BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BLOOMINGTON TEACHERS ASSOCIATION	Case 4 No. 46577 MA-7010
and	
BLOOMINGTON SCHOOL DISTRICT	

Appearances:
Mr. Leroy Roberts, Executive Director, South West Education Association, appear
Mr. John Cooper, District Administrator, and Kramer, McNamee & Brownlee, Attorn

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the District or Employer respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on February 3, 1992 in Bloomington, Wisconsin. The hearing was not transcribed. Afterwards, the parties filed briefs which were received by March 4, 1992. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

> Did the Employer pay the premiums for Charlene Osterhaus as required by the contract?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-91 collective bargaining agreement contained the following pertinent provisions:

> A. Recognition
> The Board of Education of the Bloomington Community Schools recognizes the Bloomington Teachers Association as the exclusive representative for all full-time and regular part-time certified employees of the District, but excluding the District Administrator and Principals.

. . .

Provision 3

3. Health, Dental and Optical Insurance: The Board of Education will pay 100% of the monthly cost of the family or single health, dental and optical insurance for all faculty members. The selection of the companies to provide these benefits will rest with the Board. However, the benefits to be offered will not be less than those now offered under these policies.

FACTS

The parties' contract language dealing with insurance has not changed significantly in 20 years. From 1973 through 1980 it provided that the Board would "pay full insurance for all faculty members". From 1981 through the present the pertinent contract language has provided that the Board "will pay 100% of the monthly cost of the family or single health, dental and optical insurance for all faculty members."

So far as the record shows, the District has never paid all of the insurance premium for a part-time employe. In those instances where three different teachers were employed at less than full-time, the District paid a prorated share of the insurance premium. The amount paid by the District was equal to the percentage of full-time at which the teacher was employed. For example, when a teacher was employed at 50% of full-time, the District paid 50% of the monthly cost of insurance.

The parties are currently negotiating a successor to their existing collective bargaining agreement. Initial contract proposals concerning same were exchanged in March, 1991. One of the Association's proposals provides that the District is to pay all the insurance premium for part-time staff working 50% or more. As of the time of the hearing herein, the Employer had not agreed to this proposal.

Charlene Osterhaus, one of the District's part-time teachers, has been employed since 1970. She has worked part-time from 1985 to the present. When she went to part-time status in 1985 District Administrator John Cooper told her that her insurance premiums would henceforth be prorated. Each year since then Osterhaus has paid a prorated percentage of the total insurance premium. Osterhaus is working a 4/5 teaching load for the 1991-92 school year and the Employer is paying 80% of the insurance premium and Osterhaus is paying 20% of the premium.

In September, 1991, Osterhaus filed a grievance which asserted that the District was responsible for paying her entire insurance premium. The grievance was not resolved and was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

It is the Association's position that the District's prorating of insurance payments for the grievant, a part-time employe, violates the contract. In the Association's view, all bargaining unit employes, including part-time employes, are contractually entitled to full payment of insurance premiums by the District. In support thereof, it relies exclusively on the language contained in Provision 3 (the insurance clause). The Association reads the reference therein to "all faculty members" as containing no limitations or exclusions. The Association asserts that this language is clear and unambiguous so there is no need for the arbitrator to even look at any District past practice. According to the Association, if the arbitrator does look at the District's past practice, he should still find the contract language controlling for the following reasons. First, the Association believes there is no contractual support for the District's practice. Second, the Association submits that it had no knowledge of the District's practice. In order to remedy this existing contractual violation, the Association requests that the grievant be made whole both retroactively and prospectively.

It is the District's position that its prorating of insurance benefits for the grievant, a part-time employe, does not violate the contract. According to the District, the parties' collective bargaining agreement is silent concerning insurance benefits to be paid part-time employes. Relying on this premise (i.e. that the contract is silent as to insurance benefits for part-time employes) it believes the District's past practice governs the interpretation of the contract. The District asserts that its long-standing practice has been to prorate insurance benefits for part-time employes. It submits that both the grievant and the Association were well aware of this practice. The District asks the arbitrator to give effect to this long-standing practice which, in its view, is not inconsistent with the contract. The District also asserts that other substantial evidence supports the District's interpretation of the contract. First, it notes that although the insurance language in the contract has not changed significantly over the years, no question has been raised, until now, about the District's interpretation or implementation of that provision. Next, it cites the fact that the Employer's health care plan booklet provides, in pertinent part, that "Part-time employees. . .must contribute to the cost of coverage. . ." Third, it notes that before this grievance was even filed, the Association submitted a contract proposal in the current negotiations which, had the Employer agreed to it, would have provided that the District pay all the insurance premium for part-time employes. According to the District, this grievance is nothing more than a thinly-disguised attempt to obtain through grievance arbitration what the Association has not yet been able to attain through negotiations. It therefore requests that the grievance be denied.

DISCUSSION

At issue here is whether the District has to pay the full insurance premium for the grievant, a part-time employe. The Association asserts that the District is contractually obligated to pay her entire insurance premium while the District obviously disputes this contention. In deciding this question, my analysis will begin with a review of the pertinent contract language. After it is reviewed, attention will be turned to an alleged past practice.

Both sides agree that the contract language applicable here is Provision 3, the insurance clause. It provides in pertinent part:

The Board of Education will pay 100% of the monthly

> cost of the family or single health, dental and optical insurance for all faculty members. (Emphasis added).

The Employer contends that this clause applies only to full-time employes and is silent concerning insurance benefits to be paid part-time employes. I disagree. The undersigned reads the reference in that clause to "all faculty members" to be just that; everyone in the bargaining unit. On its face, no express limitations or exclusions are found therein. The only conceivable way the phrase "all faculty members" could be read to implicitly exclude part-time employes is if part-time employes were excluded from the bargaining unit. They are not. Instead, part-time employes are specifically mentioned in the recognition clause as being included in the bargaining unit. Given their express inclusion in the bargaining unit, it logically follows that the reference in Provision 3 to "all faculty members" must include part-time employes. That being so, the undersigned finds that Provision 3 is clear and unambiguous in requiring the Employer to pay 100% of the monthly cost of insurance (i.e. the monthly insurance premium) for all employes, both full-time and part-time. This of course means that under the literal language of Provision 3, the District is required to pay the full insurance premium for the grievant, a part-time employe.

Notwithstanding the above-noted contract language, a long-standing practice exists to the contrary. The record indicates that the District has never paid all of the insurance premium for a part-time employe. Instead, in those instances where three different teachers were employed at less than a full-time level, the District paid a prorated share of the insurance premium. While the Association contends it was not aware of this practice, its own actions belie this assertion. This is because before this grievance even arose, the Association proposed in contract negotiations that the District should pay all the insurance premium for part-time employes. As a practical matter, this proposal shows that the Association knew the District was not currently paying all the insurance premium for part-time employes. Otherwise, there would have been no need for the Association to make such a proposal. Additionally, there is no question that the grievant was aware of the District's practice inasmuch as she has been paying a prorated share of her insurance premium since she went to part-time status in 1985.

This practice clearly conflicts with the contract language. As previously noted, the contract language requires that the Board pay all of the monthly insurance premium for full-time and part-time employes. However, the District's actual practice has been to prorate insurance benefits for part-time employes. Thus, the situation herein is that the Association's position will be upheld if the contract language is applied literally, while the District's position will be upheld if the parties' past practice is found controlling.

It is a long-recognized principle in grievance arbitration that a well-established practice will not be used to interpret clear and unambiguous language and will not countervail clear contract language. 1/ Application of this principle here means that the contract language prevails over the Employer's past practice. Said another way, the interpretation of the insurance provision is governed by its express terms - not the Employer's practice which is contrary and has no contractual support whatsoever.

This outcome is not altered by the fact that the Association has failed over a long period of time to enforce the literal language of the insurance

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1/ Elkouri and Elkouri, How Arbitration Works, Third Edition, at page 303-304 and page 408-410.

provision. Be that as it may, the Association never surrendered the right to now start enforcing it. This is because mere non-use of a contractual right does not entail a loss of it. That being so, the Association is not estopped from now enforcing the literal language of Provision 3 to part-time employes.

Additionally, the fact that the District's health care plan booklet provides that "Part-time employes. . .must contribute to the cost of coverage" does not change the result here either. Generally speaking, a labor agreement cannot be changed or modified by statements or documents not contained in the labor agreement itself. 2/ Here, though, that is exactly what the District is trying to do via the aforementioned booklet. Having previously held that the contract language (specifically Provision 3) was clear and unambiguous, and that there was no need to resort to the Employer's past practice to interpret same, it likewise follows that parol evidence (in the form of the booklet) will also not be allowed to vary the contract. 3/

In summary then, it has been held that the contract language is controlling here rather than the District's past practice. Additionally, none of the District's defenses have been accepted. Therefore, since the District is contractually bound to pay the grievant's full insurance premium, and is not currently doing so, it follows that the District is in violation of the contract.

Having so held, attention is now turned to the remedy considered necessary to rectify this violation. When fashioning remedies, arbitrators generally try to make the grievant whole by putting them in the same position they would have been in had the employer adhered to the contract in the first place. Ordinarily, a make whole remedy dates back (i.e. is retroactive) to the time of the initial contract violation. In this case though, retroactivity back to the date of the initial contract violation will <u>not</u> be part of the remedy awarded here due to the length of time the contract violation was allowed to exist. As previously noted, the contract violation began in 1985 when the District first started prorating the grievant's insurance premiums and has continued to the present. During that time, the Association and the grievant sat on their contractual rights and failed to enforce Provision 3 to part-time employes. The overwhelming weight of arbitral authority holds that when there is a continuing contract violation, the remedy is limited to the date the grievance was filed. 4/ In accordance with this accepted view, the remedy awarded here has likewise been limited to the date the grievance was filed.

Based on the foregoing and the record as a whole, the undersigned enters the following

<u>AWARD</u>

1. The Employer is not paying the premiums for Charlene Osterhaus as

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2/ Ibid., p. 362.

3/ Ibid.

4/ Ibid., p. 153.

required by the contract;

2. In order to remedy this contractual violation, the District is directed to pay all of the grievant's insurance premiums, retroactive to the date the grievance was filed.

Dated at Madison, Wisconsin this 8th day of May, 1992.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator

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