STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

POTOSI COUNCIL OF AUXILIARY PERSONNEL, Complainant,

vs.

SCHOOL DISTRICT OF POTOSI, Respondent.

Case 33
No. 67084
MP-4358

Decision No. 32269-A

Appearances:

Nancy Kaczmerek, Attorney at Law, Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003, Madison, Wisconsin, 53708-8003, appearing on behalf of Complainant.

Leslie A. Sammon, Axley, Brynelson, Attorneys at Law, 2 East Mifflin Street, P.O. Box 1767, Madison, Wisconsin 53701-1767, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

The complaint filed on June 29, 2007 alleges that Respondent District violated Sec. 111.70(3)(a) 4 and 5, Stats., when it unilaterally amended an HRA agreement to exclude certain eligible out-of-pocket costs in violation of the parties' collective bargaining agreement. On November 13, 2007, the Commission appointed Coleen A. Burns as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Sec. 111.70(4)(a) and 111.07, Stats. Hearing in the matter was held in Potosi, Wisconsin on February 12, 2008. The record was closed on July 3, 2008, following receipt of the transcript of the hearing and the written argument of the parties.

On the basis of the arguments of the parties, and the record as a whole, the Examiner makes and issues the following

FINDINGS OF FACT

1. Potosi Council of Auxiliary Personnel, hereafter PCAP, Association or Complainant, is a labor organization located in Potosi, Wisconsin. The Association is the

exclusive bargaining representative of a collective bargaining unit consisting of certain employees of the School District of Potosi. At all times material hereto, the Association has been represented by Joyce Bos, in her capacity as Executive Director of the South West Education Association. At all times material hereto, School District of Potosi employees Marilyn Ward and Linda Vogelsberg have been members of the PCAP collective bargaining unit represented by Complainant.

2. School District of Potosi, hereafter District or Respondent, is a municipal employer located in Potosi, Wisconsin. At all times material hereto, Steven Lozeau has been employed by the District as its District Administrator and has acted on behalf of the District.

3. Complainant and Respondent have been parties to a series of collective bargaining agreements, the most recent of which was executed on April 20, 2005 and, by its terms, is in effect from July 1, 2005 through June 30, 2007. The parties' 2005-2007 collective bargaining agreement includes the following language:

ARTICLE V - GRIEVANCE PROCEDURE

Definition: A "grievance" is a substantial complaint by an employee having a substantial impact on wages, hours, or conditions of employment and the interpretation meaning, or application of the provisions of this agreement. The grievance should entail:

1. clear concise facts of the grievance;
2. the part of the agreement allegedly violated; and
3. the remedy sought.

Whenever a substantial grievance shall arise, the following procedure shall be followed:

Step One: The grievant shall have the obligation to informally discuss a grievance directly with his immediate supervisor. Step One shall be initiated no later than fifteen (15) work days after the occurrence or after the grievant should have known of the events giving rise to the grievance. Work day is defined as a day when the district offices are open for business

Step Two: If the grievance is not satisfactorily resolved in Step One, the grievant within ten (10) work days, shall submit, in writing, a grievance directly to his immediate supervisor and submit a copy to the District Administrator and the Potosi Council of Auxiliary Personnel. The reply, shall be in writing, within ten (10) work days to the grievant.

Step Three: If the grievance is not satisfactorily resolved in Step Two, the grievant, within ten (10) work days, shall forward copies of the grievance to the District Administrator and the Potosi Council of Auxiliary Personnel representative to attempt to resolve the grievance. The District Administrator shall give his answer to the grievant and the Potosi Council of Auxiliary Personnel representative within ten (10) work days of this meeting.

Step Four: The grievant has the right to appeal the decision of the Superintendent by filing the grievance, in writing, to the president of the board within ten (10) workdays after receipt of the Superintendent's decision. The Board of Education shall consider the grievance at the following meeting, or at any special meeting called for that purpose in the interim. A representative of the grievant and the grievance committee, shall have the right to present their position to the board at such meeting. The board shall within ten (10) work days after the meeting advise the grievant and grievance committee, in writing, of the action taken with regard to the grievance.

. . .

The parties' 2003-2005 and 2005-2007 collective bargaining agreements include the following language:

APPENDIX A
FRINGE BENEFITS

. . .

D Health Reimbursement Account (HRA)
The district will apply up to $1,000 for a single plan and up to $2,500 for a family plan to cover eligible out-of-pocket expenses through the HRA Plan administrator.

. . .

In an email dated "2/20/06 12:18:33 PM," District Administrator Steven Lozeau notified PCAP bargaining unit employee Marilyn Ward of the following:

Subject: Drug Co Pays

I looked back at negotiations discussions, meetings with PCAP, and called Medical Associates.

The following are what I believe to be accurate and what was shared with the staff:

1) The negotiated agreement was that the $2,500 deductible would be covered for qualifying Medical Associates required co-pays that apply to the deductible amount.

2) Drug co-pays do not apply to the $2,500 deductible amount. (As do not mental health deductibles)

3) The former $100 co-pay that was part of the WEA plan was eliminated, as part of the negotiations, with the comment that the savings will help offset some of the additional drug co-pays.

4) The HRA was amended to specify the provision stated in #1. A loophole existed between what the HRA plan and the Medical Associates deductible coverage considered qualifying expenses. The Medical Associates plan was what was negotiated and takes precedence.

5) Any additional benefits that any employee received as a result of this error should be considered an unintended benefit that is no longer available.

Lozeau subsequently received the following email:

From: Marilyn Ward
To: Steven Lozeau
Date 2/20/2006 2:56:34 PM
Subject: Thanks for the HRA information clarification.

4. On May 12, 2006, Ward submitted a grievance to the District that includes the following:

Grievance between Marilyn Ward and the School District of Potosi

Statement of Facts:

The 2003-05 contract between the School District of Potosi and the Potosi Council of Auxiliary Personnel (PCAP) negotiated the terms and conditions of the HRA to be operated by the District for PCAP members. In particular, the HRA Adoption Agreement between the school district and eflexgroup.com, the

HRA plan administrator, specified that claims that were considered 2l3D eligible medical claims would be reimbursable. This HRA Adoption Agreement was signed by Dr Lozeau on August 22, 2003 and would be implemented on September 1, 2003.

From the first implementation of this HRA plan on September 1, 2003 until midway through this school year (2005-06) my prescription drug co-pays, among other items, were reimbursed just as the HRA plan specified.

Lately I have noticed that claims I sent to eFlex for reimbursement did not match the amounts on the checks eFlex sent me in return. I could not figure out the problem. I made calls to eFlcx inquiring why the reimbursement amounts did not match the claims submitted. Finally I learned on or about May 5, 2006 that the District unilaterally implemented an amendment to Potosi's HRA plan that changed what type of HRA plan was to be in effect for PCAP and thus what items were reimbursable from the HRA. This Amendment to HRA Adoption Agreement, dated November 11, 2005, changed what items are reimbursable by eflexgroup.com. Now my prescription drug co-pays, among other qualifying 213D items, are not being reimbursed.

Contract provision violated:

The failure of the district to continue the original type of HRA plan as negotiated in the 2003-05 contract and as implemented on September 1, 2003 is a unilateral change in the wages and conditions of my employment. A change in HRA plan is a mandatory item of bargaining and PCAP and the District did not negotiate this plan change. This unilateral change in the HRA plan violates the health insurance provisions in the contract and also constitutes a prohibitive labor practice.

Remedy sought:

I seek for myself and all other similarly affected members of PCAP a return to the original HRA plan dated August 22, 2003 and implemented on September 1, 2003 that required reimbursed (sic) for all 213 D related medical claims. This is the HRA plan in effect before the District unilaterally changed the conditions by the Amendment to the HRA plan dated November 11, 2005. I want the HRA Amendment revoked and I want all rejected claims reviewed and reimbursed according to the original HRA plan agreement.

Because this grievance affects not only myself but every member of PCAP, I request that this grievance start at level four of the grievance procedure and be considered by the Board at a time agreeable to both PCAP and the Board.

> I also notify the Board and Dr Lozeau that Ms Joyce Bos, SWEA Uniserv Director, has permission to act as my representative in this grievance procedure. Please address all future correspondence to Ms Bos and provide me with a copy of all such correspondence.

Eflex is a company that processes claims for reimbursement under the District's HRA plan. On May 12, 2006, Vogelsberg submitted a grievance to the District that includes the following:

> Statement of Facts:
>
> The 2003-05 contract between the School District of Potosi and the Potosi Council of Auxiliary Personnel (PCAP) negotiated the terms and conditions of the HRA to be operated by the District for PCAP members. In particular, the HRA Adoption Agreement between the school district and eflexgroup.com, the HRA plan administrator, specified that claims that were considered 2l3D eligible medical claims would be reimbursable. This HRA Adoption Agreement was signed by Dr Lozeau on August 22, 2003 and would be implemented on September 1, 2003.
>
> From the first implementation of this HRA plan on September 1, 2003 until midway through this school year (2005-06) my diabetes testing supplies and prescription drug co-pays (among other items) were reimbursed just as the HRA plan specified.
>
> Lately I have noticed that claims I sent to eFlex for reimbursement did not match the amounts on the checks eFlex sent me in return. I could not figure out the problem. I made calls to eFlcx inquiring why the reimbursement amounts did not match the claims submitted. Finally I learned on or about May 5, 2006 that the District unilaterally implemented an amendment to Potosi's HRA plan that changed what type of HRA plan was to be in effect for PCAP and thus what items were reimbursable from the HRA. This Amendment to HRA Adoption Agreement, dated November 11, 2005, changed what items are reimbursable by eflexgroup.com. Now my diabetic supplies and prescription drug co-pays, among other qualifying 213D items, are not being reimbursed.
>
> Contract provision violated:
>
> The failure of the district to continue the original type of HRA plan as negotiated in the 2003-05 contract and as implemented on September 1, 2003 is a unilateral change in the wages and conditions of my employment. A change in HRA plan is a mandatory item of bargaining and PCAP and the District did not negotiate this plan change. This unilateral change in the HRA plan violates the health insurance provisions in the contract and also constitutes a prohibitive labor practice.

Remedy sought:

I seek for myself and all other similarly affected members of PCAP a return to the original HRA plan dated August 22, 2003 and implemented on September 1, 2003 that required reimbursed (sic) for all 213 D related medical claims. This is the HRA plan in effect before the District unilaterally changed the conditions by the Amendment to the HRA plan dated November 11, 2005. I want the HRA Amendment revoked and I want all rejected claims reviewed and reimbursed according to the original HRA plan agreement.

Because this grievance affects not only myself but every member of PCAP, I request that this grievance start at level four of the grievance procedure and be considered by the Board at a time agreeable to both PCAP and the Board.

I also notify the Board and Dr Lozeau that Ms Joyce Bos, SWEA Uniserv Director, has permission to act as my representative in this grievance procedure. Please address all future correspondence to Ms Bos and provide me with a copy of all such correspondence.

Executive Director Bos did not prepare either of the above grievances. By letter dated May 16, 2006, District Administrator Lozeau responded to the grievances of May 12, 2006 as follows:

District Administrator Response to grievance dated May 12 2006.
This response is submitted on May 16 2006

The District has received a written grievance dated May 12, 2006,conceming an alleged violation of the 2001-2003 Master Agreement changes concerning the HRA agreement to the health plan. The grievance asserts that there was a unilateral change in the HRA plan that is inconsistent with the agreed to provisions of Appendix A Section D of the negotiated agreements.

The district is willing to accept this grievance as step 3 of the grievance process as the building principal (step 2) is not familiar with the facts or the circumstances surrounding the negotiations or the resulting decisions. Proceeding directly to step 4 is denied.

STATEMENT OF FACTS:

1. During the 2001-2003 negotiations process there was agreement to change the health insurance provider. The 2003-2005 contract negotiations made no changes to the 2001- 2003 agreement. The impact to the plan participants, regarding the HRA, were discussed in 2001-2003 and agreed to as follows:

- The increased deductible/out-of-pocket costs from 100/200 to 1000/2500 would be covered through an HRA account. The eligible expenses are those charged as deductible or out-of-pocket co-payments that accrue under the Medical Associates Plan and provisions. They do not include any additional benefits not currently covered by the WEA insurance plan.
- Specific discussion took place during negotiations that outlined the fact that prescription drug co-pays were the responsibility of each participant under WEA and would remain so with Medical Associates. However, there would now be a zero co-pay for insurance so those savings would help offset some of the increased prescription drug co-pays.

The PCAP President who was involved in the negotiations validates these first 2 items.

- Appendix A Section D of the negotiated agreement states, "The district will apply up to $1,000 for a single plan and up to $2,500 for a family plan to cover eligible out-of-pocket expenses through the HRA plan administrator". It does not indicate anything other than eligible expenses to meet the 1,000/2,500 threshold as administered by the HRA not per the HRA agreement. The negotiated contract, spirit, and intent of the negotiations take precedence.

- The HRA plan that was effective on 9-1-03 was executed by E-flex. The administrators of the plan were advised that the intent of the plan was to cover Medical Associates eligible out-of-pocket expenses. (Those that are included in costs that accumulate to the 1000/2500 level)

    i. In the fall of 2005 1 became aware that the application of the HRA plan was not consistent with the spirit and intent of the 2001-2003 bargaining.

    ii. Upon discussion with the E-flex representatives, it was confirmed that the agreement as written extended beyond the intent of bargaining.

    iii. On 11-11-2005 the HRA agreement was amended to reflect the intent that only eligible Medical Associates Plan out-of-pocket expenses were included.

iv. No action was taken to recover costs for previously submitted claims that were not in compliance with the spirit and intent of the negotiated agreement.

2. The grievance should not be considered, on procedural grounds, in that the grievance is not timely.

- On 11-11-2005 the HRA agreement was amended.
- On 11-14-2005 I sent an e-mail to all PCAP employees clarifying the criteria of the use of the HRA. (See attachment)
- On or about 2-17-06 I was contacted by Marilyn Ward regarding the HRA not paying for prescription drug co-pays. I talked with her about it and agreed to provide additional information. (Step 1 — non formal discussion)
- On 2-20-06 I received an e-mail confirming the receipt and acceptance of the information. (See attachment)
- On 5-12-2006 I received, what is considered to be step 3 of the grievance process, from Marilyn Ward and Linda Vogelsberg.

ARTICLE V OF THE NEGOTIATED AGREEMENT STATES THAT "WITHIN 10 WORK DAYS THE GRIEVANT SHALL SUBMIT A GRIEVENCE IN WRITING"

Whether the 11-14-05 date or the 2-20-06 date is used as the date of the employee being aware of the alleged violation, both are well outside of the 10-work day limit for filing a grievance.

For the above reasons, the grievance is denied.

. . .

Cc:
Joyce Bos — SWEA Rep — e-mail copy
Marilyn Ward — Grievant
Linda Vogelsberg — Grievant
Joe Kerkenbush — PCAP President

In the above response, all references to the 2001-2003 Master Agreement contract should be references to the 2003-2005 contract and all references to the 2003-2005 contract should be references to the 2005-2007 contract. Attached to the above response was the following memo:

From: Steven Lozeau
To: Staff-Distribution List
Date: 11/14/2005 10:31:48AM
Subject: NOTE TO PCAP MEMBERSHIP

Dear Staff:

I have been informed that an interpretation of the spirit and intent of the negotiated HRA agreement has been questioned. My comments follow.

1) The intent of the HRA plan for PCAP members was to maintain a low level of deductible or as Medical Associates call it "out-of-pocket expenses". The agreement was that it would be similar to a "0" deductible plan for office visits, co-pays, etc. It was not to increase any other benefit.

2) It appears that someone has questioned that. Let me firmly state that the agreed upon allowable expenses will be paid. Any others that have appeared in lists of sample benefits that go beyond co-pays, deductibles, etc. are not covered under our current plan nor were they ever the intent of the negotiators when the plan was put into effect.

Summary: Out-of-pocket expenses for services that are part of the Medical Associates Heath Plan and that are approved under the plan will still be treated as they have been. We have a limited HRA plan that does not cover any incidentals that do not fall under reasonable Medical Co-pays,etc.

. . .

Ward and Vogelsberg were on the "Staff-Distribution List." Also attached was Ward's February 20, 2006 email in which she thanked the District Administrator for the HRA information clarification. Ward's grievance of May 12, 2006 and Vogelsberg's grievance of May 12, 2006 were not processed to Step 4 of the contractual grievance procedure.

5. Vogelsberg submitted a grievance to the District, dated June 20, 2006, which includes the following:

Statement of Facts:

The 2003-05 contract between the School District of Potosi and the Potosi Council of Auxiliary Personnel (PCAP) negotiated the terms and conditions of the HRA to be operated by the District for PCAP members. In particular, the HRA Adoption Agreement between the school district and eflexgroup.com, the HRA plan administrator, specified that claims that were considered 2l3D eligible medical claims would be reimbursable. This HRA Adoption Agreement was signed by Dr Lozeau on August 22, 2003 and was implemented on September 1, 2003.

From the first implementation of this HRA plan on September 1, 2003 until midway through this school year (2005-06) my diabetes testing supplies and prescription drug co-pays (among other items) were reimbursed just as the HRA plan specified.

In May of 2006 I sent receipts for diabetes testing materials and prescription co-pays to eflexgroup.com for reimbursement from my HRA. Eflexgroup.com denied my claim in a postcard postmarked June 15, 2006 and received June 17, 2006. This denial of my claim for reimbursement from my HRA constitutes a violation in the collective bargaining agreement. This date of denial is the effective date of the event giving rise to this grievance.

Contract provision violated:

The failure of the district to continue the original type of HRA plan as negotiated in the 2003-05 contract and as implemented on September 1, 2003 is a unilateral change in the wages and conditions of my employment. A change in HRA plan is a mandatory item of bargaining and PCAP and the District did not negotiate this plan change. This unilateral change in the HRA plan violates the health insurance provisions in the contract and also constitutes a prohibitive labor practice.

Remedy sought:

I seek for myself and all other similarly affected members of PCAP a return to the original HRA plan dated August 22, 2003 and implemented on September 1, 2003 that required reimbursement for all 213 D related medical claims. This was the HRA plan in effect from the initial implementation of the HRA plan (September 1, 2003) until the District unilaterally changed the conditions by the Amendment to the HRA plan dated November 11, 2005. I want the HRA Amendment revoked and I want all rejected claims reviewed and reimbursed according to the original HRA plan agreement.

Because this grievance affects not only myself but every member of PCAP, I request that this grievance start at level three of the grievance procedure and be considered by the Board at a time agreeable to both PCAP and the Board.

I also notify the Board and Dr Lozeau that Ms Joyce Bos, SWEA Uniserv Director, has permission to act as my representative in this grievance procedure. Please address all future correspondence to Ms Bos and provide me with a copy of all such correspondence.

Ward submitted a grievance to the District, dated June 22, 2006, which includes the following:

Grievance between Marilyn Ward and the School District of Potosi

Statement of Facts:

The 2003-05 contract between the School District of Potosi and the Potosi Council of Auxiliary Personnel (PCAP) negotiated the terms and conditions of the HRA to be operated by the District for PCAP members. In particular, the HRA Adoption Agreement between the school district and eflexgroup.com, the HRA plan administrator, specified that claims that were considered 2l3D eligible medical claims would be reimbursable. This HRA Adoption Agreement was signed by Dr Lozeau on August 22, 2003 and would be implemented on September 1, 2003.

From the first implementation of this HRA plan on September 1, 2003 until midway through this school year (2005-06) my prescription drug co-pays, among other items, were reimbursed just as the HRA plan specified.

In May of 2006 I sent receipts for prescription co-pays to eflexgroup.com for reimbursement from my HRA. Eflexgroup.com denied my claim in a postcard postmarked June 15, 2006 and received June 17, 2006. This denial of my claim for reimbursement from my HRA constitutes a violation in the collective bargaining agreement. This date of denial is the effective date of the event giving rise to this grievance.

Contract provision violated:

The failure of the district to continue the original type of HRA plan as negotiated in the 2003-05 contract and as implemented on September 1, 2003 is a unilateral change in the wages and conditions of my employment. A change in HRA plan is a mandatory item of bargaining and PCAP and the District did not negotiate this plan change. This unilateral change in the HRA plan violates the health insurance provisions in the contract and also constitutes a prohibitive labor practice.

Remedy sought:

I seek for myself and all other similarly affected members of PCAP a return to the original HRA plan dated August 22, 2003 and implemented on September 1, 2003 that required reimbursement for all 213 D related medical claims. This was the HRA plan in effect from the initial implementation of the ERA plan (September 1, 2003) until the District unilaterally changed the conditions by the Amendment to the HRA plan dated November 11, 2005, 1 want the HRA Amendment revoked and I want all rejected claims reviewed and reimbursed according to the original HRA plan agreement.

Because this grievance affects not only myself but every member of PCAP, I request that this grievance start at level four of the grievance procedure and be considered by the Board at a time agreeable to both PCAP and the Board.

I also notify the Board and Dr Lozeau that Ms Joyce Bos, SWEA Uniserv Director, has permission to act as my representative in this grievance procedure. Please address all future correspondence to Ms Bos and provide me with a copy of all such correspondence.

Following receipt of these grievances, the District Administrator sent the following email to Executive Director Bos:

From: Steve Lozeau
To: Bos, Joyce
Subject: Grievance

6-21-06 1:45p.m.

Joyce:

I will begin by stating that I vehemently disagree that the current grievance is any different in substance to the one I responded to on May 16, 2006.

That having been said, I will again treat this grievance at the Step 3 level which is at the superintendent/district administrator level. In accordance with step 3, I would like to "attempt to resolve" the grievance by meeting with the grievant and her representative at the soonest possible time for all parties. After the meeting I will respond to the grievance within 10 days if it is not resolved at the meeting.

Although the grievance states that you are authorized to act on the grievant's behalf, it is essential that she be in attendance as I will likely present information that has a major impact upon the "Knowledge" of negotiators, and PCAP members, as to the terms of the agreement and the intent of the HRA plan.

The first possible date for a meeting at which I can be present will not take place until after July 6, 2003. My preference would be July 7, 10, 11, or 12.

Please discuss and decide which date is best. I am open to other dates in July but I do have some commitments that "black out" some of them.

I would appreciate a response that you have received this e-mail.

Knowing an agreed upon date ASAP would also be of help to all parties.

. . .

The District Administrator's Step 3 response to the June 2006 grievances includes the following:

From: Steven Lozeau
To: Bos, Joyce; Linda Vogelsberg; Marilyn Ward
Date: *7/24/2006* 1:54:32 PM
Subject: Grievance Response

Good Day All:

Attached is my response.
I am also sending hard copies with signatures.
I am considering tomorrow July 25, as day 1 for implementation of Article V Step 4.

. . .

The referenced attached response includes the following:

District Administrator Response to grievance dated June 22, 2006.
This response is submitted on July 24, 2006

The District has received a written grievance dated June 22, 2006, (which addresses the same issue as the one that was presented on May 12, 2006) concerning an alleged violation of the 2003-2005 Master Agreement concerning changes to the HRA agreement of the health plan. The grievance asserts that there was a unilateral change in the HRA plan that is inconsistent with the agreed to provisions of Appendix A Section D of the negotiated agreements.

Subject to the timeliness objection stated below, the district is willing to accept this grievance at step 3 of the grievance process as the building principal (step 2) is not familiar with the facts or the circumstances surrounding the negotiations or the resulting decisions. Proceeding directly to step 4 is denied.

STATEMENT OF FACTS:

1. During the 2003 -2005 negotiations process there was agreement to change the health insurance provider. The 2005-2007 contract negotiations made no changes to the 2003- 2005 agreement regarding

health coverage. The impact to the plan participants, regarding the HRA, were discussed in 2003-2005 and agreed to as follows:

- The increased deductible/out-of-pocket costs from 100/200 to 1000/2500 would be covered through an HRA account. The eligible expenses are those charged as deductible or out-of-pocket co-payments that accrue under the Medical Associates Plan and provisions. They do not include any additional benefits not currently covered by the WEA insurance plan.

- Specific discussion took place during negotiations that outlined the fact that prescription drug co-pays were the responsibility of each participant under WEA and would remain so with Medical Associates. However, there would now be a zero co-pay for insurance so those savings would help offset some of the increased prescription drug co-pays.

  Meetings were held with the PCAP staff in the Fall of 2003 to review the coverage. It is the same plan that went into effect on Sept. 1, 2003 for administrative and non-union support staff. The data on the sheet dated Sept. 10 reflects the coverage and what was being offered to the union, which entered into the plan on January 1, 2004.

  At the meeting on July 21, 2006 a letter dated Sept 10, 2003 was presented that included the offer in detail indicating that the position of the district was known by the negotiators. The PCAP president has previously verified that the coverage offered was as detailed in the letter.

- Appendix A Section D of the negotiated agreement states, "The district will apply up to $1,000 for a single plan and up to $2,500 for a family plan to cover eligible out-of-pocket expenses through the HRA plan administrator." It does not indicate anything other than eligible expenses to meet the 1,000/2,500 threshold as administered by the HRA not per the HRA agreement. The negotiated contract and intent of the negotiations govern the interpretation of the contract.

The HRA plan that was effective on 9-1-03 (For administrative/non-union support staff) was executed by E-flex. The administrators of the plan were advised that the intent of the plan was to cover Medical Associates eligible out-of-pocket expenses. (Those that result in costs accumulating to the 1000/2500 level)

i. In the fall of 2005 I became aware that the application of the HRA plan was not consistent with the 2003 -2005 bargaining.

ii. Upon discussion with the E-flex representatives, it was confirmed that the agreement, as written, extended beyond benefit that was bargained.

iii. On 11-11-2005 the HRA agreement was amended to reflect the negotiated benefit to specify that only eligible Medical Associates Plan out-of-pocket expenses were included.

iv. No action was taken to recover costs for previously submitted claims that were not in compliance with the spirit and intent of the negotiated agreement.

2. In regard to items provided by the PCAP and Joyce Bos.

- The letter dated in 2005 that explained the benefits and included the reference to 213D was obtained from e-flex and distributed by the PCAP, not the district. The inclusion of 213D was not intentional when the contract with e-flex was signed in Sept. 2003. The original document shows the Medical Associates statement typed with the reference to 213D handwritten. This should not have been added.

- The 2003 contract reference to 213D was a miscommunication between the c-flex representative who developed the document and myself. The intent of negotiations was to cover the amounts applying to expenses qualifying for the maximum MA out-of-pocket costs.

3. Ms. Bos also alluded to the district savings. PCAP employees received a .40/hr raise in each of 2 years (03-05) and have obtained payments ranging from about $500 to near $1,000 in each year for their part of decreased insurance costs. These ongoing costs offset a large portion of the savings.

4. Administrative, non-union support staff, and support staff members all are covered by Medical Associates Insurance with the same HRA plan to cover MA qualifying expenses. If the intent of the agreement was to cover more than the out-of-pocket expenses applying to the Medical Associates maximum, I would have expected more than a handful of

beneficiaries to take advantage of the opportunity and that it would have begun with day one. In addition, the district would have been advising staff members of this opportunity. Lacking evidence of common knowledge to the contrary, it is more likely that all staff members were advised correctly as to the coverage and that those who obtained extra benefits as a result of the contract with E-fiex were an anomaly.

5. Any funds that were obtained as a result of an error in the agreement with E-Flex may be considered subject to recovery.

6. The grievance should not be considered, on procedural grounds, in that the grievance is not timely. It is the same grievance as the one dated May 12, 2006, which failed to meet contract timelines. The current grievance is an evident attempt to circumvent the previous improperly submitted grievance, which included the following timelines.

- On 11-11-2005 the HRA agreement was amended.
- On 11-14-2005 I sent an e-mail to all PCAP employees clarifying the criteria of the use of the HRA.
- On or about 2-17-06 I was contacted by Marilyn Ward regarding the HRA not paying for prescription drug co-pays. I talked with her about it and agreed to provide additional information. (Step 1 — non formal discussion)
- On 2-20-06 I received an e-mail confirming the receipt and acceptance of the information.
- On 5-12-2006 I received, what is considered to be step 3 of the grievance process, from Marilyn Ward and Linda Vogelsberg.

ARTICLE V OF THE NEGOTIATED AGREEMENT STATES THAT "WITHIN 10 WORK DAYS THE GRIEVANT SHALL SUBMIT A GRIEVENCE IN WRITING"

For the reasons provided, the grievance is denied.

. . .

Cc:
Joyce Bos - SWEA Rep — e-mail copy
Marilyn Ward - Grievant
Linda Vogelsberg - Grievant
Joe Kerkenbush - PCAP President

The June 2006 grievances were appealed to Step 4 of the contractual grievance procedure. The two June grievances were denied by the Board on August 28, 2006 as follows:

> Dear Ms. Bos:
>
> This memo is in response to the grievance heard by the School Board on August 21, 2006, related to payment of certain deductibles through the District's HRA.
>
> It is the Board's position, first, that the grievance is untimely. The HRA administration agreement was amended on November 11, 2005. A memorandum to that effect was sent to all PCAP staff three days later. PCAP members either knew or should have known that the HRA contract had been amended as of that date. In February, additional material was provided to Marilyn Ward in response to a request for information regarding prescription drug coverage. On May 12, 2006, Linda Vogelsburg filed a grievance regarding coverage for certain items and did not pursue the grievance. This grievance was not filed until June 2006.
>
> Second, the substance of the grievance lacks merit. It is alleged that the District unilaterally changed an insurance benefit. It did not. An error arose when the District's HRA administrator included certain coverage for certain items in its contract with the District that neither PCAP nor the District intended. When that error was recognized, the contract was changed to reflect what had actually been negotiated.
>
> For the foregoing reasons, the grievance is denied.

. . .

6. The grievances of June 20 and 22, 2006, in all relevant respects, are the same grievances that were filed on May 12, 2006. Complainant failed to exhaust the contractual grievance procedure when it did not process the grievances of May 12, 2006 to Step 4 of the parties' contractual grievance procedure.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Complainant Potosi Council of Auxiliary Personnel is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent School District of Potosi is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. Marilyn Ward and Linda Vogelsberg are municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

4. Complainant has failed to exhaust the contractual grievance procedure and, therefore, the Examiner will not assert the Commission's jurisdiction to determine the merits of Complainant's allegations that Respondent has violated Sec. 111.70(3)(a)5 and, derivatively violated Sec. 111.70(3)(a) 4, Stats., when Respondent unilaterally amended an HRA agreement to exclude certain eligible out-of-pocket costs in violation of the parties' collective bargaining agreement.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 27th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

SCHOOL DISTRICT OF POTOSI

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

Complainant alleges that the Respondent violated Sec. 111.70(3)(a) 5, Stats., and, derivatively, Sec. 111.70(3)(a)4, Stats., when Respondent unilaterally amended an HRA agreement to exclude certain eligible out-of-pocket costs in violation of the parties' collective bargaining agreement. Respondent denies that it has violated Sec. 111.70(3)(a)4 and 5, Stats., as alleged by Complainant and asserts, by way of affirmative defenses, the following:

1. Some or all of Complainant's claims are barred by the statute of limitations;
2. Complainant failed to timely, and without undue delay, exhaust the contractual grievance procedure with respect to the dispute which is the subject of its prohibited practice claims; and, therefore, failed to satisfy the jurisdictional prerequisites necessary for the Commission to assert jurisdiction;
3. Some or all of Complainant's claims fail to state a claim upon which relief may be granted
4. Respondent has no duty to bargain with respect to matters alleged in Complainant's complaint;
5. Respondent satisfied any duty to bargain that it may have had with respect to the matters alleged in the Complainant's Complaint;
6. Complainant waived any entitlement to bargain with respect to any duty to bargain that Respondent may have had concerning the matters alleged in Complainant's Complaint.
7. To the extent that any HRA plan/contract was contrary to any agreement between Complainant and Respondent it was the result of mistake
8. Complainant may have failed to take reasonable measures to mitigate damages.

POSITIONS OF THE PARTIES

Complainant

On November 11, 2005, the District Administrator executed an amendment to the HRA plan that limited eligible out-of-pocket expenses to only those deductibles, co-insurances and co-pays that the Medical Associates' insurance plan applies to the PCAP members' out-of-pocket and excluded reimbursement for Sec. 213(d) out-of-pocket expenses. This unilateral amendment to the HRA plan is not consistent with the interpretation and application of Appendix A, Section D, of the parties' collective bargaining agreement.

By amending the HRA agreement on November 11, 2005, the District Administrator has unilaterally changed the HRA plan; thereby violating Sec. 111.70(3)(a)4 and 5, Stats. As a result of the November 11, 2005 amendment to the HRA plan, PCAP bargaining unit employees Marilyn Ward and Linda Vogelsberg were not reimbursed for the costs of prescription co-pays and/or diabetic supplies that had been previously reimbursed under the HRA plan.

In early May of 2006, Ward and Vogelsberg filed grievances based upon their understanding that certain out-of-pocket expenses were no longer being reimbursed under the HRA plan. These grievances were not advanced to the Board level of the contractual grievance procedure because the Grievants did not have a formal reason for denial from eflexgroup to support a grievance.

On or about June 15, 2006, Ward received notification from eflexgroup that an EOB for deductibles, co-pays and co-insurance approved by Medical Associates was required to process her claim. On June 22, 2006, pursuant to the contractual grievance procedure, Ward filed a grievance. On June 15, 2006, Vogelsberg received a formal reason for the denial of her reimbursement claims from eflexgroup and filed her grievance of June 20, 2006.

A grievance is defined under the terms of the Agreement as "a substantial complaint by an employee having a substantial impact on wages, hours or conditions of employment and the interpretation, meaning or application of the provisions of this agreement." Vogelsberg and Ward should not be penalized for exercising caution in evaluating the merits of their grievance and waiting until they had a factual basis for the same; especially since the District has not raised an issue that the timing of their grievances was in any way prejudicial.

Ward and Vogelsberg did not know and did not have reason to know of a grievable matter until they received a reason for claim denial from eflexgroup. The Association was not aware of the District's contract violation until after the two employees had filed their grievances. The absence of any other grievances by the Association or PCAP members does not compel a conclusion that there was an accepted or acknowledged agreement to the Amendment. The grievances of Ward and Vogelsberg are procedurally arbitrable.

Vogelsberg and Ward's grievances are timely filed under the collective bargaining agreement. Additionally, continuing violations give rise to continuing grievances which may be grieved at any time. Each time the District refused to provide the negotiated benefit constitutes a separate violation.

Assuming *arguendo* that the grievances are untimely, the agreement does not provide a penalty for late filing or processing of grievances. To not address the merits of the complaint would be to impose a penalty that the District and PCAP did not include within their collectively bargained grievance procedure.

The contract does not provide for final and binding arbitration of grievances. The one year Sec. 111.07(14) statute of limitations does not arise until the exhaustion of the contractual

grievance procedure. The grievance procedure was exhausted when the Board issued its denial of the grievances.

The language of Appendix A, Paragraph D, is ambiguous. However, under the most reasonable interpretation of the plain language of Appendix A (D), the Association could reasonably assume that out-of-pocket health expenses incurred by PCAP members would be reimbursable under the HRA plan. As the proponent of the language, the District bore the responsibility to demonstrate that this language meant something else and to establish any limitations with regard to eligible out-of-pocket expenses.

The only evidence of bargaining history pertains to the negotiation of the 2003-05 agreement. This evidence suggests that the parties did not discuss the issue of what would be considered an eligible out-of-pocket expense under the HRA. The documents involved in the negotiating process do not reference, nor define, what is meant by "eligible out-of-pocket expenses." Nor do they indicate that prescription drugs and diabetic supplies would not be considered an eligible out-of-pocket expense under the Medical Associates plan or the HRA plan.

The Association was mislead as a result of the District's failure to explicitly communicate that "eligible out-of-pocket expenses," as used in the Agreement, was to be defined by the terms of the Medical Associates insurance policy. Public policy and equity favors the Association's position. The District should not be permitted to gain in arbitration that which it did not gain in negotiation.

Bargaining team member Kerkenbush credibly testified that he was not told by anyone that prescription drug co-pays would not be covered under the Medical Associates plan. Rather, Kerkenbush assumed that prescription drug co-pays would not be covered under Medical Associates' plan based upon his previous personal experience with WEA insurance.

The terms of the Medical Associates insurance contract were not incorporated into the collective bargaining agreement by reference, nor was it demonstrated that the parties agreed on the benefits or other terms of the Medical Associates insurance contract. Additionally, the District Administrator's reliance upon the Medical Associate's plan is seriously weakened by the Group Contract and the Group Subscriber Agreement for the District of Potosi; which contract constitutes the entire agreement between Medical Associates and the District.

Past practice evidence and conduct of the parties is evidence of how the parties understood and interpreted the Appendix A (D) language. Vogelsberg's out-of-pocket expenses for office co-pays and prescription drug co-pays were routinely reimbursed under the HRA agreement for dates of service beginning in October 2004 through the early part of November 2005. Ward's out-of-pocket expenses for office call co-pays and prescriptions for her and her spouse were routinely reimbursed under the HRA agreement for dates of service beginning in January 2005 through the early part of January 2006, with the exception of one prescription co-pay for her spouse. Contrary to the argument of the District, these practices were not created by the Grievants' allegedly circuitous actions.

It is incredible that Lozeau would wait for over two years before "correcting" the plan documents. Assuming arguendo, that the District made a unilateral mistake when it entered into the two HRA agreements, the District is only entitled to unilaterally correct the "mistake" in its past practices if the contract language is clear and unambiguous. The evidence does not demonstrate that the District's implementation of the HRA was a mistake.

The District was obligated to adopt and maintain an HRA plan which was consistent with the negotiated terms of the parties' collective bargaining agreement. Thus, any conflict between the insurance policy obtained by the District and the collective bargaining agreement must be resolved in favor of the collective bargaining agreement.

Under well-established principles of arbitration, if an agreement is susceptible of two constructions, the construction resulting in forfeiture should be avoided. The District can readily arrange for the HRA to provide reimbursement for prescription co-pays and medical supply co-insurance.

The complaint is timely filed. The Commission has jurisdiction to decide the merits of the Association's claim that Respondent violated Appendix A, Section D, of the agreement; thereby violating Sec. 111.70(3)(a)5, Stats., and, derivatively, violating Sec. 111.70(3)(a)4, Stats.

Complainant has met its burden of proof. The Examiner should award all relief deemed appropriate, including, but not limited to, an order that the District be required to follow the agreed-upon language, including implementation of the terms of the HRA plan, before it was amended. The Association seeks a make-whole award, including interest, for the Grievants' loss of benefits resulting from the District's unlawful conduct.

Respondent

The applicable one year statute of limitations is strictly construed by the Commission. The Complainant must allege a "specific act" within the one-year statute of limitations that constitutes "in and of itself" a prohibited practice and the one-year period generally begins to run once a complainant has knowledge of the act alleged to violate the statute. The standard applied is whether the complainant "knew or reasonably should have known" of the act.

Complainant's Sec. 111.70(3)(a)5 claim is subject to the Commission requirement that it will not assert jurisdiction over an alleged violation of a collective bargaining agreement unless the Complainant has exhausted the contractual grievance procedure without undue delay. A Sec. 111.70(3)(a)4 claim that arises during the term of a collective bargaining agreement is not subject to this exhaustion rule. Such a claim, however, is subject to the "knew or reasonably should have known" standard.

The PCAP bargaining unit members became covered under the Medical Associates plan and the HRA plan effective January 1, 2004. Processing of expenses reimbursable under the

HRA plan is initially handled through Medical Associates. Under this process, expenses paid by employees are submitted directly to Medical Associates for approval; an explanation of benefits (EOB) is created for those expenses which are eligible out-of-pocket expenses under the HRA plan; the EOB is submitted by Medical Associates to the HRA plan; the EOBs are electronically filed with Eflex each week; and reimbursed directly to the employees via a check written by Eflex.

There was no intent to have employees submit claims for reimbursement directly to Eflex. Rather, all out-of-pocket employee expenses were to be determined as eligible or ineligible and approved by Medical Associates prior to sending a claim for reimbursement to Eflex. By submitting claims directly to Eflex, Ward and Vogelsberg circumvented the Medical Associates administration of the HRA reimbursement process; thereby creating a "practice" inconsistent with the bargained benefit and without the knowledge of or acceptance of the District. When the District Administrator became aware of the fact that Eflex had been reimbursing claims in a manner inconsistent with the negotiated benefit, the District Administrator executed the November 11, 2005 amendment to correct this mistake.

The District's interpretation of the relevant contract language is supported by the evidence of bargaining history and the testimony of PCAP President Kerkenbush. When Respondent acted to correct the HRA plan it was acting consistent with the negotiated agreement.

Complainant's attempt to expand the meaning of Appendix A(D) "eligible out-of-pocket expenses" to include expenses eligible under a provision of the Internal Revenue Code never contemplated by the parties is an attempt to gain through its prohibited practice complaint that which it failed to gain in negotiations. It is not a forfeiture to deny benefits not bargained by the parties. The Grievants have received an unintended windfall.

The parties' contractual grievance procedure has a time limit for filing grievances. The Grievants had knowledge of the amendment and change to the HRA plan no later than February 20, 2006. For purpose of timeliness, knowledge by a grievant of the basis for a grievance should be imputed to the union.

The grievances were accepted at Step 3 of the grievance procedure. This acceptance does not change the contractual time line for filing a grievance. Each grievance was denied on the basis of the timeliness of the grievance as well as on the merits of the grievance. The District Administrator's Step 3 response was timely.

Even if Executive Director Bos correctly recalls that she did not assist in drafting the May 12, 2006 grievances, she was expressly identified by each Grievant as their grievance representative; the District was advised that it should address all future correspondence to Executive Director Bos; and, as requested, Executive Director Bos was sent a copy of the District Administrator's May 16, 2006 grievance response. PCAP President Kerkenbush was also provided a copy of this response.

The grievance procedure is presumed to be the exclusive mechanism for resolution of alleged violations of the contract and the Commission has expressed its desire to honor parties' collective bargaining agreements. Honoring the agreement includes honoring the agreed upon timelines for filing and processing the grievance.

The District's policy and practice has been to comply with these timelines unless there is a written agreement between the parties to extend or suspend the timelines. There has been no written agreement to extend the contractual grievance timelines. The grievances were filed well beyond the Article V time limit.

The factual basis for the grievance, *i.e.*, the alleged unilateral amendment of the HRA plan, was known to Ward, Vogelsberg, Kerkenbush and Executive Director Bos at the time of the May 2006 grievances. Consequently, there was no reason to delay processing the grievances to Step 4.

In the present case, the May 12, 2006 grievances were not processed to Step 4 of the parties' contractual grievance procedure and, thus, Complainant has failed to exhaust the contractual grievance procedure. Given the information provided to PCAP members and PCAP President Kerkenbush, Complainant knew or should have known not later than November 14, 2005 that the challenged unilateral action had been taken; which makes the June 29, 2007 claim untimely.

Subsequent responses from Eflex did not provide the Grievants or PCAP with any relevant information not known in May of 2006. The June 2006 grievances included allegations identical to the allegations made in the May 2006 grievances. Following receipt of the June 2006 grievances, the District Administrator contacted Executive Director Bos and reiterated his frustration with the fact that the grievances were materially the same grievances that had been denied; but agreed to attempt to resolve the grievances.

The second set of grievances were processed through Step 4 of the grievance procedure and denied. The timeliness objection was reiterated.

While Complainant's continuing violation theory may have relevance to the determination of the timeliness of a grievance, it does not necessarily follow that the theory applies to the determination of the timeliness of a prohibited practice complaint. Complainant should not be allowed to resurrect what would otherwise be an untimely prohibited practice claim by manipulating the exhaustion doctrine.

The duty to bargain during the term of an existing contract does not extend to matters embodied in the contract; even when the issue at the heart of the dispute is not specifically discussed. The HRA plan is embodied in the parties' contract. Respondent has not violated the parties' collective bargaining agreement or unilaterally changed a mandatory subject of bargaining as alleged by Complainant.

Complainant, and not the District, has the burden of proof in a complaint proceeding. Complainant has not met its burden of proof to establish a violation of MERA. The complaint should be dismissed.

If Complainant were to establish a violation of MERA, the appropriate remedy would be limited. Any remedy should date back only to the date of the June 26, 2006 grievances. Second, only those out-of-pocket expenses that are the subject of the Ward and Vogelsberg grievances should be awarded. Any expenses that may have been incurred by other bargaining unit members are not properly awarded as part of the instant complaint.

The complaint should be dismissed on the basis that Complainant has failed to exhaust the contractual grievance procedure and the complaint was not timely filed under Sec. 111.07 (14), Stats. Alternatively, the complaint should be dismissed because Complainant's alleged violations of Sec. 111.70(3)(a) 4 and 5, Stats., are without merit.

DISCUSSION

Applicable Statutes

Section 111.70(3)(a)4 ad 5, Stats., provide, in relevant part, that it is a prohibited practice for a municipal employer:

> 4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. . .
>
> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . .

To violate Sec. 111.70(3)(a)4 and 5, Stats., is to derivatively violate Sec. 111.70(3)(a)1, Stats.; which provides that it is a prohibited practice for a municipal employer:

> To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

Sec. 111.07(14), Stats., which is made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides:

> The right of any person to proceed under this section shall not exceed beyond one year from the date of the specific act or unfair labor practice alleged.

Sec. 111.07(14), Stats., is a statute of limitations that can be waived when not properly raised by a party as an affirmative defense. STATE OF WISCONSIN, DEC. NO. 28222-C (WERC, 7/98). Affirmative defenses not raised by a timely answer are waived. ERC. 12.03(1).

Respondent's Affirmative Defenses

Respondent has filed a timely answer in which it raises a number of affirmative defenses, including that Complainant's claims are barred by the Sec. 111.07 (14), Stats., statute of limitations and/or by Complainant's failure to exhaust the contractual grievance procedure. It is appropriate for the Examiner to consider these two affirmative defenses.

According to Complainant, Respondent violated Sec. 111.70(3)(a)5 and, derivatively violated Sec. 111.70(3)(a)4, Stats., when, on November 11, 2005, Respondent unilaterally amended an HRA agreement to exclude certain eligible out-of-pocket costs in violation of the parties' collective bargaining agreement. As Respondent argues, the act complained of, *i.e.*, the unilateral amendment of the HRA agreement in violation of the collective bargaining agreement, occurred in November 2005 and the complaint was filed on June 29, 2007. As Respondent further argues, the Commission has held that the Sec. 111.07(14) one-year statute of limitations begins to run "once a complainant has knowledge of the act alleged to violate the statute." STATE OF WISCONSIN, DEC. NO. 26676-B (WERC, 4/91)

Where, as here, the parties have negotiated a contract which includes a grievance procedure, the Commission will not exercise its discretion to hear a Sec. 111.70(3)(a)5 violation of collective bargaining agreement claim unless there has been an exhaustion of the contractual grievance procedure. This exhaustion doctrine is applicable in cases in which the contractual grievance procedure culminates in arbitration, as well in cases in which the contractual grievance procedure does not culminate in arbitration. WINTER SCHOOL DISTRICT, DEC. NO. 17867-C (WERC, 5/81)

An exception to this general rule will be made where the employer has repudiated the grievance procedure; there has been unfair representation by the union; or futility. CITY OF MADISON, DEC. NO. 28864-A (Crowley, 1/97); AFF'D EXAMINER'S FINDINGS OF FACT, MODIFIED EXAMINER'S CONCLUSION OF LAW AND AFFIRMED EXAMINER'S ORDER, DEC. NO. 28864-B (WERC, 10/97). The rationale underlying the requirement to exhaust the contractual grievance procedure is to give full effect to the parties' agreed-upon procedure for resolving disputes and to encourage the voluntary settlement of disputes. MINERAL POINT UNIFIED SCHOOL DISTRICT, DEC. NO. 14970-C (WERC, 10/78).

Given the requirement to exhaust the contractual grievance procedure, the Sec. 111.07(14), Stats., one-year statute of limitations for Complainant's Sec. 111.70(3)(a)5 violation of collective bargaining agreement claim is computed from the date on which the

grievance procedure was exhausted by the parties to the agreement, provided that the complaining party has not unduly delayed the processing of the grievance. WILMOT SCHOOL DISTRICT, DEC. NO. 21092-A (WERC, 10/84) [CITING: HARLEY-DAVIDSON MOTOR COMPANY, DEC. NO. 7166 (WERC, 6/65); CITY OF MADISON, DEC. NO. 15725-A,B (WERC, 6/79); LOCAL 950, OPERATING ENGINEERS, DEC. NO. 21050 (WERC, 7/84).]

In the present case, the contractual grievance procedure does not culminate in arbitration. Rather, the last step of the contractual grievance procedure is Step 4, which is an appeal to the Board of Education.

On May 12, 2006, Complainant's bargaining unit members Marilyn Ward and Linda Vogelsberg each filed a grievance alleging, *inter alia*, that, on November 11, 2005, Respondent unilaterally amended an HRA agreement to exclude reimbursement of certain out-of-pocket costs in violation of the parties' collective bargaining agreement. Each grievance states that, as a result of the November 11, 2005 amendment, prescription drug co-pays were no longer being reimbursed under the HRA plan. Vogelsberg's grievance also states that, as a result of the November 11, 2005 amendment, diabetic supplies were no longer being reimbursed under the HRA plan.

Each May 12, 2006 grievance requests that the grievance start at Step 4 of the contractual grievance procedure. In his May 16, 2006 Step 3 response to these grievances, the District Administrator accepted the grievances at Step 3 of the grievance procedure, but denied the grievance request to proceed directly to Step 4 of the grievance procedure. The District Administrator also denied the grievances on the basis that they were not filed within the ten work day time limit provided for in Article V of the parties' contractual grievance procedure and that the November 11, 2005 Amendment to the HRA Adoption Agreement was consistent with the negotiated agreement.

Although Executive Director Bos states that she was not involved in writing the grievances of May 12, 2006, these grievances identify Executive Director Bos as the PCAP Representative on these grievances and request that all future correspondence be addressed to Executive Director Bos. Executive Director Bos, as well as the Grievants and PCAP President Kerkenbush, were "cc'd" on the May 16, 2006 Step 3 response.

Executive Director Bos does not deny receiving copies of this Step 3 response. Given the evidence that Executive Director Bos' copy of the Step 3 response was provided by email, it is reasonable to conclude that Executive Director Bos received her copy of the District Administrator's Step 3 response on or about May 16, 2006. The grievances of May 12, 2006 were not appealed to Step 4 of the contractual grievance procedure.

Complainant does not argue, and the record does not establish, that Respondent has agreed that Complainant need not exhaust the contractual grievance procedure or that the May 12, 2006 grievances were not processed to Step 4 of the contractual grievance procedure due to the employer's repudiation of the grievance procedure; unfair representation by the union

or futility. With respect to the May 12, 2006 grievances, Complainant failed to exhaust the contractual grievance procedure.

Complainant, contrary to Respondent, asserts that it had a reasonable basis to not process the grievances of May 12, 2006 to Step 4 of the contractual grievance procedure because the Grievants had not yet received a formal reason from Eflex for its denial of the Grievants' reimbursement claims. Eflex is the company that processes claims for reimbursement under the HRA plan.

Complainant argues that, following receipt of Eflexes' formal reason for its denials of the Grievants' reimbursement claims on June 17, 2006, Vogelsberg's grievance of June 20, 2006 and Ward's grievance of June 22, 2006 were timely filed and processed through Step 4 of the parties' contractual grievance procedure. According to Complainant, its duty to exhaust the contractual grievance procedure was satisfied when, in August 2006, the District's Board of Education issued its Step 4 response to the June 2006 grievances.

The Examiner, however, is persuaded that it is the knowledge that the District, on November 11, 2005, amended the HRA agreement to exclude certain eligible out-of-pocket expenses, rather than any specific denial of a reimbursement claim from Eflex, which gives rise to the Sec. 111.70(3)(a)5 violation of collective bargaining agreement claim alleged in the instant complaint. Statements contained in the grievances of May 12, 2006 establish that the Grievants possessed such knowledge at the time that they filed their grievances of May 12, 2006.

According to Respondent, one may reasonably impute to Executive Director Bos, as the Grievants' designated grievance representative, knowledge of the statements contained in the grievances of May 12, 2006. Even if Respondent's argument were incorrect, statements contained in the District Administrator's Step 3 response to the May 12, 2006 grievances provided Executive Director Bos with the knowledge of the District act that gives rise to the Sec. 111.70(3)(a)5 violation of collective bargaining agreement claim alleged in the instant complaint.

In summary, by at least the time that the District Administrator provided Executive Director Bos with his Step 3 response to the May 12, 2006 grievances, on or about May 16, 2006, the Grievants and Complainant had knowledge of the Respondent act that gives rise to the Sec. 111.70(3)(a)5 violation of collective bargaining agreement claim that is the subject of this complaint. When Complainant failed to appeal the grievances of May 12, 2006 to Step 4 of the contractual grievance procedure and sought to exhaust the contractual grievance procedure by filing and processing the grievances of June 20 and 22, 2006, Complainant unduly delayed the grievance procedure.

The grievances of June 20 and 22, 2006 are, in all relevant respects, the same grievances that were filed on May 12, 2006 and raise the same Sec. 111.70(3)(a)5 violation of collective bargaining agreement claim. Contrary to the argument of Complainant, the grievances of June 20 and 22, 2006 are not based upon a "continuing" violation of the collective bargaining

agreement such that the requirement to exhaust the contractual grievance procedure recommences with the filing of the June 2006 grievances.

Conclusion

As set forth in the complaint, the alleged unilateral change is the District Administrator's November 11, 2005 amendment to the HRA plan. As discussed above, the District Administrator's Step 3 response of May 16, 2006 provided Executive Director Bos with knowledge of the November 11, 2005 amendment to the HRA plan. As Respondent argues, any Sec. 111.70(3)(a)4 "unilateral" change claim that is not subject to the requirement that Complainant exhaust the contractual grievance procedure would be untimely on the basis that Complainant had knowledge of the act alleged to have violated MERA more than one-year prior to filing its complaint on June 29, 2007.

In the present case, however, Complainant alleges that its Sec. 111.70(3)(a)4 unilateral change claim is derivative to its Sec. 111.70(3)(a)5 violation of collective bargaining agreement claim. It follows, therefore, that, if the Examiner cannot assert jurisdiction over Complainant's Sec. 111.70(3)(a)5 breach of contract claim, then the Examiner cannot assert jurisdiction over the derivative Sec. 111.70(3)(a)4 claim.

For the reasons discussed above, Complainant's duty to exhaust the contractual grievance procedure attaches to the May 12, 2006 grievances. As discussed above, these grievances were not processed beyond Step 3 of the contractual grievance procedure and, thus, Complainant has failed to exhaust the contractual grievance procedure. Given this failure to exhaust the contractual grievance procedure, the Examiner will not assert the Commission's jurisdiction to determine the merits of Complainant's allegations that Respondent has violated Sec. 111.70(3)(a)5, Stats., and, derivatively violated Sec. 111.70(3)(a)4, Stats. The Examiner has dismissed Complainant's complaint in its entirety.

Dated at Madison, Wisconsin, this 27th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CAB/gjc
32269-A