BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WEST BEND EDUCATION ASSOCIATION	Case 69 No. 46818 MA-7077
and	
WEST BEND SCHOOL DISTRICT	

Appearances:
Mr. John Weigelt, UniServ Director, Cedar Lake United Educators Council, 411 No
Ms. Anne L. Weiland, Attorney at Law, W182 N9052 Amy Lane, Menomonee Falls, Wisconsin 53051, appeared on behalf of the District.

ARBITRATION AWARD

On January 3, 1991, the West Bend Education Association and West Bend School District filed an arbitration request with the Wisconsin Employment Relations Commission, asking the Commission to appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on March 23, 1992, in West Bend, Wisconsin. The proceedings were not transcribed. Post-hearing briefs and reply briefs were filed and were exchanged by May 28, 1992.

This arbitration addresses the Employer's obligation to pay health insurance premiums on behalf of employes who have exhausted their paid leave of absence and are absent on approved leaves without pay.

BACKGROUND AND FACTS

This grievance arbitration concerns itself with the disputed application of recently modified contract language to a member of the collective bargaining unit, Annette DeGroot. Ms. DeGroot took an approved leave of absence beginning March 23, 1990 and lasting until approximately May 29, 1990. The first day of that leave was a paid personal day. The next 14 days were paid days of sick leave. In total Ms. DeGroot had 26 days of unpaid leave due to the occurrence of Easter break during her absence. During the period of her leave of absence, Ms. DeGroot was paid at least one day in each of the calendar months of March, April, and May and her Board paid insurance benefits were continued without interruption through those three months.

It was the School Board's interpretation of Article X, Section 9, paragraph (b), that the grievant's summer health insurance benefit continuation was subject to proration. The Board based its decision upon the fact that Ms. DeGroot experienced 26 days of absence without pay during the 1989-90 contract year. The determination of the amount of proration was calculated in accordance with the language contained in the example set forth in paragraph (b). That computation resulted in Ms. DeGroot having $158.56 deducted from her paycheck. Ms. DeGroot grieved the withholding, alleging that the contract did not require her to pay a prorated portion of her benefits. The parties were unable to resolve the grievance and it led to the instant proceeding.

The language applicable to this dispute, and set forth in its entirety below, was newly-negotiated by the parties. Previously, the parties had been governed by the following language:

9. July, August Benefit Continuation

> For employees who complete the term of his or her individual contract, the District shall provide fully paid coverage for insurance benefits through the month of August following the date of completion of the individual contract. Employees who do not complete the individual term of his or her contract and/or work assignment shall have insurance benefits terminated at the end of the month following the employee's actual severance of employment with the District.

The parties had an interpretive agreement that the words "complete the term of his or her individual contract" meant that the individual had to be in pay status on the last day of the contract year in order to receive benefits. Employes in pay status on that day were eligible to receive the benefit. Employes who were not on the payroll on that day were not. The interpretive practice had led to a number of situations deemed undesirable by both parties. Teachers who had exhausted their leave balances and who were truly ill, felt obligated to find a way back into the classroom for a single day so as to get their summer benefits. Both sides regarded this as a poor educational and personnel practice.

In addition to the above, prior to the 1989-92 collective bargaining agreement the parties had a non-contractual practice which resulted in the School Board paying for an employe's health insurance for any month in which the employe worked (was in pay status) for a single day. As noted, this was a practice, which existed without benefit of contractual language.

The School Board submitted its initial proposal for modifications of the collective bargaining agreement on or about April 6, 1989. Included within its proposals was the following on insurance continuation:

> Section 9 - Insurance Continuation
>
> "Employees shall be eligible for insurance benefits provided the employee is paid at least half of the eligible contract days each month or ten days each month, whichever is greater. For employees who complete the term of their individual contracts, the District shall provide coverage for insurance benefits through the month of August following the date of completion of the individual contract. Employees shall be considered to have completed their contract if they meet the above criteria for the last month of contracted employment."

This proposal seeks to change both the method by which an employe qualifies for monthly payment of the health insurance premium and also the method by which an employe becomes entitled to Employer-paid coverage through the summer months.

The parties had a bargaining session on or about May 4. During the hearing there were several accounts of what was said and what was meant during the course of that meeting. I believe it to be a fair summary of all testimony that there was little, if any consensus achieved. It also appears that the focus of discussion was the last day of school. During the session, the School Board submitted a counterproposal. That proposal reads as follows:

> Modify Article X, Section 9 to read as follows:
>
> Employees shall be eligible for insurance benefits provided the employee is paid at least half of the eligible contract days each month or ten days each

> month, which ever is greater. Employees shall be eligible for insurance continuation during the summer months on a prorated basis and provided they are available and able to work.

The Board's May 4 proposal sought to eliminate the existing use of the term "complete the term of their individual contracts", and instead go to a system of proration based upon the amount the individual worked during the preceding school year.

While, as noted, there seemed to be confusion as to what was agreed upon, minutes of the negotiation session of May 4 were prepared. Those minutes reflect the following:

> May 11, 1989
>
> On May 4, 1989, the parties met for their third session of teacher negotiations. Child rearing leave and insurance benefit continuation were the two topics of discussion.
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> The Board explained that present child rearing leave has resulted in some leaves being taken as a subterfuge for other activities or reasons than were originally intended and that the present language on the permissible duration of such leaves is unintelligible. After a lengthy discussion the parties tentatively agreed upon the following points:
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> 1. It might be appropriate to limit child rearing leaves to preschool age children and the time immediately following adoption of a child.
>
> 2. The parties might make a provision for such leaves in extenuating circumstances when the health of an older child requires the parent's taking a leave but that such leaves should be accompanied by independent verification of need.
>
> The Board agreed to prepare a draft of language on this subject and bring it to the next meeting.
>
> The Board presented a counter proposal on the subject of summer benefit continuation which would prorate a teacher's right to the benefits based upon the portion of paid employment he/she had completed on the contract during the school year. The parties agreed on the concept of summer proration but not on the idea that employees who go on leave would be eligible for paid insurance only for months in which they had worked at least half of the month. The Board agreed to draft language that might be acceptable to both parties.
>
> Because these two items took until 10:00 p.m. to complete, the parties agreed to hold over the topic of insurance benefits until the next meeting on May 10, 1989.

As promised, the Board drafted a new proposal covering benefit

continuation and summer benefit continuation and presented that proposal at the June 13 negotiation session. That proposal is set forth in its entirety:

Revise Article X, Section 9 to read as follows:

9. Benefit Continuation

a. Monthly continuation
Employees shall be eligible for insurance benefits for each month the employee is paid at least half of the eligible contract days or ten days, which ever is greater.

b. Summer benefit continuation

Employees shall be eligible for paid insurance continuation during June, July and August on a prorated basis, proportionately reduced by the time they are on an approved leave of absence. Leaves of absence lasting one month or less shall not result in any loss of summer benefit eligibility. Any employee who pays for benefit continuation shall do so by direct payment or payroll deduction.

Example :

Employee is on leave of absence without pay for 65 contract days. Benefits for June, July and August cost $300 per month.

The employee must pay:

(65 divided by 191) x 900 = $306.28

The key to this proposal, at least in the eyes of the School Board, is the division of the language into separate paragraphs. Paragraph (a) addresses monthly health insurance only. Paragraph (b) addresses summer benefit continuation only. The parties spent time during the course of the June 13 negotiations discussing this proposal.

On June 22 the Association prepared a written counterproposal which it delivered to the Board. That proposal is set forth below in its entirety:

Article X, Section 9, Benefit Continuation

A. Monthly Continuation: Employees shall be eligible for insurance benefits for each month the employee is paid at least one contract day in a month.

B. Summer Benefit Continuation: Employees shall be eligible for paid insurance continuation during June, July and August on a prorated basis proportionately reduced by the time they are on an approved leave of absence. Leaves of absence lasting one month or less shall not result in any loss of summer benefit eligibility. Any employee who pays for benefit continuation shall do so by direct payment or payroll

> deduction. Example: Employe is on leave of absence without pay for 65 contract days. Benefits for June, July and August cost $300 per month. The employe must pay: (65 divided by 191) x $900 = $306.28.

The effect of the Association's June 22 proposal was to arrive at an agreement with respect to paragraph (b), the summer benefit continuation, but to leave the monthly contribution as an issue in dispute.

At a subsequent bargaining session, on August 30, the School Board accepted the Association's offer of June 22.

During the hearing, the Employer demonstrated that it had applied the language consistent with its interpretation to individuals who were potentially affected. There appears to be one employe (J. Hoffman) who was absent beginning March 2 through and including April 23 and who was prorated for summer insurance. Hoffman did not miss an entire calendar month. There is no indication that Hoffman has filed a grievance.

ISSUE

The parties were unable to stipulate the issue at hearing. In the Employer's view, the issue is as follows:

> Did the Employer violate Article X, Section 9 (b) of the teacher agreement when it computed the proration of summer benefit continuation for the grievant by dividing the number of days she was on leave of absence without pay by the total number of contract days and multiplying the resulting percentage by the total cost of her monthly benefits for June, July and August?

The Association states the issue as follows:

> Whether the District violated Article X, Section 9, by prorating summer benefits to employe Annette DeGroot.

I believe the Association more accurately states the issue. I believe this because I believe the fundamental question posed is whether or not the Employer was entitled to prorate DeGroot at all. That is the question asked by the Association. The Employer's issue implies that this is a dispute over the computation of the proration. I do not believe based upon the record as a whole that there is any meaningful dispute over the mathematics involved.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

> **9. Insurance Continuation**
>
> a. Monthly Continuation: Employees shall be eligible for insurance benefits provided the employee is paid at least one contract day in a month.
>
> b. Summer Benefit Continuation: Employees shall be eligible for paid insurance continuation during June, July, and August on a prorated basis proportionately reduced by the time they are on approved leave of absence. Leaves of absence lasting one month or less shall not result in any loss of summer benefit eligibility. Any employee who pays for benefit continuation shall do so by direct payment or payroll

deduction. Example: Employee is on leave of absence without pay for 65 contract days. Benefits for June, July, and August cost $300 per month. The employee must pay: (65/191) x $900 or $306.28.

POSITIONS OF THE PARTIES

It is the Employer's view that the language of Article X, paragraph 9 requires proration of summer benefit eligibility based upon the grievant's total number of days of leave of absence without pay. The Board contends that Article X, paragraph 9 is clear and unambiguous. The Board notes that paragraph (a) and paragraph (b) were consciously separated because they dealt with separate subjects. Given the distinct delineation between paragraphs, one must rely on paragraph (b) only for guidance in the resolution of this dispute. By the express terms of paragraph (b), summer benefit eligibility is "proportionately reduced by the time they (the employes) are on approved leave of absence." The Board notes that there is no dispute that the term "leave of absence" refers to an absence without pay. The Board acknowledges the existence of the language of the exception to proration for leaves of absence "lasting one month or less" but contends that that simply does not apply because by any means of calculation, be they calendar days or contract days, the grievant's single leave of absence lasted longer than one month.

The interpretation advanced here and its application to this grievant are clear, simple and logical. It is based upon the well-recognized and equitable notion of accrual of benefits. As employes work, they earn or accrue rights to certain benefits such as sick leave, vacation, retirement and insurance benefits.

The Employer notes the inequities found in the previous contractual language and contends that the newly-negotiated contract language remedies those inequities in that all teachers earn rights to summer insurance benefits based upon the portion of the 191-day contract they work. By making summer benefit eligibility based upon a simple percentage proration the aberrant results of the prior contract language is eliminated.

While the Employer believes that the language is so clear and unambiguous that the arbitrator need not resort to an examination of other evidence to reach a determination, the evidence of bargaining history does support the Board's interpretation. The Board notes that eligibility for benefit continuation during the school year was previously governed by a long-standing practice not stated in the agreement. It further notes that the summer benefit eligibility was independently dictated by contract language contained in Article X, Section 9 of the 1987-89 agreement. The Board contends, and there appears to be no meaningful dispute, that the parties agreed that that contract language created inequitable and problematic results which should be corrected. The School Board's proposals had two objectives. The first was to codify the past practice regarding eligibility for monthly benefits during the school year and increase the minimum number of days needed to be eligible. The second was to fix the inequitable summer benefit rule so that teachers would not feel compelled to return to work on the last day irrespective of their health, with the disruptive effect it caused. By May 4, 1989 the parties had reached conceptual agreement on only one of these objectives. They agreed at that time that a teacher's right to summer benefits would be based upon the portion of paid employment he/she had completed on the contract during the school year. It was not until August 30, 1989, that the Board agreed to the Association's proposal on paragraph a containing the codification of the past practice regarding monthly benefit continuation during the school year.

The Board contends that the concept and express language of paragraph (b)

regarding summer benefit proration based upon "the portion of paid employment completed during the school year" was agreed upon long before any agreement was reached in paragraph (a). Paragraph (b) cannot be dependent upon paragraph (a). If the two paragraphs were in any way interdependent, the parties could not possibly have agreed to paragraph (b), <u>including the calculation example</u>, over two months before they agreed to paragraph (a). The Board concludes that paragraph (b) must stand alone and represent the complete agreement on summer benefit continuation.

The bargaining history also shows that the practice regarding monthly continuation during the school year prior to 1989 operated independently from the contract language dealing with summer benefit continuation. Had the parties intended these two formerly independent concepts to be linked in application under the new language, one would assume that the language selected would have made that change clear and that the parties at some point would have discussed that linkage. No such discussion occurred.

Finally, the Board argues that it has consistently applied its interpretation of that language to all cases which occurred after the signing of the agreement.

The Association agrees that the language that preceded the language in question was problematic. The Association wished to eliminate the loss of summer benefits to those teachers absent during the month of June. In order to satisfy its interests and those raised by the Board, the Association agreed to compromise and contractualize the language ultimately written into the agreement. The understanding of the Association at the time of the agreement was that the definition of the word "month" as contained in the language was the common dictionary definition of that word. The Association points to <u>Webster's New World Dictionary</u> at page 923 for the following definition of "month":

> 1. Any of the main parts (usually 12) into which the calendar year is divided: also <u>calendar month</u>.

The Association based its understanding not only upon the dictionary definition but more strongly upon the long-standing past practice of the District in the interpretation and application of the word "month" in the prior language. Under the old language, the word "month" had always meant calendar month. The understanding of the Association was that an employe would have to be absent from work during the entirety of a calendar month before being required to pay a portion of the summer insurance benefit. During the course of the hearing, a District witness indicated that at some point in time the District interpreted the word "month" to mean a specific number of work days, notably 20. Testimony of that witness was that the District needed some determination of what the appropriate language ought to be. The District's action in choosing the number 20 is, according to the Association, arbitrary. The Association indicates that rather than unilaterally implement this arbitrary standard, the District should have come to it and talked about the matter. However, there was no discussion with the Association. The Association notes that the number of days is an arbitrary number making no allowance for either the number of days in a month or the composition of that month.

The Association contends that it is clear from the testimony in the record that the language in the contract was not clearly understood by anyone. All of the witnesses, whether called by the Association or District did agree that the practice in the District had been to interpret the word "month" to mean a calendar month. Based upon the ambiguous language and the unambiguous practice, the Association believes its position should prevail.

The second basis upon which to decide in the Association's favor is the dictionary definition cited earlier.

A third basis upon which the Association should prevail is that the District is not entirely free to argue that the definition of "month" ought to be different from that posed by the Association. The language found in the contract was drafted by representatives of the District. The Association argues that ambiguous language should be construed against its drafter.

Finally, the Association argues that the interpretation of the language must be against the party selecting the language.

The Association contends that as a matter of equity it should prevail. Had the District truly believed in equity its representatives would have communicated their intentions relative to contract application to the Association. Had they done so in a timely manner, the parties might have been able to work this dispute out.

DISCUSSION

In my view, this dispute really boils down to what the parties intended by the use of the phrase "an absence lasting one month or less". I do not believe the language to be so clear that use of interpretive aides is inappropriate, even if one were to read paragraph (b) alone. While the first sentence of paragraph (b) unambiguously creates a proration of the summer benefit, that provision is subsequently modified by the very next sentence. The term "month" may have different connotations. As argued by the Union, a calendar month is a common use, and perhaps the most common use, of that term.

The Employer acknowledges the existence of an exception to the proration language. The Employer assumes that whatever one month means, the 26 work day absence satisfies it. I am not willing to assume away the definition of what I regard to be the key term in the contractual clause. It is not so that 26 days satisfies all definitions of "month". For instance, if the calendar month, as argued by the Association, is the intended meaning, the exception is not satisfied.

The Employer contends that a system of accrual of benefits is operative in this agreement. That is true. However, the mechanism of accrual and contractual exceptions to that accrual are the very issue raised by this proceeding. The Employer urges that its position be accepted in that its construction is clean. However, the Employer has arbitrarily defined the term "month" as a number of work days. This definition ignores the fact that calendar months are not equally long. The fact that the Employer's construction of the language in question is clean, objective, and pure does not result in the conclusion that its construction is what the parties bargained into their agreement.

In the Employer's view, its construction of the language in question remedies the inequities created by the pre-existing language. While that is true enough, it is no less true that the construction of the language offered by the Association remedies the same inequities. It is my view that the focus of concern during negotiations was the status of the last school day. It was the problems arising over the perceived need of sick teachers to return for one day in order to claim summer benefits that was the focus of the parties' negotiations. Under either construction of this language, that "problem" has been remedied. The effectiveness of the remedy is, I suspect, a matter of perspective.

The Employer points out that paragraph (b) was agreed to prior to the agreement on paragraph (a). Therefore, argues the school district, the construction of paragraph (b) cannot depend upon paragraph (a). This is not necessarily so. All proposals were exchanged as part of packages. Those packages contained both (a) and (b) within them. In each exchange, paragraph (a) and (b) were submitted together. It may well be that during the course of those exchanges each party relied upon its own construction of paragraph (a) in proposing paragraph (b), and vice-versa. It is at least possible that the context in which proposals on paragraph (a) and (b) were made was such that parties relied upon their own competing constructions of each of those paragraphs in making proposals. It is also possible, that no one gave the relationship of these paragraphs any thought at the time of the negotiations. Whatever the case, it appears to me from the testimony, that there was not a meaningful exchange, or understanding, as to the interplay of paragraphs (a) and (b). The fact is, when they were all done, the parties put paragraphs (a) and (b) into the same section of the labor agreement, dealing with insurance continuation. The paragraphs deal with the same subject matter. Each of them outlines circumstances in which "employes shall be eligible for [paid] insurance."

In paragraph (a), the health insurance benefit is paid for on a calendar month basis. The paragraph itself makes reference solely to the term "month". The construction placed on that term by the parties is that a "month" is the equivalent of a calendar month. Administration of the monthly benefit is made on a calendar month basis. Under paragraph (a), if an employe is in pay status for one day of a calendar month, that employe is eligible for employer payment of the health insurance benefit for the calendar month in question.

Under the Employer's construction of this language, an employe could be eligible for Employer-paid insurance for each month of the school year, and then prorated for the summer. It is possible that this is what the parties intended. However, this result follows only if the use of the term "month" in paragraph (b) is different from the definition of the term "month" in paragraph (a). In each paragraph, the term "month" is used as the measuring period for accrual of the health insurance benefit. I am reluctant to read this agreement with different interpretations of the term "month" within the same article dealing with the same benefit notwithstanding the fact that paragraph (b) was agreed upon prior to paragraph (a).

My reluctance in this regard is magnified by the history of the language in question. Previously, benefits were based on a system where an employe who worked one day in a calendar month received benefits. Employes were required to "complete the term of his or her individual contract" by working a single day. That day had to occur in the last calendar month of the work year. It is in that context in which this agreement was negotiated. If the parties intended a departure from their historic use of the term "month" to mean calendar month, there should be some indication of that fact available. There is none.

The Employer contends that the use of two separate paragraphs was intended to create independent constructions applicable to the two separate benefits. I agree that two benefits are addressed. The physical separation makes sense. However, both benefits address a common subject matter, that is, the payment of health insurance premiums. The separation is merely a separation of the work year from the summer. It is equally true that the benefits are grouped together, under a common heading. The two paragraphs are both defined by the fact that they govern the eligibility of employes for paid health insurance. The physical separation of the two paragraphs cannot form a basis to ignore the context in which the parties use the term "month".

The Board notes that it has consistently applied its construction of the language. That appears to be true. However, its application was, as noted by the Union, unilateral. There is no indication that the Union joined in to provide a mutual interpretation of the words. The Hoffman application suggests acquiescence. However, the Hoffman application is but a single incident and cannot rise to the level of a mutually accepted and binding interpretive practice.

In summary, I view the common meaning of the term "month" as being calendar month. I acknowledge that the term can be used otherwise. The history of these parties is that that term has been used to mean "calendar month" for purposes of administration of this benefit. I find no evidence that the parties intended to alter their historic use of the term. Specifically, the article in question has two paragraphs, both dealing with eligibility for paid health insurance. In paragraph (a) a "month" has been interpreted by the parties to mean calendar month. I believe it logical to interpret paragraph (b) to have that same meaning.

AWARD

The grievance is sustained.

REMEDY

The Employer is directed to reimburse Ms. DeGroot $158.56 as the amount deducted from her paycheck as a proration of her summer benefits.

Dated at Madison, Wisconsin this 6th day of October, 1992.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator

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