STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| GREEN BAY EDUCATION ASSOCIATION,<br><br>Complainant,<br><br>vs.<br><br>JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY AND TOWNS OF ALLOUEZ, BELLEVUE, DE PERE, EATON, GREEN BAY, HUMBOLDT, AND SCOTT, AND BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 1 CITY OF GREEN BAY ET AL.<br><br>Respondents. | : | Case XXX<br>No. 23932 MP-924<br>Decision No. 16753-A |

Appearances.

Kelly and Haus, Attorneys at Law, by Mr. Robert C. Kelly, appearing on behalf of the Association.

Parins & McKay, S.C. Attorneys at Law, by Mr. J. D. McKay, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Green Bay Education Association, herein Complainant or Association, having on December 22, 1978, filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission, herein Commission, alleging that Joint School District No. 1, City of Green Bay and Town of Allouez, Bellevue, De Pere, Eaton, Green Bay, Humboldt, and Scott, and Board of Education of Joint School District No. 1 City of Green Bay, et. al., herein Respondent or District, has committed prohibited practices within the meaning of Section 111.70(3)(a), of the Municipal Employment Relations Act; and the Commission having appointed Thomas L. Yaeger, a member of its staff, to serve as Examiner and make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and hearing on said complaint having been held before the Examiner at Green Bay, Wisconsin on March 13, 1979; and post-hearing briefs having been received by May 17, 1979; and the Examiner having considered the arguments, 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 Complaintant Association is the recognized exclusive collective bargaining agent for all regular full time and regular part time certificated teaching personnel employed by the District and is a labor organization having its principal offices at 1960 August Street, Green Bay, Wisconsin.

2. That Respondent District is a municipal employer having its offices at 100 North Jefferson Street, Green Bay, Wisconsin; and that the Board of Education is its agent charged with the possession, care, control and management of its property and affairs.

3. That at all times material hereto the Association and District were parties to collective bargaining agreements that governed

the wages, hours, and conditions of employment of the aforesaid employes of the District; 1/that said labor agreements contained among their provisions a grievance procedure culminating in final and binding arbitration; and that said labor agreements also contained the following provisions: 2/

ARTICLE VIII
INSURANCE

A. The District shall provide group health, life, dental and long-term disability insurance programs for teachers in accordance with the specifications set forth in Appendix 6.

1. The District shall pay one hundred percent (100%) of the insurance premium cost for all full-time teachers, employed for a full contract year of one hundred and ninety (190) days, except that teachers electing family health coverage shall pay ten percent (10%) of the difference between the single and family monthly premium.
2. The District shall pay one hundred percent (100%) of the insurance premium cost for all part-time teachers, employed for a full contract year of one hundred and ninety (190) days, except for health insurance. Part-time teachers electing either single or family health coverage shall pay a portion of the insurance premium cost in accordance with the following schedule:

| HOURS WORKED/WEEK | PORTION OF PREMIUM |
|---|---|
| 28.3 to 37.5 | None |
| 18.9 to 28.2 | One-quarter |
| 9.5 to 18.8 | One-half |
| .1 to 9.4 | Three-quarters |

3. Teachers terminating employment during the school year shall be provided insurance benefits for one (1) month beyond the month in which termination occurs.
4. Teachers employed during the school year shall be considered the same as teachers in (1) and (2) above.

. . .

F. Any policies accepted by the Board shall be from a nationally recognized company.

. . .

K. The Board shall provide dental benefits with minimum coverages as indicated in Appendix 6A.

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1/ There were two collective bargaining agreements in effect during the periods relevant herein. The first was for the calendar year 1977, while its successor was for the period January 1, 1978, through June 30, 1979.

2/ The provisions quoted hereinafter are contained in the 1978-79 labor agreement. Only Article VIII(a) and Appendix 6A differ from that which appeared in the preceeding 1977, labor agreement, but said differences are immaterial to the decision reached herein.

## ARTICLE XXXIV
## STANDARDS CLAUSE

Except as this Agreement shall hereinafter otherwise provide, all wages, hours, and conditions of employment in effect at the time this Agreement is signed as established by the rules, regulations and/or policies in force on said date, shall continue to be so applicable during the term of this Agreement. It is recognized that rules and regulations referred to above may differ from one school to another.

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## DENTAL INSURANCE SPECIFICATIONS

| 1. BASIC BENEFITS | AMOUNT OF PAYMENT |
|---|---|
| Initial examination<br>Initial full series of x-rays<br>Prophylaxis<br>Semi-annual re-examinations<br>Extractions<br>Fillings<br>Inlays<br>Oral surgery<br>Periodontics<br>Root canal therapy<br>Denture repair | 80% of cost of customary and usual charge (80% of all charges for gold fillings or gold inlays) |
| 2. PROSTHETICS | |
| Complete or partial dentures<br>Porcelain jackets<br>Cast crowns<br>Fixed and removable bridgework | 80% of cost of customary and usual charge (80% of charges for gold crowns) |
| 3. ORTHODONTIA | |
| All procedures | 50% of customary and usual charges. Lifetime maximum of $1,500 per individual. |

Co-Insurance
The insurance carrier shall pay eighty (80%) percent of all covered benefits except as otherwise specifically indicated. The remaining twenty (20) percent shall be the responsibility of the subscriber.

Deductible
There shall be no deductible as a prerequisite for any benefit.

2. Furnished by the United States Veterans Administration, any federal or state agency, or any local political subdivision, when the participant or his property is not liable for their costs;

3. Required because of an injury, sickness or disease caused by atomic or thermonuclear explosion, or radiation resulting therefrom, or any type of military action whether friendly or hostile;

4. Performed primarily for cosmetic purposes, except when necessitated by accident;

5. Performed either before the effective date or after the termination date of the participant's coverage under this contract;

6. For replacement of lost or stolen dentures or other prosthetic devices;

7. For dentures unless the participant has been insured for twelve (12) consecutive months under this plan.

Dependents
Dependents include the spouse of the subscriber and any unmarried children principally supported by the subscriber who have not reached age 19.

Dependent student coverage to age 23.

Benefit Year
The Benefit Year is the 12 month period beginning with the benefit year date of April 1, 1977.

Other Dental Insurance
If a participant is also covered under another policy, the insurance carrier's payment for a service will be proportionate to that available under other coverage.

If payment made by the insurance carrier is prorated, a refund will be made on the portion of the premium which applies to the portion of the benefit not paid by the insurance carrier.

4. That on January 27, 1977,after negotiations for the 1977, labor agreement had been concluded, wherein the District had agreed to provide its employes with certain "dental benefits", the District sought bids from various insurance carriers to provide insurance coverage for said benefits; and that through said bidding prcedure, the District selected Connecticut General Life Insurance Company, herein Connecticut General, as insurance carrier for the group dental insurance benefits, and Connecticut General issued said policy of insurance on June 2, 1977.

5. That during negotiations for a successor agreement to the 1977, labor contract the matter of carrier for dental insurance was not discussed and no material changes were made in Article VIII, Insurance, or Appendix 6A; that after said negotiations were concluded Connecticut General continued as carrier; that in or about October 1978, the Association learned the District was planning to solicit bids from insurance carriers for the dental insurance then being provided by Connecticut General; that bid specifications were released in November, 1978, with a copy thereof supplied to the Association; that said bids were to be submitted to the District by December 12, 1978, with the effective date of said coverage as Januaryl, 1979; that on December 19, 1978, at a special meeting of the District's Board of Education, said Board voted in favor of awarding the "dental

insurance contract" to Blue Cross/Blue Shield on the basis of its low bid; and, that said decision was thereafter implemented and from January 1, 1979, to the present Blue Cross/Blue Shield has been the insurance carrier for the aforesaid dental benefits.

6. That although the Association, from the time it had notice the District was soliciting bids for dental insurance in October 1978, and filing of the instant complaint on December 22, 1978, had expressed displeasure with the contemplated and ultimate decision to switch from Connecticut General to Blue Cross/Blue Shield as carrier, it never requested to bargain with the District concerning said decision.

7. That the 1978-79, collective bargaining agreement subsisting between the Association and the District did not preclude the District from dropping Connecticut General as insurance carrier for dental benefits and selecting a different carrier during the term of said collective bargaining agreement.

Upon the basis of the foregoing Findings of Fact, the Examiner makes the following

## CONCLUSIONS OF LAW

1. That because both the 1977, and 1978-79 labor contracts, although dealing in considerable detail with respect to the level of dental benefits to be provided to employes, are silent with respect to the identity of the insurance carrier for said benefits, and because after receiving notice that the Respondent was contemplating dropping the existing carrier, Connecticut General, the Complainant never demanded to bargain with Respondent concerning the matter of changing carriers, Complainant waived any right it may have had to demand to bargain with Respondent before any change in carrier was made.

2. That Respondent, by unilaterally dropping Connecticut General as the insurance carrier for dental benefits and contracting with Blue Cross/ Blue Shield to provide said insurance coverage effective January 1, 1979, without first bargaining with Complainant concerning said change in carrier, did not commit a prohibited practice within the meaning of Section 111.70(3)(a) 4 and 1 Stats.

3. That although the parties 1977, and 1978-79, collective bargaining agreements contain a final and binding arbitration provision for resolution of alleged breach of contract disputes, Respondent has never objected to the Commission asserting its jurisdiction to determine whether Respondent breached the 1978-79, collective bargaining agreement and said allegation was fully litigated at hearing herein; therefore, the Examiner has asserted the Commission's jurisdiction to determine if a breach occurred.

4. That inasmuch as neither the 1977, or 1978-79, collective bargaining agreements required the continuance of Connecticut General as insurance carrier for said dental benefits, the Respondent did not breach either of said agreements when it dropped Connecticut General as carrier and contracted with Blue Cross/Blue Shield to be insurance carrier for said dental benfits; therefore, Respondent did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5, Stats.

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

ORDER

It is ordered that the complaint in the instant matter be and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 6th day of December , 197

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

Jt. School District No. 1 of Green Bay, Case XXX, Decision No. 16753

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The subject complaint was filed with the Commission on December 22, 1978, wherein it alleged that the District unilaterally, without first bargaining with Complainant, changed insurance carriers for negotiated dental benefits during the term of the parties collective bargaining agreement. By doing so, Complainant contends that Respondent committed prohibited practices by breaching said collective bargaining agreement and refusing to bargain about its decision to change the identity of the insurance carrier. In its answer to the complaint, Respondent, while admitting it changed carriers denied it had committed any prohibited practices. Further, in defense of its actions, it claims it did not have a duty to bargain with Complainant about its decision to change insurance carrier and moreover that Complainant never demanded to bargain about said change or its effects thereby waiving any right it had to bargain on the matter.

BREACH OF CONTRACT:

The Association, in support of its claim the District breached the collective bargaining agreement by virtue of the change in carrier, argues that because of the lack of discussion during negotiations for the 1978-79, contract 3/ on the subject of the dental insurance carrier, and because of the inclusion of the "Standards Clause" in said contract and because of the renewal of the contract with Connecticut General as carrier after April 1, 1978, the parties had thereby agreed to a continuation of Connecticut General as carrier for the term of the 1978-79 labor contract. Consequently, the District was contractually prohibited from changing carriers during mid-term. Furthermore, it contends that such a change, over its objection, was contrary to the established past practice regarding a change in insurance carriers for other benefit programs. In all other instances, it claims such changes were only made after first giving notice to the Association and obtaining its concurrence or acquiescence.

The Commission's long standing policy regarding alleged breach of contract prohibited practices is to defer to the arbitration process where said collective bargaining agreement provides for final and binding arbitration. Exceptions to the general rule are, however, made where the parties waive their right to insist that alleged violations be submitted to arbitration. 4/ Herein, Respondent never objected to the Commission asserting its jurisdiction to determine whether changing carriers breached the contract, and the issue was fully litigated. Consequently Respondent has waived its right to insist said allegations be submitted to arbitration, and the Commission will therefore, assert its jurisidiction to resolve the allegation.

The obvious question that must be answered in order to determine if the change in carriers did breach the collective bargaining agreement is whether the contract required Connecticut General to be maintained as carrier during its term. There has however, been no claim advanced

establishing benefit level and carrier to be inseparable in the hope of establishing that carrier identity is a mandatory subject of bargaining. As manifested by the contract itself and Hathaway's testimony, the Association can however, enforce the benefits established by contract through the contractual grievance and arbitration machinery. Respecting the complainant's charge that the change in carrier breached the contract, the undersigned has concluded, after reviewing the record, that the 1978-79, collective bargaining agreement did not require the District, as a party thereto, to maintain Connecticut General as insurance carrier. Even assuming arguendo that identity of the dental insurance carrier was a "wage or condition of employment" at the time of signing the contract, as those terms are included in Article XXXIV, Standards Clause, said clause does not require that Connecticut General be maintained as carrier. First, the wage, hours and conditions of employment govered by the clause are restricted to those existing when the contract was executed and which have been established by rule, regulation or policy. Complainant, however, has not proven that Connecticut General's initial selection as carrier was the result of a District regulation or policy governing the selection of carrier, nor the result of a prior Association concurrence in the selection. Rather, the evidence discloses that the carrier was initially selected through a bidding procedure whereby the lowest bidder was selected.

Likewise, the lack of any discussion in contract negotiations concerning change of carriers does not support a conclusion that the parties must, therefore, have agreed to continue Connecticut General as carrier. If as claimed by Respondent, it believed it had the legal authority to change carriers there would be no need to discuss a contiplated change therein with Complainant during contract negotiations. Thus, it cannot be concluded solely on the basis that it was not discussed, that the Respondent thereby agreed to maintain the then existing carrier throughout the succeeding contract term. Silence herein cannot be read as agreement to anything.

Finally, while the Association claims a past practice exists wherein prior to any change in carriers the Respondent first discussed the Association's concurrence, and in fact never made any such change over Union objection, the evidence does not confirm this claim. Rather, the evidence merely demonstrates that in the past, on at least two occasions when insurance carriers were changed the Association concurred in those changes. This, however, does not substantiate the Association's claim that a practice existed precluding a carrier change during the contract term without its concurrence. Such a claim, to be upheld requires at a minimum a demonstration that a mid-term change was contemplated by the District, objected to by Complainant, and thereafter not made due to the Association's refusal to concur. There has been no such showing made herein.

Consequently, the undersigned is obligated to conclude that the parties 1978-79, collective bargaining agreement did not require Connecticut General be maintained as insurance carrier for the negotiated dental benefits during said contract term. Therefore, the Respondent's change from Connecticut General to Blue Cross/Blue Shield effective January 1, 1979, did not breach the collective bargaining agreement, and did not constitute a prohibited practice.

REFUSAL TO BARGAIN:

The Association charges that the identity of insurance carrier is a mandatory subject of bargaining inasmuch as it is inseparable from the benefits provided. Any change therein therefore vitally effects the employes wages, and conditions of employment. In this case the change in carrier results in a change in benefits and method of payment for these benefits. Alternatively, it contends that even if the identity of the carrier is a mandatory subject of bargaining the impact of the

decision to change carrier, upon wages, and conditions of employment is a mandatory subject. Consequently, by changing carriers during the term of the contract without first bargaining the change or its impacts with the Association, the District committed a prohibited practice.

Assuming, arguendo, that the Respondent's change from Connecticut General to Blue Cross/Blue Shield and its impact was a subject about which the District had a duty to bargain, 5/ the record discloses the Association waived any right it had to demand to bargain about the change in carriers.

The evidence establishes that a waiver of its right to insist on bargaining a change in carriers must be found on the basis of the 1978-79, contract as well as the Association's contract once it became aware of the District's contemplated change. A municipal employer has a duty to bargain to impasse during the term of an existing labor agreement concerning any change in wages, hours or conditions of employment not covered by said agreement, unless the Union has waived its right to insist on bargaining about said change. Herein, however, the 1978-79, contract did deal with the subject of dental benefits. In Appendix 6A, the exact benefits that are to be provided have been negotiated and included in the contract. In addition, Article VIII, K provides "The Board shall provide dental benefits with minimum coverages as indicated in Appendix 6A." Also, Article VIII, F, says "Any policies accepted by the Board shall be from a nationally recognized company." Taken together, it is clear that the general subject matter of dental insurance has been comprehensively dealt with in the parties agreement. The absence of any reference to carrier in the contract, while at the same time providing in great detail for other aspects of the program including the reference to the District accepting only nationally recognized carriers is clear and unmistable 6/ evidence of waiver.

In addition to a contractual waiver, there was also waiver by inaction. The Association learned in October 1978, that the District was soliciting bidders to provide dental insurance. Inasmuch as Connecticut General was the carrier at that time, it had to have been obvious to the Association that a change in carrier was being considered. However, notwithstanding this knowledge, the Association never demanded to bargain about any decision to change carriers or the impact of a change in carriers. Furthermore, prior to the District's consideration of bids in mid-December, it cannot be said that a change in carrier was a fait accompli. 7/ It did nonetheless, once it learned the low bidder was Blue Cross/Blue Shield, object to it being given the contract. It objected to Blue Cross/Blue Shield because of problems that had previously been encountered with it as health insurance carrier for the District. This objection, however, cannot be construed as a demand to bargain. This is particularly so in light of Association Executive Director Hathaway's, testimony: "The inquiry, or the inquires we made in writing and verbally [prior to December 18th] were concerned with contract maintenance in our judgement, and not in bargaining." 8/ Further, there is no evidence of any demands to bargain the impact of the District Board's decision of

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5/ Walworth County Handicapped Children's Education Board (17433) 11/79

6/ NLRBV Rural Electric Co., 49LRRM2097 (CA10,1961); Spun-See Corp., GCLRRM2495(CAZ,1967; Columbia Enameling & Stamping Co., 4LRK524(1939).

7/ Kennimore Jt. School Dist. No. 5 (11865-A) 6/74.

8/ This position is reafirmed by the Association's complaint herein alleging breach of contract. Furthermore, if carrier identity was fixed by contract, there would not have been a duty to bargain or either parties part and neither could insist that the other bargain about a change in carrier during the contract term. See Racine Unified School Dist. No.1 (14722-A) 8/78

December 18th, to accept Blue Cross/Blue Shield's low bid effective January 1, 1979. Indeed, four (4) days later the Association filed the subject complaint.

Thus, because the Association waived any right it may have had to bargain either the District's decision to change carriers during the term of the 1978-79, contract and the impact of that decision, the District did not commit a prohibited practice when it changed from Connecticut General to Blue Cross/Blue Shield on January 1, 1979.

Inasmuch as Complainant neither plead or argued that the alleged change in benefit levels constituted a prohibited practice independent of the change in carrier, the undersigned makes no findings in that regard.

Dated at Madison, Wisconsin, this 6th day of December, 1979.

By _____
Thomas L. Yaeger, Examiner