STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT and THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.

Case 155
No. 55521
MP-3335

Decision No. 29195-B

Appearances:

Kelly & Kobelt, by **Attorney Robert C. Kelly**, 122 East Olin Avenue, Suite 195, Madison, Wisconsin 53713, appearing on behalf of the Racine Education Association.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker** and **Attorney Dana J. Erlandson**, 119 Martin Luther King, Jr. Boulevard, P. O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Racine Unified School District and the Board of Education of the Racine Unified School District.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On March 9, 1998, Examiner Lionel L. Crowley issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein he determined that the above-named Respondents had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 or 1, Stats., by unilaterally changing a long term disability insurance carrier from Fortis to UNUM during the hiatus following expiration of the 1992-1993 contract between Respondent Racine Unified School District and Complainant Racine Education Association. He therefore dismissed the complaint.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received May 18, 1998.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

The Examiner's Findings of Fact, Conclusion of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

THE PLEADINGS

As amended, Complainant's complaint asserts the Respondents violated Sec. 111.70(3)(a) 4, Stats., by failing to provide disability benefits comparable to those identified in "the revised CNA insurance policy" during a contract hiatus.

In their answer, Respondents deny any violation of Sec. 111.70(3)(a)4, Stats., and affirmatively assert that the complaint is barred because the grievance alleging the same claim was not timely filed under the expired contract and because Complainant's withdrawal of said grievance is res judicata and collaterally estopps Complainant from pursuing the merits of the complaint.

The Examiner's Decision

The Examiner found that when the Respondents began providing long term disability benefits through UNUM, Respondents continued to provide the "comparable" long-term disability benefits mandated by the status quo. Thus, he found no violation of Sec. 111.70(3)(a)4 and dismissed the complaint. He reasoned:

> The District has argued that Section 19.3 is void because no CNA policy was given to the District and the parties had a mistaken understanding of this Section. These arguments are not persuasive. The language of the contract interpreted in the light of the parties' actions over the past five years as well as bargaining history establishes that the language is not void but is effective to both parties. The issue presented is whether the change in carrier from Fortis to Unum constituted a change in the status quo during a hiatus. A unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act. Such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because they undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), AT 12; GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84) AT 18-19; AND SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) AT 14. In addition, such an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA, AT 14.

When determining the status quo in the context of a contract hiatus, the Commission considers relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92); SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA.

Section 19.3 of the collective bargaining agreement provides as follows:

> 19.3 Disability Benefit
>
> Within a reasonable period of time after this agreement is approved, the District shall provide disability benefits comparable to the revised CNA insurance policy as proposed by the Association.

This language provides that the District shall provide disability benefits comparable to the revised CNA insurance policy as proposed by the Association. The evidence indicates that the Association did not propose an actual CNA insurance policy but the Association in negotiations made a proposal for a long term disability insurance from CNA Insurance Companies (Ex. 21). Although there was a reference to the CNA insurance policy, there was no policy, only a proposal (Ex. 27). The District did not agree to this proposal (Ex. 28). This then became referred to as the revised CNA insurance policy and was referred to as such by both parties (Exs. 29 and 31). The parties reached final agreement on Section 19.3 and both understood the meaning although it was not expressed in the most precise terms. After agreement was reached, Mr. Stepien, the District's Assistant Superintendent for Business Services, took the specs as revised as well as CNA's proposal (Ex. 21) and created the District's request for proposals (Ex. 20). Fortis was selected. No objection or grievance was received with respect to the selection of Fortis and no bargaining proposal was made in the next round of negotiations to change Fortis or the benefits provided under the long term disability plan. Thus, the parties understood what they had agreed to and Fortis remained the carrier for approximately 4 ½ years.

In 1996, the District unilaterally changed the long-term disability carrier to Unum. The language of Section 19.3 does not specify a carrier and merely requires the District to provide benefits; therefore, the District retained the right to change carriers at any time during the contract or a hiatus. The change to Unum itself was not a violation of the status quo. The crux of the instance complaint is whether after the change in carriers, was the District providing disability benefits comparable to the revised CNA insurance policy as that term was understood by the parties. Section 19.3 provides that the disability benefits must be "comparable to" the revised CNA insurance policy. The term "comparable to" does not mean equal to or better or substantially equal or better. RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 26816-B AND 26817-B (HONEYMAN, 4/92) The terms as defined in a dictionary is in a circular fashion as having enough like characteristics or qualities to make comparison

appropriate. In other words, there can be differences in benefits and the plans can still be comparable. The issue is whether the change in carriers affected the benefits sufficiently such that the benefits are no longer comparable.

The Association claims that the benefits are not comparable to those required under the contract. The Association has the burden of proving by a clear and satisfactory preponderance of the evidence that the disability benefits under Unum are not comparable. The review of the evidence leads to the conclusion that the Association failed to meet its burden of proof.

With respect to CNA's letter of December 16, 1996 (Ex. 11), it contains a significant error in the definition of monthly earnings. It further points out that the limitations of "any occupation," "work incentive benefit" and "self reported symptoms limitation" are not felt because the maximum benefit is 24 months. CNA's analysis simply states that there are subtle changes which give Unum increased power to deny or terminate claims. No evidence was presented that Unum denied any claim. The mere ability to deny a claim does not mean that the benefits are not comparable. If legitimate claims are improperly denied, a grievance can be filed to correct that situation but mere speculation on ability to deny a claim is not a change in benefits, and, at most, could be merely a change in administration of the plan that goes hand in hand with a change in carrier, a right the District retained. This change was not shown to be significant enough to demonstrate that the benefits were not comparable. Thus, the analysis by CNA fails to prove that the disability benefits provided under the Unum contract are not comparable.

The Association, by the testimony of its expert, Mr. David Huttleston, also failed to establish that the disability benefits provided under the Unum contract are not comparable. The expert compared the Unum contract with the bid specs (Exs. 3 and 5). An inherent problem with this methodology is that the expert had the Unum contract with all its attendant language versus the bid specs which is like comparing apples and oranges. His concern was that Unum had wording that gave it extreme control as to the handling of disability claims. He felt that one whole section on fraud just blatantly says we are going to watch everything you do and we are going to monitor everything and if you step close to the line we will deny benefits (TR. 77-78). First, no employe is entitled to obtain benefits from a fraudulent claim and the District can be blatant about telling employes that a fraudulent claim is not a benefit under the long-term disability plant. Without a CNA policy to compare, CNA could be just as blatant because no insurance company sanctions fraudulent claims. Mr. Huttleston also testifies that CNA includes coaching pay in the definition of earnings inferring that UNUM did not; however, he got this information outside the specs in a letter provided by CNA (Tr. 66, 92). He did not seek any clarification from Unum. Apparently unknown to Mr. Huttleston, the District had the loss of license or certification removed from the contract. As Mr. Huttleston did not know this, he properly noted this difference from the specs. The major objection to Unum was language giving Unum control over claims (Tr. 77); however, this does not prove

that the disability benefits are less or that it does not meet the specs. This all goes to administration of the plan and speculation as to what that might be. Here again, there was no evidence of a change in benefits that was so significant as not to be comparable to the specs. Thus, the testimony of Mr. Huttleston failed to prove anything except his concern over language giving the administrator possible grounds to improperly deny a claim. This proves nothing. If a claim is improperly denied, and no evidence was presented that such was the case, then a grievance may be filed and the problem resolved. The evidence simply failed to show any change in benefits or in the level of claim payment and thus there was no proof of a violation of the "comparability" standard. See RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 26816-C AND 26817-C (WERC, 3/93). Therefore, there was no improper change in the status quo and the complaint has been dismissed.

The District raised a number of issues related to the scope of review, the withdrawal of the grievance, an ad hoc agreement to arbitrate and a waiver of bargaining. None of these have any merit and have been dismissed.

Inasmuch as the District did not impermissibly alter the status quo during the hiatus, the alleged violation of Sec. 111.70(3)(a)4, Stats., has been dismissed and the alleged violation of Sec. 111.70(3)(a)1, Stats., must fail because it is derivative.

POSITIONS OF THE PARTIES ON REVIEW

Complainant

Complainant asserts the Examiner erred when finding that Respondents did not modify the status quo as to long-term disability benefits.

Complainant initially argues that "equity" requires that the Respondents have the burden of establishing that the UNUM benefits are comparable to the benefits mandated by Section 19.3 of the expired contract. Complainant contends that the Examiner erred by requiring Complainant to meet that burden. Nonetheless, Complainant alleges that it met the burden improperly placed upon it to establish that the Respondents were failing to provide comparable benefits.

Complainant asserts that the comparability standard is violated if even one employe will be denied benefits by UNUM which would have been received under the CNA insurance policy. Complainant contends that its documentary evidence and witnesses conclusively established that the benefits offered by UNUM are not comparable to those provided by the CNA policy.

Given the foregoing, Complainant asks that the Examiner's decision be reversed.

Respondents

Respondents assert the Examiner properly dismissed the complaint.

Respondents contend the Examiner properly allocated the burden of proof to Complainant and properly concluded that Complainant had failed to established any breach of the comparability obligation. Respondents assert that a comparability obligation permits some change in benefits and thus disputes the Complainant's contention that the comparability obligation is violated if even one employe were to lose benefits.

Respondents argue that the contractual phrase ". . . the revised CNA Insurance policy proposed by the Association." creates a benefit limited to the five matters addressed by Exhibit 28 (i.e., percent of premium paid by Respondents; duration of waiting period; percent of salary paid as a benefit; maximum salary covered; and duration of benefits). Respondents contend that UNUM benefits meet or exceed those benefits. Even if it is erroneously concluded that above-quoted contractual phrase encompasses the terms of Exhibits 3 and 21, Respondents allege the UNUM benefits are still comparable.

Lastly, Respondents argue the Examiner erred by summarily dismissing the various affirmative defenses Respondents presented.

DISCUSSION

We affirm the Examiner.

As the Complainant in this duty to bargain complaint proceeding, the Racine Education Association has the burden of proof in this proceeding. MADISON TEACHERS, INC. V. WERC, 218 WIS. 2D 75, 86 (1998); LA CROSSE COUNTY INST. EMPLOYEES V. WERC, 52 WIS. 2D 295, 302 (1971) . We are satisfied that Complainant has not established that the benefits provided through UNUM violate the status quo "comparable" benefit standard created by Section 19.3 of the expired 1992-1993 contract.

The status quo as to long term disability benefits which the Respondents were obligated to maintain during the contract hiatus in question is defined by Section 19.3 of the expired contract which states:

> Within a reasonable period of time after this agreement is approved, the District shall provide disability benefits comparable to the revised CNA insurance policy as proposed by the Association.

Reasonable minds can disagree as to the base line benefit standard established by Section 19.3 of the expired 1992-1993 contract. Reviewing Section 19.3 in light of the bargaining history which led to its creation, we conclude that the third page of Exhibit 28 and pages 3-11 of Exhibit 21 most accurately define the "benefits" to which the "comparability" standard should be applied. We reach this conclusion because: the third page of Exhibit 28 was provided to the Respondents when the Complainant first proposed the language which ultimately

became Section 19.3 and the word "revised" in Section 19.3 reflects the reduction in the Complainant's benefits proposal from 66% to 60%; Exhibit 21 is a CNA document provided to the Respondents' bargaining team by Complainant while the parties were in the process of reaching agreement on Section 19.3; and Respondents subsequently used those pages of the CNA document almost verbatim (along with information from the third page of Exhibit 28) when soliciting bids for long term disability benefits. Thus, we also conclude that within the context of the language of Section 19.3, the third page of Exhibit 28 and pages 3-11 of Exhibit 21 are "the revised CNA Insurance policy proposed by the Association." Our determination is this regard is particularly compelling because it is clear that the Complainant never provided Respondents with an actual CNA insurance policy at anytime during the bargaining.

Having determined what "benefits" the Respondents are obligated to provide on a "comparable" basis, we turn to the question of how the word "comparable" should be understood in the context of Section 19.3.

There is no evidence that the parties intended the word "comparable" to have anything other than its commonly accepted meaning. In a prior decision involving these same parties. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 26816-C (WERC, 3/93), we concluded that the comparability standard allows for changes in benefits to occur, particularly where, as here, the status quo allows a change in insurance providers. Thus, contrary to Complainant's position herein, comparability can still be maintained even where there is some reduction in benefit levels. Complainant incorrectly equates "comparable" with "equal to" or "maintenance of existing benefits" language. Comparability provides less benefit protection than do such alternative benefit level requirements. In addition, a comparability standard allows for the balancing of benefit improvements against benefit reductions.

When we measure the evidence of the "benefits" provided by UNUM against the "benefits" standard established by Section 19.3, we find that the "comparable" standard has been honored by the Respondents.

We reaching this conclusion, we think it important to reiterate and expand upon the points made by the Examiner regarding the comparability evidence presented by Complainant. The comparison letter from CNA employe Lynch (Exhibit 11) contains a significant error regarding the definition of monthly earnings. This error lessens the credibility of the letter as a whole, particularly given CNA's presumed financial interest in obtaining the business which the Respondents' long-term disability policy would represent. Even if one presumes the letter is generally accurate, the letter concedes that within the context of a 24-month benefit period, certain cited differences do not come into play. Lastly, Lynch's critique to a large extent focuses on the assertion that the UNUM **policy** gives UNUM the ability to deny claims to a greater extent than allowed in the **bid specifications**. This comparison is of no real value when it is remembered that the benefit obligation under Section 19.3 is limited to the bid specifications contained on the third page of Exhibit 28 and pages 3-11 of Exhibit 21. No policy was ever provided by Complainant to Respondents. Thus, although a policy is obviously a necessary component of providing benefits to employes, the parties did not bargain for a specific policy when they reached agreement on Section 19.3. In this context, comparing the nuances and implementation language of a policy with generic bid specifications is an "apples to oranges" effort which proves very little. Furthermore, to the extent Complainant argues that it is a CNA

policy which establishes the base benefit under Section 19.3, the record does not allow for a comparison of a CNA policy and UNUM policy because no CNA policy was presented either at the bargaining table or during the hearing before the Examiner.

The "apples to oranges" point is also applicable to Huttleston's evidence. The benefits under Section 19.3 are limited to the bid specifications. The issue before us is limited to the question of whether UNUM is providing "comparable" bid specification benefits. Even if one were to conclude that a comparison of policies was appropriate, Huttleston did not perform such a comparison. We have no CNA policy before us.

When we compare the bid specification type benefits found in the UNUM policy with the material found on the third page of Exhibit 28 and pages 3-11 of Exhibit 21, we find the Respondents honored their comparability obligation. Most benefits remain the same under UNUM. Some benefits are better under UNUM (for instance, the duration of benefits for employes aged 66-67; benefits to survivors; and a more lenient waiting/elimination period). Some benefits are reduced under UNUM (for instance, the percentage level adjustment of residual disability benefits; and exclusion of disabilities resulting from intentionally inflicted injuries, participation in a riot, or commission of a crime). From our review of the record as a whole, on balance, the benefits clearly remain comparable.

Given the foregoing, we affirm the Examiner's conclusion that the change to UNUM did not violate the Respondents' obligation to maintain the status quo as established by Sec. 19.3. As we have also affirmed his dismissal of the complaint on that basis, we find it unnecessary to determine whether he correctly or incorrectly found Respondents' affirmative defenses to be lacking in merit.

Dated at Madison, Wisconsin this 21st day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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