BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION	Case 289 No. 44096 MA-6168
and	
MILWAUKEE COUNTY	

Appearances:
Ms. Marna M. Tess-Mattner, Gimbel, Reilly, Guerin & Brown, Attorneys at Law, appearing on behalf of the Association.
Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, appearing on behalf of the County.

ARBITRATION AWARD

The Association and the County named above are parties to a 1989-90 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance concerning Martha McCoy Brock. The undersigned was appointed and held a hearing on September 11, 1990, in Milwaukee, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. The parties made oral arguments in lieu of filing briefs, and the record was closed upon the conclusion of the hearing.

ISSUE:

The Association frames the issue as the following:

> Whether each deputy sheriff, regardless of whether that deputy is married to another deputy, is entitled to select health insurance benefits pursuant to Section 3.11(1) of the 1989-90 contract?

The County raises an additional issue:

> Is the grievance arbitrable?

The County does not stipulate to the Association's framing of the issue and agrees that the Arbitrator may frame the issue.

The Arbitrator will address the following issues:

> Is the grievance arbitrable?
>
> Did the County violate the collective bargaining agreement when it transferred the Grievant, Martha McCoy Brock, to her husband's family insurance plan over her objection? If so, what is the appropriate remedy?

CONTRACT PROVISIONS:

> 3.11 EMPLOYE HEALTH AND DENTAL INSURANCE
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> (1) Milwaukee County employes may choose health benefits for themselves and their dependents either under a fee for service plan or health maintenance organization approved by Milwaukee County.
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> . . .
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> 5.01 GRIEVANCE PROCEDURE
>
> (1) APPLICATION: EXCEPTIONS. A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute by an employe or group of employes concerning the application of wage schedules or provisions relating to hours of work and working conditions. The grievance procedure shall not be used to change existing wage schedules, hours of work, wording conditions, fringe benefits, and position classifications established by ordinances and rules

which are matters processed under other existing procedures.

. . .

(4) TIME LIMITATIONS. If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing. If any extension is not agreed upon by the parties within the time limits herein provided or a reply to the grievance is not received within time limits provided herein, the grievance may be appealed directly to the next step of the procedure.

. . .

(7) STEPS IN THE PROCEDURE

(a) STEP 1

1. The employe or his representative shall prepare the grievance in writing and shall serve it upon the person designated to receive grievances in his department.
2. The person designated in Par.1. will conduct a hearing within 10 days from the date of service of the Grievance Initiation Form. Within 10 days of the conclusion of such hearing, the Hearing Officer shall inform the aggrieved employe in writing of his decision.
3. If the grievance is not resolved at Step 1 as provided, the Association or the County may refer such grievance within 5 working days to Step 2.

(b) STEP 2

1. For the purpose of discharging its responsibilities to administer collective agreements during their terms in accordance with Sec. 79.02, C.G.O., and in order to avoid unnecessary appeals from the first step to the Arbitrator, the Director of Labor Relations or his designee may, at the request of either party, review first step issues which appear to be resolvable prior to arbitration, and shall respond to the parties in writing within forty-five (45) days.
2. In the event this review results in a resolution of the dispute acceptable to both the association and the County, it shall be binding upon all parties and shall serve as a bar to further appeal to the Arbitrator.

3. This procedure shall in no way diminish the authority or responsibility of the first step Hearing Officer as such are defined in the grievance procedures.

(8) Grievances designated for arbitration shall be appealed to the Wisconsin Employment Relations Commission within 10 days of the date of the written response from Step 2.

(9) No grievance shall be initiated after the expiration of 90 calendar days from the date of the grievable event, or the date on which the employe becomes aware, or should have become aware, that a grievable event occurred, whichever is later. This clause shall not limit retroactive payment of economic benefits for which it has been determined the County is liable nor would it prohibit a prospective adjustment of an ongoing situation.

BACKGROUND:

Few, if any, of the facts are in dispute. The Grievant is Martha McCoy Brock, hired as a deputy sheriff and currently a detective and member of the

bargaining unit. On May 3, 1986, the Grievant married another bargaining unit member, Deputy Albert Brock. Albert was hired before Martha, and both are covered by the same collective bargaining agreement.

The Grievant is the legal guardian of a child, Chalena Ungewitter. The Grievant's husband has children from a previous marriage. When the Grievant married, the County informed her that she and her husband were entitled to one health insurance policy -- one family plan. The County informed her that under the County's practice, her single policy would be discontinued, and she was transferred to her husband's policy, over her objection.

The Grievant wants to have health insurance coverage with an HMO affiliated with Mt. Sinai Hospital, because Chalena has serious medical problems and has been treated since her birth at Mt. Sinai. Chalena receives SSI benefits and Title XIX covers her medical expenses at the moment. The Grievant and her husband want different HMO's for personal reasons, and the parties stipulated that the additional cost to the County for such an arrangement would range between $280 to $400 per month. When the County transferred the Grievant to her husband's plan, it informed the Grievant that her husband must add Chalena to his policy as a dependent, but he has refused to do so. The HMO is requiring that the subscriber (Albert in this case) must sign for the child Chalena in order for Chalena to receive coverage. The Grievant's husband has not been willing to add Chalena to his policy because she is not legally his dependent.

On June 16, 1986, the Grievant filed a grievance which was processed to the County's Department of Labor Relations. The Department of Labor Relations never responded to the grievance, due to some administrative problems apparently related to turnover of Department Directors. During this period of time, the collective bargaining agreement in place did not specify any time for the Department of Labor Relations to respond to a grievance, although the current contract has a 45 day limit.

The Grievant also filed a discrimination complaint with the Equal Rights Division. The discrimination complaint also dealt with the subject of health insurance benefits as an aspect of employment and marital status. A decision in that case favored the County.

In April of 1990, the Grievant and Association Secretary Deputy David Engelhardt met with Carol Whiteman from the Department of Labor Relations to discuss the status of the Grievant's health insurance benefits. Nothing was resolved. Engelhardt then contacted the current Director of the Department of Labor Relations, Henry Zielinski, to inquire about the status of the grievance filed in 1986. Zielinski told Engelhardt to file a new grievance, which the Association did.

The County has had a long standing past practice, going back more than 20 years, of providing one family health and dental insurance plan to two County employees married to each other. When a County employee marries another County employee, the County merges the two plans into one family plan, and the choice goes to the more senior of the employees, if they do not agree on which plan to use. During orientation of new employees, the County distributes a booklet which illustrates this practice.

County Exhibit #6 shows that between 1978 and 1990, there were six instances of deputies marrying other deputies or other County employees, and in all cases, the County cancelled the single or single parent coverage of one spouse and changed the other spouse's policy to family coverage. There is no evidence one way or the other that any of those employees objected to the change in insurance coverage.

THE PARTIES' ARGUMENTS:

The County raises several procedural arguments. First, the County contends that under the last sentence of Section 5.01(1) of the contract, the grievance is outside the scope of the grievance procedure. The language states that the grievance procedure shall not be used to change fringe benefits, among other things, and that for the Association to claim that the County should do something other than what it has done in the past is outside the scope of the grievance procedure.

The Association responds by noting that the grievance procedure is designed to clarify and challenge all contractual provisions, and it is proper to address a dispute over how the contract applies through the grievance procedure. The Association points to the language of Section 6.01, which states that: "To the extent that the provisions of this Agreement are in conflict with existing ordinances or resolutions, such ordinances and resolutions shall be modified to reflect the agreements herein contained." The Association notes that there is an ordinance that addresses this issue, and the ordinance has to yield if in conflict with the contract.

The County raises the issue of the timeliness of the grievance, as the triggering event occurred in 1986. The County notes that a grievant has 90 days from the date of the event, or the date on which the employee became aware or should have become aware of the event, to initiate a grievance. The County also questions whether the grievance should be resolved on the basis of the contract language in place during 1986, while the Association is bringing its claim based on current contract language which has been changed. The County further notes that this grievance could have been appealed at any time since then. The County objects to the time delay where Section 5.01(9) allows for retroactive payment (or prospective relief) of economic benefits if the County is held liable where a grievance has been lying around for four years.

The Association makes several responses to the County's timeliness arguments. First, the Association submits that the County has waived the timeliness argument where is was not raised at lower steps of the grievance procedure. The Association notes that under the predecessor labor contract, the Department of Labor Relations had no time limit to respond to a grievance (unlike the current contract), and that while the triggering event was in 1986, this was a grievance that got lost in the cracks. However, the Association argues that this is an ongoing problem and has been timely prosecuted since it was reactivated. The Association is not claiming the Grievant should receive retroactive benefits, but that prospective relief is in order. Therefore, the Association states that it has filed its claim under the current contract language, due to the ongoing nature of the problem and that fact that it is not looking at a retroactive application of the contract. The Association contends that Zielinski could have reactivated the 1986 grievance, but that he told the Association to file a new grievance. The Association states that the Grievant became aware in the spring of 1990 that the Labor Relations Department had not resolved her grievance, and she detrimentally relied on Zielinski's statement to file a new grievance.

The County notes that the administration of its insurance programs are governed by contract, practices, ordinances, and procedures. Under a County ordinance, the following language applies: "In the event both a husband and a wife are employed by Milwaukee County and are eligible for participation in the County Group Health Benefit Program, either the husband or the wife shall be entitled to one family plan. In the event the husband elects to be named the insured, the wife shall be the dependent under the husband's plan; in the event the wife elects to be named the insured, the husband shall be the dependent under the wife's plan." (County Exhibit #8.)

The County then notes that if the grievance is considered under the contract in effect in 1986, the ordinance does not apply, while the Association states that the ordinance does apply as it is going under the 1989-90 contract, which includes the language of Section 6.01 noted earlier which provides for the resolution of conflicts between ordinances and contract language.

The County also argues that the Grievant should be collaterally estopped from bringing this claim, due to a ruling against the Grievant in the discrimination claim. The County states that the complaint was filed on the same issue, between the same parties, with the decision favoring the County. The Association states that it was not a party to the discrimination claim, and that the issues were different, because the issue in the discrimination claim was whether the County violated state law on an aspect of employment due to marital status, while the issue here is whether the Grievant is entitled to her own benefits. The Association states that the application of the collective bargaining agreement was not relevant in the claim before the Equal Rights Division.

County Exhibit #4 is a ruling in 1976 from an umpire (Frank Zeidler) finding that there was no right for spouses to each have a family plan. The County submits that the umpire's prior ruling is relevant to this dispute and shows what the County has relied on in its administration, and that the practice has been long standing. The Association submits that the umpire's ruling is not relevant, as it involved a different bargaining unit, a different labor contract with different language, and is remote in time.

Regarding the merits of the dispute, the Association argues that it is looking at specific contractual terms about benefits for employees and dependents, and that the County's practice is this case is depriving one employee of the choice of benefits allowed in Section 3.11(1). The Association contends that not only is the Grievant denied the choice of coverage, but her dependent has no coverage under the County plan, and her dependent is entitled to coverage under the contract.

The Association further submits that these are benefits that were bargained for, and that the contract language of Section 3.11(1) is very clear. The Association rejects the County's fears that an award in the Association's favor in this case could lead to thousands of dollars of additional expenses,

as there is no evidence that other employees have objected to being placed under one family plan when marrying County employees. The Association asserts that the County's practice conflicts with the contract language, and that the County ordinance also conflicts with the contract language.

The County submits that given the language of Section 3.11(1), there is no inconsistency in its administration of the insurance program through its long practices which are codified in an ordinance. The language provides that employees may choose plans approved by the County. The County asserts that the Grievant had no claim of a lack of freedom to make a choice. The County also contends that there has been no economic harm to the Grievant, while an adverse ruling here could create great economic harm to the County. The County points out that if a one-time exception to its practice were granted in this case, the cost for this one person could be magnified by several thousand due to the number of cases that may arise in the County. Finally, the County states that this is an attempt to change a past practice through a grievance and not through bargaining, and there is nothing to show a need to reverse the County's practice, particularly where there is great potential harm to the County.

DISCUSSION:

The County's argument that Section 5.01(1) means that this grievance is outside of the grievance procedure is rejected. The last sentence of Section 5.01(1) states: "The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits, and position classifications established by ordinances and rules which are matters processed under other existing procedures." (Emphasis added.)

The obvious intent of such language is to prevent either party from attempting use the grievance process as a mechanism for ongoing bargaining over certain matters. Nothing in this language would preclude the Association from using the grievance procedure to determine rights to certain fringe benefits when a dispute arises. This dispute is based on whether the Grievant has a right to her own family insurance policy, separate from her husband's family insurance policy, and the language of Section 5.01(1) does not preclude this grievance. The first sentence of Section 5.01(1) allows for such a grievance, where it defines a grievance as any controversy over an unsatisfactory adjustment or failure to adjust a claim or dispute concerning wages, hours or work and working conditions.

As to the timeliness issue, there are several problems with the process used by both parties. Indeed, the Grievant and/or the Association could have and should have pursued the grievance in a much more timely manner. Even if the Labor Relations Department had been negligent in handling the grievance, the initiating parties still waited four years to actively pursue it. Such a delay is not explained by the Association, and the Labor Relations Department's failure to respond does not excuse the Association from following up in a timely manner.

However, the Association is correct in that this is indeed one of those grievances that fell through the cracks. The Labor Relations Department appears to have gone through some difficulties during the period of time in question, which most likely led to administrative disarray. The fact that the Department did not have time limits to respond in the prior contract hardly excuses it from a more timely processing of a grievance, since the possibility of liability was present. Then in 1990, when Zielinski then told the Association to file a new grievance, the Association did so.

Furthermore, the County did not raise the issue to timeliness at earlier stages of the grievance process. As a general matter in arbitration, an objection to timeliness must be raised in a timely manner in order that the other party is not taken by surprise and has sufficient notice to rebut the argument.

Arbitrators often find that where reasonable doubts exist as to whether parties have followed procedural requirements, they will generally be resolved in favor of finding the issues to be arbitrable. 1/ This is a case where reasonable doubt exists. Both parties have engaged in procedural omissions. At a minimum, the both parties should have been much more diligent about processing the grievance, and the County should have raised the timeliness issue before the hearing in the matter.

Therefore, I find that the better method is to treat the grievance as an ongoing dispute between the parties, one which was filed under the 1989-90 contract, in accordance with the direction given by Zielinski, and that the grievance is arbitrable.

1/ See Seaboard Allied Milling Corp., 82-1 CCH ARB Para. 8308 (Madden, 1982).

As to the merits, the language of Section 3.11(1) states that: "Milwaukee County employes may choose health benefits for themselves and their dependents either under a fee for service plan or health maintenance organization approved by Milwaukee County." According to the Association, the County's action has denied the Grievant her choice of coverage, and her dependent has no coverage. It must be noted here that it is the Grievant's husband's refusal to sign for the Grievant's dependent that has denied the Grievant's dependent coverage under a County plan, although the dependent child is receiving medical coverage through other sources.

What the Grievant wants is the ability to choose for herself and her dependent one insurance plan and have the County pay for the family coverage, while her husband wants the same ability to choose another plan for himself and his dependents and have the County pay family coverage for his plan. This would result in two separate family plans for one family. This is not what the contract language regarding "choice" means. The word "choose" as used in the entire sentence allows employees to choose either a fee for service plan or an HMO plan. The word "may" as used before the word "choose" reinforces this interpretation, as employees may choose either one plan or another. The choice allowed in Section 3.11(1) is not a choice of two family plans -- it is a choice of a fee for service plan or an HMO. The contract language says nothing about whether employees may have one single plan, one single parent plan, one family plan, two family plans or two single plans.

The language of Section 3.11 also reveals that the parties have not provided for the scenario in this grievance. The parties have been aware for many years that there are situations where one County employee has married another County employee, and one is transferred onto the other's policy. Nonetheless, the parties have apparently chosen not to bargain over language to cover these situations. Sections 3.11(2)(e) and (f) and (3)(a) describe the amount of employee contribution toward insurance for those employees hired after November 1, 1989. However, nothing in the parties' contract states how employees receive family or single or single parent coverage.

In this case, it is appropriate to look at the past practice to resolve this issue, not because the contract language is ambiguous and a past practice would help interpret it, but rather, because the contract does not address the issue presented in this grievance. It is generally accepted by arbitrators in, in the absence of written contractual language, a binding past practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

The past practice is clear, and the Association does not dispute that for over 20 years, the County has merged two plans into one family plan upon a marriage between County employees. The Association contends that the past practice, as well as the ordinance codifying the past practice, is in conflict with the contract language. I disagree. The contract language does not cover this situation, and therefore, there is no conflict between the past practice and the contract language. It follows that there is also no conflict between County ordinances and the contract language. The parties have not bargained for the particular benefit the Association now seeks. Therefore, the County correctly notes that there is no reason to reverse the past practice.

The Arbitrator finds that although the grievance is arbitrable, the County did not violate the collective bargaining agreement when it transferred the Grievant to her husband's family insurance plan over her objection, and the grievance is denied.

AWARD

The grievance is dismissed.

Dated at Madison, Wisconsin this 3rd day of October, 1990.

By _____
Karen J. Mawhinney, Arbitrator