STATE OF WISCONSIN
BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

THE LAKE GENEVA TEACHERS' ASSOCIATION

and

LAKE GENEVA JT. SCHOOL DISTRICT #1

Daniel Nielsen, Arbitrator
Case 16, No. 45387, MA-6583

Hearing 5/24/91
Record Closed 6/10/91
Award 9/16/91

Appearances:

Davis & Kuelthau, S.C.,111 East Kilbourn Avenue, Suite 1400, Milwaukee WI 53202 by **Mr. Daniel Vliet**, Attorney at Law appearing on behalf of the Lake Geneva Jt. School District #1.

Southern Lakes United Educators, Council 26, 124 South Dodge Street, Burlington, WI 53105 by **Ms. Esther Thronson**, UniServ Director appearing on behalf of the Lake Geneva Teachers' Association.

ARBITRATION AWARD

Pursuant to the grievance procedure contained in their collective bargaining agreement, the Lake Geneva Teachers' Association (hereinafter referred to as the Association) and the Lake Geneva Jt. School District #1 (hereinafter referred to as the District) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute concerning the amount of insurance contribution made by the District on behalf of teachers working less than full time and more than half time. The undersigned was designated and, at the request of the parties, conducted a mediation session on April 27, 1991 in Lake Geneva, Wisconsin. The matter was not resolved and a hearing was held on May 24, 1991 in Lake Geneva, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs, and the record was closed on June 10, 1991. Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

I. ISSUE

The parties stipulated that a violation of a binding custom or past practice is a violation of the collective bargaining agreement. With that stipulation, the parties agreed that the following issue was to be determined herein:

> "Did the District violate the collective bargaining agreement when it offered pro-rated insurance benefits to the grievant? If so, what is the appropriate remedy?" 1/

II. RELEVANT CONTRACT PROVISIONS (FROM TENTATIVELY AGREED 1990-92 DRAFT)

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ARTICLE III - GRIEVANCE PROCEDURE

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D. ARBITRATION

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2. Authority of the Arbitrator. It is understood that the function of the arbitrator shall be to provide a binding decision regarding the grievance. The arbitrator shall have no power to advise on salary adjustments, except the improper application thereof, nor to issue any opinions directing the parties to add to, subtract from, modify or amend any terms of this Agreement.

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ARTICLE VI - INSURANCE

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A. The Board shall pay 100% of the premium cost of the hospital medical insurance plan. The teacher shall elect either single or if eligible for, family coverage.

B. The Board shall pay 100% of the premium cost for a dental insurance plan which contains a no deductible provision.

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III. BACKGROUND

The District is a municipal employer providing general educational services to the people of Lake Geneva, in southeastern Wisconsin. The Association is the exclusive bargaining representative for all regular, non-supervisory certified teaching personnel employed by the District. Randy Jones, who is the subject of the instant grievance, is a teacher who worked 66% of a full time position for the District in the Fall of 1990.

The instant grievance was filed after the Association's Grievance Chair overheard a comment during the mediation of a contract for a different bargaining unit that the teachers had proration of insurance benefits. Upon looking into the matter, Olson found that teacher Randy Jones had been offered 66% payment of his insurance premiums when he was hired for a 66% FTE position in October of 1990.

Article VI of the collective bargaining agreement between the parties requires the District to provide insurance coverage for its teaching personnel:

1/ The Association seeks only a prospective declaration of rights in this proceeding, and thus any remedy would be limited to such an order.

"The Board shall pay 100% of the premium cost of the hospital medical insurance plan..."

Although the language makes no mention of a distinction between full-time and part-time personnel, the parties have followed a practice of not providing paid insurance to teachers working less than 50% FTE, and of requiring the District to pay 50% of the insurance premium for teachers working 50% FTE. The Association's grievance contends that the District is obligated to pay 100% of the premium for teachers working over 50% FTE, while the District claims that the practice has been a pro-ration of insurance premium contributions for teachers working more than 50% but less than 100% FTE. The topic has never been discussed across the table in contract negotiations, nor has it apparently been the subject of any prior grievance.

A review of part-time employees over the past shows the following patterns with respect to insurance coverage for teachers between 50% and 100% FTE:

Part-time Teacher/Part-time Teachers' Aide: Full premium contributions have been made on behalf of six teachers (Sharon Knight, Tammy Roesler, Jeanine Schafer, Patti Faivre-Hall, Beth Huml and Debbi Bowman) whose part-time teaching contracts were supplemented by contracts as teachers' aides, resulting in full employment with the District.

Began as Full-time and Later Reduced: There were four teachers (Patty Faivre-Hall, Elsie Goulding, Deanna Karlsen, and Maria Sharpe) who started as full-time teachers, and were then reduced to less than full-time, but continued to receive full insurance contributions.

Shared Teacher: One teacher, Marty Pennington, was employed for two years on a part-time basis, with the remainder of her time being spent teaching at a neighboring district. She received full insurance, but the other district was billed for a share of the cost.

Job Shares: Pam Frame taught full-time for 16 years, and then entered into a job sharing arrangement for one year, working 60% FTE. She received a 60% premium contribution from the District. Linda Priebe had a 60% FTE position in 1990-91, with an additional 20% FTE job sharing with another teacher. Priebe received a 60% premium contribution from the District in that year.

Title I: Two teachers, Jean Mahnke and Carol McLErnon, began as full-time teachers, then went to the Title I Program as aides at less than full-time, and later became full-time teachers again. Throughout, they received fully paid insurance.

Sarah Frank: Sarah Frank was hired as 60% FTE and worked at that level for two years, before moving to full-time for one semester and 80% FTE for the second semester. Throughout, she received fully paid insurance.

Sandy Gerber: Sandy Gerber taught 50% FTE in 1989-90. In 1990-91, she was increased to 66%. She resigned in October of 1990, and was replaced by Randy Jones, the teacher who is the subject of this grievance. In both years of her employment with the District, she received fully paid insurance benefits.

Additional facts, as necessary, are set forth below.

IV. THE POSITIONS OF THE PARTIES

A. The Position of the Association

The Association asserts that the clear practice of the District has been to pay 100% of the insurance benefits for teachers working more than 50% FTE contracts, and that this gives rise to an "implied mutual agreement .. arising by inference from the circumstances." While the District tries to claim that there is a policy of paying full insurance for employees who started at 100% FTE and were then reduced to less than full-time. the Association notes that

this "policy" is unwritten, unknown to the Association and has never been referred to before. Furthermore, if such a policy were in place, Sarah Frank would not have received 100% insurance coverage during her first two years of employment at 60% FTE, nor would Sandy Gerber have during September and October of 1990. While acknowledging that pro-rations have been made in cases of job sharing, the Association argues that the primary rule on insurance for part-time employees has been full payment, and asks that the grievance be upheld.

B. The Position of the District

The District takes the position that the practice of pro-ration is well established, and should not be disturbed. While teachers who begin their careers are full-time teachers are allowed to continue at 100% District contribution after a reduction, there is no example in the record of a teacher starting at less than full-time and receiving fully paid insurance, other than Sandy Gerber. In the case of Sandy Gerber, the teacher was mistakenly paid full benefits even when she worked 50% FTE. Under both parties' theories of the case this was an error. The error was carried forward into the second year of her employment by a new payroll clerk, and was not discovered until Gerber resigned from the District. It was the correction of this error, in the contract offered to Randy Jones, that led to the instant grievance.

The District argues that pro-ration has been used in the cases of Marty Pennington, for whom the District contributed 70% of the premium in 1972-74; Linda Priebe, for whom the District contributed 60% in 1990-91; and Sally Roth, who received pro-rated contributions while working 33% FTE. This is, the District avers, standard operating procedure, and it is the Union which seeks to change the status quo through this grievance. The District discounts the case of Sarah Frank, asserting that the record is unclear about whether she received insurance during her first two years as a 60% FTE teacher with the District.

The District argues that common sense supports pro-ration of insurance benefits for less than full-time faculty members. Health and dental insurance are analogous to the other major component of the compensation package - wages. While the contract does not specifically allow the District to pay less than full wages to a part-time teacher, the Association does not question the District's right to do so. Any other result would make part-time teachers more expensive than full-time teachers.

Since the past practice supports the District, and since both Gerber and Jones fully understood that they were being hired with only pro-rata insurance benefits, the District asks that the grievance be denied.

V. DISCUSSION

At issue in this case is the exact nature of the past practice in the Lake Geneva Schools concerning insurance premium contributions for part-time teachers. Both parties agree that the contract is ambiguous as to insurance for part-timers, that there is no relevant bargaining or grievance history, and that past practice controls the issue. The Association asserts that all teachers receive full insurance contributions, except for those in three categories: Teachers working less than 50%, who are not entitled to any contribution; Teachers working exactly 50% of a full contract, who receive a 50% contribution; and teachers involved in a job sharing arrangement, who receive premium contributions commensurate with their portion of the full-time position. 2/ The District argues that its policy is to pay full insurance

2/ A fourth category would be teachers working a full time schedule, part-time as teachers and

costs only for part-time teachers who began as full time employees and were later reduced. This policy is unwritten, and has never been communicated to the Association prior to the processing of this grievance.

In reviewing the records of part-time employees over the past three decades 3/, it appears that nine employees have received full insurance benefits while working part-time 4/:

1 - Patti Faivre-Hall
2 - Elsie Goulding
3 - Deanna Karlsen
4 - Jean Mahnke
5 - Carol McLernon
6 - Maria Sharpe
7 - Sandy Gerber
8 - Sarah Frank
9 - Marty Pennington

The first six were full-time teachers who were reduced to part-time and their treatment is consistent with either party's theory of the past practice.

The seventh listed teacher, Sandy Gerber, received full insurance while working a 50% contract in 1989-90 and while working a 66% contract for the first two months of the 1990-91 school year. Both parties concede that the payment of full insurance benefits to her when she worked only half time in 1989-90 was an error, and the District makes a plausible argument that her benefit level in 1990-91 -- whether correct or incorrect -- was because a new bookkeeper continued her insurance benefits at the previous year's level, and not because of any agreement by the District that 100% insurance was appropriate. The undersigned therefore discounts the payment to Gerber as proof of any binding past practice.

The eighth listed teacher, Sarah Frank, was employed at 60% FTE for two years and 100% FTE for one year. Contrary to the District's assertion that the record is not clear on whether she received full insurance benefits, Joint Exhibit #4 and the testimony of both Association Grievance Chair Donna Olson and Superintendent Harry Van Dyke establish that she received fully paid insurance benefits during her three years with the District. This is inconsistent with the District's theory of the case, and supports the Association's view.

The final teacher, Marty Pennington, received full insurance benefits while working 60% FTE in 1972-73 and 70% FTE in 1973-74. In those two years, she also worked 30% FTE for the Trevor School District, and that district was billed for 30% of her insurance by Lake Geneva. The billing arrangement distinguishes Pennington's case, and renders her a less than persuasive example for either party's theory of this grievance. While the District claims that she is an example of a teacher receiving pro-rated contribution, the proration

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part-time as teacher aides. Both parties agree that the teachers in this category have historically received full insurance contributions.

3/ Joint Exhibit #4

4/ Excluding those holding split appointments as teachers and teacher aides

was not accomplished by having her contribute any portion of the premium. Instead the proration was accomplished by an after the fact reimbursement to Lake Geneva by the Trevor School District. From the teacher's point of view, there would have been no basis for any grievance or complaint, since she was receiving full insurance benefits. To the extent that Pennington's case bears on either party's arguments, the treatment of Pennington is inconsistent with the District's claim of a straight pro-ration, since she worked only 60% FTE for Lake Geneva in her first year but the District paid 100% of her insurance premium while being reimbursed for only 30%.

Aside from Pennington, the District cites two cases of pro-ration for part-time teachers in support of its arguments. Sally Roth was employed as a 33% FTE in the 1986-86 and 1987-88 school years, and received some insurance contribution from the District. 5/ The undersigned has some difficulty in drawing any conclusions from this evidence, since both the Association's Grievance Chair and the District's Superintendent testified that Roth was irrelevant to this dispute because, as a less than 50% FTE, she was not eligible for insurance contributions from the District. The payment of any benefits to her is inconsistent with both parties' theories of the case, and the District's citation of Roth is therefore unpersuasive.

The second teacher cited by the District is Linda Priebe, who worked 20% FTE in 1988-89 and was not eligible for insurance. In 1989-90, she worked 40% FTE, plus a 20% job sharing with another teacher, for a total of 60% FTE. She did not take insurance in that year. In 1990-91, Priebe's individual teaching contract was increased to 60% FTE, and she continued to work a 20% FTE job share, for a total of 80% FTE. She elected to take insurance, and the District contributed 60% of her premium. 6/ The Association argues that this instance is distinguishable, since Priebe is involved in a job sharing arrangement and those are treated differently than normal part-time appointments. This strikes the undersigned as a classic "distinction without a difference". The Association's argument fails to explain why the 60% FTE individual teaching contract issued to Priebe would not, standing alone, justify a full insurance contribution. If, as the Association argues, any individual contract over 50% should yield a full contribution, there is no reason for Priebe to have received a pro-ration, notwithstanding her 20% job sharing. Thus the undersigned concludes that the case of Linda Priebe is consistent with the District's view of the practice as being payment of pro-rata insurance benefits to part-time employees. Substantially reducing its persuasive impact, however, is the fact that Priebe received pro-rata contributions for only two months before the instant grievance was triggered by the offer of pro-rated insurance to Jones, and the fact that the pro-ration was unknown to the Association. While it may stand as evidence of the Superintendent's good faith belief in his right to pro-rate insurance, the Priebe case has relatively little value in proving what the mutual understanding of the parties was on this issue.

5/ While Joint Exhibit #4 indicates that Sally Roth received full health and dental benefits during this period of time, Association Exhibit #8, identifying the teacher as Sarah Fiedler Roth, indicates partial payment of benefits.

6/ The contribution at 60% rather than 80% apparently reflects an agreement made between Priebe and Laurie Lasure, the teacher with whom she shares a position, at the time they agreed to job share. See Joint Exhibit #3:

"Linda Priebe receives 60% payment of health and dental premiums even though she works 80% FTE. This is the result of a job sharing agreement between Laurie Lasure and Linda established in 1989-90 whereby Laurie 'gave' one of her days to Linda..."

The issue in this case is what the implied mutual agreement of the parties -- as shown by their past practice -- has been on insurance for teachers working more than half time but less than full-time. Eleven teachers have taught at 51% to 99% FTE. With the exception of Linda Priebe and the nominal grievant, Randy Jones, the treatment of each is consistent with the Association's claim that full contribution is the status quo in Lake Geneva. The District's position rests on its claim that six of the eleven are distinguishable based upon a policy of maintaining full contribution for those who have had full contribution in the past. While this would be a rational distinction to draw, there is no proof in the record that this limitation was ever enunciated by the District before this grievance was filed, much less agreed to by the Association. Moreover, the treatment of Sarah Frank, and to a lesser extent Marty Pennington, refute the District's argument that full payment is limited to only that particular class of part-time employees. The sole case supporting the District's view is that of Linda Priebe. As discussed above, the timing of the proration to Priebe and the fact that it was unknown to Association representatives reduce its value as evidence of any implied agreement.

Given that only five teachers -- Pennington, Frank, Gerber, Jones and Priebe -- have been initially hired to teach more than 50% but less than 100%, the evidence concerning the parameters of the past practice is scant. The preponderance of the available evidence, however, supports the Association's view that the agreement of the parties, as shown by their actions, has been to provide fully paid health and dental insurance to all part-time employees working individual contracts at more than 50% FTE. 7/

The Association has stipulated that it seeks only a prospective declaration of rights, rather than any make whole remedy. On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The District violated the collective bargaining agreement when it offered pro-rated insurance benefits to the grievant. The appropriate remedy is to order the continuation of the past practice of allowing teachers working more than 50% FTE on an individual contract to receive fully paid health and dental insurance benefits.

Signed this 16th day of September, 1991 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

7/ This in no way affects the distinction, recognized by both parties, between part-time teachers and those working under a job sharing arrangement.