BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
PARA-PROFESSIONAL EMPLOYEES ASSOCIATION OF THE BROWN COUNTY DEPARTMENT OF SOCIAL SERVICES	Case 459 No. 45640 MA-6685
and	
BROWN COUNTY, WISCONSIN	

Appearances:

Ms. Lise Lotte Gammeltoft, Zuidmulder, Appel & Gammeltoft, S.C., Attorneys at Law, 345 South Adams, P.O. Box 926, Green Bay, Wisconsin 54305, appearing on behalf of the Para-Professional Employees Association of the Brown County Department of Social Services, referred to below as the Association.

Mr. John C. Jacques, Assistant Corporation Counsel, Brown County, 305 East Walnut, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing on behalf of Brown County, Wisconsin, referred to below as the County.

ARBITRATION AWARD

The Association and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Pamela Nemetz, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on July 30, 1991, in Green Bay, Wisconsin. The hearing was transcribed and the parties filed briefs and reply briefs by October 4, 1991. The Association submitted additional comment in a letter received by the Commission on October 9, 1991.

ISSUES

The parties stipulated the following issues for decision:

> Did the County violate Article 12 of the collective bargaining agreement by requiring the Grievant to pay more than 5% of the insurance premium?
>
> If so, what is the appropriate remedy? 1/

RELEVANT CONTRACT PROVISIONS

> Article 9. GRIEVANCE PROCEDURE
>
> . . .
>
> All grievances which may arise shall be processed as follows:
>
> Step 1. Supervisor: Grievance shall first be

1/ The parties stipulated that I should address, with this decision, only the issue on the merits, and should retain jurisdiction over the matter if a remedy was appropriate.

presented in writing to the appropriate supervisor within fifteen (15) working days after the date of the event or occurrence which gave rise to the grievance.

. . .

Article 12. INSURANCE

The County agrees to continue to make available to the employees, a group insurance program. Such plan shall retain the terms and conditions in effect as of the date of the signing of this Agreement and benefits shall be improved as negotiated by the County and the Association.

The employee shall pay five percent (5%) of the family premium per month for the Basic Health Plan and dental plan. The County shall pay 95% of the family premium and 100% of the single premium for the Basic Health Plan and dental plan.

Employees may also participate in the GHP (Group Health Plan) or the Co-pay HSP and the County will pay up to the premium amount paid for the Basic Health Plan with the employee paying the balance of the premium.

. . .

Article 21. PART-TIME EMPLOYEES

Effective 7/18/91, part-time employees' seniority will be prorated based on hours worked for job posting and bumping purposes only. 2/

2/ This provision was first included in the parties' 1991-1992 labor agreement. It contains a typographical error noted under "The Association's Closing Letter" section of "The Parties Positions", set forth below.

MEMORANDUM OF UNDERSTANDING

Job Share

. . .

> It is recognized that job sharing employees generally work one-half (1/2) of fulltime and receive benefits on a prorata basis based on the one-half (1/2) time employment.

BACKGROUND

The grievance was filed on February 5, 1991, and was signed by the Grievant. The grievance form states the following as the "REASON FOR GRIEVANCE":

> I believe the department is in violation of (Article 12). This article clearly states that the employee shall pay 5% of the family premium per month for the basic health plan and dental insurance. I am paying 50% of the county share plus 5% of the employee share for the basic health plan (family) and family dental insurance.

The grievance form states the following as the "SPECIFIC ADJUSTMENT REQUIRED":

> I am requesting the department to adhere to the para-professional contract and change my premium deduction to 5% for the basic health and dental plans. I also request to be reimbursed for all premiums that I have paid in excess of the 5% employee share.

Gerald Lang, the County's Personnel Director, issued the County's answer to the grievance in a letter dated April 5, 1991, which reads thus:

. . .

> With the exception of the County Board members, Brown County prorates benefits for all part-time employees. This has been the practice to my knowledge since the beginning of part-time employees being employed in Brown County. Therefore, I am denying the grievance.

The immediate cause for the filing of the grievance was the County's issuance of a letter dated November 14, 1990, which was headed "RE: Health Annual Choice Option", and reads thus:

> This letter is to notify you of your annual option to select your health care coverage for the upcoming year. This option is offered to you until December 7, 1990.

> A complete description of the plans is outlined in your "Employee Health Booklet" and the enclosed plan description.
>
> . . .
>
> Our new actuarially calculated premium levels, as approved by the County Board, that will go into effect January 1, 1991, are:

		COUNTY SHARE	EMPLOYEE SHARE
HSP	Single	$136.28	$0.00
	Family	358.28	0.00
BASIC	Single	151.79	0.00
	Family	378.26	19.91
GHP	Single	151.79	156.17
	Family	378.26	432.81
DENTAL	Single	24.39	0.00
	Family	45.25	2.38

> . . .

The letter did not distinguish between full and part-time employes.

The Grievant was, as of January 1, 1990, enrolled in the Basic plan for the Family, and the Dental Plan. Prior to enrolling in the Basic plan, the Grievant had been enrolled in an HMP option, which was the predecessor of the GHP option listed above.

The Grievant was hired by the County as a full-time employe on April 4, 1978. She successfully posted for a part-time position on October 17, 1988, and continues to be employed by the County as a part-time employe. At the time of her change from full-time to part-time status, she discussed various benefit changes with Kristen Carter, the County's Business Administrator. Carter noted to her that she would receive one-half of the vacation and holiday benefit that full-time employes receive. Neither Carter nor the Grievant could recall any discussion of any proration of the County insurance premium contribution.

After receiving her first paycheck as a part-time employe, the Grievant became aware that the County's contribution toward her insurance had lessened. She testified regarding her awareness of the change, at that time, thus:

> Q All right. Now, were you given any information at the time that you became part-time or within months, say a couple of months after, about insurance, your insurance benefits?
>
> A Yes. by my check stub . . . The -- when I received -- I think it wasn't until December. The premium that came out of my check stub for insurance was more than a full-time person's. 3/

3/ Transcript (Tr.) at 10.

The difference in County premium contribution due to her change to part-time status was about $60 monthly. She did not, at that time, file a grievance or further check into the matter, because "(i)t really didn't -- it really didn't make that -- it wasn't that big of a difference." 4/

The premium costs from 1988 through 1990 increased. In 1989, a full-time employe contributed $92.19 per month for the HMP and Dental plans. A part-time employe contributed $225.84 per month. These increases did not, however, prompt her to check into the basis for the differential. She reconciled her doubt on the point thus: "I assumed that there was something stipulated as to what a part-time person would have to pay." 5/

The premium increase reflected in the November 14, 1990, letter was, however, of such a magnitude that she checked into the matter in greater detail, questioning the County's Insurance Department and the Association. She ultimately decided to file the grievance posed here, reasoning thus:

> It didn't -- insurance had not gone up drastically until the last couple years. It may have gone up a little bit here and there, but there was not such a drastic change in health insurance benefits until the last couple years and that's when I began to wonder whether I would have a check stub -- or have a check and questioned why I was paying more than what the 5 percent was which was listed in our contract . . . 6/

That completes a sketch of the background to the grievance. The parties also adduced evidence on past practice and bargaining history.

The Evidence On Past Practice And Bargaining History

The evidence of bargaining history regarding the parties' first contract is documentary, since none of the testifying witnesses were involved in that bargaining. The parties' first contract was effective, by its terms, from January 1, 1978, through December 31, 1978. Article 12 of the agreement contains the following provisions:

4/ Tr. at 11.

5/ Tr. at 20.

6/ Tr. at 101.

ARTICLE 12. HEALTH AND WELFARE

> The County agrees to continue to make available to the employees a group insurance program. Such plan shall retain the terms and conditions in effect as of the date of the signing of this Agreement and benefits shall be improved as negotiated by the County and the Association.
>
> The employee shall pay five percent (5%) of the family premium per month for health and welfare and dental insurance. The County shall pay 95% of the family premium and 100% of the single premium.

Lang testified that in the bargaining which has occurred since his arrival in 1979, the County has consistently advocated the position that benefits for part-time employes should be prorated. He also noted that the parties have never addressed the premium contribution for part-time employes in collective bargaining.

Lang testified that the County has never afforded part-time employes hired into the Social Services Department the same insurance premium contribution as that afforded full-time employes. Carter and Robert Dreher, the County's Risk Manager, affirmed this point, as do letters of hire sent to three unit employes offered employment, on a part-time basis, between April 23, 1984, and October 29, 1985. The letters address the differential implicitly, by stating the employe's premium contribution. The differential is not express, but must be inferred by comparing the stated amounts with the amounts then contributed by full-time employes. It is not clear how many part-time employes actually enrolled in the County's insurance program between 1978 and 1991, although Carter did testify that some part-time employes did so.

It is, in any event, apparent that the County required a proration of premium for part-time unit employes, since certain payroll records from 1986 through 1991 are set up to state the County and employe share of premium costs based on the employe's work schedule as a percentage of full-time employment. These payroll records were not distributed to the Association or to employes generally.

The County, by ordinance, has denied or established prorata insurance benefits for County employes, other than County Board Supervisors, since at least 1978. The proration of benefits for part-time employes is also noted in a 1969 County Personnel Manual. The County Code, which sets forth existing ordinances, is not generally distributed to employes, although it may be available within the Social Services Department. No testifying witness could recall whether the 1969 Personnel Manual was distributed to Association represented employes.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Association's Initial Brief

In support of its contention that the County has violated Article 12, the Association argues that the language of that provision "is clear and unambiguous". Since "there is nothing in the contract to indicate that part-time employees are to pay a higher proportion of the health insurance premium than full-time employees", and since "part-time employees have not agreed to such a provision", it follows, the Association concludes, that "the County violated the contract by requiring (the Grievant) to pay more than 5 percent of the family premium".

The Association's next major line of argument is that the County's assertion of a binding past practice prorating part-time employes' benefits must be rejected. More specifically, the Association contends that arbitral precedent requires conduct to be knowingly indulged in and jointly accepted by the parties over a significant period of time to become a binding practice. No such conduct has been proven, according to the Association. More specifically, the Association notes that the matter has not been raised during collective bargaining; is not covered by the Job Sharing side letter; was not covered by the job posting for the Grievant's present position; and is not covered by the 1969 Personnel Manual. The proration is not provided by any part of the language to Article 12, the Association argues, and no document establishing the proration as a matter of County policy has been disclosed to, or discussed with, the Association. Beyond this, the Association asserts that "(f)ringe benefits vary from one county contract to another", and concludes that the fact that some contracts require a proration "does not mean that (the Association) should be bound by that practice." The Association contends that the record establishes that the alleged practice was neither indulged in, nor agreed to by the Association "except through inaction". This is not, the Association argues, an adequate basis on which to ground any binding past practice.

The County's violation requires, according to the Association, that the Grievant should be repaid "the difference between what she has paid and the amount required by the Agreement for HMP insurance for October 17, 1988 through December 1989, and for the Basic Health Plan after January 1990 through the date that the County ceases its action." Beyond this, the Association seeks an order ceasing "its practice of requiring part-time employees to pay a higher share of the health insurance premium than full-time employees."

The County's Initial Brief

The County argues initially that Article 12 expressly incorporates the "terms and conditions in effect" as of the parties' 1978 labor agreement. Under the health insurance plan in effect at that time, "it was clearly and unequivocally established that part-time employees received prorated insurance benefits", according to the County. Since there has been no bargaining to improve that benefit, it follows, the County concludes, that the Association has not established the entitlement it seeks for the Grievant.

Beyond this, the County contends that the record demonstrates that no part-time employe has received the benefit the Grievant seeks. The County characterizes the record on this point thus: "The undisputed facts established that part-time employees have, at all times relevant, received only prorated insurance benefits."

The County contends the Association bore the burden of proving that:

1) part-time employees have received full-time

> benefits in the past; 2) the insurance benefit plan in existence in 1978 allowed full-time insurance benefits to part-time employees and 3) the employer "negotiated" since 1978 and agreed to grant full-time benefits to part-time employees.

The record will not support any conclusion that the Association met any one of these criteria, according to the County.

The County's next major line of argument is that the parties mutually intended, in 1978, to freeze insurance benefits at then-existing levels, and to allow improvements on those benefits only through express bargaining. The grievance thus, according to the County, undermines the negotiated purpose of Article 12. Beyond this, the County urges that "(t)he Grievant's position that a part-time employee should receive the same benefits as a full-time employee defies the principle of equitable treatment."

The County's next major line of argument is that the Grievant's inaction from October of 1975 through February 5, 1991, "(c)onclusively established her knowledge of the prorated insurance benefits." The County argues that the Grievant acknowledged that when she became a part-time employe she was aware that full and part-time employes received different benefits. Given this and the $3,516 difference between what she has paid as a part-time employe for insurance and what she claims she ought to have paid, the County concludes that her knowledge of the prorated benefit has been established.

The County concludes the grievance "should be denied on the merits" since "the contract provides for the proration of insurance benefits for part-time employees" and since the "Grievant is not equitably entitled to a greater relative benefit than those granted to full-time employees, nor one unintended by the parties."

The Association's Reply Brief

In reply to the County's brief, the Association notes that the absence of bargaining on the County's premium contribution is undisputed, but concludes that this shows no more than that the Association was unaware of the proration of insurance benefits until the Grievant came forward. The letters of hire and other documentation cited by the County to establish a practice evidence, according to the Association, not "acquiescence" but "ignorance of what the County was requiring."

Beyond this, the Association challenges the County's interpretation of the "terms and conditions in effect as of the date of the agreement" incorporated by Article 12. According to the Association, "the first paragraph (of Article 12) refers to benefits and coverage and not the cost of the plan, which is specifically dealt with in the second paragraph of Article 12." The Association also challenges the County's citation of County ordinances and the Job Share side letter. The Association urges that the former does not apply, and the latter actually underscores the validity of the Association's position, since there would have been no need to mention proration in the side letter if a binding past practice existed.

Nor does the Association accept the County's characterization of the burden of proof. The burden, according to the Association, actually is on the County "to show a mutually agreed-upon past practice." The Association concludes that the County failed to meet this burden.

Even if a practice existed, the Association argues that the sole binding indicator of the parties' intent is the clear and unambiguous language of

Article 12, which does not mention any proration. Beyond this, the Association asserts that the record will not support the County's contention that the Grievant's position is somehow inequitable. At most, the record reveals only that "there are circumstances in which part-time employees' benefits are prorated and circumstances in which they are not", the Association concludes.

That the Grievant delayed in grieving this matter establishes only that "she did not challenge the County's practice earlier because it initially did not make much financial impact on her and she also assumed that the County was following . . . the contract." The Association urges that any inaction on the Grievant's part at most "could arguably affect the extent of the remedy", and "certainly should not affect the validity of her claim."

The County's Reply Brief

In reply to the Association's brief, the County initially argues that the "terms and conditions" reference of Article 12 is relevant to this case, and must be given its bargained effect. Beyond this, the County challenges the Association's assertion that seniority is not affected by an employe's part-time or full-time status. In fact, according to the County, "Article 21 of the 1991-92 agreement . . . does indicate an intent of the Union and the employer to prorate as to posting for part-time employees hired after 7/18/91."

The County contends that the hiring letters sent several unit employes establish that the County openly communicated its practice of prorating the insurance benefit of part-time employes. The proration was, in any event, explained to the employes during orientation, according to the County.

The County's next major line of argument is that arbitral authority establishes that "pre-existing insurance plan . . . and benefits remain in effect after the first contract was negotiated." This principle was codified in the first paragraph of Article 12, according to the County.

The County's final major line of argument is that the 15 day time limit of Step 1 of Article 9 "precludes any repayments to grievant."

The Association's Closing Letter

In a letter dated October 7, 1991, the Association noted:

> As Attorney Jacques is aware, the contract does contain a typographical error in Article 21 and the actual language that was passed by the Union and the County Board is as follows: "Effective 7/18/91, new part-time employees' seniority will be prorated based on hours worked for job posting and bumping purposes only."

DISCUSSION

As preface to addressing the stipulated issue on Article 12, it is necessary to note that the parties stipulated that the grievance poses no threshold procedural issues. The arguments brought by the County concerning Article 9 concern remedy, and the contractual propriety of providing the Grievant a remedy for a period of time during which she had not lodged a timely grievance.

The stipulated issue focuses on Article 12, and requires that the relationship between the first and second paragraphs be interpreted regarding the proration of the County's insurance contribution for part-time employes. The County focuses its arguments on the first paragraph, while the Association

focuses its arguments on the second. The Association forcefully urges that the second paragraph, standing alone, clearly and unambiguously grants the Grievant the benefit she seeks, since the language refers only to the "employee" and does not distinguish between full and part-time employes. This may well be the case, but the Article must be read as a whole, and the relationship between the first and second paragraphs can not be considered clear and unambiguous. If the first paragraph incorporates the proration the County asserts as one of "the terms and conditions in effect as of the date of the signing of this Agreement", then reading the second paragraph as the Association asserts effectively renders the first paragraph meaningless.

Because the relationship between the first two paragraphs of Article 12 is amenable to either the County's or the Association's interpretation, it is necessary to turn to interpretive guides beyond the language of the agreement. The most appropriate guides to resolving contractual ambiguities are past practice and bargaining history, since these factors focus directly on the conduct of the bargaining parties, whose agreement is the basis and the goal of contract interpretation.

The parties' use of other interpretive guides affords limited guidance here. Each party focuses on the presence or absence of the mention of the proration of benefits for part-time employes in other contract provisions. For example, the Association notes that the contract's seniority provisions contain no proration for employes hired prior to July of 1991, while the County notes that the job share side letter does. The presence or absence of the express mention of prorated benefits for part-time employes in provisions other than Article 12 provides dubious guidance. The express mention in the job share side letter may underscore the County's assertion that it consistently has bargained for the proration of benefits for part-time employes. It can, however, with equal validity, be said to underscore the Association's assertion that the parties expressly provided for proration when they deemed it necessary, making the silence of Article 12 meaningful in itself. The absence of any mention of proration in the seniority provisions for employes employed prior to July of 1991, may indicate that contractual silence means no proration, as the Association asserts. It can, however, with equal validity, be said to underscore the County's assertion that where no prior practice exists and no contract language provides for it, there is no proration of benefits for part-time employes.

Nor does an appeal to equity provide any guidance here. While the County asserts granting a part-time employe the same benefits as a full-time employe is inequitable to full-time employes, this point begs the issue. The bargaining parties define what is equitable. That the contract provides a larger County insurance contribution, in absolute dollar terms, to employes taking the family plan than to those enrolled in the single plan may indicate employes in the single plan are subsidizing those in the family plan. This subsidy is not inherently any more inequitable than a full-time employe subsidizing the benefits of a part-time employe. Either is enforceable if the parties' agreement has provided for it. This begs the issue here, which is whether the parties' agreement does provide for it.

As the Association has persuasively argued, the evidence of past practice does not independently establish a practice which clarifies or overturns the language of the second paragraph of Article 12. What constitutes a past practice has been variously defined. 7/ However defined, the binding force of

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7/ Compare, for example, Infant Socks Inc., 51 LA 400, 404 (Moberly, 1968), cited by the Association, with Celanese Corp. of America, 24 LA 168, 172 (Justin, 1954), in which the Arbitrator stated: "In the absence of a

a past practice is rooted in the agreement manifested by the parties' conduct. 8/ In this case, there is no evidence that the Association has, by conduct within the memory of testifying witnesses, independently agreed that the County's insurance contribution should vary based on an employe's full or part-time status. The payroll documents, letters of hire and the 1969 Personnel Manual cited by the County do not appear to have been made known to the Association generally. The parties' labor agreement, not the County Code, governs the provision of the benefit at issue here. That the Code provides for the proration of benefits for part-time employes does not, standing alone, say anything about the interpretation of the second paragraph of the labor agreement.

The second paragraph of Article 12 does not, however, stand alone, and the evidence of past practice and bargaining history coalesce to form a meaningful picture of the context preceding and succeeding the negotiation of the first paragraph of Article 12. The County Code and 1969 Personnel Manual do establish that the County, prior to the Association's certification, prorated the insurance benefits of part-time employes, and did distinguish between the benefits afforded employes based on their status as full or part-time. This sets the context against which the parties' first contract was negotiated. The first paragraph of Article 12 establishes that the parties set a floor against which "benefits shall be improved as negotiated". There has been no bargaining to improve that floor, which included the proration of the County's insurance contribution for part-time employes.

The County's practice of prorating the insurance contribution for part-time employes continued unaffected by the creation of Article 12 of the parties' labor agreement. The practice both flowed from and relied on the first paragraph of that Article, which effectively froze the then-existing status quo regarding terms and conditions of the insurance plan. This unilateral practice was openly followed by the County, as the letters of hire show. While this practice has not been sufficiently notorious to become binding in itself, it does offer insight into the bargaining process by which the parties' first contract was created. Beyond this, the degree to which knowledge of this practice permeated the workplace should not be underestimated. The Grievant acknowledged that she did not object immediately to the increased contribution, even though she was aware, in 1988, that the County was exacting an increased contribution from her. The differential, in itself, did not trouble the Grievant and appears to have been expected in some sense. That she chose not to object until the increases reached a level she could no longer tolerate poses the interpretive problem with the Association's arguments -- the grievance seeks through arbitration a benefit not secured in collective bargaining.

The Association forcefully argues that the second paragraph of Article 12 deals with premium contribution, thus relegating the "terms and conditions" of the first paragraph to non-premium contribution items. This argument has considerable persuasive force, but can not be accepted on this record.

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written agreement, 'past practice,' to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties."

8/ See, generally, Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, Proceedings of the 14th annual meeting of the NAA (BNA, 1961), which is cited in Elkouri & Elkouri, How Arbitration Works, (BNA, 1985) at chapter 12.

Initially, it should be noted that considering the proration a "condition" of an employe's receipt of the insurance contribution does not strain the language of the section, and is reconcilable with the actual premium contribution specified in the second paragraph. Beyond this, the Association's view has no supporting evidence of mutual intent beyond the breadth of the language of the second paragraph, and can not be reconciled to the bargaining context demonstrated here. If the Association asserts that the parties actually bargained the end of the proration in 1978, it must follow that the County's unilateral practice, which succeeded that bargaining, constitutes a bad faith repudiation of the agreement struck in 1978. No such evidence has been introduced. Rather, the evidence indicates that the County continued the proration in the good faith belief the bargaining had not affected it. If the County's view is accepted, the fact that the practice preceded and succeeded the first contract becomes comprehensible in the absence of bad faith. That view requires only that the first paragraph be reconciled with the second. The first paragraph froze the proration as the floor against which improvements could be bargained. No such bargaining has occurred, and the unilateral practice has, accordingly, survived as a condition of the insurance plan in effect at the time of the execution of the 1978 agreement. 9/

In sum, the Association's interpretation of Article 12 must be rejected because it renders the first paragraph of the article meaningless, which is insupportable in light of the evidence of the collective bargaining context in which the article was created. To grant the grievance would afford the Association through grievance arbitration a benefit never secured in collective bargaining.

AWARD

The County did not violate Article 12 of the collective bargaining agreement by requiring the Grievant to pay more than 5% of the insurance premium.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin this 11th day of December, 1991.

By _____
Richard B. McLaughlin, Arbitrator

9/ Whether or not the insurance program was self funded in 1978 could arguably impact what constitutes a "term or condition" of an insurance plan. The record establishes that the County self funds its programs, at present, at least in part. The record is not clear on the degree of self funding as of 1978. Accordingly, no conclusion has been made regarding any impact on Article 12 of the means by which the insurance program was provided.