such premiums at District expense was a continuing application of its 1971 policy, not otherwise proscribed by the 1971-72 agreement.

ANALYSIS AND CONCLUSION:

The Examiner rejects one of the District's threshold arguments, namely, that the Association cannot be heard to claim that it challenged the Christensen grievance and the District's policy change of 1971 bottomed on a violation of the 1970-71 agreement, since neither made a precise allegation in 1971 that the District had violated the master contract. The ultimate facts set forth in the Findings of Fact reflect that the District was placed on notice that the Association made a claim that the District's 1971 rescission of the practice did constitute a violation of the agreement.

On the question of the "zipper clause" Article XIII, B, the Examiner finds that after the parties first adopted said provision in the spring of 1969 for the 1969-70 contract the District continued to pay health insurance premiums for all teachers on a 12-month basis, including coverage for teachers quitting in June 1969 and 1970. In addition, Deetz, on behalf of the District, embarked on a policy change in the late spring of 1969 after the parties had executed the 1969-70 contract, but then reversed its plans to rescind the prior policy, which resulted in the District paying for such coverage at least through the summer of 1970. It is clear that the Board's practice of providing insurance coverage for teachers who terminated in June survived the 1969-70 installation of the "zipper clause" up to the summer of the 1970-71 agreement. That fact, together with the Examiner's having credited the testimony of Association witnesses (though Washa's testimony that Article XIII, B required complete "mutuality" before a change could be effectuated, is discounted) convinces the undersigned that only those practices inconsistent with the 1971-72 agreement are deemed expunged by the so-called "zipper clause".

The Association argues that its challenge of the Board's 1971 policy-change, at a time when the 1970-71 contract still applied, effectively preserved the continuity of the old pre-1971 practice. This is a tenuous argument at most when we consider that the instant dispute involves the health insurance provision of the succeeding 1971-72 agreement. The Association, in its demand-letter of July 13, 1972, in its pleadings and in argument in course of hearing, conceded that the agreement is silent with respect to the District's obligation to pay the insurance premiums for teachers who quit in June. If the Association is to prevail, it would appear also that it would be on grounds other than that the language of Article V, K is clear and unambiguous. However, the Association, in effect does bottom its case on two theories, namely that:

1. That insurance provision is ambiguous and that pre-1971 long-standing practice is to be resorted to as an aid in interpreting Article V, K to mean that the parties intended said general provision to provide for coverage for all teachers who did complete their teaching duties in June, including those who quit,

or

2. That the contract clause in question is silent as to such coverage and that the aforementioned pre-1971 practice, being long standing and accepted by the parties, constitutes an implied term of the agreement.

It becomes apparent that under either theory, the Complainants would have the Examiner conclude that the District could not have changed or purged its pre-1971 practice (ala the Board conduct involving the Christensen grievance in June of 1971) so long as the Association had challenged the 1971 change of policy as a contract violation of the 1970-71 agreement.

Assuming that the Christensen grievance and the claims of Complainants had all been advanced under the terms of the same labor agreement spanning both transactions, it would be unlikely that an arbitrator or a 301-type forum would view a one-time deviation from an eight-year practice by an employer as an effective purging of past practices which otherwise would constitute an implied term of the agreement. But there is more here in terms of evidence of extrinsics.

Unlike the private sector, the Association's conduct involving administration of the 1970-71 contract and its bargaining-table conduct leading to a 1971-72 agreement must be viewed in the context of the machinery for dispute settlement under the 1970-71 agreement; and in the context of the newly enacted contractual remedies available after November 11, 1971, under MERA.

The Association, in substance, advances this proposition, namely, that the past practices (pre-1971) which have risen to the character of an implied term of the agreement cannot be unilaterally rescinded by the District (even over the span of succeeding agreements) without the agreement of the Association to so modify.

Were the Examiner confronted with a claim for relief involving the Christensen grievance under the 1970-71 agreement, the Association's contention might be persuasive.

The crucial evidentiary facts in this controversy appear to be the following:

1. A bargaining proposal made by the District in early 1971 for a 1971-72 agreement which remained outstanding and part of the impasse in June of 1971 and through September 1971.

2. The Board's action of June 21, 1971, which changed its long-standing practice resulting in the termination of said insurance coverage for teachers quitting in June of 1971.

3. The Association participating in the process of the Christensen grievance from July to October 1971 at a time coincident with its ongoing bargaining for a 1971-72 agreement from late May 1971 to early October 1971, during which the very question of termination of insurance benefits for teachers who quit at the end of the school year constituted a matter in dispute, and thus part of an impasse existing from June to October 1971.

4. The Board's denial at the final step of the grievance procedure in September of 1971 of the Christensen grievance followed by the October 1971 agreement on essentially the very same health insurance language, with no attending Association or District conditions as to whether the 1971-72 accord depended upon either the retention of the old practice or rescission of the Board's June 1971 changes.

The Examiner concludes that such conduct clearly placed the Association on notice that the District would not continue to pay for insurance coverage of terminated teachers after the June 1971 date and is deemed by the undersigned to be tantamount to an across-the-

table notice from District negotiators to Association bargainers in the concluding stages of 1971-72 negotiations that the District intended to purge its pre-1971 practice. The Examiner is convinced that no employer, private or public, is constrained to maintain a practice in perpetuity regarding the application and distribution of benefits under terms of a collective bargaining agreement which are silent or present some gap as to precise application. The District did not need the Association's assent before abandoning its old policy in view of the bargaining history and contract administration in evidence here. One must conclude that the Association, by its contention as to the viability of the pre-1971 policy through the 1972 summer months, is in effect asserting the presence of an implied "maintenance of standards provision". The latter device is the common vehicle that labor organizations use to insure the continuity of employer practices, i.e., "benefits", where the labor agreement itself is silent.

The Examiner is convinced that the Association has failed to prove by a sufficient quantum of evidence that the District's pre-1971 practice constitutes an implied term of the agreement requiring insurance coverage on a 12-month basis for teachers who quit and failed to show that the Board's 1971 change of policy was ineffectual.

For much the same reasons, in the alternative, the Association has failed to prove that the pre-1971 Board policy constitutes a viable past-practice to which resort can be made, in order to interpret the 1971-72 health insurance provision, according to the meaning of Article V, K advanced by the Association. The post-June 21, 1971 practice is the only policy one can look to as an aid in interpreting the instrument. The Association's "table-conduct" in 1971-72 bargaining together with the Association's knowledge and actions in handling the Christensen grievance convinces the Examiner that Article V, K is susceptible of an interpretation that the District, after the summer of 1971, intended that only employes of the District returning in the following autumn are entitled to 12 months of health insurance coverage. The Association has failed to meet its burden of proof to otherwise prevail under the second theory, namely, the ambiguity of the proviso in question, arguably made clear by resort to the pre-1971 practice.

The complaint filed herein has therefore been dismissed.

Dated at Madison, Wisconsin this 9th day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner