

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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 RACINE EDUCATION ASSOCIATION, :  
 :  
 Complainant, :  
 :  
 vs. : Case 122  
 : No. 44861 MP-2414  
 : Decision No. 26816-C  
 RACINE UNIFIED SCHOOL DISTRICT, and :  
 THE BOARD OF EDUCATION OF THE :  
 RACINE UNIFIED SCHOOL DISTRICT, :  
 :  
 Respondents. :  
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RACINE EDUCATIONAL ASSISTANTS' :  
 ASSOCIATION, :  
 :  
 Complainant, : Case 123  
 : No. 45112 MP-2432  
 : Decision No. 26817-C  
 vs. :  
 :  
 RACINE UNIFIED SCHOOL DISTRICT, and :  
 THE BOARD OF EDUCATION OF THE :  
 RACINE UNIFIED SCHOOL DISTRICT, :  
 :  
 Respondents. :  
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Appearances:

Kelly & Haus, Attorneys at Law, by Mr. Robert C. Kelly, and Ms. Carol L. Melli, Walker, Pease & Ruhly, S.C., by Mr. Jack D. Walker and Ms. JoAnn M. Hart, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Respondents.

Rubin,

ORDER AFFIRMING AND MODIFYING EXAMINER'S  
FINDINGS OF FACT AND CONCLUSIONS OF LAW  
AND AFFIRMING EXAMINER'S ORDER

On April 16, 1992, Examiner Christopher Honeyman issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matters. He therein dismissed complaints alleging that the Racine Unified School District had violated the status quo as to health and dental insurance and thereby committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats.

No. 26816-C  
 No. 26817-C

On May 5, 1992, the Racine Education Association and the Racine Educational Assistants' Association timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received August 19, 1992.

Having reviewed the record, the Examiner's decision, the petition for review, and the parties' written argument, the Commission makes and issues the

following

ORDER 1/

- A. Examiner's Findings of Fact 1-7 are affirmed.
- B. Examiner's Findings of Fact 8-13 are modified from:

8. At all times pertinent to this proceeding, the parties continued to be governed by the collective bargaining agreements respectively identified in Findings of Fact 6 and 7 above, following their expiration, since no new collective bargaining agreement had been reached in either bargaining unit by the date the record in this matter closed.

9. For a number of years, the District's health and dental insurance had been provided under the terms of a self-funded plan administered by a third party administrator. From about 1986, when that plan was formulated, till early 1991, the third-party administrator was A & H Administrators, Inc. of Racine, Wisconsin. Beginning in the spring of 1990, the District participated in the formation of MEI, Inc., a corporation organized under the laws of the State of Wisconsin and owned by Racine area employers including S.C. Johnson Wax, Modine Manufacturing Company and Western Publishing Company. MEI was organized for purposes of providing health care benefits information and consulting services to these employers. During 1990 and early 1991, MEI began to provide such services, and selected Wausau Insurance Companies to act as administrator of self-funded health insurance policies on behalf of the employers who were participants in MEI, Inc. The District, on February 1, 1991, formally transferred third-party administrator function from A & H Administrators to Wausau.

(Footnote 1/ appears on page 16.)

10. MEI, Inc. offered to provide medical case review management and other services, which at all material times was not adopted by the District, though their costs (sic) was included in the fees paid to MEI, Inc. The District transferred from A & H to Wausau the terms of the plan previously in effect. A & H had been paying the full amount of all non-surgical claims, and in two letters the District first instructed Wausau to continue said practice for the time being, and then extended that instruction past the close of the hearing herein.

11. REA and REAA both demanded to bargain concerning the selection of an insurance administrator/carrier, and neither agreed to the selection of Wausau or MEI.

12. The record fails to demonstrate any substantial change in the level of benefits or level of service provided to date as a result of the change from A & H to Wausau/MEI. The record thus demonstrates that the plan and its administration by Wausau/A & H are comparable to that in effect previously, within the terms of the collective bargaining agreements noted above at Findings of Fact 6 and 7. By agreeing to said collective bargaining agreements, Complainant Associations thereby authorized the change complained of here.

13. The record fails to demonstrate that the District engaged in dilatory conduct by declining to negotiate concerning a 1991-92 collective bargaining agreement with REAA providing receipt of an arbitrator's award specifying the terms of the 1989-91 agreement.

to:

8. As of February 1, 1991, the parties had not reached agreement on contracts to succeed those referenced in Findings of Fact 6 and 7.

9. Prior to July 1, 1986, health and dental benefits to District employes represented for the purposes of collective bargaining by the REA and REAA were provided by an insurance carrier, Blue Cross/Blue Shield. Effective July 1, 1986, the District began to self-fund the health and dental benefits and contracted with A & H Administrators, Inc. (A & H) to provide administrative services related to provision of these benefits.

One of A & H's responsibilities under its contract with the District was to make initial determinations as to benefit eligibility. Although the District possessed ultimate control over all benefit determinations, if A & H determined that a claim should be paid, it paid the claim from District funds without prior consultation with the District. If A & H determined that a claim should not be paid, the employe had the right to have the District review that determination.

The District advised A & H of the benefits available to employes by providing A & H with a copy of the Blue Cross/Blue Shield insurance policy. Said policy specified the following summary of health and dental benefits:

#### HEALTH CARE PLAN

#### SUMMARY OF HEALTH BENEFITS

#### I. BASIC BENEFITS

HOSPITAL-INPATIENT AMOUNT PAID, CO-PAID, OR

DEDUCTED, AND MAXIMUM LIMITS

Room and Board Rate	Average Semi-Private
Intensive and Coronary Care	Usual and Customary Fee
Hospital Miscellaneous	Usual and Customary Fee
Maximum Number of Days Per Admission	365 days per admission
--except for Mental and Nervous Disorders, Alcoholism and Drug Abuse	
Mental & Nervous, Alcoholism and Drug abuse (additional benefits are payable for Mental and Nervous Disorders under the Major Medical portion of the Plan)	70 days per period of disability

HOSPITAL-OUTPATIENT

Outpatient Surgery, Emergency Care, X-ray and Radiation Therapy, Pre-Admission Testing, and diagnostic x-ray and laboratory tests Follow-Up Care for Injury and Surgery (except Class A)	Usual and customary
--	---------------------

DOCTOR BENEFITS

Surgery, Including Assistants	Usual and Customary Fee*
In-Hospital Medical Care	Usual and Customary Fee Limited to one visit per day, per physician*
Consultations	Usual and Customary Fee*
Anesthesia	Usual and Customary Fee*
Diagnostic X-rays and Laboratory Tests	Usual and Customary Fee*
Radiation Therapy	Usual and Customary Fee for proven malignancies.*
Oral Surgery	Usual and Customary Fee*
Sterilization/ Elective Abortion	Usual and Customary Fee*
Newborn Exam	Usual and Customary Fee*
Emergency Care	Usual and Customary Fee*
Follow-up Care for Injury	Usual and Customary Fee*

and Surgery (except  
Class A)

Hospital	Same as described under Hospital-Inpatient.
Obstetrical	Usual and Customary Fee*
<u>OUTPATIENT NERVOUS AND MENTAL DISORDERS, ALCOHOLISM AND DRUG ABUSE</u>	Limited to \$500 per calendar year. Additional benefits are available for some services under Major Medical.

**FOR KIDNEY, NURSING HOME  
CARE, POST-HOSPITAL  
COORDINATED HOME HEALTH  
CARE AND DIABETIC COVERAGE,  
PLEASE SEE SECTION ENTITLED  
"SPECIAL BENEFITS."**

II. MAJOR MEDICAL BENEFITS

Calendar Year	\$50 per Covered Person
up	
Deductible	to a maximum of 3 per family - Class A
	\$100 per covered person up to a maximum of 3 per family - all other Classes.

Payment Percentage 80% of the Usual &  
Customary Fee

Maximum Payment Amount \$250,000.00 Lifetime

\*These benefits subject to \$10,000 Basic benefit  
maximum per disability. The maximum \$10,000 benefit  
will be renewed upon resumption of full-time duties for  
the employee or normal activities for dependents.

DENTAL CARE PLAN

Maximum Dental (Per Calendar Year)	
Class G	\$1,000.
Classes A, B, C, D, E	\$1,500.

Maximum Orthodontic (Lifetime)	
All Classes	\$1,500.

Coinsurance  
Classes A, B, C, D, E  
Diagnostic and  
Preventive, Ancillary,

Simple Extractions, Endodontics, Non-gold restorations, Oral Surgery, Periodontics, Prosthodontics, Orthodontics	80%
Gold Restorations	50%
Class G Diagnostic and Preventive	100%

Ancillary, Simple Extractions,  
 Endodontics, Restorations,  
 Oral Surgery, Periodontics,  
 Emergency Denture Repair &  
 Adjustments 80%

Prosthodontics (except emergency  
 denture repair and adjustments)  
 and Orthodontics 50%

Deductible  
 All Classes \$25/individual  
 \$75/family aggregate

Application of  
 Deductible  
 Class G Deductible applies  
 to: Ancillary, Simple  
 Extractions, Endodontics,  
 Restorations, Oral Surgery,  
 Periodontics, and  
 Prosthodontics

Classes A, B, C, D, E Deductible applies  
 to: Prosthodontics  
 and Orthodontics

Occlusal Adjustments  
 Class G \$100. lifetime  
 maximum per Covered  
 Person

Class A, B, C, D, E None

10. On June 1, 1987, the REA filed a complaint  
 with the Wisconsin Employment Relations Commission  
 which alleged in pertinent part:

6. The final offers of both the  
 Association and the District have been  
 certified by the Commission and an  
 interest arbitration Arbitrator has been  
 mutually selected. The final offers of  
 both parties contain the following  
 Insurance proposals:

Article X V

INSURANCE AND RETIREMENT

- 1.a. The Board shall provide each teacher (except where both spouses are employees, only one will be eligible for family coverage; however, both may elect single coverage) an opportunity to participate in a group hospitalization and surgical/medical benefit plan. Participants will pay \$6.00 per month per year for single coverage and \$12.00 per month for family coverage plus the cost of any additional benefits as well as any future cost increases on such additional benefits added to the group hospitalization and surgical/medical benefit plan in effect August 24, 1982, through an automatic salary deduction established by the Payroll Department. The Board shall pay the balance of the cost of such group hospitalization and surgical/medical benefit plan.
- b. The Board shall provide a plan comparable to that in effect August 24, 1982, during the term of the Agreement.

7. The District has been under a continuing duty since August 24, 1985, to maintain the status quo of terms of the expired agreement which govern mandatory subjects of bargaining, including insurance.

8. On June 2, 1986, the District changed health insurance administrators. The change in administrators from Blue Cross to A & H, Inc., has resulted in various changes in coverage, benefits and "usual and customary" benefit payments. The plan that has been provided since June 2, 1986 is not comparable to the plan provided prior to June 2, 1986, contrary to Wis. Stats., secs. 111.70(3)(a)1. and 5.

The REA subsequently advised the District that it would withdraw the complaint

"If the District will agree to waive any timeliness defense regarding a grievance

encompassing this issue and defer the matter to arbitration. . ."

The District declined to waive its defenses. The REA subsequently withdrew the complaint.

11. In 1990, the District and other large employers in the Racine area began to discuss formation of an entity which would provide them with information related to controlling health and dental benefit costs. From these discussions, MEI, Inc. evolved. At all times material herein, District representatives served on the MEI Board of Directors. In September, 1990, the District contracted with MEI to act as its consultant as to health and dental benefits at a cost of \$13,800 per month.

The relationship between the District and MEI was communicated to employes as follows:

DATE: September 27, 1990

TO: All Employees and Retirees

From: Delbert Fritchen  
Assistant Superintendent, Personnel Services

The Racine Unified School District is cooperating with four other Racine area employers in exploring ways to provide quality health care at affordable costs for all employees and retirees. The District is purchasing services from a newly formed health-care benefit information and consulting company called MEI, Inc. The five employers currently involved with MEI, Inc. are Modine Manufacturing, Racine County, Racine Unified School District, S.C. Johnson Wax and Western Publishing.

MEI, Inc. will provide participating employers with valuable information regarding medical services and utilization as well as personal services for employees and retirees. MEI will be establishing a medical claims administration and customer service office in Racine. The school district and its employees and retirees will eventually be able to utilize these services.

The District's participation in this cooperative effort will not affect your current medical, dental or prescription drug benefits. As this new organization develops and the District becomes more involved, you can be assured that your current benefit levels will not change as

a result.

MEI, Inc. is an innovative concept which can be a valuable resource to the District and to you and your dependents. It is an excellent opportunity for public education, local government and business to work together. We will keep you informed of the progress in this effort and alert you to any new services which the District and you may be able to utilize.

One of the facets of the District's relationship with MEI was an understanding that the District, like other entities who contracted with MEI, would have the administrative services related to its health and dental plan provided by an MEI-selected entity. MEI selected Employer's Insurance Company of Wausau (Wausau) as the common administrator. On February 1, 1991, Wausau replaced A & H as the entity providing administrative services to the District for its existing health and dental plan. This change was generally announced to employees represented by the REA and REAA through the following memo:

**DATE:** January 30, 1991

**TO:** All Employees covered by Racine Unified School District's Health and/or Free-Standing Dental Plan Administered by A & H

**FROM:** Delbert L. Fritchman, Assistant Superintendent - Personnel Services

**SUBJECT:** Change in Health & Free-Standing Dental Plan Administrator

This is to advise you that, per Board of Education action, effective February 1, 1991, Wausau Insurance Companies is scheduled to become the new health and free-standing dental plan administrator for Racine Unified School District. YOUR BENEFITS WILL REMAIN THE SAME. THERE IS NO CHANGE IN YOUR COVERAGE. This change will not impact on your prescription drug coverage with Bravell Claims Management or DentaCare coverage with Blue Cross.

It will not be necessary for you to re-enroll with Wausau. Your current cards will be transferred from A & H Administrators to Wausau Insurance. Your payment for health care and related costs will be processed in the same manner as

with A & H Administrators. (You will not have to obtain claim forms, but rather continue to submit bills and receipts.)

You may expect to receive Wausau insurance cards within a relatively short period of time. Many health and dental service providers are aware of this change. You should only need to inform them to send the claims to Wausau Insurance Companies.

If any provider has questions relative to your coverage, please have them contact Racine Unified School District - Personnel Department.

A new feature that offers a convenience to you is that Wausau Insurance has an office in Racine at MEI, 1100 Commerce Dr., Suite 110, Racine, Wisconsin 53406. The Customer Service Coordinators are Patty Stockowitz and Bernie Rutkowski, their local telephone number is 866-7333. You may also use the Wausau Insurance Companies toll-free telephone number which is 1-800-826-9781. They will assist you with any questions and/or concerns either you, or your medical provider, may have or you may want to contact the Personnel Department for further assistance at 631-7020.

As was true with A & H, if Wausau determined that a claim should be paid, payment was made without consultation with the District. If disputes arose as to a claim, the employe could have the District review Wausau's decision. A & H and Wausau utilize different information and procedures for determining: (1) the "usual and customary" fee for a specific services; (2) whether a service or procedure is "experimental"; and (3) whether a service or procedure is "medically necessary".

12. Prior to February 1, 1991, both the REA and REAA advised the District of their view that a change from A & H to an MEI selected provider of administrative services would breach the District's duty to maintain the status quo. Pursuant to the request of the REA and REAA, the District and the REA/REAA bargained over health and dental benefits. The REA/REAA proposed that health and dental benefits be provided by a traditional indemnity insurance carrier or that the benefits contained in the existing District plan be listed in the collective bargaining agreements. No agreement was reached by the parties prior to the February 1, 1991 move from A & H to Wausau.

Aside from the bargaining which preceded the move from A & H to Wausau, the District otherwise

refused to bargain with the REAA over the terms of a successor to a 1989-1991 contract during the pendency of an interest-arbitration proceeding which would establish the terms of the 1989-1991 contract.

13. After February 1, 1991, the District began receiving complaints from employees that Wausau was not approving claims which A & H had previously approved. Upon investigation of these complaints, the District discovered that A & H had been paying all non-surgical claims in full without regard to whether the claim level fell within the "usual and customary" limitation in the health plan. The District then advised employees as follows:

**DATE:** May 7, 1991

**TO:** All Employees or Retirees Covered by  
Racine Unified's Health and/or Free-  
Standing Dental Plan

**FROM:** Delbert L. Fritchen, Assistant  
Superintendent, Personnel Services

**SUBJECT:** Health Coverage

On February 1, 1991, the District changed its health care administrator from A & H Administrators to Wausau Insurance Companies. At that time, you were notified that the level of health benefits would remain the same as outlined in your Health Care booklet.

Since the change, it has been determined that "usual and customary" fees were not supplied as required on page four of your Health Care booklet except for "surgery, including assistants." Since many of the medical fees in the Racine area are above what is "usual and customary" for our area, many of you would be required to pay the difference if the health plan were now administered according to the plan.

In order to avoid any misconception that the District has changed your level of health benefits or that Wausau is not administering the health plan correctly, the District has decided to temporarily waive the application of "usual and customary" on all basic health benefits listed on page four of the health booklet with the exception of "surgery, including assistants." This will include all covered persons. This waiver will stay in effect through August 31, 1991. Employees

that have already had fees charged to them that are now being waived will have their accounts reviewed by Wausau and appropriate adjustments will be made.

Meanwhile, the District's health care consultant, MEI, Inc., will monitor and compile actual medical fees in comparison to "usual and customary" standards and report this information back to the District so that the matter can be reviewed before August 31, 1991.

In the very near future, employees utilizing medical services and who receive Wausau's "Explanation of Benefits" form will also receive an enclosure, similar to the one below, explaining how "usual and customary" will be applied in the future.

Racine Unified School District, in conjunction with our insurance consultant, MEI, Inc., is currently reviewing all medical bills to determine if the amount billed by your provider exceeds the amount allowable under a usual and customary fee schedule. During this review, the District has agreed to make additional payment(s) to the provider on your behalf. This means that the District will cover charges billed above the usual and customary fee. THIS IS A TEMPORARY MEASURE, EFFECTIVE THROUGH AUGUST 31, 1991. Effective September 1, 1991, the usual and customary fee schedule will be applied to all charges.

All unions who represent Racine Unified bargaining groups have been notified of this situation and it is expected that there will be discussions on this subject in the coming months.

If you have any questions about this, please feel free to contact Mike Farrell, the District's benefits specialist, at (414) 631-7020 or you may directly contact Wausau Insurance Companies, 1-800-826-9781 or visit the walk-in customer service center at MEI, 1100 Commerce Drive, Suite 110, Racine, WI 53406.

Wausau conformed its claims administration to the memo. The District subsequently extended the terms of the May 1 memo from September 1, 1991 to December 1, 1991.

During the summer of 1991, Wausau advised the District of its view that A & H had also been paying claims for services in certain circumstances from certain providers not covered by the District plan. These claims/services included:

- \* Skin Destruction
- \* Chemotherapy
- \* Crown Replacement
- \* Eye Examination
- \* Glaucoma Testing
- \* Anesthesia
- \* Pre-Op. Exam
- \* Occlusal Guards
- \* T.M.J. Treatment
- \* Allergy Treatment
- \* Mental Health
- \* Counseling
- \* Anorexia/Bulimia
- \* Mental Health

The District concluded that it would continue to pay such claims for the duration of ongoing treatments/illnesses if an employe could demonstrate that the service had been covered in the past.

14. In its role as District consultant, MEI audits Wausau's performance, provides the District with its opinion as to whether certain disputed claims should be paid, and provides the District with information and analysis regarding large medical service claims provided to MEI by Wausau.

C. Examiner's Conclusions of Law 1 and 2 are modified from:

1. Racine Unified School District did not violate Sec. 111.70(3)(a)4, Wis. Stats. when it transferred the administration of its health and dental insurance plans from A & H Administrators, Inc. to MEI/Wausau, because the new method of administration and plan were comparable to the old and were thus authorized under the terms of the collective bargaining agreements between Complainants and Respondents.

2. Racine Unified School District did not refuse to bargain in violation of Sec. 111.70(3)(a)4, Wis. Stats. by delaying bargaining with REAA pending receipt of an arbitrator's award specifying the terms of the 1989-91 collective bargaining agreement.

to:

1. The Racine Unified School District did not commit prohibited practices within the meaning of

Secs. 111.70(3)(a)4 and 1, Stats. when it replaced A & H, Inc. with Wausau Insurance as the entity providing certain administrative services as to the District's health and dental plan.

2. The Racine Unified School District did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats. by contracting with MEI, Inc. for information and analysis regarding large medical service claims.

3. The Racine Unified School District did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4 and 1, Stats. to the extent it refused to bargain with the Racine Educational Assistants' Association over a successor to the parties' 1989-1991 contract during the pendency of interest-arbitration proceeding which would establish the terms of the 1989-1991 contract.

D. The Examiner's Order dismissing the complaint is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of March, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/  
A. Henry Hempe, Chairperson

Herman Torosian /s/  
Herman Torosian, Commissioner

William K. Strycker /s/  
William K. Strycker, Commissioner

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1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues)

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any

contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues)

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING  
ORDER AFFIRMING AND MODIFYING EXAMINER'S  
FINDINGS OF FACT AND CONCLUSIONS OF LAW  
AND AFFIRMING EXAMINER'S ORDER

THE EXAMINER'S DECISION

The Examiner concluded that the status quo allowed the District to transfer the administration of its health and dental insurance plans from A & H to Wausau "because the new method of administration and plan were comparable to the old." In reaching this conclusion, he determined:

- The identity of a plan administrator continues to be a mandatory subject of bargaining because different plan administrators interpret plan language related to benefits in different ways.
- The record does not establish that employes are at present receiving different benefits.
- The function of interpreting and applying the terms of the District's health and dental plan was shared by the District and A & H and is shared by the District and Wausau.
- The "comparable" benefits language in the expired contracts provides "weak" protection against benefit changes and thus the change from A & H to Wausau did not violate the status quo.
- Complainants did not waive bargaining through their conduct.

The Examiner also concluded that the District did not violate Sec. 111.70(3)(a)4, Stats. by its refusal to bargain with the REAA over a successor to a 1989-1991 contract during the pendency of interest-arbitration proceedings which would establish the terms of the 1989-1991 agreement.

POSITIONS OF THE PARTIES

Complainants assert that the Examiner erred by concluding that the status quo authorized the Respondent to make dramatic changes in employe medical and dental benefits. Complainants argue that unless the changes are clearly and unmistakably authorized by contract language, it cannot be concluded that Complainants waived their right to bargain over the changes. Here, Complainants contend the Examiner erroneously concluded that the contract language clearly authorized the changes, in part because the Examiner wrongly relied upon language in the unilaterally-established insurance plan. Complainants assert that the requisite finding of waiver is particularly unavailable where, as here, the record establishes that changes included a major restructuring of the manner in which health and dental benefits are provided.

If it is erroneously concluded the contractual language establishes that Complainants have waived the right to bargain over the change in third party administrators, Complainants argue the scope of the waiver was expressly limited by the contractual language requiring plan comparability. Complainants

contend the new plan was not comparable because: (1) the new administrator applied very different "usual and customary" and "medical necessity" standards and refused to pay claims for treatment which had previously been covered; and (2) Respondent contracted for new case review services. The Complainants contend that the Respondents' decision to postpone the impact of these changes should not cloud the Commission's analysis. Complainants assert that the issue is whether the status quo does or does not authorize the changes which the Respondents assert can be made.

Given the foregoing, the Complainants ask the Commission to reverse the Examiner and find the Respondents to have violated Secs. 111.70(3)(a)4 and 1, Stats.

Respondents urge the Commission to affirm the Examiner's determination that the status quo allowed the change in plan supervisor, citing the bargaining and litigation history of the parties as well as prior changes made under the contract language. Respondents contend that the parties' history and practice essentially rebut all status quo arguments made by Complainants for the first time on review.

Respondents argue that the Commission's recent decision in Mayville Schools, Dec. No. 25144-D, disposes of all Complainants' arguments regarding "comparability". Further, Respondents assert that Complainants have not established any change in claim payment or benefit.

Respondents ask the Commission to reverse the Examiner's rejection of Respondents' additional defenses that: (1) the choice of a new plan supervisor is not a mandatory subject of bargaining; (2) Complainants waived any right they had to bargain by their conduct and (3) the parties were at impasse and thus Respondents were entitled to implement the change in plan supervisor.

#### DISCUSSION

The essential questions before us are: (1) did the employee cost for health and dental services change when Wausau replaced A & H as the entity making initial claim determinations under the District's health and dental plan; and, (2) if so, did the status quo allow for these changes?

As to the first question, we think it clear that the switch from A & H to Wausau produced change. As evidenced by Finding of Fact 9, under the District's health and dental plan, many benefits are defined by the "usual and customary" fee or the "usual customary" and "reasonable" fee. Other benefits hinge on the definition given to "medically necessary" or "experimental". It is apparent from the record that A & H and Wausau use different data and procedures to determine the scope of these benefit-defining terms. 2/ Differing data and procedures produce different definitions and thus different levels of District claim payment.

The District protests that because it ultimately retains full authority to determine benefit levels and coverage, no change in benefit levels and coverage occurred with the switch from A & H to Wausau. However, the record amply demonstrates that the District's retention of authority does not and has not eliminated the change in benefits and coverage. As evidenced by

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2/ Contrast transcript for September 12, 1991 as to Wausau "UCR" (34-38, 74-75), "medically necessary" (59-60) and "experimental" (72-74) with transcript for March 28, 1991 as to A & H "UCR" (142-150), "medically necessary" (165-173) and "experimental" (174-176).

Complainants Exhibit 46, which is reflected in part by Finding of Fact 13, Wausau's interpretation of language in the District's plan produced a change in the services/procedures covered by the plan under A & H. The District decided that it would continue to cover these services/procedures, but only for the duration of a current medical condition for employes who were already receiving such services and who could establish that such services had previously been reimbursed. But for the switch to Wausau, this change would not have occurred.

Further, if the entity making the initial claim determination authorizes payment, the District plays no decision-making role and the matter ends. However, if the claim is initially denied, the employe must then rely upon the District's appeal process and hope for a reversal. Access to benefits is clearly more cumbersome, time consuming and uncertain if an employe must resort to an appeal. Because of the differing data and procedures used by A & H and Wausau, different initial benefit determinations will be produced. The degree of employe reliance on the appeal process for benefits will thus also change. Therefore, benefit availability will thus also inevitably change even though the District retains ultimate decision-making power.

Even in the context of the District's time-specific directives to Wausau to pay in full all non-surgical medical claims, (as A & H had), it is apparent that changes in the employe cost of health and dental services occurred as a result of the switch to Wausau. Surgical services became subject to the different "usual and customary" determinations of Wausau, thus inevitably producing different reimbursement for surgical services.

We turn to the question of whether the status quo gave the District discretion to change the services and procedures covered and the extent of such coverage.

As already discussed, changes in the extent of coverage for services and procedures were caused by the change in the entity administering the health and dental plan through initial claim determinations. If the status quo allows the District to change the entity making the initial claim determination, the changes traceable to the new entities' interpretation of the existing plan are also allowable under the status quo, subject to the "comparability" contract standard.

When determining the status quo in the context of a contract hiatus, we consider relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. 3/

The health and dental benefit language in the expired REA/REAA contracts states:

REA CONTRACT

19.1 Group Hospitalization Surgical/Medical Plan

19.1.1 Cost to Teachers

The Board shall provide each teacher [except where both spouses are employes, only one (1) will be eligible for family coverage] an opportunity to participate in a group hospitalization and surgical/medical benefit

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3/ Mayville School District, Dec. No. 25144-D (WERC, 5/92); School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

plan. Participants will pay ten dollars (\$10.00) per month for single coverage and twenty dollars (\$20.00) per month for family coverage through an automatic salary deduction established by the Payroll Department.

The Board shall pay the balance of the cost of such group hospitalization and surgical/medical benefit plan.

#### 19.1.2 Comparable Plan/Prescription Drug Plan

The Board shall provide a plan comparable to that in effect August 24, 1988, plus a prescription drug plan with a two dollar (\$2.00) deductible per prescription individual payment, during the term of this Agreement.

The District will issue prescription insurance plan cards to teachers and retired teachers as part of its prescription insurance plan on or about November 1, 1988. Teachers will be responsible for the two dollar (\$2.00) deductible payment at the time of purchase. Reimbursement for prescription purchases between August 25, 1988 and the date that the cards are issued will be made after submission to A & H Administrators of the receipts for such purchases by the teachers under the same provisions as if the two dollar (\$2.00) plan had been in effect August 25, 1988. . . .

. . .

#### 19.4 Group Dental Benefit Plan

The Board shall provide each teacher the opportunity to participate in a group dental benefit plan comparable to that in effect August 24, 1988. Participants will pay one dollar (\$1.00) per month per year for single coverage or three dollars (\$3.00) per month per year for family coverage through an automatic salary deduction established by the Payroll Department.

. . .

#### REA CONTRACT

##### 1. Medical Insurance

a. The Board shall provide each assistant (except where spouses are employees, only one will be eligible) an opportunity to participate in a group hospitalization and surgical-medical benefit plan.

b. The plan shall be comparable in benefits as the plan in effect during the school year 1984-85.

. . .

e. In the event an HMO or PPO health plan is

made available and the employee elects such plan in lieu of the standard medical plan, the participant will pay any premium cost that exceeds the premium of the available standard medical plan. In addition, the participant will pay any contribution required in this contract for the standard medical plan.

Under the language, the District is to "provide" the benefit plan. There is no reference to a benefit plan administrator other than to A & H in the REA prescription drug plan language. The REA makes much of this reference as an indication that the District must retain A & H during the contract hiatus. We do not find this REA argument persuasive. Initially, we note that the A & H reference is found only in the prescription drug language and thus has no particular application to health or dental benefits. Further, the reference to A & H comes in the context of language establishing an interim payment procedure. Thus, on balance, even as to the prescription drug benefit, the A & H reference would seem only to reflect A & H's status as the claims administrator in place at the time the language was bargained, rather than an agreement that A & H was to remain the claims administrator. 4/ Because we conclude that the applicable language does not identify the source from which the District is to provide benefits or the entity to be administering the benefit, the parties' language is supportive of a conclusion that the District retains discretion to change the entity administering the benefit plan. Thus, the language on its face evidences a status quo which allows the change in benefits produced by the change in the entity interpreting/administering the benefit plans, so long as such change is consistent with the contractual "comparability" language.

Evidence of the manner in which the language in question has historically been applied is not analytically significant. When the District moved from a benefit plan provided and administered by Blue Cross/Blue Shield, to a self-funded benefit plan utilizing A & H as an administrator, the REA challenged the action by filing a complaint with this agency. The complaint was ultimately withdrawn. Contrary to the District's arguments, we do not equate the withdrawal with any concession by the REA as to the meaning of the language in question.

The record also does not contain any significant evidence of bargaining history as to the specific language before us.

Given the foregoing, we are left with the language in question as the reliable basis for a status quo determination. As discussed earlier, the language grants the District discretion to change the entity making initial claim determinations. As discussed earlier, such a change inevitably brings changes to the employees in terms of medical/dental procedures covered and the level of claim reimbursement. Remaining for resolution is Complainants' alternative argument that although the changes in question are attributable to a change in administrator, such changes nonetheless exceeded those allowed by the "comparability" language.

The REA "Group Hospitalization Surgical/Medical Plan" contract language obligates the District to provide "a group hospitalization and surgical/medical benefit plan" and further that the "plan" must be "comparable" to that in

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4/ Indeed, in August, 1990, the District switched from A & H to Bravell as the administrator of the drug program. Complainants' Exhibit 32.

effect August 24, 1988. The REA "Group Dental Benefit Plan" obligates the District to provide "a group dental benefit plan comparable to that in effect August 24, 1988". The REAA "medical insurance" language obligates the District to provide "a group hospitalization and surgical-medical benefit plan" which "plan shall be comparable in benefits as the plan in effect during the school year 1984-85." While the language is not precisely the same, we conclude that maintenance of comparable benefits is the common intent expressed. This is because in all three instances, the "comparable" standard can most reasonably be interpreted as being linked to "benefits" rather than the potentially broader concept of a "plan", as argued by the Complainants.

The term "benefit" can most reasonably be interpreted as the listing of medical and dental services summarized in Finding of Fact 9 and set forth in greater detail in Complainant's Exhibit 2. The District's obligation is to provide benefits comparable to those set forth in Finding of Fact 9 and Exhibit 2. If the listed benefits had changed when Wausau began administering claims, such a change would be measured against the comparability standard to determine whether the change in benefits violated same. Here, Wausau is administering the same list of benefits as A & H had previously administered. No change in listed "benefits" occurred. Further, although it is apparent that the change in administration will inevitably alter the level of claim payment and indeed whether certain procedures are covered at all, the changes established in this record do not violate the "comparability" standard.

The Complainants also assert that the District breached the status quo by contracting with MEI, Inc. for analysis and review of large medical claims. Because this record does not provide a persuasive basis for us to find a linkage between this review service and a change in the cost of health and dental services to employees, we need not proceed further to determine whether any such change would be allowable under the status quo. Thus, we reject this argument. 5/

Given the foregoing basis for our dismissal of the complaints, we find it unnecessary to determine whether, as argued by Respondents, the Examiner erred by rejecting or failing to analyze Respondents' other defenses. We have modified the Examiner's Findings and Conclusions to provide greater precision and detail.

Dated at Madison, Wisconsin this 5th day of March, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/  
A. Henry Hempe, Chairperson

Herman Torosian /s/  
Herman Torosian, Commissioner

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5/ In its petition for review, Complainants did assert that the Examiner erred by concluding that the District did not violate Sec. 111.70(3)(a)4, Stats. by its refusal to bargain a new contract with the REAA until an interest-arbitration award established the terms of the existing contract. As was true before the Examiner, Complainants presented no argument in support of their position. Within the context of the argument presented in this case, we conclude the Examiner correctly dismissed this allegation.

William K. Strycker /s/  
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William K. Strycker, Commissioner