STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICE LAKE AREA SCHOOL DISTRICT EMPLOYEES, LOCAL 3286, AFSCME, AFL-CIO, Complainant.

vs.

RICE LAKE AREA SCHOOL DISTRICT, Respondent.

Case 73
No. 66219
MP-4286

Decision No. 31813-A

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 64, Menomonie, Wisconsin 54751-0064, appearing on behalf of the Complainant.

Weld, Riley, Prenn & Ricci, S.C, by **Attorney Thomas B. Rusboldt**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 543702-1030, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 17, 2006, Rice Lake Area School District Employees Local 3286, AFSCME, AFL-CIO, filed a complaint against the Rice Lake Area School District, alleging that the District violated Sec. 111.70(3)(a)1, 3, 4 & 5, Wisconsin Statutes, by failing to maintain the status quo during the contract hiatus in that, without the consent of the Union, on August 1, 2006, the District eliminated a cap on prescription drug co-pays which was contained in the expired collective bargaining agreement. The Commission appointed John Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On September 28, 2006, the District filed an Answer to the Complaint. On October 26, 2006, a hearing was conducted in Rice Lake, Wisconsin. The proceedings were transcribed and the transcript was filed on November 14, 2006. The parties filed their initial briefs by January 4, 2007, whereupon the record was closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. Rice Lake Area School District Employees Local 3286, AFSCME, AFL-CIO, the Complainant herein, is a labor organization maintaining its principal place of business at P.O. Box 64, Menomonie, Wisconsin.

2. Rice Lake Area School District, the Respondent herein, is a municipal employer maintaining its principal place of business at 700 Augusta Street, Rice Lake, Wisconsin.

3. At the time of the events referenced herein, the collective bargaining agreement between the parties covering the period July 1, 2003 to June 30, 2006 had expired and the parties had not agreed to a successor contract.

4. Article 1 of the expired agreement recognized the Union as "...the exclusive bargaining representative on wages, hours and conditions of employment, for all regular full-time and regular part-time employees, teacher aides, aides for the handicapped, and swimming pool aides, excluding all food service personnel, maintenance, custodial and laundry room employees, bus drivers, teachers, administrators, professional, seasonal, casual, and supervisory employees."

5. The District also has collective bargaining relationships with Northwest United Educators, representing both the professional employees and a separate bargaining unit of custodial and laundry workers, and with Teamsters General Union, Local 662, representing the food service employees.

6. Historically, the District has agreed to provide uniform health insurance benefits to all of its employees based upon the benefits negotiated with the professionals' bargaining unit.

7. Prior to 2003, the District had negotiated language with the food service unit and the custodial and laundry workers' unit providing that the District could change health insurance carriers or self fund its insurance program so long as the benefits were identical to those provided to the teachers. The corresponding provision in Local 3286's 2000-2003 contract, Section 18.04, provided as follows:

> "The Board may, from time to time, change insurance carriers and/or self fund its health insurance program if it elects to do so, provided the level of benefits is substantially equivalent to the level of coverage provided in the 1986-87 school year, except that health insurance shall be substantially equivalent to that provided in the 1986-87 school year modified by the inclusion of a pre-hospital admission review provision."

8. In 2003, the District and Northwest United Educators negotiated a provision into the teachers' 2003-2005 contract to include a prescription drug co-pay benefit in the health insurance benefit structure, as follows:

> "Effective July 1, 2003, the parties agree to implement a $10 generic, $20 name brand preferred, and $30 name brand non-preferred prescription co-pays [sic]. There shall be a $400 stop per policyholder each year."

9. In negotiations over their 2003-2006 contract, both the District and Local 3286 made health insurance proposals. The District was seeking language identical to that in its other contracts linking a decision to change insurance carriers or to self fund insurance to providing benefits at the same level as those provided to the teachers. The Union was seeking a prescription drug benefit consistent with that provided in the teachers' 2003-2005 contract.

10. The parties ultimately reached agreement on a 2003-2006 contract, which was signed on December 22, 2003 and which included the following language in Section 18.04:

> "The Board, may from time to time, change insurance carriers and/or self funds [sic] its health insurance program, provided the level of benefits is identical to the teachers.
>
> Based upon the above language in 18.04 employees will receive a new drug card at $10/$20/$30 with a $400 annual family cap."

11. During negotiations over the health insurance language, District Finance and Operations Director Patrick Blackaller advised Union Staff Representative Steve Hartmann that it was the District's position that, under the new language, if the teachers subsequently agreed to change their health insurance benefits it would effectively change the benefits in Local 3286's contract, as well. At the time, Hartmann expressed neither agreement nor disagreement with Blackaller's interpretation of the provision.

12. Subsequently, the District reached agreement with the teachers' unit on contracts for the years 2005-2007 and 2007-2009. Article XVI, Section A. of those contracts provided, in pertinent part:

> "Effective July 1, 2003, the parties agree to implement a $10 generic, $20 name brand preferred, and $30 name brand non-preferred prescription drug co-pays [sic]. There shall be a $400 stop per policyholder in the 2005-2006 school year and none thereafter."

13. Based on the language contained in Article XVI, Section A. of the teachers' contract, on August 1, 2006, the District eliminated the $400 annual cap on prescription drug co-pays for all District employees.

15. The District's action in unilaterally eliminating the drug card co-pay cap had the effect of altering the dynamic status quo during the parties' contract hiatus.

CONCLUSIONS OF LAW

1. The Complainant, Rice Lake Area School District Employees Local 3286, is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats..

2. The Respondent, Rice Lake Area School District, is a municipal employer, within the meaning of Section 111.70(1)(j), Wis. Stats.

3. The District's failure to maintain the status quo ante during the contract hiatus constitutes a prohibited practice, contrary to Sec. 111.70(3)(a)1 and 4, Wis. Stats.

4. The District has not violated a collective bargaining agreement where no collective bargaining agreement was in effect, and therefore, did not violate Sec. 111.70(3)(a)5, Stats., by eliminating the drug co-pay cap in August 2006.

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

ORDER

The Rice Lake Area School District, it officers and agents, shall immediately take the following actions consistent with the Findings of Fact and Conclusions of Law set forth above:

a) Cease and Desist from unilaterally eliminating or otherwise altering contractual employment benefits that are mandatory subjects of bargaining during the contract hiatus;

b) Make any and all Local 3286 bargaining unit members affected by the elimination of the drug card cap during the contract hiatus whole as to any and all prescription drug expenses sustained during the hiatus as a result of the elimination of the drug card cap;

c) Post the notice attached hereto as "Appendix A" in conspicuous places in the District's buildings where notices to District employees represented by Local 3286 are posted. The Notice shall be signed by a representative of the District and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

d) Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Fond du Lac, Wisconsin, this 13th day of August, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

APPENDIX

**NOTICE TO ALL EMPLOYEES REPRESENTED BY
RICE LAKE AREA SCHOOL DISTRICT EMPLOYEES LOCAL 3286,
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees represented by the Rice Lake Area School District Employees Local 3286, AFSCME, AFL-CIO that:

> WE WILL NOT violate Section 111.70(3)(a)1 & 4 of the Municipal Employment Relations Act by unilaterally eliminating or otherwise altering contractual employment benefits that are mandatory subjects of bargaining and are subject to the dynamic status quo during a contract hiatus.
>
> WE WILL NOT violate Section 111.70(3)(a)1 & 4 of the Municipal Employment Relations Act by refusing to bargain over mandatory subjects of bargaining.

RICE LAKE AREA SCHOOL DISTRICT

By:_____

RICE LAKE AREA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Rice Lake Area School District has four organized bargaining units representing different groups of employees. Two of the bargaining units, one comprised of the professional staff and one comprised of the custodians and laundry workers, are represented by Northwest United Educators. One of the bargaining units, comprised of the food service employees, is represented by Teamsters General Union, Local 662. The remaining bargaining unit, which includes the secretarial-clerical employees, teacher aides, aides for handicapped students and swimming pool aides, and which is the complainant herein, is represented by Local 3286, Wisconsin Council 40, AFSCME, AFL-CIO.

All of the bargaining units bargain with the District separately and have different bargaining cycles, but, to the extent it is able to do so, the District has attempted to offer a uniform health and dental insurance benefit program to all of its bargaining units for ease of administration and cost control. Prior to 2003, however, one significant difference between the Local 3286's contract and those of the food service and custodians' units was language that permitted the District to change insurance carriers or to self fund its insurance as long as the insurance benefits were the same as those provided in the teachers' contract. The other contracts contained such language, but Local 3286's contract did not.

In February 2003, the District completed negotiations with the professionals' unit on two two year contracts, covering 2001-03 and 2003-05. Under the terms of the 2003-05 agreement, as of July 1, 2003 the District implemented a prescription drug co-pay program for the professionals' unit which included a three tier prescription drug co-pay structure with a $400 annual cap. This benefit was not available to Local 3286 at the time because it was still operating under its 2000-03 contract, which did not expire until June 30, 2003.

When the District and Local 3286 commenced negotiations over a successor contract, both parties made proposals for health insurance changes. Specifically, the District wanted language linking a decision to change carriers or self fund insurance to provision of the same benefits available to the teachers, as the other units had. Local 3286 wanted the drug co-pay language with the $400 annual cap contained in the professionals' contract. The negotiations resulted in a successor agreement covering the period July 1, 2003 - June 30, 2006, which was signed on December 22, 2003 and which included both the respective changes sought by the parties. Thus, Section 18.04 of that agreement states, in pertinent part:

> "The Board, may from time to time, change insurance carriers and/or self funds [sic] its health insurance program, provided the level of benefits is identical to the teachers.

> Based upon the above language in 18.04 employees will receive the new drug card at $10/$20/$30 with a $400 annual family cap."

It is the interpretation and application of this language that is the crux of the dispute between the parties herein.

During negotiations there was an exchange between the chief negotiators of the parties, District Finance and Operations Director Patrick Blackaller and AFSCME Staff Representative Steve Hartmann, about the effect of the drug card language. In that exchange, Blackaller informed Hartmann that, under the agreed language, if the teachers' unit subsequently agreed to change the health insurance benefit any such change would also apply to Local 3286. Hartmann, by all accounts, did not express a position in response to Blackaller's assertion. Subsequently, the District negotiated a successor agreement with the teachers' unit for 2005-07, which included an elimination of the $400 cap on prescription co-pays after the 2005-06 school year. Local 3286's contract expired on June 30, 2006 without a successor contract having been agreed to. On August 1, 2006, the District eliminated the $400 drug co-pay cap for all employees during the hiatus with Local 3286 based on its agreement with the teachers' unit. Local 3286 responded by filing a prohibited practice complaint alleging an alteration of the status quo during the contract hiatus, contrary to Sec. 111.70(3)(a)1, 3, 4 & 5, Wisconsin Statutes.

POSITIONS OF THE PARTIES

Complainant

The Complainant's position is that the sole purpose of the first sentence of Section 18.04 is to establish the baseline for health insurance benefits for the bargaining unit members in the event the District chose to self-fund its insurance or change insurance carriers. This language was sought by the District during negotiations over the 2003-06 contract to replace language requiring a return to the benefit levels in place in 1986-87 in the event of a change and to conform to the language contained in the District's other collective bargaining agreements. There is no language in the agreement providing for a change of benefit levels under any circumstances other than those described in Section 18.04.

The Union sought and obtained language including a drug card benefit in the same bargain. The District wanted the drug card language tied to the change of carrier language and so sought to add the clause, "Based on the above language of 18.04…" to modify the drug card provision to which the Union agreed. All that clause means is that the Union could not claim that the described drug card benefit would survive a change in carrier or decision to self-fund, in the event the teachers' union would agree to modify or drop the benefit. The District's chief negotiator testified as to what the District intended the language to mean, but never proposed language that gives it the authority it now clams to have. The Union sought to obtain the Union's agreement as to the meaning of the language and could not. The Union never agreed to the District's proposition and the District's cannot now claim that the Union's silence implies consent. The language is clear and should be construed accordingly.

The District attempted to make a unilateral change in the Union's health insurance benefits during the contract hiatus. Under the contract, such a change is only permitted in the event of a decision to self-fund insurance or change carriers. There is no dispute that neither event took place. If the District desires the language to mean something else it must bargain over such a change.

Respondent

The District contends that the phrase, "Based upon the above language..." in the second paragraph of Section 18.04 is crucial to proper interpretation of the provision, because it harmonizes the drug card language with the language in the first paragraph, "... provided the level of benefits is identical to the teachers'."

Contract language should be construed to give effect to all words and, further, the words should be construed to give effect to the parties' underlying intent. If the words are ambiguous, intent must be determined by other means, such as past practice and bargaining history. Here, Mr. Blackaller's testimony shows that historically the District has offered identical benefits to all its employees. This was agreeable while benefits expanded, but when coverage needed to be reduced the District made it clear that the teachers' contract would set the standard for the benefit structure. Therefore, past practice supports the District's interpretation.

Bargaining history also supports the District. Union representative Hartmann's testimony made it clear he understood how the District interpreted the language in question and the District's intent in proposing it. When asked if he understood that the clerical benefits would model the teachers' benefits and would change if the teachers' benefits changed, he "grunted" his understanding, which may be interpreted as acquiescence. It is clear now that Hartmann "sandbagged" the District in order to settle the contract because he believed the language was ambiguous and could be challenged later if he disagreed with it. He now seeks to have the District found guilty of a prohibited practice founded on that "sandbagging." This should not be allowed.

DISCUSSION

The Allegations of the Complaint

The factual allegations of the complaint herein are as follows:

> "The collective bargaining agreement expired 6/30/06. Under the terms of Art. 18 Sec. 18.04 drug co-pays are capped at $400. Effective August 1, 2006 the School District eliminated the cap without the consent of AFSCME Local 3286. This constitutes unilateral change in terms of employment and a violation of the *status quo*.

The Applicable Statutes

The Union alleges that the District's actions constitute violations of Sec. 111.70(3)(a)1, 3, 4 & 5, Wisconsin Statutes. Those statutes provide, in pertinent part, that it is a prohibited practice for an employer to:

> 1. interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2), which include the right to bargain collectively through representatives of their own choosing;
>
> . . .
>
> 3. encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment;
>
> 4. refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit;
>
> 5. violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees...

A fair reading of the complaint supports a conclusion that the sole action of the District leading to this complaint was its alleged unilateral removal of the $400 annual drug card cap from Local 3286's health insurance benefits during the hiatus period following expiration of the parties' 2003-2006 collective bargaining agreement. There is no allegation, nor is there evidence on the record, that the District's action was discriminatory, was intended to encourage or discourage membership or participation in the Union, or had any such effect. I conclude, therefore, that Sec. 111.70(3)(a)3 is not applicable to this case. Sec.111.70(3)(a)5 violations occur where there has been a violation of a collective bargaining agreement and the parties do not have resort under their contract to binding grievance arbitration. This typically occurs where there is no arbitration clause in the contract or where the contract has expired and one party refuses to arbitrate. Here, a grievance arbitration provision exists and the contract had expired, but there is no allegation or evidence of refusal to arbitrate. Because there is no contract, therefore, there can be no violation of a contract and so Sec. 111.70(3)(a)5 is also not applicable. What remains is a need to determine whether the District's actions, as established by the record, constitute violations of Sec. 111.70(3)(a)4 and, derivatively, 111.70(3)(a)1.

Sec. 111.70(3)(a)4

The record establishes that the District modified the drug card provision in Local 3286's contract during the hiatus between the expiration of the parties' 2003-06 contract

and the successful negotiation of a successor agreement. It did so in reliance on the language of Section 18.04, which, in the District's view, permits unilateral modification of the Union's health insurance benefits to the extent that any such change is agreed to by the teachers' union. This was admitted in testimony of the Director of Finance and Operations, Patrick Blackaller, who was also the District's chief negotiator for the 2003-06 bargain. The Union asserts that the applicable contract language expressly limits the District's authority to take such action to circumstances where the District would either decide to self-fund its health insurance or change carriers. Neither situation arose here, leading the Union to charge that the District's action violated the dynamic status quo in place during the hiatus and was, therefore, a prohibited practice.

The state of the law with regarding the necessity of retaining the status quo during a contract hiatus was recently articulated by Examiner Karen Mawhinney, as follows:

> "The Commission stated the applicable legal principles recently in SCHOOL DISTRICT OF KETTLE MORAINE, DEC. NO. 30904-D (WERC, 4/07):
>
> . . . It is a fundamental tenet of Commission law, and labor relations law in general, that, where employees are represented by a union, an employer may not change the existing wages, hours, or working conditions without exhausting its obligation to bargain in good faith with the union about those subjects. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 Wis. 2D 671 (Ct. App. 1994); JEFFERSON COUNTY V. WERC, 187 Wis.2D 647 (Ct. App. 1994); MAYVILLE SCHOOL DIST. V. WERC, 192 Wis.2D 379 (Ct. App. 1995); RACINE EDUCATION ASSOCIATION V. WERC, 214 Wis.2D 352 (Ct. App. 1997). The Commission summarized the reasons for this rule long ago as follows:
>
> > Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. In addition, an employer unilateral change evidences a disregard for the role and status of the majority representative which disregard is inherently inconsistent with good faith bargaining.
>
> SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) at 14, CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), GREEN COUNTY, DEC. NO. 10308-B (WERC), 11/84. See also, NLRB V. KATZ, 396 U.W. 736 (1962).
>
> The concept underlying this longstanding principle is that the purposes of the Municipal Employment Relations Act (MERA) – effective bargaining and labor peace – are best effectuated by maintaining stability regarding wages, hours, and working conditions while these matters are under negotiation.

> This duty to maintain the "status quo" applies whenever there is a duty to bargain, including the period between the expiration of one contract and the execution of its successor. During this "hiatus," while the parties are negotiating over the terms of the successor agreement, the Commission has long required the employer to maintain the existing wages, hours, and working conditions until the new contract is finalized. GREEN COUNTY, DEC. NO. 10208-B (WERC, 11/84); OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04). Either party may negotiate for changes, including a proposal to make those changes retroactive to the beginning of the hiatus. However, during the hiatus, while the bargaining process is ongoing, no changes may be implemented without the other party's consent. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96), at 21.
>
> A primary element in a unilateral change violation is establishing what the existing wages, hours, and working conditions were at the time the employer allegedly changed them. Under the Commission's traditional approach, this determination is based upon relevant language (if any) in the expired contract, bargaining history that may shed light on such contract language, and the parties' actual practices on the topic. See, e.g., CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). While the expired contract plays an important role, "[I]t is crucial… to observe that, since the contract no longer exists, the duty to maintain the status quo is not contractual in nature. Rather, it is a function of the collective bargaining law. SUN PRAIRIE AREA SCHOOL DISTRICT, DEC. NO. 31190-B (WERC, 3/06) at 17."
> PRAIRIE DU CHIEN SCHOOL DISTRICT, CASE 25, NO. 66322, MP-4295
> (MAWHINNEY, 5/22/07)

To determine what constituted the status quo at the time the agreement expired, I start with the pertinent contract language. Section 18.04 states, in relevant part:

> The Board, may from time to time, change insurance carriers and/or self funds [sic] its health insurance program, provided the level of benefits is identical to the teachers.
>
> Based upon the above language in 18.04 employees will receive the new drug card at $10/$20/$30 with a $400 annual cap.

In accordance with this language, as of June 30, 2006, when the contract between the District and Local 3286 expired, the bargaining unit's health insurance benefit included the $10/$20/$30 drug card, with the $400 annual cap in place. The health insurance benefit, which is the subject of Section 18.04 and this proceeding, is clearly a mandatory subject of bargaining, and so is covered by the dynamic status quo described above. The question, then, becomes whether under the status quo the District had the authority to act as it did. On its face, the language, gives the District the ability to conform the Union's health insurance to that

of the teachers in the event that the District elected to self fund its insurance or change carriers, but neither of those events occurred. Instead, the District negotiated a benefit change with the teachers, which took effect on August 1, 2006, and now asserts that Sec. 18.04 also gives it the ability to change Local 3286's benefits under those circumstances. It contends that the phrase, "Based upon the above language in 18.04," in paragraph 2 clearly ties Local 3286's health insurance benefits to the teachers' and that to hold otherwise would render that language superfluous. It also maintains that its position is supported by both bargaining history and past practice. For the following reasons, I disagree.

In the first place, while the language might arguably support a finding that the health benefits of the teachers and Local 3286 were, in fact, identical, as evidenced by the changes in the change of carrier language and the addition of the drug card, there is no way, absent resort to extrinsic evidence, to read the language so as to convey to the District the power to change the Union's benefits unilaterally based on changes in the teachers' contract. It simply is not there. It is certainly not unheard of, in multi-unit employment settings, that benefits will be uniform and that the largest or most powerful unit will act as the "bellwether," so that it negotiates changes in benefits that the other units will typically later accept. Usually, however, that acceptance is a result of negotiations and is based on pragmatic considerations, such as the optimal allocation of limited resources or the likelihood of success in interest arbitration. Rarely is such a change imposed by fiat. Further, where such a change by fiat applies, the language would have to clearly authorize it. Indeed, it would be unusual that one bargaining unit would permit another one, represented by an entirely different labor organization, to, in effect, negotiate for it and totally concede the ability to negotiate for itself and I would expect any agreement to do so to be clearly spelled out. That is not the case here. Based on the language alone, therefore, and without further considerations, it would seem clear to me that the District's unilateral action was a violation of the status quo.

The District argues, however, that the practice has been that the non-professional bargaining units all receive the same health benefits negotiated by the teachers and that the new language in 18.04 merely codifies that practice. In this context, the District's argument is a form of affirmative defense offered in rebuttal of the Union's characterization of the language. As such, the District bears the burden of establishing such a practice. As stated above, in the past those changes in benefits in the non-professional units have always come by negotiated agreement. As far as this record shows, there is no practice of automatically changing the benefits in all units to conform to those of the teachers without negotiation. Further, the other bargaining units are all represented by other labor organizations. So, even if the District had such a practice with those units, such a practice would not be binding on this unit, where it has not existed heretofore. For the same reason, the fact that the other units apparently did not object to the District's action here is entitled to no weight in evaluating the merits of the District's actions as to Local 3286. I find, therefore, that the District has not sustained its burden as to the existence of a binding past practice favoring its interpretation of the language.

Finally, the District asserts that bargaining history favors its position because Director Blackaller told Union Representative Hartmann during negotiations that the language gave the

District the ability to change Local 3286's health insurance plan to conform to any changes agreed by the teachers and that Hartmann did not object. Indeed, the District accuses Hartmann of trying to have his cake and eat it because, by keeping silent, he was able to settle the contract by agreeing to add the language sought by the District, knowing the District's intent in seeking it, and yet retain the ability to object later if the District actually attempted to unilaterally apply the language, as, in fact, happened. The District asserts that Hartmann's silence should be interpreted as acquiescence and, further, that the equities militate against rewarding what it considers to be a questionable bargaining tactic. This argument, too, is an affirmative defense, which it is the District's burden to establish. Blackaller's testimony as to the interchange with Hartmann was as follows:

> Q: What did it mean from the district's perspective with respect to a change of benefits that occurs not with the change of carriers but occurs by a change in the negotiated agreement with the teachers?
>
> A: Well, the -- our understanding, and this is something we talked about, I think, a number of times during the process is that language was intended to have the benefits change as the teachers' benefits changed, so the bargaining group -- the teachers bargaining a new piece of language, the support staff, when that was implemented with the teachers, would also get that -- that level of benefit.
>
> Q: And your testimony is that it cuts both ways?
>
> A: Right.
>
> Q: Increases or improvements of benefits or losses of benefits?
>
> A: Correct.
>
> Q: Was that made clear to the bargaining committee for the clerical staff?
>
> A: Yeah. In fact, I recall a discussion at part – near the end of the negotiations process in which Mr. Hartmann was very – wanted the language, the second paragraph put into the contract, and my statement was understand, though, that if benefits change, this changes, too. In other words, if teachers' benefits change, this will change, also. His response was kind of (inaudible), you know, it wasn't a yes and it wasn't a no, he kind of grunted and went on, that was my recollection of the discussion.
>
> Q: Did you take that to be a passive agreement on his part?

A: Yes, we obviously settled the contract, there wasn't a no, we're not doing this.

Hartmann's testimony regarding the exchange was as follows:

Q: I take you back to the negotiation session when this language was proposed and agreed to, when you proposed to the district – Mr. Blackaller was the district's lead negotiator –

A: Uh-huh.

Q: -- correct?

A: Yes.

Q: That the contract include the 10/20/30 and $400 stop loss, do you recall his saying yes, we will include that language or that provision in the contract but understand it can change if the teachers' benefits change?

A: I don't recall that but he might have said that, I'm not going to say he didn't.

Q: And assuming he did say that, and his testimony will be that he did say that, what was your response?

A: I don't recall my response, but if he said it, it still comes back to we put that language in that the district wrote and that's what it says. If they wanted something different, they could have – they should have dealt with it. It says what it says.

Q: But your testimony –

A: They wanted – they wanted something, I wanted something, which was a $400 cap, we both got what we wanted.

Q: My understanding from just hearing your last – the answer to your question is that he may well have said you can have the language on the drug card, 10/20/30 and the $400 cap but understand that it will change if the teachers change, he may well have said that and you don't recall your response to that, correct, is that correct?

A: Yeah, I don't recall.

Q: Okay. You may well –

A: I don't know if I responded or I didn't respond.

Q: And you may well have agreed with that, correct?

A: I'm not going to say yes or no to that.

Q: Okay.

A: I don't recall.

As far as the record shows, Blackaller and Hartmann were the only ones present during the conversation. Further, Blackaller appears to have the more complete recollection of what was said. Nevertheless, even his best recall is that after setting forth his interpretation of the language, all he was able to obtain from Hartmann was an ambiguous response that he chose to interpret as acquiescence. I find this insufficient to establish agreement between the parties as to the meaning of the language or even to be a deception adequate to justify reasonable reliance so as to invoke estoppel. The impetus for the change of benefit language came from the District. As such, it was the District's obligation, not the Union's, to either obtain language clearly delineating its purported rights or to obtain an unequivocal understanding with the Union as to what the language meant. It accomplished neither and so I find that bargaining history does not support the District's interpretation.

At the time the parties; contract expired on June 30, 2006, the status quo included the described drug card benefit, including the $400 annual cap. The language of Sec. 18.04 does not expressly give the District the authority to unilaterally change health insurance benefits, except in the event the District decides to self-fund its health insurance or change carriers, neither of which occurred here. The past practice of the parties and bargaining history do not support a finding that the District's authority to act unilaterally in this area was broader than that described in the language. Thus, the District's action in unilaterally eliminating the drug card cap was an impermissible change in the dynamic status quo and a violation of Sec. 111.70(3)(a)4, Stats, and, derivatively, Sec. 111.70(3)(a)1, Stats.

Dated at Fond du Lac, Wisconsin, this 13th day of August, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

gjc
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