STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN DEER EDUCATION ASSOCIATION, and LORRAINE PRIEVE, Complainants, vs. BOARD OF EDUCATION OF THE BROWN DEER SCHOOL DISTRICT, Respondent.	Case 24 No. 41228 MP-2151 Decision No. 25884-A

Appearances:

Mr. Patrick A. Connolly, Executive Director, North Shore United Educators, 4620 West North Avenue, Milwaukee, Wisconsin 53208, appearing on behalf of Brown Deer Education Association and Lorraine Prieve.

Mr. Warren L. Kreunen, von Briesen and Purtell, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, appearing on behalf of Board of Education of the Brown Deer School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Brown Deer Education Association and Lorraine Prieve filed a complaint with the Wisconsin Employment Relations Commission on November 1, 1988, alleging that the Board of Education of the Brown Deer School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 and 5, Stats. On February 8, 1989, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a), and Sec. 111.07, Stats. Hearing on the matter was conducted in Brown Deer, Wisconsin on April 20, 1989, during the course of which the District entered its answer to the complaint. A transcript of the hearing was provided to the Commission by May 23, 1989. The parties entered oral argument at the April 20, 1989, hearing, and the District filed a written memorandum at the close of the hearing. The Association was permitted to respond to that memorandum, and did so in a written memorandum filed with the Commission on May 8, 1989.

FINDINGS OF FACT

1. The Brown Deer Education Association, referred to below as the Association, is a labor organization which maintains its offices in care of 4620 West North Avenue, Milwaukee, Wisconsin 53208.

2. The Board of Education of the Brown Deer School District, referred to below as the District or as the Board, is a municipal employer which maintains its offices at 8200 North 60th Street, Brown Deer, Wisconsin 53223.

3. Lorraine Prieve, who is referred to below as Prieve, is an individual who resides at 2350 West Good Hope Road, Glendale, Wisconsin, and who worked for the District as a teacher from 1969 until her retirement at the close of the 1985-86 school year. While employed by the District as a teacher, Prieve was an individual member of a bargaining unit of professional employes for which the Association served as the exclusive bargaining representative.

4. In a memo dated January 23, 1986, to Kenneth Moe, the District's Superintendent, and to "School Board Members", Prieve formally requested "early retirement as of June, 1986." Prieve and Moe met at least once to discuss her request, and in a letter to Prieve dated February 17, 1986, Moe confirmed the Board's approval of that request. The February 17, 1986, letter reads as follows:

At the regular board meeting held Monday, February 17, 1986 the Brown Deer Board of Education unanimously approved your request for early retirement, effective at the end of the 1985-86 school year. This approval is in accordance with the negotiated agreement and board policy 4.05 (2) (A).

. . .

5. Board Policy 4.05(2)(A) is entitled "EARLY RETIREMENT", and reads thus:

The following criteria has been established for administrators and teachers to qualify for the early retirement option:

. . .

4. The employer agrees to pay the actuarial cost of the increased benefit pursuant to Sec. 42.245 (2) (bm) 5, as determined by the Department of Employee Trust Funds.

5. Administrators and teachers who elect early retirement shall continue to be eligible for the group health insurance coverage maintained by Employer. Employer shall pay the monthly rate for single plan or family coverage as applicable, based upon the current rate of insurance paid by the district during the year in which the employee retired. If the insurance rate increases for single or family cover in succeeding years, the employee will pay the difference between the rate in effect at the time of retirement and any increases. This payment shall be for the same coverage that is in effect for other professional employees. This insurance premium shall continue until such time as applicant becomes eligible for Medicare or comparable government insurance benefits.

. . .

Original Guidelines & Policy Approved by School Board: January 26, 1981

Revised Guidelines Approved by School Board: October 25, 1982

6. The District and the Association have been parties to a series of collective bargaining agreements, including one in effect, by its terms, "as of August 1, 1985 . . . through July 31, 1986." That agreement contains, among its provisions, the following:

500.07 HEALTH INSURANCE

1. The School District will pay for each full time employee covered by this Agreement the total cost of health insurance.

. . .

520.00 EARLY RETIREMENT

. . .

520.07 INSURANCE

Any teacher retiring prior to age 65 and having completed a minimum of 15 years of service with the Brown Deer School District and having attained an age of at least 55 years may remain a member of the group health insurance program until age 65 with the Board continuing to contribute toward the cost of the premium the same amount it was contributing for the premium at the time the teacher retired.

7. From the time of her retirement through the present, Prieve has been a member of the District's group health insurance plan. At all times relevant to this proceeding, the District has utilized the Wisconsin Education Insurance Trust (WEAIT) to provide its group health insurance plan. Throughout the 1985-86 school year, Prieve was covered by a WEAIT Family plan. The monthly premium for that plan was $228.86. As of September 1, 1986, the cost for the monthly premium for that plan rose to $240.48. As a result, Prieve paid the District $11.62 to maintain her coverage. In October of 1986, Prieve's husband qualified for Medicare insurance coverage. As a result, WEAIT required Prieve to enter a Special Medicare Plus plan, which did not afford benefits available to Prieve or her husband through Medicare. The monthly premium for the WEAIT Special Medicare Plus plan, in October of 1986, was $114.30. Prieve was not aware, until sometime in May of 1988, that the premium cost for her health insurance coverage had fallen. The premium cost for the WEAIT provided insurance plans noted in this paragraph, and Prieve's contribution toward the cost of maintaining her insurance varied from her retirement through the present. The variances from Prieve's retirement through June of 1988 can be summarized thus:

DATE	MONTHLY PREMIUM COST BILLED BY WEAIT		AMOUNT PAID MONTHLY BY PRIEVE TOWARD PREMIUM
	Family	Special Medicare Plus	
6/86-8/86	$228.86	$109.82	$0.00
9/86-8/87	$240.48	$114.30	$11.62
9/87-6/88	$318.54	$192.38	$89.68

8. Sometime in May of 1988, Prieve became aware that the cost of her health insurance coverage had fallen, and she contacted the District's business office to determine if she was entitled to a refund. The District formally responded to Prieve in a letter dated May 12, 1988, which reads as follows:

> After your call advising that you have been enrolled in the WEA Medicare Plus health insurance program since October of 1986, we discussed the possibility that there may be a refund due you because of the change in your health insurance program status.
>
> You have paid insurance premiums since September 1986 through June 30 of 1988 in the amount of $1036.24. Payments for that period should have amounted to $946.86, for a refund of $89.38. Below are the calculations used to arrive at that amount.
>
> PREMIUM COSTS BASED ON RETIREMENT IN JUNE 1986
>
> Group health insurance premium: 6/86 - $228.86
> Medicare Plus premium: 6/86 - $109.62
>
> Medicare Plus premium: 9/1/86 - $114.30
>
> Medicare Plus premium: 9/1/87 - $192.38

Payments 1986-June 30, 1988		Payments Should Have Been
July & August:	-0-	-0-
September:	$ 11.62	$ 11.62
October-August 1987:	127.82	51.48
September-June 1988:	896.80	883.76
	$1036.24	$946.86

> A check in the amount of $89.38 will be sent to you under separate cover. In the interim, if you have any questions concerning this matter, please call.

9. The Association filed a grievance on May 23, 1988, alleging the District's response to Prieve violated Section 520.07. The parties processed the grievance through the grievance procedure of their collective bargaining agreement, which does not provide for grievance arbitration. The grievance procedure in the collective bargaining agreements in effect at all times relevant to this matter has provided that a grievant may be a teacher, a group of teachers or the Association.

10. In response to Prieve's complaint, the District recalculated the amount it required her to contribute toward the cost of her health insurance. The recalculation became effective in July of 1988. The variation in that amount and in the actual premium costs from July of 1988 through April of 1989 can be summarized thus:

DATE	MONTHLY PREMIUM COST BILLED BY WEAIT		AMOUNT PAID MONTHLY BY PRIEVE TOWARD PREMIUM
	Family	Special Medicare Plus	
7/88-8/88	$318.54	$192.38	$82.76
9/88-4/89	$375.46	$225.54	$115.92

11. The Association and the District reached tentative agreement on a collective bargaining agreement to cover the 1984-85 school year in early June, 1984. The parties were, however, unable to reduce the tentative agreement on Section 520.07 to writing, and exchanged a number of proposals and counter proposals on that section between June of 1984 and February of 1985. An unsigned copy of the 1984-85 agreement was prepared which includes the following provision:

> 520.07 INSURANCE
>
> Any teacher retiring prior ot age 65 and having completed a minimum of 15 years of service with the Brown Deer School District and having attained an age of at least 55 years may remain a member of the group health insurance program until age 65 with the Board paying the same premium (at the time of retirement as for presently employed staff).

Section 500.07 of that agreement was entitled "HEALTH INSURANCE", and Subsection 1. of that section provides: "The School District will pay for each full time employee covered by this Agreement the total cost of health insurance . . ." Representatives of the District and the Association ultimately executed the following agreement:

> The School District of Brown Deer, Wisconsin (hereinafter referred to as School District), represented by its School Board (hereinafter referred to as Board), and the Brown Deer Education Association (hereinafter referred to as BDEA), are the parties to this agreement. The terms of this agreement shall be binding upon the Board, the BDEA, and all personnel represented by each.
>
> WHEREAS the Board and the BDEA are in disagreement on the precise meaning of the last phrase of Section 520.07 Insurance, which reads, ". . .with the Board paying the premium."; and
>
> WHEREAS the Board and the BDEA are desirous of completing negotiations on the 1984-85 collective bargaining agreement and of executing that agreement;
>
> NOW, THEREFORE, it is agreed as follows:
>
> 1. That teachers who retire before August 1, 1985 under the provisions of Section 520 shall have the full health insurance

premium paid by the Board; teachers who retire after July 31, 1985 shall have the contribution to the health insurance premium provided by Board Policy 4.05 (2)(A) of the Board early retirement policy (copy attached) and

2. That the Board and the BDEA shall negotiate the precise language and meaning of the last phrase of 520.07 during negotiations for the 1985-86 collective bargaining agreement; and

3. That neither the Board nor the BDEA shall claim any status quo meaning to Section 520.07 in bargaining the successor agreement; and

4. That Section 520.07 shall only derive meaning upon the execution of a successor agreement.

This agreement made and entered into this 26th day of February, 1985.

The reference to "Board Policy 4.05(2)(A)" appears in handwriting next to the typed entry "paragraph 4" in section 1 of that agreement. The "paragraph 4" entry is crossed out. Attached to the agreement is a copy of the Board policy noted in Finding of Fact 5. The District made the following proposal dated April 17, 1985, regarding Section 520.07:

Article 520.07 - Modify to read as follows:

Any teacher retiring prior to age 65 and having completed a minimum of 15 years of service with the Brown Deer School District and having attained an age of at least 55 years may remain a member of the group health insurance program until age 65 with the Board paying up to $209.00 towards the premium.

The Association made the following proposal dated May 6, 1985, regarding Section 520.07:

In 520.00 EARLY RETIREMENT, modify Section 520.07 INSURANCE to read as follows: Any teacher retiring prior to age 65 and having completed a minimum of 15 years of service with the Brown Deer School District and having attained an age of at least 55 years may remain a member of the group health insurance program until age 65 with the Board paying the full premium.

During the course of those negotiations, the District stressed to Association negotiators that the District would not pay the full premium for retired teachers, and that the District wished to set a dollar limit for such premium costs. The Association representatives understood the District to wish to specify a dollar cap for its premium contribution. The parties did not, in those negotiations, specifically discuss the effect on a premium cap of a teacher being required to move from a Family premium to a Special Medicare Plus premium. The District did not have, at that time, any teacher receiving WEAIT insurance coverage under the Special Medicare Plus plan.

12. In the 1983-84 school year two District teachers applied for, and were granted early retirement. Moe indicated to each teacher by letter dated July 26, 1984, that the District would pay the full cost of their health insurance premium. There was, at that time, no provision in the parties' collective bargaining agreement governing District payment of the cost of health insurance premiums for retired teachers. The Board ultimately agreed to honor the statement in Moe's letter. The next teacher to apply for and receive early retirement was Douglas McFarlane, who retired in January of 1986. MacFarlane received a letter confirming his early retirement which expressly referred to Board

Policy 4.05(2)(A). In October of 1987, the District granted MacFarlane's request that he be moved from a WEAIT Family policy to a WEAIT Single policy. This move reduced the premium cost for MacFarlane's insurance. MacFarlane dropped his health insurance coverage on or about June 1, 1988. The District, on June 8, 1988, billed MacFarlane for the difference between the monthly cost of the single premium in effect at the time of his retirement ($89.20) and the actual monthly cost of the single premium between October of 1987 and June of 1988 ($121.74). MacFarlane was, at the time he dropped his insurance coverage, delinquent in his monthly payment of this differential. The District determined that MacFarlane's retirement should be processed under the terms of the February 26, 1985, settlement agreement noted in Finding of Fact 11, and processed his retirement according to its view of those terms.

CONCLUSIONS OF LAW

1. The Association is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. Prieve is a "teacher" within the meaning of Section 520.07 of the parties' 1985-86 collective bargaining agreement, and in that status is a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

4. The "same amount" the District must continue "to contribute toward the cost of the premium" for Prieve's health insurance under Section 520.07 of the parties' 1985-86 collective bargaining agreement is the amount the District "was contributing for the premium at the time" Prieve retired. That amount is $228.86, which is the cost of the Family premium as of the date of Prieve's retirement. The District's use of any other amount to calculate the amount, if any, Prieve was to contribute toward her health insurance coverage violated Section 520.07, and thus, Sec. 111.70(3)(a)5, and, derivatively, Sec. 111.70(3)(a)1, Stats.

ORDER 1/

1. To remedy its violation of Sec. 111.70(3)(a)5, and, derivatively, Sec. 111.70(3)(a)1, Stats., the District shall immediately:

a. Cease and desist from:

(1). Using any amount other than $228.86 to calculate the amount, if any, Prieve is to contribute toward her health insurance coverage.

b. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

(1). Pay Prieve the difference between the amount she contributed toward the cost of her health insurance premium and the amount she would have contributed if the District had contributed up to $228.86 per month toward the cost of her health insurance premium. This payment shall cover the period from Prieve's retirement until the time the District complies with this Order, and shall include interest at a rate of 12% per year. 2/ Interest on the amount overpaid by Prieve shall be calculated from the time the District received each overpayment.

(2). Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the District has taken to comply with this Order.

Dated at Madison, Wisconsin this 21st day of June, 1989.

By 
Richard B. McLaughlin, Examiner

(Footnotes 1/ and 2/ appear on page 7.)

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the Commission. The complaint was filed November 1, 1988, when the Sec. 814.04(4), Stats., rate in effect was 12% per year. See Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83).

BROWN DEER SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Background

The complaint alleges District violations of Sec. 111.70(3)(a)5 and 1, Stats. The District entered its answer to these allegations at the April 20, 1989, hearing, and the Association entered an objection to the timeliness of the answer.

The Parties' Positions

In its closing argument at the April 20, 1989, hearing, the Association contended that the present matter "is a very simple case." Noting that the District's avowed intention in collective bargaining concerning Section 520.07 and in the processing of the Prieve grievance was to "fix their cost at the time of retirment", the Association asserted that "(t)he business office and the District made a mistake." According to the Association, the mistake was the District's failure to monitor the cost of Prieve's insurance. Once the District discovered the mistake, according to the Association, it "came up with this novel theory about changing from the base for determining the health insurance premium payment for retirees to a new base for what . . . Special Medicare Plus would have cost had the person been taking that at the time that they retired." Acknowledging that neither party anticipated the Prieve situation during bargaining, the Association argued that the interpretation now asserted by the District is "inconsistent" with its avowed purpose of fixing the cost of retiree insurance payments, since the District view assumes that a retiree's switch from single to family coverage would increase its insurance payments. Noting that Section 520.07 is ambiguous, the Association contended that the ambiguity is traceable solely to the parties' attempt to distinguish the District's contribution for retirees from its contribution for regularly employed teachers. It follows, the Association concluded, that Section 520.07 does not state a flexible standard governing the District's premium contribution for retirees, but states a specific benefit for a retiree, which is fixed at the time of retirement.

In its closing argument at the April 20, 1989, hearing, the District argued that the District's avowed intent in bargaining is manifested by its conduct in administering Section 520.07 and in defending that interpretation. Noting that the present matter reflects a conflict of two reasonably held views, the District asserted that:

> What normally happens in this situation is that (the parties) get together and bargain. And if they can't reach a conclusion, the employer normally implements the conclusion which they believe is correct. And then it comes up for bargaining . . . at the next contract.

The District argued that the Association is attempting to secure through the grievance/complaint procedure an interpretation it was unable to secure in bargaining. According to the District, its handling of the MacFarlane and Prieve retirements is consistent with the contract and with established Board policy. Asserting that the parties never reached a mutual understanding on the situation posed by Prieve, the District concluded that there can be no finding of a contractual or statutory violation.

The District filed a written memorandum at the close of the April 20, 1989, hearing. In that memorandum, the District argues initially that the Association must establish a contract violation by a clear and satisfactory preponderance of the evidence, and must overcome the "presumption of good faith and regularity for the acts of public officials". Contending that the evidence fails to show "the District . . . knowingly violate(d) that contract provision", the District concludes the Association has not met its burden of proof. The District's next major line of argument is that a prohibited practice can not be found on the ambiguous provision at issue here, since the record demonstrates the parties never reached a clear understanding on how Section 520.07 would be applied in situations such as that posed by Prieve. Because "(b)argaining history further clarifies that the contract language does not cover this situation", the District concludes that: "where a contract can be read two ways, absent evidence clearly showing the

interpretation favoring the union was the one intended by the parties, the employer can not be found in violation of the contract." It follows, according to the District, that the complaint must be dismissed.

In its written reply to the District's memo, the Association urges that "the District's Trial Memorandum simply begs the question of whether a contract violation occurred . . . " Beyond this, the Association asserts that the record will establish that in collective bargaining and in the processing of the Prieve grievance the District stated its intention to have Section 520.07 operate as a cap, fixed at the time of retirement, on its insurance costs. In addition to this, the Association contends that it has met its burden of proof, and that whatever ambiguity exists in the present matter "exists as a result of a tortuous interpretation of the language by the Employer." Because "(i)t is not uncommon for a situation to arise that was not anticipated by the parties at the time the contract provision was negotiated", it follows, according to the Association, that "if the language is broad enough to cover the unanticipated fact situation, the contract must be enforced." Concluding that Section 520.07 can not reasonably be read in conflicting ways, the Association argues that the District's interpretation in fact "goes directly against its expressed interests during negotiations", and must be rejected.

Discussion

The Association's objection to the District's failure to answer the complaint until the April 20, 1989, hearing was addressed at the hearing, but requires a more specific discussion of governing principles. The Association's objection is well founded in Sec. ERB 12.03(6), Wis. Adm. Code, which reads thus:

> ADMISSIONS BY FAILURE TO ANSWER. Failure to file a timely answer, in the absence of extenuating circumstances recognized by the commission, constitutes an admission of and a waiver by such party of a hearing as to the material facts alleged in the complaint.

The Commission has, however, read this rule in conjunction with Sec. ERB 10.01, Wis. Adm. Code, which provides: " . . . The commission, or fact finder, as the case may be, may waive any requirements of these rules unless a party shows prejudice thereby." 3/ The failure to file a timely answer can not be dismissed as a trivial point, but there has been no showing of prejudice to the Association in this case due to the untimeliness of the District's answer. Thus, the District has been allowed to enter its answer at the April 20, 1989, hearing, and thus it becomes necessary to address the merits of the parties' dispute.

The complaint alleges District violations of Sec. 111.70(3)(a)1 and 5, Stats. The allegations focus on an alleged District violation of the parties' collective bargaining agreement and thus on Sec. 111.70(3)(a)5, Stats. The alleged violation of Sec. 111.70(3)(a)1, Stats., is, then, derivative and will not be separately discussed.

It is undisputed that the parties' labor agreement does not provide for grievance arbitration, and that the Association has exhausted the procedural requirements of the contractual grievance procedure. It is, then, appropriate to exercise the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine if the District has violated the parties' collective bargaining agreement. 4/

The District raises certain threshold issues concerning the burden of proof governing this case. Sec. 111.70(4)(a), Stats., makes the procedures of Sec. 111.07, Stats., applicable to this matter. Sec. 111.07(3), Stats., states the burden of proof thus:

> . . . the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

3/ See City of Milwaukee, Dec. No. 8017 (WERC, 5/67).

4/ See Winter Joint School District No. 1, Dec. No. 17867-C (WERC, 5/81).

The Commission allocates the burden of proof in cases of discipline under a just cause provision differently than in cases of contract interpretation. 5/ In cases posing issues of contract interpretation, the complainant has the burden. 6/

The District's initial point regarding the Association's burden is that the District enjoys a "presumption of good faith." This asserted presumption is not, however, relevant to this matter, since the record affords no basis to doubt that the District is advocating a plausible, good faith view of the language at issue.

Beyond this, the District urges, through a series of contentions, that the Association's burden requires that it establish that the parties specifically intended their contract to read as the Association asserts and that the District knowingly violated the contract. The assertion that the Association must show the bargaining parties specifically intended the result urged here overstates the point, and would place an impossible burden on the bargaining process. It is impossible for bargaining parties to anticipate every point which may arise during a contract's term. The grievance procedure represents one vehicle by which parties address this problem. Professor Harry Schulman addressed this point thus:

> . . .it surely is true that no collective agreement has been or can be written which covers in detail all the exigencies with which the parties may be confronted in the contract period, or which makes crystal-clear its meaning with respect to the matters that it does cover. . .It is this that makes collective bargaining an unending process in labor relations, and it is this that makes the grievance procedure the heart of the collective agreement. 7/

This fundamental point has been noted by other commentators as well as by the United States Supreme Court. The Court, after citing both Archibald Cox and Schulman, noted:

> Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. 8/

In this case, Sec. 111.70(3)(a)5, Stats., serves the same purpose as grievance arbitration, which is to resolve the uncertainty created by plausible, but conflicting views of contractual provisions.

In this case, then, the Association's burden is to establish, by a clear and satisfactory preponderance of the evidence, the existence of a contractual provision intended by the parties to govern the grievance, and an interpretation of that provision which is more persuasive than that of the District's.

While the present record poses a close interpretive issue, the Association has met its burden of proof. There is no dispute that the Association has met the first aspect of its burden, since the parties do not dispute that they intended Section 520.07 of their 1985-86 agreement to govern the District's contribution toward the premium cost of a retired teacher's insurance. Rather, the parties dispute the effect that provision should be given.

Because the parties acknowledge that the language of Section 520.07 can not be considered clear and unambiguous, a determination of the effect the language should be given turns on the language of the provision, viewed in light of the parties' past practice and bargaining history.

5/ See Tomahawk School District, Dec. No. 18670-D (WERC, 8/86).

6/ See Memorial Hospital Association, Dec. No. 10010-B, 10011-B (WERC, 11/71) and Evco Plastics, Dec. No. 16548-E (WERC, 6/84).

7/ Passage taken from Elkouri & Elkouri, How Arbitration Works, (BNA, 1985) at 153-154.

8/ Steelworkers v. Warrior Navigation Co., 363 US 574, 46 LRRM 2416, 2419 (1960).

The Association's interpretation of the language of Section 520.07, standing alone, is more persuasive than the District's. The repeated singular references to "the" premium, "the" same amount, and "the" teacher each underscore the Association's view that the parties intended to fix a specific dollar amount applicable to an individual teacher at the time of that individual's retirement. The District's assertion that the dollar amount could be any one of three possible amounts, two of which the District may never have contributed for the teacher, has little support in this language. Similarly, the reference to "the same amount it was contributing for the premium at the time the teacher retired" implies that the District in fact was contributing the amount for the retiring individual teacher. This is consistent with the Association's interpretation, but not with the District's, which urges that the actual District contribution for the retiring teacher is not necessarily the relevant amount.

The parties did not expressly consider the fact situation posed by the Prieve grievance in their bargaining for a 1985-86 contract. They did, however, discuss the general considerations necessary to fix the District's contribution toward the cost of an retired teacher's insurance, and the Association's interpretation of Section 520.07 falls within the scope of points considered by the parties in bargaining, while the District's does not. Barbara Holzhauer was the Association's Chief Negotiator during the negotiations which preceded the 1985-86 agreement, and testified that she understood the Board's main priority in those negotiations to be "to ascertain what their dollar liability would be." 9/ Moe addressed the point thus:

> I recall that the Board of Education did not want to agree to anything that insured the full premium payment for which the BDEA had requested. They wanted to set a dollar limit for the amount of the premium. 10/

The parties' written bargaining proposals reflect that the Association sought full payment for retiree insurance while the District sought a single, fixed cap for its liability. This cap required individual retirees to share in the premium costs for their insurance only to the extent those costs exceeded the single, fixed cap. The Association's interpretation represents a compromise of these two positions, by which the District achieved a fixed cap for its liability and the Association achieved a floating dollar amount which would not have to be addressed in each successive round of collective bargaining. This interpretation falls well within the scope of the parties' bargaining for a 1985-86 agreement. The District's interpretation of Section 520.07 seeks not simply the cost containment of a fixed dollar cap, but the sharing of premium costs by the District and individual retirees, without regard to a single, fixed cap. This is neither an unreasonable nor an improper interpretation, but there is no persuasive evidence that the parties' bargaining addressed issues of cost sharing, except where premium costs exceeded a single, fixed cap.

Further considerations underscore this conclusion. Prior to Prieve, the District has not had a teacher covered by the Special Medicare Plus plan. This makes it most improbable that the parties contemplated using that premium as one of three relevant caps for determining the District's contribution for the cost of a retired teacher's insurance premium. Nor does the District's assertion of Policy 4.05(2)(A) undercut the persuasive force of the Association's reading of Section 520.07. The policy is itself ambiguous. The reference to payment of the single or family premium "as applicable" may permit the cap to change after retirement depending on the needs of the teacher, or may permit the cap to be set only once, at the time of retirement. In any event, the policy refers to only two of the three possible caps advanced by the District as the relevant amounts set by Section 520.07. More significantly, the February, 1985, settlement agreement does not only refer to Policy 4.05(2)(A), but also requires the Board and the Association to "negotiate the precise language and meaning of the last phrase of Section 520.07 during negotiations for the 1985-86 agreement. . ." As noted above, the parties' negotiations for that agreement posed a single, fixed dollar cap against full payment. The District did not advance in those negotiations either

---

9/ Transcript (Tr.) at 66.

10/ Tr. at 99.

the two arguable caps of Board Policy 4.05(2)(A) or the three caps it asserts in this proceeding. This undercuts the persuasive force of the two caps arguably present in Board Policy 4.05(2)(A).

Evidence of past practice is of no assistance in the present matter. The Association has noted that the District once paid the full insurance costs of retirees. Moe's testimony that this payment represents an error stands unrebutted. The District has noted its handling of MacFarlane's retirement, but this matter does not constitute past practice relevant to the interpretation of Section 520.07. First, there is no persuasive evidence that the Association was aware of the MacFarlane matter prior to Prieve's assertion of her grievance. Since the essence of a past practice is the agreement manifested by the parties' conduct, 11/ the MacFarlane example can not be considered a binding past practice. More significantly, the MacFarlane retirement was governed by the February, 1985, settlement agreement which, by its terms, called for the parties to bargain the clarification of Section 520.07. The MacFarlane matter thus has a bearing on the February, 1985, settlement agreement, but has little bearing on the interpretation of the language which was negotiated as a result of that settlement agreement.

Beyond this, the District accurately points out that the MacFarlane matter could have been grieved by MacFarlane, the Association, or a group of teachers. That the Association may have waived the grieving of the MacFarlane matter does not, however, establish that the Association agreed with, or acquiesced in the District's interpretation of Section 520.07.

In sum, the Association has the burden of proving, by a clear and satisfactory preponderance of the evidence, the existence of a contractual provision intended by the parties to govern the Prieve grievance and an interpretation of that provision which is more persuasive than the District's. The Association has met that burden since the parties agree that Section 520.07 governs the Prieve grievance, and since the Association's interpretation of that language, viewed in light of relevant evidence of bargaining history, is more persuasive. That interpretation is well rooted in the language of Section 520.07, and falls within the considerations addressed by the parties in the collective bargaining which created the section. The District's interpretation, though plausible, strains the language of Section 520.07, and asserts cost-sharing considerations beyond those posed by a single, fixed cap on its insurance contribution. Such considerations played no apparent role in the negotiations which produced the 1985-86 labor agreement.

The record does not pose any remedial issues requiring extensive discussion. The Association has requested that the District be found to have violated Sec. 111.70(3)(a)1 and 5, Stats.; that the District be ordered to cease and desist from such violations; that the District compensate Prieve for her overpayment of health insurance premium costs, with interest; that the District be required to post notices to the effect that "it has engaged in prohibited practices and further that it will not engage in prohibited practices again in the future"; and that the District be ordered to pay the Association's costs and attorney's fees. The Order entered above states the violations found on this record, enters a cease and desist order, and requires the District to compensate Prieve for the overpayments involved. Interest has been included on this amount as required by the Commission's case law. 12/ The Order requires no notice posting. The remedy noted above fully addresses the contractual breach involved here. The present dispute involves the assertion of two plausible, but conflicting, views of a contractual obligation. The notice requested by the Association would, in effect, require the District to state it will not in the future assert its own sincerely held views of contract provisions. Whatever basis for an award of litigation costs exists in Commission case law is traceable to a concurring opinion in Madison Schools. 13/ That concurrence refers to "exceptional cases where an

---

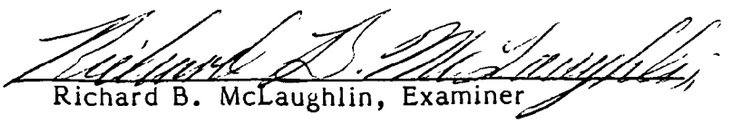
11/ For a general discussion of this point, see How Arbitration Works, Elkouri & Elkouri, (BNA, 1985) at Chapter 12.

12/ See footnote 2/.

13/ Dec. No. 16471-D (WERC, 5/81), cited with approval in Rock County, Dec. No. 23656 (WERC, 5/86).

extraordinary remedy is justified." 14/ The present matter poses two plausible, good faith views of ambiguous contract language. Thus, the Order includes no award of the Association's litigation costs.

Dated at Madison, Wisconsin this 21st day of June, 1989.

By 
Richard B. McLaughlin, Examiner

14/ Cited in footnote 3/ at 9 of Rock County, Dec. No. 23656 (WERC, 5/86).