BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
NORTHWEST UNITED EDUCATORS	Case 31 No. 48227 MA-7548
and	
BLOOMER SCHOOL DISTRICT	

Appearances:
Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin, 54868, for the Union.
Weld, Riley, Prenn & Ricci, S.C., 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by Mr. Stephen L. Weld, for the District.

ARBITRATION AWARD

Northwest United Educators (herein, NUE or the Union), and Bloomer School District (herein, the District), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on November 17, 1992, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of said agreement. Hearing was held in Bloomer, Wisconsin on February 1, 1993. No transcript was taken. The parties filed briefs and reply briefs, the last of which was received March 31, 1993.

ISSUE

The parties were unable to stipulate to a statement of the issue. Having considered the proposed issue of both parties, the arbitrator frames the issue as follows:

> Did the District violate the collective bargaining agreement when it offered only one health and dental insurance policy to married couples, of which both husband and wife are teachers employed by the District?
>
> If so, what is the appropriate remedy?

The parties stipulated that if a violation should be found, the arbitrator should retain jurisdiction over the matter of remedy.

BACKGROUND

Grievant Mary Holle is a member of the bargaining unit of teachers employed by the District and represented by Northwest United Educators. 1/ She

1/ The parties agreed that this arbitration proceeding would also govern the grievances of the three grievants who did not testify at the hearing: Tammy Harm, Jim Madison and Sue Martin.

has been a full-time employe since 1987 and previous to that, a part-time employe during the 1985-86 school year. She is married to Alan Holle who has been a full-time teacher since 1969. The couple and their dependent children have been covered through the District's health and dental insurance policies.

In spring, 1991, Grievant asked a representative of the then-current insurance carrier, Blue Cross & Blue Shield (herein BCBS), if she could receive coverage in her own name. Subsequently, Grievant made various other inquiries with the insurance carrier. On August 30, 1991 Grievant received a response to an inquiry from a BCBS customer service representative that she would have to wait for an open enrollment period. On or about April 1, 1992, Grievant filed an application for dental insurance with BCBS. The carrier rejected the application, stating that Grievant had not applied for coverage during her probationary period. On July 16. 1992, the District's legal counsel, Stephen Weld, wrote NUE Executive Director Alan Manson stating the District position that the Grievants are covered by District insurance policies but are not entitled to insurance policies in their own name. On September 4, 1992, NUE filed a grievance over the denial of dental insurance issued in the name of employes married to another District employe. 2/ On September 9, 1992 NUE filed a similar grievance regarding health insurance. Those grievances remain unresolved and are the subject of this arbitration award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE II - RECOGNITION

. . .

3. The Board on its own behalf and on behalf of the electors of the School District, hereby retains and reserves unto itself without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the school code and the laws of the state, the constitution of the state of Wisconsin and/or the United States. Such rights, duties, etc., shall include, by way of illustrations and not by limitation, the right to:

. . .

7. The Board agrees that it will not exercise any of the foregoing rights in such manner as to violate the express provisions of this contract or the statutes or constitution of the State of Wisconsin or the United States.

. . .

ARTICLE V - TEACHER RIGHTS

1. Both parties recognize and respect the rights and responsibilities accorded all citizens of

2/ This award uses the term "married couples" in a more narrow than ordinary sense to indicate a couple both of whose members are teachers employed by the District.

the United States and the State of Wisconsin by the federal and state constitutions.

2. All rules and regulations governing employee activities and conduct shall be interpreted and applied as uniformly as is reasonably possible throughout the District; provided, however, that the parties recognize that valid differences in rules and regulations on similar issues may exist between the buildings and between grade levels and subject area fields.

ARTICLE VI - GRIEVANCE PROCEDURE

. . .

It is understood that the function of the arbitrator shall to be interpret and apply specific terms of this Agreement. The arbitrator shall have no power to advise on salary adjustment, except the improved application thereof, nor to add to, subtract from, modify, or amend any terms of this Agreement.

. . .

ARTICLE XV - INSURANCE BENEFITS
(see Side Letter)

1. In 1991-92 the Board will pay 98 percent of the family and single health insurance premiums. In 1992-93 the District will pay up to 15 percent more than it paid in 1991-92 toward the family premium; and in 1993-94 the District will pay up to 15 percent more than the 15 percent maximum for 1992-93. The District may, from time to time, change the insurance carrier and/or self-fund the health care program provided the level of benefits remains substantially the same or improves (see Side Letter). Part-time faculty members will be eligible for a proportional amount of the monthly premium, the proportion being the same as the proportion of time they are contracted for. The Board will pay 100 percent of a family plan if both spouses work for the District.

. . .

6. The Board will provide a payment of up to $45.00 per month on a group dental insurance policy for all members of the faculty ($51.75 in 1992-93 and $59.51 in 1993-94). This insurance will be comparable to the dental plan which was in effect in June of 1991. Part-time faculty members will be eligible for a proportional amount of the monthly premium, the proportion being the same as the proportion they are contracted for.

. . .

POSITIONS OF THE PARTIES

The Union

The Union argues that it has never acknowledged or agreed to the District's interpretation of the health insurance and dental insurance provisions. It emphasizes the value of insurance policies issued to the employe as compared to a policy which merely covers the employe. It cites both collective bargaining agreement provisions and the School Board's Policies in support of its position. It points to Article II - Recognition which refers to the Board's rights and duties and references statute and state and federal constitutions. It points to Article V - Teacher Rights which also references the state and federal constitutions and provides that rules and regulations will be interpreted as uniformly as possible.

Addressing the insurance language itself, the Union argues that in the dental insurance provision a reference to a dollar contribution and its proration for part-time employes evinces an intent that each employe receives a separate policy. As to the health insurance, it argues that each husband and wife employe couple has the option of receiving two policies for which the District will contribute 98 percent of the premium or a single policy for which the District will contribute the entire premium.

In its reply brief, the Union insists that by failing to grieve the District's action in issuing only a single police to husband and wife teams, it was not acknowledging the practice. It argues the contractual language is not itself discriminatory, but the manner in which the District has interpreted the provision is discriminatory, and therefore a contract violation. Contrary to the District, it insists the arbitrator does have authority to determine whether the contract is discriminatory under Wisconsin statute. It cites another case in which the arbitrator exercised jurisdiction to review the employer's action in light of the constitution. The Union finds further support in the recently issued decision in Braatz v. LIRC 3/ in which the Wisconsin Supreme Court found a certain provision regarding health insurance to constitute discrimination based on marital status.

The District

The District argues the Union should not be allowed to gain through the arbitration procedure a benefit that it did not achieve through bargaining. The District points out that the last sentence of Article XV, Section 1, which requires the District to pay 100% of the premium for husband and wife employe teams was added to the contract during the same bargain which obligated employees for the first time to make a contribution to the insurance premium. The District reasons from this fact that the parties were addressing the issue of benefits for husband and wife employe teams by providing that they should not have to make a contribution to the premium. The District rejects the view that husband and wife teams had a choice between a single fully paid policy or two policies for which the employes would have to make a premium contribution. The District points to the Union's position, stated after bargaining, that the disputed provision discriminates against married couples. If the contract gave husband and wife teams such a choice, that contract could not be considered discriminatory. Since the last sentence of Section 1 was proposed by the Union, it had the obligation to explain any ambiguities or implied changes in the existing practice.

3/ 174 Wis.2d 286 (1993).

As to the dental insurance, the District argues since the only change to the provision during the bargaining for the 1991-94 contract was a revision of the dollar figure to reflect the current amount of the premium, the existing practice of providing only one family plan for the husband and wife team is unchanged.

The District argues the long standing practice of providing only one policy indicates the correct interpretation of the disputed provisions. As to the Union's argument that the provision violates Wisconsin law regarding discrimination based on marital status, the District answers that this arbitration is not the correct forum for such a challenge.

DISCUSSION

I. Health Insurance

The first two sentences of the health insurance provision, Article XV Section 1 (set forth above) do not, on their face, indicate whether or not married couples are entitled to two insurance policies. Analysis must turn to the last sentence of the paragraph, which first appeared in the 1991-94 contract.

During the bargaining for the 1991-94 contract, the parties modified the health insurance entitlement of the predecessor collective bargaining agreement. The earlier version had provided that the District would pay 100% of the health insurance premium. The 1991-94 modification provided that the District would contribute less than the full 100%. 4/ At the same time, the parties also added the last sentence to the section: "The Board will pay 100 percent of a family plan if both spouses work for the District."

Both parties agree that the newly added sentence refers to one family health insurance policy in the name of only one employe with the second employe covered only as a dependent. The dispute arises over the NUE contention that the parties intended to offer married couples the choice between one fully paid policy or two policies for which the employes would have to make contribution toward the premium.

On its face, the agreement has no indication that this option exists. Such an option would be found only by inference, yet there is no evidence from which to infer employes have a second option. NUE presented evidence that it intended for a second option to exist, but Executive Director Manson admitted that NUE never told the District during bargaining of its intention. Moreover, since NUE was the party who proposed the last sentence of Section 1, it was obligated, as the proponent, to make explicit any implied aspects of the proposal which made it more generous to itself than appeared on its face. No such explanation ever occurred. Bargaining table conduct, then, does not support a finding that the parties intended an implied option to have two insurance policies.

Mr. Manson's September 9, 1992 letter to Superintendent Pauline Roll gives further support for the conclusion that the parties did not intend for the provision to carry an implied option for a couple to have two policies if

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4/ The amount of the District contribution varies during the contract's three-year term. See the provision set forth in the Pertinent Collective Bargaining Agreement Provisions section. That variation is irrelevant to this award.

they were willing to make the premium contribution. In that letter, in pertinent part, Mr. Manson stated:

> During the negotiations for the current contract, NUE negotiators sought to obtain full health insurance for each employee, single or with dependents, in each employee's name. When the final agreement was made, it included a provision for 100 percent health insurance payments for Bloomer staff who are married to other Bloomer staff; but when that agreement was reached, NUE negotiators told the District that there were individual bargaining unit members who believed that this was still discriminatory against married people, and that NUE concurred with their opinion. Thus NUE states that while it did agree to some distinction for married teachers who are married to other Bloomer staff, it was done in the context of an overall settlement and with the notation by NUE that such language did not serve to overcome the discrimination which NUE believes is improper due to the terms in Article V - Teacher Rights.

If the parties had, in fact, intended that married couples could have two health insurance policies by making a contribution to the premium cost, married couples would have the option of being treated as if they were not married and there would have been no basis at all for arguing that the provision was discriminatory. By stating that it believed the provision was discriminatory, NUE was at the same time acknowledging that the parties' agreement did not give married couples the option of separate policies if they chose to make the premium contribution.

The past practice of the parties also confirms that the parties have intended that married couples are entitled to only one family policy. There is no evidence that any married couple has ever been issued two separate policies for either health or dental insurance. Since at least 1980, the administration of insurance for married couples has been unchanged and NUE has not filed any grievances previous to the instant one. The record does not indicate the period of time that three of the Grievants have been the second part of the married couple working for the District, but Grievant Holle has been employed full-time since 1987. Her husband, Alan Holle has held a leadership position with NUE since it became the bargaining agent in 1980. As a Union officer, Mr. Holle is presumed to understand employes' contractual rights and the District's administration of the contract, especially regarding a provision which directly affected him and his wife who was also employed by the District. The past practice, then, is found to be known to NUE.

The undersigned rejects NUE's argument that the District's administration of the provision cannot be found to indicate a past practice because the Union has never failed to pursue a grievance over the matter. Although the failure to process a grievance is <u>one</u> way a union can acknowledge the accuracy of the employer's interpretation of a provision, it is not the <u>only</u> way. The failure to file <u>any grievances at all</u> in the face of an administration of a provision which created a practice that was both consistent and known to the union, such as occurred here, can also indicate such tacit acknowledgement by the union. By not filing a grievance earlier, NUE tacitly acknowledged the correctness of the District's interpretation of the health and dental insurance provisions.

Finally, the undersigned addresses the NUE argument that the District's interpretation of the insurance provision constitutes discrimination based on marital status in violation of Sec. 111.32, Stats., the Wisconsin Fair

Employment Act, and therefore violates the contract by virtue of the Article II Sections 3 & 7 Article V Sections 1 & 2. The undersigned finds it inappropriate and unnecessary to reach a conclusion on the alleged discrimination. The contract provision regarding insurance coverage addresses, even though with some ambiguity, the issue of insurance policies for married couples. Traditional methods of contract interpretation, applied above, are sufficient to resolve that ambiguity and determine the mutual intent of the parties. Since the intent of the specific provision is discernable, the undersigned finds no need to resort to a general provision which makes a general requirement that rights are to exercised without violating statutes or constitutions. 5/

The instant case is distinguishable from the School District of Lake Holcombe 6/ arbitration award which was cited by NUE. In that case, in which the contract had similar language recognizing the teachers' constitutional rights and responsibilities, the employer had prohibited the grievant from wearing political campaign buttons during parent-teacher conferences, and disciplined the teacher who wore one. The arbitrator found such a prohibition to be unconstitutional under the first amendment of the U.S. Constitution, and therefore improper under the contract. 7/

In Lake Holcombe, the employer was not applying a specific contract provision, but exercising a general management right to issue work rules. There was no showing that the parties had ever addressed the issue of the employer's prohibition of campaign buttons. The proper application of external law, in that case, the constitution, does not support the application of external law in this arbitration award where the disputed action, the provision of health and dental insurance, was the subject of agreement between the parties.

II. Dental Insurance

A review of the language governing dental insurance, Article XV Section 6 reveals that it is ambiguous as regards the question of whether married couples are entitled to one or two dental policies. The District's obligation is stated in terms of the premium contribution ("payment of $45.00 per month.) The payment is not to be made to each teacher, but for "a group dental policy for a members of the faculty." Thus while it is clear that married couples are to be covered by a "group dental policy," it is unclear whether each teacher is entitled to a separate policy if he or she is covered by virtue of being married to a member of the bargaining unit.

As in the case of the health insurance, the past practice sheds light on the parties' intent. Again, as in the case of the health insurance, although there are four married couples in the bargaining unit, the District has never provided two separate policies for these married couples and there has never been a grievance objecting to the District's administration of the provision.

5/ Even though this case does not require an application of Sec. 111.322(1), Stats., for its resolution, the parties could have, through mutual agreement of either a submission agreement or explicit language in the arbitration or other clause of the contract, given such jurisdiction to the arbitrator. They did not do so.

6/ (McCrary, 1979)

7/ The suspension without pay was found to not violate the contract for reasons irrelevant to the instant case.

In the bargaining for the 1991-94 contract, the provision was amended to change the amount of the District's contribution. No other changes were made in the provision. At the time of bargaining, the District's practice had continued for as long as the contract had provided for health insurance, yet NUE did not seek a modification in the provision to change that administration. By not challenging this administration of the dental insurance, NUE acknowledged that the administration properly reflected the agreement, and by not changing the provision other than in the stated dollar amount, NUE was tacitly agreeing to three more years of the status quo as regards dental insurance.

As to any arguable marital discrimination involved in this provision, the same considerations and conclusions regarding the health insurance also apply to the dental insurance.

III. Summary

The health insurance provision explicitly provides for one, fully-paid family coverage for married couples and is not found to provide an option of two policies for married couples. The dental insurance provision is more ambiguous. Such ambiguity is resolved by the consistent and well-known practice of the District in providing one policy for married couples. This practice has never previously been challenged by the Association and therefore is found to be tacitly accepted by NUE. This conclusion regarding the intent of the parties' contract cannot be affected by any arguable marital discrimination which might be found under the Wisconsin Fair Employment Act.

In the light of the record and the above discussion, the arbitrator issues the following

AWARD

1. The District did not violate the collective bargaining agreement when it offered only one health and dental insurance policy to married couples, of which both husband and wife are teachers employed by the District.

2. The grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 29th day of June, 1993.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator