STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JEFFERSON COUNTY EMPLOYEES, LOCAL 655-D, AFSCME, AFL-CIO, Complainant, vs. CITY OF JEFFERSON, WISCONSIN, MR. RICHARD J. FISHER, MAYOR, and MR. JACK DABAREINER, PERSONNEL COMMITTEE CHAIRMAN, Respondents.	Case XI No. 21609 MP-747 Decision No. 15482-A

Appearances:

Mr. Darold O. Lowe, District Representative, Wisconsin Council of County & Municipal Employees, appearing on behalf of the Complainant.

Mr. Bruce W. Freeburg, City Attorney, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having on April 29, 1977, filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondents had committed a prohibited practice within the meaning of Section 111.70 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held before the Examiner in Jefferson, Wisconsin, on June 1, 1977; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Jefferson County Employees, Local 655-D, AFSCME, AFL-CIO, herein Complainant, is a labor organization functioning as the collective bargaining representative of "all regular full-time and regular part-time employees, excluding clerical, law enforcement personnel, seasonal employees, supervisory and confidential employees" employed by the City of Jefferson.

2. That the City of Jefferson, Wisconsin, herein Respondent, is a municipal employer; that Mr. Richard J. Fisher, herein Respondent Fisher, is Respondent's mayor and functions as its agent; and that Mr. Jack Dabareiner, herein Respondent Dabareiner, is the chairman of Respondent's Personnel Committee and functions as its agent.

3. That the parties' 1976 collective bargaining agreement contained the following provision:

"ARTICLE VIII
HOSPITAL - SURGICAL, LIFE
INSURANCE, AND RETIREMENT

Section 1. The Employer shall continue in force hospital, surgical and life insurance policies at least equal to or better than those presently in effect. The Employer shall pay the full cost of the life insurance policy and shall pay up to $28.74 per month toward a single contract and up to $78.07 per month toward a family contract of hospital and surgical insurance plus any increases in premium in 1976."

4. That on September 28, 1976, the parties met and began collective bargaining for their 1977 bargaining agreement; that on or about November 1, 1976, Wisconsin Physicians Service (WPS), the Respondent's hospital and surgical insurance carrier, notified Respondent, through a letter dated October 29, 1976, that effective November 1, 1976, its policy with WPS would be altered so as to include a $50 in-patient hospital deductible and an increase in out-patient psychiatric benefits; that these changes were not solicited by Respondent nor was Respondent aware of the change before receiving the October 29 letter; that the insurance policy in effect between WPS and Respondent prior to November 1, 1976, did not have any in-patient hospital deductible; and that on or about November 1, 1976, all members of Complainant who were covered by the WPS policy, including Complainant's president, received copies of a document which indicated that the $50 deductible had been implemented.

5. That on February 8, 1977, the parties held their second bargaining session and reached a tentative settlement of their 1977 bargaining agreement; that part of said settlement included the alteration of Article VIII, Section 1, to read as follows:

"The Employer shall continue in force hospital, surgical and life insurance policies at least equal to or better than those presently in effect. The Employer shall pay the full cost of the life insurance policy and the full cost of the hospital and surgical insurance."

that there was no discussion between the parties regarding the $50 deductible during the February 8 bargaining session or at any time prior thereto; that sometime after February 8, 1977, the Complainant's membership met to consider ratification of the tentative settlement; that Complainant's membership ratified the tentative settlement at said meeting while aware that the insurance policy then in effect contained the $50 deductible; and that prior to said ratification Complainant never demanded that Respondent bargain with respect to the deductible.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Respondents, City of Jefferson, Richard J. Fisher, and Jack Dabareiner, did not refuse to bargain collectively with Complainant, Local 655-D, regarding the implementation of the $50 in-patient hospital deductible and therefore did not commit a prohibited practice within the

meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 19th day of August, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint filed April 29, 1977, the Complainant alleged that Respondents committed a prohibited practice within the meaning of Section 111.70(3)(a)4 of MERA when they "changed conditions of employment by (a) placing a $50 deductible on the hospital portion of the hospital and surgical insurance policy; (b) failing to notify the Union of such change; and (c) refusing to submit such change in conditions of employment to collective bargaining with the Union." The Respondents filed an answer on May 26, 1977, which denied Complainant's allegations and affirmatively alleged that WPS independently placed the deductible in the insurance policy; that all members of Complainant were immediately notified of the deductible's presence; that no claims were submitted between November 1, 1976 and January 1, 1977 which involved the deductible; and that Complainant did not notify Respondents that the change was unacceptable until after the 1977 contract had been ratified by both sides.

Section 111.70(3)(a)4 of MERA establishes the Municipal Employer's obligation to bargain in good faith with the collective bargaining representative of its employes with respect to said employes' wages, hours, and conditions of employment. This duty to bargain continues during the term of a collective bargaining agreement and requires that the Municipal Employer bargain with its employes' bargaining representative before unilaterally changing employes' wages, hours, or conditions of employment. 1/ However, the Municipal Employer's duty to bargain and the Union's right to same may be waived by the terms of the parties' bargaining agreement and/or pertinent bargaining history. 2/

In the instant situation a letter from WPS dated October 29, 1976, informed Respondent of certain changes in the health insurance policy being offered Respondent which would become effective November 1, 1976. The scope of insurance benefits available to employes has an undeniable impact upon their "wages, hours, and conditions of employment", and thus clearly constitutes a mandatory subject of bargaining between Respondent and Complainant. Thus, Respondent was obligated to bargain with Complainant regarding this change in insurance coverage which was occurring during the term of the parties' 1976 collective bargaining agreement. The record reveals the Respondent did not bargain with Complainant regarding said change and thus must be found to have violated Section 111.70(3)(a)4 unless Complainant waived its right to so bargain. The Examiner therefore turns to an examination of the parties' bargaining agreement and bargaining history to determine if such a waiver did occur. Waiver will not be found absent clear and unmistakable evidence indicating same. 3/

1/ City of Beloit, (11831) 9/74; aff'd in relevant part, nos. 144-272 and 144-406 (Dane Co. Cir. Ct.) 1/31/75; app'd to Wis. Sup. Ct.; aff'd 6/2/76 Oak Creek-Franklin Jt. School Dist. No. 1, (11827) 9/74; aff'd, No. 144-473 (Dane Co. Cir. Ct.) 11/75.

2/ City of Madison, (15095) 12/76; Middleton Jt. School Dist. No. 3, (14680-A, B) 6/76; City of Green Bay, (12411-A, B) 4/76; Milwaukee County, (12734-A, B) 2/75.

3/ City of Milwaukee, (13495) 4/75; City of Menomonie, (12674-A, B) 10/74; Fennimore Jt. School Dist., (11865-A, B) 7/74; Madison Jt. School Dist., (12610) 4/74; City of Brookfield, (11406-A, B) aff'd Waukesha County Cir. Ct. 6/74.

Article VIII, Section 1 of the parties' bargaining agreement states that "the Employer shall continue in force hospital, surgical, and life insurance policies at least equal to or better than those presently in effect." This language appears to allow the Employer to change insurance carriers and/or benefit packages as long as the newly provided benefits remain at least equal to those in effect before the change. It could reasonably be concluded that by agreeing to Article VIII, Section 1, the Complainant waived its right to bargain over changes in insurance benefits which fell within the "at least equal to or better than" category. In order to determine whether Complainant waived its right to bargain over the instant change, one must therefore determine whether the revised policy was "at least equal to" its predecessor.

The record reveals that effective November 1, 1976 employes became subject to a $50 deductible while becoming eligible for greater outpatient benefits for psychiatric treatment. As there is no evidence in the record which would allow the Examiner to objectively determine whether the loss of benefits represented by the deductible was completely counteracted by the gain in benefits for psychiatric care, 4/ one must of necessity make a subjective theoretical determination regarding same. It is the undersigned's belief that the loss represented by the deductible is more significant than the gain in psychiatric benefits inasmuch as the former would in all likelihood affect many of the employes while the latter might never be utilized. Thus, the new package of benefits is found to be of lesser value than that previously enjoyed by the employes. Having made this determination, the Examiner is then confronted with the question of whether the new insurance coverage is therefore removed from the realm of coverage "at least equal to" that formerly enjoyed and thus taken beyond the scope of waiver represented by Article VIII, Section 1.

While the appearance of a $50 deductible might be viewed as somewhat insignificant in relationship to the array of coverage which the new policy retained, such a deductible is still likely to translate into increased health cost for employes and thus cannot be ignored. Given this fact and the unequivocal contractual requirement of "equality", it must be concluded that the new policy was not "at least equal" to that previously enjoyed. Given this determination it must also be concluded that Article VIII, Section 1, does not constitute a waiver of Complainant's right to bargain over this change in benefits. The Examiner thus turns to the question of whether Complainant waived its right to bargain as a result of its conduct.

The record indicates that as soon as it became aware of the deductible, Respondent sent documents to all bargaining unit members, including Complainant's president, which indicated that the deductible had been inserted into the WPS policy. By taking this action Respondent could reasonably assume that all employes would become aware of the change. Although Complainant's president testified that he did not read the documents which he received, it is concluded that at least a substantial portion of Complainant's membership did read the document upon receipt inasmuch as there was a general awareness of the deductible at the ratification meeting and the document mailed to all employes was Respondent's only effort to relay the policy change to bargaining unit members. Thus, it is concluded that on or about November 1, 1976,

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4/ Although Complainant did assert in its closing argument that several employes had paid the deductible for claims occurring during 1977.

Complainant was in fact aware or reasonably should have been aware of the deductible's presence. Upon becoming aware of the change, it was incumbent upon the Complainant to demand that Respondent bargain about same. It is not Respondent's obligation to initiate discussion about the issue when Complainant was or reasonably should have been aware that the change had occurred. The record indicates that despite an awareness of the change, Complainant never requested that Respondent bargain. It must therefore be concluded that Complainant, by its failure to demand bargaining, clearly and unmistakably waived its right to bargain about the unilateral change in insurance benefits during the term of the 1976 contract.

The record also indicates that during bargaining for the 1977 contract, Complainant never raised any issue with respect to the deductible's existence. Indeed Complainant ratified the 1977 contract despite employe discussion about the deductible at the ratification meeting. It must therefore also be concluded that Complainant, by its failure to demand bargaining on the deductible during negotiations for the 1977 agreement, waived its right to bargain about said deductible for the term of the 1977 contract.

Dated at Madison, Wisconsin this 19th day of August, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner