BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF NEW BERLIN	Case 71 No. 48393 MA-7588
and	
NEW BERLIN PUBLIC EMPLOYES UNION, LOCAL 2676, DISTRICT COUNCIL 40, AFSCME, AFL-CIO	

Appearances:

Davis and Kuelthau, S.C., by Mr. Roger E. Walsh, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the City.

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, appearing on behalf of the Union, and, written submissions Lawton and Cates, S.C., by Mr. Bruce F. Ehlke, 214 West Mifflin Street, Madison, Wisconsin 53701-2965.

ARBITRATION AWARD

The City of New Berlin, hereinafter referred to as the City, and the New Berlin Public Employes Union, Local 2676, District Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to hear a dispute over the lawfulness of a duplication of health insurance benefits provision. Hearing on the matter was held in New Berlin, Wisconsin. It was scheduled to be held on January 28, 1993, postponed to March 8, 1993 and postponed again and held on May 7, 1993. Post-hearing arguments and reply briefs were received by the undersigned by August 16, 1993. Full consideration has been given to the evidence, testimony and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties were unable to agree on the framing of the issue. After reviewing the testimony, evidence and arguments presented by the parties the undersigned frames the issue as follows:

"Does the parties' collective bargaining agreement give an arbitrator the authority to

determine whether a section of the collective bargaining agreement is unlawful?"

"If yes, is the last sentence of Section 12.01 unlawful?"

"If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IV - GRIEVANCE PROCEDURE

4.01 - Definition and Procedure. A grievance shall be defined as any matter concerning the interpretation, application, or enforcement of the terms of this Agreement. Any grievance that may arise between the Employer and an employee, or the Employer and the Union, shall be subject to the following procedure:

. . .

ARTICLE XII - INSURANCE

12.01 - Hospitalization and Surgical Insurance. The City shall provide the standard health insurance program in effect as of December 31, 1990, except as modified in Appendix "B", for all employees, except regular part-time employees, and shall pay the full premium cost of the single plan for single employees and the family plan for employees with dependents. The City may also, at its option, offer one or more HMO programs for such employees. The City shall have the right to substitute carriers for its standard health insurance program if the replacement is substantially equivalent and there is no lapse of coverage. In the event an employee has a spouse that is also a City employee, that employee and the employee's spouse will be entitled to only one family health insurance contract between them from the City.

. . .

ARTICLE XXIII - NON-DISCRIMINATION

23.01. There shall be no discrimination with respect to any employee or the hiring of

new employees because of age, sex, race, religion or national origin in violation of state or federal law.

. . .

ARTICLE XXVII - SEPARABILITY

27.01. Should any provision of this Agreement be found to be in violation of any law, all other provisions of this Agreement shall remain in full force and effect for the duration of the Agreement. The parties hereto shall immediately meet and negotiate to find a satisfactory solution to the issue in violation of the law.

BACKGROUND

The City and the Union have been parties to a series of collective bargaining agreements. Since the 1985-1986 collective bargaining agreement was entered into the parties' collective bargaining agreements have contained the following sentence:

> "In the event an employee has a spouse that is also a City employee, that employee and the employee's spouse will be entitled to only one family health insurance contract between them and the City."

In 1989 an administrative law judge for the Labor & Industry Review Commission found a provision of a collective bargaining agreement between the Maple School District and the Maple Federation of Teachers which mandated that employes with a spouse who had insurance coverage from their employer had the option of carrying the School District's policy or the spouse's but could not have both did not violate the Wisconsin Fair Employment Act as constituting unlawful marital status discrimination. This decision was appealed to and upheld by the Labor & Industry Review Commission (LIRC). Thereafter the LIRC decision was appealed to the courts. The Circuit Court reversed the LIRC decision with the decision of the Circuit Court affirmed by the Court of Appeals, and affirmed by the Wisconsin Supreme Court, on March 16, 1993 in Braatz v. LIRC, 174 Wis. 2nd 286, holding that the complained of clause in the Maple School District collective bargaining agreement was discriminatory and in violation of the Wisconsin Fair Employment Act.

During negotiations which led up to the parties' current 1991-1993 collective bargaining agreement neither side raised an

issue concerning the language in dispute herein. On March 24, 1993 the City's Common Council ratified the current collective bargaining agreement. On April 9, 1993 the Union's representative, John Maglio, sent the following letter to the City:

> April 9, 1992
>
> Bob Casanova, Personnel Director
> City of New Berlin
> 3805 S. Casper Drive
> New Berlin, WI 53151
>
> Re: BRAATZ V. LABOR AND INDUSTRY REVIEW COMMISSION,
> No. 91-1891 (Wis. App. 1992)
>
> Dear Mr. Casanova:
>
> The current Collective Bargaining Agreement between the City and AFSCME Local 2676, AFL-CIO, at Section 12.01, states that in the event an employee covered by the Agreement has a spouse that is also employed by the City, only one family health insurance contract shall exist between them and the City.
>
> In light of the above-referenced matter, Local 2676, AFSCME, AFL-CIO views the exclusion contained in Section 12.01 to be in violation of applicable law.
>
> We stand ready to meet with the City in an attempt to find a satisfactory solution to the issue at hand.
>
> Please notify the undersigned with the City's position on this matter.
>
> Sincerely,
>
> John P. Maglio /s/
> John P. Maglio
> Staff Representative

On June 4, 1993 the City's Personnel Director, Bob Casanova, responded to the Union that after reviewing the Braatz case it was

his opinion that the complained of language did not violate the Wisconsin Fair Employment Act. Thereafter, on June 11, 1993 the Union filed the instant grievance alleging the last sentence of Section 12.01 was unlawful and evoking Article 27.01 of the current agreement.

The matter was then processed to the arbitration step of the grievance procedure.

At the onset of the hearing the parties were unable to agree on the framing of the issue and the City raised several procedural questions. The parties did not agree that the undersigned had the authority to determine whether a specific provision of the collective bargaining agreement was unlawful. The undersigned has determined that this issue be addressed first.

CITY'S POSITION

The City contends that the Union has waived its right to object to the unlawfulness of the last sentence of Section 12.01 or to use the provisions contained in Section 27.01 of the collective bargaining agreement. The City points out the Union did not dispute this provision during the entire fifteen (15) months it took to reach the current agreement and at no time did the Union raise the issue that Section 12.01 was illegal. The City contends the Union knew or should have known of the Courts decisions prior to entering into a tentative agreement with the City. Further the Union knew or should of known prior to the City's ratification of the agreement that Braatz decision had been rendered by the Court of Appeals. The City concludes the Union is guilty of laches and has therefore waived its right to object to the provision, particularly as herein the City would have little, if any, bargaining power in reopener negotiations to obtain any cost saving provisions.

The City also contends an arbitrator does not have the jurisdiction to determine the lawfulness of the last sentence of Section 12.01. The City points out that the Union has the burden of proving that this sentence is unlawful. The City argues that while Section 23.01 of the collective bargaining agreement identifies several items for which there will be no discrimination, marital status is not among the listed items. The City stresses that a grievance is a matter involving the interpretation, application or enforcement of the agreement's terms. The City concludes that since marital status is not listed as a item of discrimination the Arbitrator does not have jurisdiction to make such a determination. The City also points out the parties have a procedure to use when there is a dispute about the working conditions not specifically referred to in the agreement.

The City also contends that arbitrators generally do not make determinations on matters involving the interpretation, application or enforcement of laws not referred to in the collective bargaining agreement. The City argues that Section 12.01 is clear and unambiguous and that it has followed this provision. The City sites several cases in support of its position that arbitrators do not generally make determinations on matters involving the interpretation, application or enforcement of laws and their impact on the collective bargaining agreement.

UNION'S POSITION

In its initial arguments the Union did not raise any positions concerning the Arbitrator's jurisdiction to determine whether a provision of the collective bargaining agreement is illegal. In its reply brief the Union asserts that it is well established that an arbitrator's authority is solely derived from the collective bargaining agreement. The Union asserts that the Wisconsin Supreme Court has explicitly held that in Braatz that. . ."(h)ealth insurance is not excepted from th(e) prohibition (against marital status discrimination), expressly or implicitly.", and concludes nonduplication provisions are illegal. The Union also argues that the collective bargaining agreement specifically states that if any provision is found to be in violation of the law the parties are to immediately meet and negotiate to find a satisfactory solution. The Union contends the Arbitrator is being asked to interpret and apply the agreement, not to pass judgement on the nonduplication provision because the courts have already done so. The Union also argues that the Article 4.01 of the collective bargaining agreement grants the Arbitrator the power to review and enforce the provisions of the against the parties who have agreed to be bound by it. The Union concludes that this is precisely what the Arbitrator is being asked to do herein and that it therefore cannot be reasonably asserted the Arbitrator does not have jurisdiction in the instant matter.

CITY'S REPLY BRIEF

In its reply brief the City points out the Union failed in its initial arguments to address the issue of whether the Arbitrator has the jurisdiction to render a decision on the instant matter. The City reasserts the argument that the Arbitrator does not have the authority to determine whether the last sentence of Section 12.01 violates the Wisconsin Fair Employment Act. The City argues that the collective bargaining agreement defines a grievance as a matter involving the interpretation, application or enforcement of the terms of the collective bargaining agreement and points out that the Wisconsin

Fair Employment Act is not a term of the collective bargaining agreement. The City also points out that marital status discrimination is not listed in Section 23.01. The City also points out that the instant matter is a grievance arbitration proceeding not a lawsuit. The City argues the cases cited by the Union deal concerning the merits of the instant matter with standards a court of law applies when interpreting a statute, which have nothing to do with the function of an arbitrator determining whether or not a party has violated the terms of a collective bargaining agreement.

The City also stresses that the statues relating to discrimination on the basis of marital status are not clear and unambiguous with respect to the contractual provision in dispute.

DISCUSSION

The collective bargaining agreement in Section 23.01 specifically states that if a provision of the agreement is found to be in violation of any law the parties shall immediately meet to find a satisfactory solution to the issue in violation of the law. The fundamental question raised by the City is who or what determines that a provision of the agreement is unlawful. The Union, in effect, argues that such a determination has already been made by the Court in the Braatz decision. However, the provision contained in the Maple School District collective bargaining agreement is distinguishable from the last sentence in Section 12.01, i.e. Maple prevented duplication of benefits between different employers and the instant language concerns duplication of benefits when both of the spouses work for the same employer, i.e. the City. Therefore the undersigned cannot conclude the matter has already been decided by the Courts and that the instant language has been declared unlawful.

Section 23.01 of the parties collective bargaining agreement specifically states that there shall be no discrimination because of age, sex, race, religion, or national origin in violation of state or federal law. As the City has pointed out this provision does not contain the term "marital status". Thus the undersigned finds that the last sentence of Section 12.01 does not violate Section 23.01.

The collective bargaining agreement in Section 4.01 defines a grievance as a matter involving the interpretation, application or enforcement of the terms of the agreement. In order for the undersigned to determine whether the last sentence of Section 12.01 was unlawful, the undersigned would have to interpret the Wisconsin Fair Employment Act and would have to interpret the Courts decision in the Braatz case. While it is evidently clear the parties have given the Arbitrator the authority to interpret

the terms of their collective bargaining agreement, nowhere in agreement is there a provision which gives the Arbitrator the right to review existing laws or caselaw to determine if a provision of their collective bargaining agreement is unlawful. Absent such a specific provision or at a minimum an agreement by the parties at the onset of a hearing to give the arbitrator such authority, the undersigned concludes the parties' collective bargaining agreement does not give an arbitrator the jurisdiction to determine whether a specific provision of the agreement is unlawful.

Therefore, based upon the above and foregoing and the testimony, evidence and arguments presented the undersigned concludes that an arbitrator does not have the jurisdiction to determine whether the last sentence of Section 12.01 is unlawful. Therefore the undersigned will not address the merits of the matter. The grievance is denied.

AWARD

The collective bargaining agreement does not give an arbitrator the authority to determine whether a provision of the collective bargaining agreement is unlawful. The grievance is dismissed.

Dated at Madison, Wisconsin this 12th day of November, 1993.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator