BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
GREEN COUNTY PLEASANT VIEW HOME EMPLOYEES LOCAL 1162, WCCME, AFSCME, AFL-CIO	:	Case 118 No. 48099 MA-7508
and	:	
GREEN COUNTY (PLEASANT VIEW NURSING HOME)	:	

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. James A. Wyss, Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Green County Pleasant View Home Employees Local 1162, WCCME, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by Green County (Pleasant View Nursing Home), herein the County, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on November 23, 1992 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on March 25, 1993 at Monroe, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on June 14, 1993.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties were unable to stipulate to the issues at hearing. The Union frames the issues as follows:

1. Did the Employer violate the collective bargaining agreement by failing to adjust the Health Plan cost to reflect plan changes retroactive to 1 October 1990, if so what is the appropriate remedy?

While the County submits that the issues to be determined are as follows:

1. Can the Union seek relief from the

judgment of the interest arbitrator's decision awarding retroactive

implementation of deductibles and co-pay on prescription drugs, without retrofitting the premium by collaterally attacking it in a new action?

2. Did the Employer violate any part of the labor agreement by implementing the arbitrator's award and not retrofitting the premium of the self-funded health insurance plan, as set forth in its final offer?

Having reviewed the entire record, the Arbitrator finds the issues to be:

1. Does the doctrine of res judicata preclude the Arbitrator from considering the merits of the instant grievance?

2. If not, did the County violate the collective bargaining agreement by failing to adjust the Health Plan cost to reflect plan changes retroactive to October 1, 1990?

3. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

The County provides its health care benefits through a self-funded plan. The County Board establishes the premium equivalency rates by resolution periodically. Full-time employes pay ten percent (10%) of the cost of the plan. Part-time employes pay a larger part of the plan cost depending on the number of hours they work each month.

The Union and the County were parties to an interest arbitration proceeding to establish the terms of a collective bargaining agreement for the period of July 1, 1990 - June 30, 1992. During the course of the investigation in that matter conducted by Jane Buffett, Investigator for the Wisconsin Employment Relations Commission, the Union submitted a final offer dated June 21, 1991, which provided in material part as follows: "Effective January 1, 1992 the health insurance coverage shall be changed to the 'Care Share' plan."

On June 24, 1991, the County submitted its final offer which provided with respect to the health insurance issue as follows:

3. Effective as of October 1, 1990 1/, the employer proposes to implement a new health insurance plan which would be the equivalent of the Care Share plan presently in place for certain employees in the county which is currently being administered by PAS as follows:

The new plan would have annual deductibles of $150 for single coverage, two $150 annual deductibles for those employees with family coverage with only two persons covered by the plan, and up to three $150 annual deductibles for persons with family coverage who have three or more persons covered under the plan.

1/ The benefits under the old plan (which is still in effect for these employees) would be essentially the same as the new plan. A document outlining the general changes is attached hereto. The employer is not able to implement whatever changes in benefits there might be between the new plan and the old on a retroactive basis, so the new plan benefits will not go into effect until the first day of the month following the date of the interest arbitrator's decision. However, actual plan deductibles and co-pay amounts for prescribed items, subject to co-pay increases, can be calculated and implemented on a retroactive basis. It is the employer's proposal that such calculations be made as of October 1, 1990.

Effective as of October 1, 1990, the plan would increase the co-pay provisions pertaining to prescribed items from $2.00 to $5.00.

. . .

By letter dated July 23, 1991, to the Investigator, with a copy to the Union, the County's representative, Howard Goldberg, wrote the following:

> . . . By way of clarification of our final offers, I informed you that the County could not actually implement the new insurance plan as of October 1, 1990 as it is required by law to continue the present plan until this entire matter is resolved. It does have, however, the ability to calculate the amounts that are to be paid by the employees under the new deductible schedule and our offer includes the implementation of those deductibles for those individuals back to October 1, 1990. We do not, by way of our last offers, intend to make any changes to the percentage of premium that the employees are required to contribute towards their health insurance coverage.

The Wisconsin Employment Relations Commission issued its Findings of Fact, Conclusions of Law, Certification of Results of Investigation and Order Requiring Arbitration on August 30, 1991. On October 24, 1991, Raymond E. McAlpin was selected to hear the case. McAlpin held a hearing in the matter on December 13, 1991 in Monroe, Wisconsin.

The parties filed briefs in the matter on January 22, 1992. The Union stated in its brief regarding health insurance that:

> The proposed change in health benefits is not in dispute, both parties are proposing a change to the new Plan B (Care Share). The difference is in the effective dates of the change. The Union is proposing that the change take effect on 1 January 1992, thus being in effect for the final six months of the term of the collective bargaining agreement. The County on the other hand is proposing that the actual change in benefits not take place until this arbitration award is received, except that they want to retroactively implement the new plan's deductibles and co-pays back to 1 October 1990. This would effectively overlay the deductibles and co-pays on the old plan without providing any of (sic) improved benefits of the new plan.

While the County stated the following in its brief regarding its final offer on the health insurance issue:

> New Health Insurance Plan: Implementation of new health insurance plan as soon as

possible following arbitrator's decision, but implement plan deductibles retroactive to October 1, 1990.

The County also noted that the Union's failure to implement the new insurance plan prior to January 1, 1992 forced it "to continue the expensive HMP plan for the employes in this bargaining unit pending resolution of this interest arbitration." In a footnote to this statement, the County commented:

> The County cannot implement an insurance plan retroactively as the insurance company will only pay pursuant to the terms of the plan in effect, and no insurance company will do this on a retroactive basis. This being the case, the County is only proposing to implement the deductible portion of the new plan, retroactive to October 1, 1990, as those amounts can be determined. Such amounts will be deducted from the amount of the pay increase.

Both parties filed reply briefs. The Union stated in its reply brief as follows:

> . . . In fact, the County's final offer explicitly states in a footnote that the changes other than the deductibles and prescription co-pay will take effect on the 1st of the month following the receipt of the Arbitrator's award.
>
> The County's proposal regarding this matter does raise a serious matter of ambiguity. It relates to what is the level of premium contribution would the employees be required to pay for the period between October 1, 1990 and the first of the month following the receipt of the Arbitrator's award. As was pointed out in the County's brief employees have been paying ten percent (10%) of the health benefit plan premium throughout the hiatus period of this contract. This amounts to $48 a year difference between the plans. The County proposal is silent as to when the change in the premium would take place. Since

> the County proposes that the only changes that would take effect on October 1, 1990 are the changes in the deductible and co-pay, one could assume that the premium change would take effect following the receipt of the Arbitrator's award. On the other hand, since the County is proposing that the changes which will most effect the cost of the health benefit plan are to take effect retroactive to October 1, 1990, the cost of the plan should be adjusted retroactive also. Clearly this represents an ambiguity in the County's proposal. This would likely result in litigation between the parties. Arbitrator's (sic) have found that where a party's offer could result in litigation, the other party's offer should be selected . . . (Emphasis added)

Arbitrator McAlpin selected the County's final offer on April 15, 1992.
As noted above, the County's final offer provided in part that the provision of the Health Benefits Plan be modified retroactive to October 1, 1990. The changes which were retroactive included the addition of a deductible of a one-hundred fifty dollar ($150.00) per person, with up to three deductibles per family. The plan also increased the drug plan co-pay provision from two dollars ($2.00) to five dollars ($5.00). Arbitrator McAlpin noted the "ambiguity regarding the Employer's proposal with respect to the relationship of the employee's contribution and the timing of the Employer's proposal to have a retroactive deductible and co-pay increase to October 1, 1990" at page 7 of his decision but went on to find that the County provided an adequate quid pro quo for the changes in health insurance including the effective date of the implementation of the health insurance plan and of the deductibles and co-pays under that plan. In reaching this conclusion, the Arbitrator determined that the Union's offer on insurance coupled with its wage proposal would "give employees something of a windfall." Based on the foregoing, the Arbitrator concluded that the County's final offer was "the more reasonable proposal before" him, and incorporated same, along with the predecessor agreement, as modified by stipulations reached in bargaining, into the instant collective bargaining agreement.

Following receipt of the Arbitrator's decision in April, 1992 the County calculated the amount of back-pay owed to employes. In calculating the amount of back-pay the County applied the changes in the deductible and drug co-pay retroactively to October 1, 1990 and took credit for these against the employes' back-pay. The County did not however make any adjustment in the premium equivalency rates to reflect the change in the cost of the Health Benefit Plan.

The Union then filed a grievance on July 13, 1992, alleging that the County had charged bargaining unit employes "an unreasonable premium for the group health care plan" because while it collected from employes the increased deductibles and co-pays, it did not reimburse the difference in premium costs.

The County filed a denial of the grievance on July 23, 1992. In said denial, the County noted the following:

> . . .
>
> 3. Delay of the Union caused the County to pay premiums for fifteen (15) months for total extra premiums of $47,625.00, of which the employees paid only a portion.
>
> 4. Additionally, the County paid into the insurance account, $85,000.00, transferred from the General Fund, to cover premiums in the last half of 1991 alone, only a portion of which was paid by employees.
>
> 5. The County premium was $17,000.00 more than the total deductible that would have been paid had insurance been effective by agreement in October, 1990.
>
> 6. Total additional wages paid by the County was $100,000.00 as quid pro quo for deductible.
>
> 7. The Arbitrator choose (sic) the County's final offer, which included implementation of the deductible and drug co-pay in October, 1990 with knowledge of the cost to the employee and benefits of wages and determined the County's insurance plan superior to the Union's.
>
> 8. Wages more than compensated the employee for additional costs.
>
> 9. No issue of retroactive reduced premium for implementation of the deductible insurance plan was raised by the Union in the final offer as they wanted an effective date of January 1, 1992 or later. The Arbitrator chose the County's final offer with an effective date of October, 1990. The County had already paid the increased premium at the time of the decision.

The Union then filed a request to be heard by the County's Personnel and Labor Relations Committee pursuant to Article VI,

Step 3 of the agreement. A hearing was held before the Committee on August 12, 1992, with representatives of the Union and County appearing. By letter dated August 27, 1992, the County denied the grievance as follows:

> The Committee met on August 25, 1992 and further discussed Grievance 92-4. Following a review of the Union's Final Offer, the County's Final Offer, Briefs submitted to the Arbitrator by counsel; the Arbitrator's Final Decision; cost of health insurance from October 1, 1990 to December 31, 1991; and the economic affects relevant to the issue; and voted unanimously that the County appropriately and correctly implemented the Arbitrator's award in favor of the County's Final Offer and that the premiums charged during the period in question were not unreasonable for the group health plan and therefore, have denied the grievance and request for premium reimbursement.

Thereafter, the Union filed a request for arbitration and an arbitration hearing was held as noted above.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE VI
Grievance Procedure

6.01 In case any dispute or misunderstanding relative to the provisions of this Agreement arise, it shall be handled in the following manner.

. . .

ARTICLE XXIII
Hospital Insurance

23.01 Effective as of October 1, 1990, the employer will implement a new health insurance plan which would be the equivalent of the Care Share plan presently in place for certain employees in the county which is currently being administered by PAS as follows:

The new plan would have annual deductibles of $150 for single coverage, two $150 annual deductibles for those

employees with family coverage with only two persons covered by the plan, and up to three $150 annual deductibles for persons with family coverage who have three or more persons covered under the plan.

Effective as of October 1, 1990, the plan would increase the co-pay provisions pertaining to prescribed items from $2.00 to $5.00.

PARTIES' CONTENTIONS:

The Union basically argues that the County is retaliating against the Union by refusing to adjust the cost of the Health Benefit Plan to reflect the changes which took effect retroactive to October 1, 1990. The Union maintains the County is taking this retaliatory action against the Union because the Union declined a request by the County to allow the changes to the insurance plan to take effect prior to the issuance of the interest arbitration award thus allowing the County to collect higher deductibles and co-pays at an earlier date.

The Union contends that the cost for the new Health Benefit Plan was less for both the family plan and for the single plan and that the County has an obligation to establish rates "fairly" based on said costs as well as the benefits provided. By failing to do so, the Union argues the County was "effectively overcharging employees for the cost of their plan versus other County employees who were receiving the same coverage."

The Union requests that the Arbitrator order the County to make affected employes whole for the lost wages which were deducted from their back-pay.

The County initially argues that the interest arbitration award is res judicata to this grievance and estops the Union from relitigating the same issue in this forum.

The County next argues that it did not violate any part of the collective bargaining agreement by implementing the arbitrator's award for retroactive implementation of deductibles and co-pay on prescription drugs without retrofitting the premium.

The County requests that the grievance be denied, and the matter be dismissed.

DISCUSSION:

The first issue before the Arbitrator is whether or not the aforesaid interest arbitration award is res judicata with respect to the instant dispute.

This Arbitrator will apply the principle of res judicata to arbitration awards. An interest arbitration award will be found to govern a subsequent dispute in those instances where the dispute which was the subject of the award and the dispute for which the application of the res judicata principle is sought share an identity of parties, issue and remedy. In addition, there cannot be any material discrepancies of fact existing between the prior dispute governed by the award and the subsequent dispute.

In this matter, it is undisputed that the parties are the same. The next question to be determined is whether the cause of action or claims are the same or similar. The Wisconsin Supreme Court, in DePratt v. West Bend Mutual Insurance Co., 113 Wis.2d 306, 310, 334 NW2d 883, 885 (1993), stated that the application of the doctrine of res judicata does not depend on the actual litigation of the issue. Res judicata renders final decisions conclusive on all subsequent actions between the same parties as to all matters which were litigated, or which might have been litigated, in the former proceedings. Id.

The record is clear that the prior award, and the instant dispute share an identity of issues. Implementation of the health insurance plan was one of only two issues in dispute before Arbitrator McAlpin in the interest arbitration proceeding. Employer Exhibit Number 10, pp 3-4. With respect to this issue, the Union proposed an implementation date of January 1, 1992, whereas the County proposed that the health insurance plan be implemented in the month following the date of the interest arbitrator's decision, but that the deductibles and co-pay provisions of the plan be implemented as of October 1, 1990. The Union had the opportunity to litigate the issue of retrofitting the premium by raising it in its final offer during the interest arbitration proceeding but failed to do so. The Union failed to adequately litigate said issue although they were aware of the County's retroactive implementation of the deductibles and co-pays and the fact that the County was going to calculate those numbers back to October 1, 1990 and deduct it from the backpay that was awarded to the employes. In addition, the Union failed to take appropriate action on the issue despite raising the matter in its argument. In this regard, the undersigned notes that the Union made a passing reference in its reply brief to the "ambiguity" raised by the County's offer relating to the "level of premium contribution" that employes would be required to pay for the period between October 1, 1990 and the first of the month following receipt of the Arbitrator's award. The Union then requested that the Arbitrator consider said "ambiguity" in

reaching his decision, and based on same, find in favor of the Union. Arbitrator McAlpin appears to have honored the Union's request to consider this issue in reaching his decision. However, he reached an opposite result.

In this regard, the undersigned points out that Arbitrator McAlpin acknowledged the Union's raising of the issue in its reply brief, Employer Exhibit No. 10, supra, p. 7, and appears to have considered same, Id. pp. 12-15, in deciding for the County Id. pp. 16-17. Finally, the Union makes no argument nor is that any evidence that the Union was somehow prohibited from fully litigating this issue in the prior proceeding. To the contrary, the Union could have litigated the issue during the investigation or, as noted above, before the arbitrator. The Union could also have raised the matter through a declaratory ruling petition before the Commission pursuant to s. ERB 32.16, Wis. Admin. Code.

Based on the foregoing, the Arbitrator finds that the second element has been met in that the issue of retrofitting the premium was, or could have been litigated in the former proceeding. A question remains regarding the remedy. Here, the Arbitrator notes the Union does not argue, nor does the record contain any evidence, that the Union seeks a remedy herein different from that it could have sought in the interest arbitration proceeding. Therefore, the Arbitrator finds that the two proceedings share an identify of remedy as well.

Finally, the Arbitrator finds that there are no material discrepancies of fact existing between the prior dispute governed by the McAlpin interest arbitration award and the instant dispute.

In view of the above and foregoing analysis, the Arbitrator has concluded that the aforesaid interest arbitration award is res judicata with respect to the instant dispute and, therefore, based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds that the answer to the first issue as framed by the undersigned is YES, application of the doctrine of res judicata herein precludes the Arbitrator from considering the merits of the instant grievance, and it is my

AWARD

That the Union grievance dated July 13, 1992 is hereby denied and the matter is dismissed.

Dated at Madison, Wisconsin this 19th day of August, 1993.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator