BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration<br>of a Dispute Between<br><br>AFSCME LOCALS 990 (COURTHOUSE AND SOCIAL SERVICES CLERICAL EMPLOYEES) AND 1392 (INSTITUTIONS)<br><br>and<br><br>KENOSHA COUNTY | Grievances numbered<br>92-990C-008 and<br>92-1392-012<br>(health/dental<br>insurance for<br>married employees who both work for the County)<br><br>WERC Case 134<br>No. 49267<br>MA-7881 |

Appearances:

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, PO Box 624, Racine, WI 53401-0624, appearing on behalf of the Union, with briefing by Mr. Bruce F. Ehlke, Attorney at Law, and Ms. Donna L. Ginzl, Law Clerk, Lawton & Cates, S.C., 214 West Mifflin Street, Madison, WI 53703-2594.

Mr. Mark F. Olson, Attorney at Law, Davis & Kuelthau, S.C., 111 East Kilbourn, Milwaukee, WI 53211, and Mr. Brooke E. Koons, Personnel Director, appearing on behalf of the County, with Mr. Victor A. Lazzaretti, Attorney at Law, on the brief.

## ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Arbitrator to hear and determine a consolidated dispute concerning the above-noted grievances being arbitrated under the grievance arbitration provisions of the 1992-94 Local 1392 Institutions collective bargaining agreement and of the 1993-95 Local 990 Courthouse and Social Services Clerical collective bargaining agreement. (The two Locals are jointly referred to as the Unions, and those two agreements are jointly referred to as the Agreements.) The Local 990 Clerical agreement for 1990-92 was also made a part of the record to establish the Arbitrator's authority for the entire pendency of the grievances.

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the Kenosha County Courthouse in Kenosha, Wisconsin, on September 30, 1993. The hearing was transcribed, and the transcript constitutes the official record of the testimony and arguments presented at the hearing. The parties submitted briefs and reply briefs. Briefing was completed on January 26, 1994, marking the close of the hearing.

ISSUES

At the hearing, the parties authorized the Arbitrator to fashion the statement of issues for determination with the benefit of their following respective proposed formulations:

Union's Proposed Issues Statement:

> Is the County in violation of Article 18 of the agreements between itself and Local 990, courthouse and social services clerical, and Local 1392, institutions, by not providing hospital, surgical, major medical and a dental policy to all employees? And further, by failing to provide said insurance coverages to married employees on a non-discriminatory basis? If so, what is the appropriate remedy?

County's Proposed Statement of the Issues:

> Did the County violate the terms of Section 18.1 of the respective contracts between Kenosha County and Local 990 and Local 1392 when the County did not provide County employees who are married to each other with two family health and dental insurance plans? If so, what is the appropriate remedy?

The Arbitrator frames the ISSUES for determination in this case as follows:

> 1. Did the County violate Art. 18 of the Agreements by prohibiting married employes both of whom work for the County from receiving two family plans for health and dental insurance?
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> 2. Did the County violate Art. 18 of the Agreements by otherwise limiting married employes both of whom work for the County to one family plan for health and dental insurance as their only option?
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> 3. Does the Agreement authorize the Arbitrator to decide the merits of the Union's contentions that the County has violated with the marital status discrimination provisions of the Wisconsin Fair Employment Act (WFEA) by the manner in which it provides health and dental insurance for married employes both of whom are employed by the County.
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> 4. If 3 is so, did the County violate the marital discrimination portions of the WFEA by the manner of in which it provides health and dental insurance to married employes both of whom work for the County?
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> 5. If either 1, 2 and 4 or any of them are so, what is the

appropriate remedy?

PORTIONS OF THE AGREEMENTS

[language common to both Agreements:]

ARTICLE III - GRIEVANCE PROCEDURE

. . .

The authority of the arbitrator shall be limited to the construction and application of the terms of this Agreement and limited to the grievance referred to him for arbitration; he shall have no power or authority to add to, subtract from, alter or modify any of the terms of this Agreement. The decision of the arbitrator shall be final and binding upon the Union and County.

. . .

ARTICLE XVIII - INSURANCE

Section 18.1. Hospital-Surgical.

[Local 1392 language:] For the duration of this Agreement, the County shall provide a comprehensive hospital-surgical-major medical coverage policy and a $25 deductible dental plan. Active employees will have the option of choosing one of the two plans outlined below. Said option must be executed during the open enrollment period which will last for one month, from October 1 through October 31 of the current year.

[Local 990 language:] Except as hereinafter provided, for the duration of this Agreement the County shall provide a comprehensive hospital-surgical-major medical coverage policy and a $25 deductible dental plan. The employee will have the option of choosing one of the two plans outlined below. Said option must be executed during the open enrollment period which will last for one month, from October 1 through October 31 of the current year.

[For purposes of this case, the balance of Art. 18 in both Agreements is materially the same; that from the Local 1352 Agreement is set forth below.]

(a) For employees enrolled for coverage for the employee only---the full premium cost of the coverage.

(b) For employees enrolled for coverage for the employee and his/her dependents--

-the full premium cost of the coverage.

(c) During the life of this Agreement, the County agrees to maintain hospital-surgical-major medical and dental coverage at levels equivalent to coverages presently in effect, and to improve such coverage where possible.

(d) An employee who becomes totally disabled due to work connected injury or illness shall continue to receive coverage paid by the County during such period of total disability until such employee becomes eligible for coverage under any present or future federal hospital-surgical-major medical insurance plan;

(e) An employee who is out due to illness shall continue to receive coverage paid by the County for six (6) months after such employee exhausts his Pay Maintenance Plan benefits. Such employee can continue coverage for an additional six (6) month period by paying, in advance, to the Personnel Department the monthly premium for his coverage.

(f) PLAN ONE. (Standard Plan - current Retirees Only) This health insurance plan shall incorporate a major medical deductible of $100/$300, 80% (County)-20% (Employee) on next $10,000, including outpatient diagnostic and x-ray, supplemental hospital and emergency medical benefits.

(g) PLAN TWO. (Pyramid Plan) This health insurance plan shall incorporate an overall policy deductible of $100.00/single, $300.00/family with an 80%/20% split on the next $3,000, (80% County/20% Employee). The former deductible of $100.00/$300.00 with an 80%/20% split on the next $10,000.00 (major medical) has been eliminated.

Additional provisions of the plan are listed on Appendix "D" to this Agreement which is attached hereto and incorporated by reference herein.

(h) PLAN THREE. (Flex Plan) This health insurance plan shall incorporate an overall policy deductible of $200.00/single, $600.00/family with an 80%/20% split on the next $5,000, (80% County/20% Employee). Additionally, provisions of the plan are listed on Appendix"E" to this Agreement which is attached hereto and incorporated by reference herein.

(i) Active employees shall no longer be eligible for the Standard Plan. Any standard plan deductible and co-pay dollars paid by the employee in 1992 will be credited to the plan to which the active employee changes from the Standard Plan.

(j) Current retirees on the Standard Plan may remain on the Standard Plan but can

switch to the Pyramid Plan at open enrollment. Retirees cannot be on the Flex Plan. Current retirees who switch to the Pyramid Plan cannot switch back to the Standard Plan. New retirees are only eligible for the Pyramid Plan.

(k) Open enrollment opportunity to be offered annually to active employees and to retirees, (except retirees already on the Pyramid Plan).

(l) Increase the Flex Plan amounts for orthodontia from $800 to $1,000 and for physical exams, etc., from $100 to $200.

(m) Incorporate any improvements in active or retiree health insurance, when and if and to the extent that such are granted to any other group(s) of county employees.

(n) Employees who begin participating in the Flex Plan after July 1 of a given year will have 50% of the flex account and physical exams account for that year.

Section 18.2. Retirees. Employees who retire after January 1, 1979, who are sixty (60) years of age and have had fifteen (15) or more years of continuous employment with the County immediately preceding retirement, shall retain hospital-surgical-major medical and dental coverage at no cost to the employee. If the employee was covered by a family policy at the time of retirement, he/she shall be eligible to retain such family coverage. The County's premium obligation shall terminate when the employee becomes eligible for Medicare. However, if the employee decides to purchase supplemental Medicare benefits, he/she shall pay the cost of such coverage.

For employees not covered by the preceding paragraph, during the duration of the Agreement, the County agrees to include retiring employees in the group for which the County shall negotiate a comprehensive hospital-surgical-major medical coverage policy including dental coverage. Retiring employees may voluntarily continue the hospital-surgical-major medical and dental coverage. Each retired employee who elects to continue said coverage shall pay the entire cost of said coverage.

Any retiring employee electing to carry said coverage after retirement shall so notify the Personnel Department in writing at least thirty (30) days before the effective date of his/her retirement. Said retired employee shall also be required to pay the monthly premium for said coverage to the personnel Department one (1) month in advance.

Retiring employees for the purposes of this provisions are defined as any employee who retires during the duration of this Agreement.

Section 18.3. Meetings with Insurance and Administration Committees.

Representatives of the Union shall be permitted to meet with the Insurance and Administration Committees of the County Board annually to discuss the insurance program and the costs of such insurance program.

Section 18.4. Life Insurance. The Wisconsin Group Life Insurance plan shall be continued. the County will pay the full premium required by the Plan.

[The Appendices referred to in 18.1.(g) and (h), above, read as set forth on the following two pages]

BACKGROUND

Prior to the filing of the grievances giving rise to this proceeding, Union Staff Representative and County Personnel Director Brooke Koons exchanged correspondence in 1991 on the subject of "Insurance Coverage of County Employees Represented by AFSCME" as follows. Maglio wrote Koons on March 22, 1991, stating,

> I've recently learned that the County may be denying certain County employees represented by AFSCME their contractual right to participate in and receive insurance coverage and benefits if s/he has a spouse who also works for the County.
>
> Is this true? If so, which County employees represented by AFSCME are affected? When did this denial of participation begin?
>
> It is the position of all AFSCME units in Kenosha County that insurance coverage, benefits and participation is available to all employees per their respective labor agreements. Please respond in writing.

Koons responded by letter dated April 2, 1991 as follows:

> I am in receipt of your letter dated March 22, 1991, relative to insurance benefits for employes whose spouse also works for Kenosha County.
>
> Kenosha County has maintained the position, through consultation with legal counsel and our insurance consultant, that it is discriminatory to provide double health insurance coverage to a family when both spouses work for the County when the same level of benefits are not available to a single employee of the County. Therefore, based on the advice of our consultant and legal counsel, we have continued to deny double family coverage for married employees working within Kenosha County.
>
> It has been, and continues to be the County's position that insurance coverage will not cover the same individual twice. I hope this answers your concerns.

Maglio responded on April 15, 1991, asking how long the County has maintained the position referred to by Koons and asking for the written legal and consultant advice referred to in Koons letter. Koons responded on April 18, 1991 that the opinion has been verbal so that there are no copies available to distribute and that "To the best of my knowledge, the County has maintained this position for as long as the County has offered health insurance." Maglio

responded on April 25, 1991 that the Unions involved were conducting research on the matter and "that as the issue is on-going, this investigative time poses no procedural issue. We will notify you with our position once we are comfortable that all needed information has been discerned."

The grievances giving rise to this proceeding both identify the date of the alleged infraction as "Ongoing." The Local 1392 grievance dated October 13, 1992, states "County is not affording all members of the unit Health and Dental coverage in violation of Sec. 13.1 and is further discriminating against said members because of their marital status; identifies Sec. 18.1 as the section violated; and requests that the County "Follow contract between Local 1392 and Kenosha County. Cover all members of the Union with Health and Dental Benefits per Sec. 18.1. Make employees whole for any costs incurred as a result of the violation." The Local 990 Clerical grievance dated October 19, 1992, states "Kenosha County is not affording all members of the unit health and dental coverage in violation of Section 18.1 of the labor agreement and is further discriminating against said members because of their marital status; identifies the violated sections as "Section 18.1 of the current labor agreement and any other article or section which may apply."; and requests that "all members be afforded health and dental coverage, irregardless of their marital status."

The grievances and three others (including an employe termination) were held in abeyance by written agreement dated December 16, 1992, which agreement, by its terms was "in no manner [to] mitigate or reduce any and all monetary claims sought by said local unions." By February 8, 1993 letter, Maglio confirmed phone conversations whereby the parties agreed to hold the two instant grievances in abeyance and to consolidate the two into one dispute for grievance arbitration purposes.

The matter was ultimately submitted for arbitration as described above. At the Arbitration hearing, the parties stipulated as follows:

> 1. There are three insurance plans available to County employees covered by these collective bargaining agreements. One reference is the Standard insurance plan, one as the Flexible Spending plan, and one as the Pyramid plan. The Standard plan is not available to members of these units who are actively employed by the County, but is available to those retired members of the bargaining units.
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> 2. There is no issue that the manner in which these grievances were presented and processed makes them procedurally defective. There is a contention or potential contention on the County's part that grievance arbitration may not be the appropriate forum in which the determination of the issues presented is to be made. The Union is not contending that the agreement as to the absence of procedural defects has any bearing on the validity or lack of validity of the County's substantive arbitrability concern.

> 3. Only in cases involving married couples who both work for Kenosha County does the County preclude dual insurance policy coverage. The County does not preclude insurance policy coverage to each individual County employee, parent, and dependents where applicable, in any other familial relationships.
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> 4. Grievances 92-990C-008 and 92-1392-012 are the grievances before the arbitrator in this matter.
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> 5. Joint Exhibit 16 represents married couples who both work for Kenosha County. The parties listed may not be all inclusive. The person whom the insurance policy is issued to is identified with an asterisk. [That list contains 17 married couples County-wide, with only one of the two identified with an asterisk; it also includes one couple "engaged to be married" with both employes identified with an asterisk. There were 11 Local 990 Clerical employes and one Local 1392 employe among the 17 couples on the County-wide list].
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> 6. The Agreements to which the parties' proposed statements of issues refer include both the 1990-92 and 1993-95 Local 990 agreements (as well as the 1992-94 Local 1392 agreement.)

At the hearing, the Union stated the relief it was requesting in this matter as follows:

> The remedy that we seek is that the County provide to each employee within the bargaining units, and any other AFSCME bargaining units for that matter, with insurance policy coverage, issued in the name of the employee involved. If in fact that particular employee is eligible for dependent coverage, and in fact has legal dependents that that policy be on a family basis. [tr.13]

The Union rested its case on the basis of the parties' stipulations and the receipt of numerous joint exhibits. The County presented testimony from Koons and County insurance consultant Andrew Serio. The record evidence is variously referred to in some detail in the summaries of the parties' POSITIONS and in the DISCUSSION, below.

POSITION OF THE UNION

The Agreements both provide, "the County shall provide a comprehensive hospital-surgical-major medical coverage policy and a $25 deductible dental plan," and that "Active employees" or "The employee" "will have the option of choosing one of the two plans outlined below." That language clearly and unequivocally requires the County to provide that insurance coverage to all of its employes. Neither past practice nor the non-duplication policy contained in the County's health plan book permit the County to deviate from the unambiguous

meaning of the Agreements. Past practice would be relevant only if the contract language were silent or ambiguous. Citing, City of Madison v. AFSCME Local 60, 124 Wis.2d 298 (CtApp, 1985). The County's various employee insurance handbooks were not bargained with the Unions, so no matter how widely they were distributed, they are not a part of the Agreements. If the County wanted a non-duplication exception to the requirement that all employes be provided with health insurance coverage, then it should have proposed and bargained for such language in the agreement, and it has failed to do so.

In any event, the County's non-duplication policy cannot be given effect by the Arbitrator because it constitutes illegal discrimination in regard to terms, conditions or privileges of employment on the basis of marital status under Secs. 111.312 and 111.322 of the Wisconsin Fair Employment Act, citing, Braatz v. LIRC, 174 Wis.2d 286 (1993). In Braatz, the Wisconsin Supreme Court held that a school district's collective bargaining agreement non-duplication provision requiring a married employe whose spouse is eligible for family coverage at his/her place of work to choose the district's policy or the spouse's, but not both, constituted unlawful marital status discrimination because single employees were allowed more choices than married employes. The County's non-duplication policy similarly precludes some employes from enjoying benefits solely on the basis of their being married to another County employe. There is no exception to the statutory prohibition against marital status discrimination for an employer who employs both spouses, and none can properly be implied under the Sec. 111.31(3) mandate requiring that the Act be liberally construed.

In its reply brief, the Union advances the following additional arguments. The District's reliance on the Bloomer Schools award is misplaced because that case involved contract language far less clear than that in the instant Agreements. The Union cannot be barred by the doctrines of waiver, estoppel or laches because: the Unions did not intentionally and voluntarily relinquish a known right; there is a strong presumption against oral waiver of rights set forth in a written contract, citing, Bell Aircraft Corp., 24 LA 325, 327 (Somers, 1955); the mere failure to exercise a right (or to grieve prior violations of it) does not waive the right to challenge subsequent violations, citing, Bendix Corp., 76 LA 493 (Cantor, 1981); and there can be no estoppel where, as here, the County has not shown that it experienced loss, injury, damage or prejudice by relying on the Union's acquiescence in its non-duplication policy, citing, Fox Manufacturing Co., 47 LA 97, 101 (A.R. Marshall, 1966). Arbitrators should generally avoid interpretation, application or enforcement of laws not specifically referred to in the agreement. However, where, as here, the contract is clear and unambiguous, the Arbitrator should not reach out unnecessarily to find an ambiguity which, in turn, permits the Arbitrator to interpret the Agreement in a manner violative of the Wisconsin Fair Employment Act.

Accordingly, the Arbitrator should grant the grievances and order the County to cease and desist from denying employees whose spouses are also employed by the County, health and dental insurance coverage.

POSITION OF THE COUNTY

The Agreements do not provide married couples who both work for the County with two family health and dental plans. Since at least 1978 (and probably since it has been providing such insurance to employes) the County has never provided two family health or dental insurance plans to County employes married to one another. Even though that longstanding practice has been clear, uniformly applied, and known to the Union, there has been no grievance and no bargaining table proposal seeking to change that practice.

Since becoming self-insured in 1978, the County has repeatedly published and made available to all County employees a handbook and (later) Plan booklets describing the terms and conditions of the insurance plans that have been available. Those publications have variously made it clear that couples employed by the County were not eligible for two family health and dental insurance plans, by stating:

> A dependent eligible for coverage as an eligible employe is not also eligible as a dependent. If both husband and wife are covered under this plan, children may be covered as dependents of one person but not both. [insurance handbooks, 1978, 1982 and 1984]
>
> or
>
> If you qualify as both an eligible employee and an eligible dependent, you will be considered for coverage only as one or the other but not both. If both a husband and wife are eligible as employees, either may elect to cover their spouse and children, but not both. [Standard and Pyramid Plan booklets]
>
> or
>
> You may not participate in this plan as an employee and as a dependent, and your dependents may not participate in this plan as a dependent of more than one employee. [Flexible Spending Plan booklet]

Given those various publications, the Union cannot argue that it was not aware of the longstanding practice of not providing two family plans to married couples working for the County. The absence of any grievance over the period from 1978 to 1992 amounts to Union acknowledgement that the County has been properly interpreting the Agreement. The principles of waiver and estoppel bar the Union from now claiming that such couples are entitled to two family plans. Citing, Bloomer Schools, (unpublished, J. Buffett, 6-29-93) and other awards. The Union's failures to attempt to alter the known past practice or even to raise the issue at the bargaining table further supports the conclusion that the Union has effectively agreed to accept continuation of that practice.

The record shows that the Union's interpretation of the Agreement would cost the County

$132,000 per year for the couples currently working in the instant bargaining units. This consists of additional premiums, loss of co-payments and possible loss of deductibles as one spouse's family plan picks up the deductibles and co-payments of the other spouse's family plan pursuant to the County's coordination of benefits (rather than carve-out) arrangement. In addition, because the County's stop-loss carrier will only cover one plan maximum per couple, the County would be exposed to at least an additional $15,000,000 in claims above applicable individual lifetime plan maximums, for which excess the County is uninsured and unfunded. It is inconceivable that the Union could have obtained a benefit of this magnitude without ever having raised the issue at the bargaining table.

Arbitrators should generally avoid making determinations on matters that involve the interpretation, application or enforcement of laws not specifically referred to in the collective bargaining agreement. (Citing several awards). There is nothing in the Agreements that gives the Arbitrator the authority to interpret state discrimination laws or case law or to rely on them in deciding this case. The Arbitrator should therefore refuse to decide the statutory discrimination issue raised by the Union in this case.

In any event, denying duplicate family insurance coverage to married employes who both work for the County does not constitute unlawful discrimination. Braatz is easily distinguishable from the instant case, citing, City of New Berlin (unpublished award, E. Bielarczyk, 11-12-93). The Maple School District teachers labor contract in Braatz provided that a married teacher whose spouse is eligible for family coverage at his/her place of work shall have the option of carrying either the district's policy or the spouse's policy but not both. The contract there did permit both employes to carry single plan insurance from their respective employers. Unlike Braatz, here both spouses are employed by the same employer. The Court noted that the complaining employes in Braatz were forced to choose between being insured under their own or their spouse's insurance, creating potential lapses or limitations on insurance coverage in the event of death or divorce. In contrast, "there is no forced choice for married employees who both work for the County. Both the employee and his or her spouse are provided with benefits under the County's health insurance, under the policy which is provided to them, as a family, by the County. In case of death or divorce, neither spouse would lose his or her eligibility for continuous coverage in the County plan." County Brief at 27. In addition, although only in dicta, the Braatz Court distinguished the State of Wisconsin's insurance plan policy from that found unlawful in Braatz on the grounds that "The State's policy only applies where both spouses are employed by the state. Maple's policy applies no matter where the employee's spouse is employed." The State's policy was described by the Court as, "If both spouses are state employees and one spouse elects family coverage, the state provides coverage to the other spouse as a dependent but prohibits that spouse from electing other coverage." Like the County's policy, the State's does not provide couples in the State's employ with two family plans. It would follow that the County's policy, like the State's, is not unlawful.

Indeed, if the County were ordered to provide dual family coverage for married employee couples, thus enabling them to avoid co-payments and perhaps deductibles, as well, the County would be inundated with grievances and claims that it is thereby discriminating in violation of law

and contract against all other County employes who are not similarly relieved of those required out-of-pocket costs.

In its reply brief, the County advances the following additional arguments. Section 18.1 does not address the question of whether the County is required to provide and pay for two separate family insurance policies for married employees who both work for the County. It is does not constitute clear and unambiguous language on that subject.

The deductible and co-insurance provisions of the Agreement were added to the Agreements in the last two rounds of bargaining. Despite the detailed attention to health insurance involved in those negotiations, the Union made no mention of or proposal for duplicate family coverage. Instead, it chose to seek that benefit through the grievance procedure rather than at the bargaining table.

Finally, Braatz did not hold that all non-duplication insurance provisions violate the Wisconsin Fair Employment Act. Whether married or single, all County employes are fully covered by County health insurance; it just does not cover them twice. The potentially undesirable or illegal effects of the provision at issue in Braatz are not present here. The County's policy does not violate the Act.

For all of those reasons, the Arbitrator should deny the grievance.

## DISCUSSION

### Rationale for the Arbitrator's Statement of the ISSUES

In framing the ISSUES, the Arbitrator concludes that, viewed in the context of the record as a whole, the instant dispute has been limited to the insurance entitlements of employes who are married to another County employe. Both of the parties' proposed statements focused on Art. 18 of the Agreement, so that is the focus of the Arbitrator's statement, as well, except as regards the question of the scope of the Arbitrator's authority.

The Union's correspondence, grievances and relief request at hearing fairly put at issue not only whether such couples are entitled to two family plan policies, but also whether each of the employes is entitled to separate insurance policy treatment even if they are not entitled to two family plan policies. ISSUE 2 has therefore been included to encompass that additional question. ISSUE 3 has been included because the County has argued that the Arbitrator would exceed his authority by addressing the merits of the Union's marital status discrimination claims. ISSUE 3 refers to the Wisconsin Fair Employment Act because the arguments presented by the Union make it clear that the Union's claim of marital status discrimination rests exclusively on the provisions of that Act.

### ISSUE 1 -- Prohibition Against Two Family Plans

An answer to ISSUE 1 is not provided by clear and unambiguous Agreement language. The language of Art. 18 (including the insurance Appendices incorporated by reference in 18.1.g. and h.) does not unambiguously address the question of whether married couples both of whom are employed by the County are entitled to two family plans.

Both the Pyramid and Flexible Spending Plan Appendices provide for co-insurance and deductibles payable by the employee up to specified out-of-pocket maximums. The Union has not taken issue with Koons' testimony that, under the County's existing coordination of benefits procedures, two family coverages would reduce or eliminate the couple's co-insurance obligations, double the lifetime individual maximums and perhaps also reduce or eliminate the couple's deductibles. Article 18 and the incorporated Appendices do not except two-employe married couples from the co-insurance or the lifetime maximums or the deductibles. The Arbitrator therefore finds it unclear from the face of the insurance language in Art. 18 and incorporated Appendices whether the parties mutually intended that two-employe couples would be granted exceptions to some or all of the expressed and unqualified requirements and limits in those regards. Thus, while there is no language excluding both employes in two-employe couples from the right to opt for family coverage, there is also no language relieving them from three significant requirements and limitations that entitlement to two family plans would apparently defeat or seriously undercut. Resort to evidence outside the four corners of the Agreement to resolve that uncertainty and ambiguity is entirely appropriate.

The Arbitrator finds the County's past practice evidence to be both sufficient and compelling to the effect that two-employe couples are not entitled to two family coverages. The record establishes that no such couple has been provided with two family coverages since at least 1978 and perhaps for the even longer period during which the County has been providing health insurance to employes. The record also establishes that handbooks and booklets published and variously distributed or made available at various times over the years by the County clearly put the employes on notice that the County's non-provision of two family plans to two-employe couples has been the longstanding and uniform policy in effect County-wide. That evidence is uncontradicted and sufficient to reliably indicate that the parties did not mutually intend that two-employe couples be eligible for two family coverages. The absence of grievances or bargaining table statements or proposals taking issue with the practice lends corroborating support to the same conclusion.

In sum, the record evidence clearly establishes that the County has not permitted two-employe couples to receive two family plan coverages. It is also clear, however, for the reasons noted above, that the County has not thereby violated Art. 18 of the Agreements.

ISSUE 2 -- Otherwise Limiting Two-Employee Couples
to One Family Plan as Their Only Option

The record indicates that the County is limiting two-employe couples to one family plan between them as their only option. Thus, the evidence shows that: only one employe in each of the 17 two-employe couples on the Joint Exhibit 16 was identified by asterisk as "[T]he person whom the insurance policy is issued to"; only one employe in such couples was listed as an

employe (and the other as a dependent) on County Exhibit 41, a printout regarding "all active and terminated employees and dependents who are/were covered under the Kenosha County Health Care Plan"; the County asserts in its briefs that its non-duplication policy is the same as the State of Wisconsin's described in Braatz; and Koons stated in his December 11, 1992 memorandum to the Administration Committee that

> The intent of the parties for as long as the County has provided health insurance, is that there is one family plan available and that if both husband and wife work for the County one spouse gets family coverage and picks up the other on the plan as a dependent which is what is contemplated under the insurance section of the labor agreement in subparagraph (b).

Thus, while the County's prohibition against two family plans does not violate Art. 18, there remains the question of whether the County is otherwise violating that Article by limiting two-employee couples to one family plan rather than permitting them to have two separate policy coverages consisting either of single plans or of one single plan and one family plan with the spouse not treated as a dependent on the family plan.

The Arbitrator finds the language of the first three sentences of Art. 18 to clearly and unambiguously answer that question. Those three sentences clearly and unequivocally say and mean that each "employee" ("Active employee" in the Local 1352 agreement) is to "have the option of choosing one of the two plans outlined below," i.e., the Pyramid Plan or Flexible Spending Plan. Allowing an employe and her/his spouse the choice of one plan for both of them does not afford each employe the plan choice clearly and unequivocally provided for on the face of Sec. 18.1. It follows that the County must allow each employe in a two-employee couple to opt for the plan of his or her choice (Pyramid or Flexible Spending) and allow each such employe to enroll in single or family coverage so long as two family plans are not provided and so long as neither employe is provided both dependent and employe coverage. Providing insurance to members of two-employe couples in that manner would not undercut the co-insurance, lifetime maximums or deductibles set forth in the insurance Appendices incorporated by references in Art. 18.

Because the Arbitrator finds the meaning of the Agreement clear and unambiguous in the above regards, resort to past practice or bargaining history is not necessary or appropriate. However, even if evidence outside the Agreement were considered on this point, it would not reliably establish that the parties have had a mutual understanding concerning the answer to ISSUE 2. For, although the language of the County's insurance handbooks and booklets clearly rules out two family plans, it does not clearly rule out two single plans or one single and one family plan for two-employe couples if between them the two plans avoided duplication of coverage of any individual by County insurance. In that context, the historical absence of grievances regarding two-employe couples' insurance does not support precluding the Union from seeking to bring the County into compliance with the clear requirements of the Agreements as regards this particular aspect of the instant grievances. The absence of proposals to alter the Agreements is also not fatal

to this aspect of the instant grievances since, subject to the limits against non-duplication noted above, the language of the Agreement already clearly and unambiguously entitles each employe to opt for the plan of his or her choice.

In conclusion, as noted regarding ISSUE 1, Art. 18 permits County to refuse to provide such couples with two family plans and permits the County to refuse to provide either of the employes in such couples with dependent and employe coverage. However, the County is violating Sec. 18.1 by not permitting each employe in such couples to opt, subject to those conditions, for the plan of her/his choice regardless of the spouse's plan selection. The Arbitrator also concludes that Art. 18 requires the County to allow two-employe couples to opt either for: one family plan covering both employes and any children; or two single plans; or one family plan (covering children but not the spouse as dependents) and one single plan.

For the County to have a non-duplication arrangement that in all respects parallels that of the State of Wisconsin as described in Braatz, the County will need to negotiate changes from the language of Sec. 18.1 which the Arbitrator has found herein to clearly and unequivocally entitle each employe to opt for the plan of his/her choice.

ISSUE 3 -- Arbitrator's Authority
Regarding Marital Discrimination Claims

The Arbitrator's authority is limited in Sec. 3.1.,

> . . . to the construction and application of the terms of this Agreement and limited to the grievance referred to him for arbitration; he shall have no power or authority to add to, subtract from, alter or modify any of the terms of this Agreement. . . .

No Agreements language has been cited by either party or found by the Arbitrator which refers in so many words to marital status discrimination or to discrimination prohibited by state law. However, the Management Rights clauses in Sec. 1.2 of the Agreements include provisions that, ". . . The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. . . . " Unlike the contract language in the City of New Berlin arbitration cited by the County, that quoted language does not exclude marital status discrimination by not including it in a listing prohibiting "discrimination becuse of age, sex, race, religion, or national origin in violation of state or federal law." The Arbitrator therefore has the additional authority under Sec. 3.1 to consider whether statutory provisions and case law are useful as guidance regarding the proper construction and application of the term "discriminatory manner" in Sec. 1.2.

Although neither of the grievances specifically alleges a violation of Sec. 1.2 or of Art. 1, the Local 1352 grievance does assert a violation of "any other section or article [of the current labor agreement] which may apply," technically authorizing the Arbitrator, consistent with Sec. 3.1, to consider that Management Rights language in this consolidated proceeding. However,

because neither party has presented arguments regarding the meaning of "discriminatory manner" in that provision, the Arbitrator will avoid construing or applying that Management Rights language in this case unless it is essential to do so, even though he finds that he technically possesses the authority to do so.

ISSUE 4 -- Merits of Marital Discrimination Claims

The Arbitrator finds the Union's contentions regarding marital status discrimination based on the WFEA and the Braatz decision to be unpersuasive as guidance to the proper construction and application of the terms of the Agreements in this case. The Braatz case is clearly distinguishable from the Kenosha County situation because it involved contract language that prevented duplication of benefits between different employers, rather than limiting itself to avoiding duplication of benefits provided to married couples employed by the same employer. Indeed, as the County points out, the Supreme Court drew a distinction between the State of Wisconsin insurance plan and the unlawful Maple Schools provision on the grounds that "The State's policy only applies where both spouses are employed by the State. Maple's policy applies no matter where the employee's spouse is employed." Braatz, at 174 Wis.2d 286 at 294. The State plan commented upon by the Court in that case both prohibits two-employe couples from receiving two family plans and limits such employes to one family plan and no other coverage. Therefore, Braatz does not support, and at least in dicta undercuts, the Union's claims that arbitral interpretation of the Agreements so as to give effect to the County's non-duplication policy would endorse illegal marital status discrimination within the meaning of the WFEA.

Therefore the Union's contentions regarding marital discrimination do not persuade the Arbitrator either to alter his interpretations of Art. 18.1 regarding ISSUES 1 and 2, above, or to conclude that County violated the anti-discrimination language of Sec. 1.2 by prohibiting two-employe couples from receiving two family plans.

The Arbitrator's ISSUE 2 determination that the County violated the more specific language of Sec. 18.1 by the conduct described in the concluding paragraph of the DISCUSSION of ISSUE 2, above, makes it unnecessary to determine whether that conduct also violated the more general anti-discrimination language in Sec. 1.2.

Except to the extent necesssary above to construe and apply language of the Agreements, the Arbitrator has not determined whether the County has committed marital status discrimination within the meaning of the WFEA, and the Arbitrator has not in any way endeavored in this case to provide a remedy for any violation of the WFEA.

ISSUE 5 -- Remedy

When the Arbitrator asked at the arbitration hearing what relief the Union was seeking in this case, the Union response was as follows:

> The remedy that we seek is that the County provide to each employee within the bargaining units, and any other AFSCME

> bargaining units for that matter, with insurance policy coverage, issued in the name of the employee involved. If in fact that particular employee is eligible for dependent coverage, and in fact has legal dependents that that policy be on a family basis. [tr.13]

The Union's brief and reply brief and the Local 990 grievance essentially echo that request for prospective relief from any violations of the Art. 18 found by the Arbitrator. Consistent with those requests, the Arbitrator finds it appropriate to grant prospective relief, but only to the extent that the County has been found to have violated Art. 18. Because the Arbitrator finds the County's prohibition against two family plans to be consistent with and not violative of Art. 18 of the Agreements, no relief from that prohibition has been granted.

The Arbitrator does not find it appropriate to make any provision for the retroactive make-whole relief requested in the Local 1392 grievance. The Agreements provide for employes to exercise their insurance options during specified annual open enrollment periods. There is no showing that any particular two-employe couple requested and was denied two single or one single and one family coverage during the relevant open enrollment period. Moreover, the absence of grievances over the years preceding the initiation of this case further militates against any retroactive relief in this Award.

The Arbitrator has directed that the County provide the specified relief "during the 1994 and subsequent open enrollment periods and such other times after the 1994 open enrollment period when insurance options are customarily exercised." The Arbitrator has chosen to make the relief effective in that way to permit an orderly and uniform application of the terms of the Award and to conform to the open enrollment language in the first paragraph Sec. 18.1 of the Agreements. By "other times . . . when insurance options are customarily exercised" the Arbitrator seeks to deal with special situations such as newly hired employes who are married to another County employe, or County employes who become newly married to another County employe at a time other than the open enrollment period specified in Sec. 18.1.

By fashioning the remedy in terms of "each married employee . . . whose spouse works for the County," the Arbitrator is, of course, not to be understood to require the parties to disregard such limits on eligibility for insurance as that set forth in Sec. 19.3 of the Local 1392 Agreement which provides, "Regular part-time employees shall be eligible to receive fringe benefits after completion of their probationary period at Brookside Care Center."

The Arbitrator has not granted relief to employes beyond those in the bargaining units covered by the two Agreements because the Arbitrator has not been formally accorded authority beyond those particular bargaining units in this matter.

Neither party requested that the Arbitrator retain jurisdiction to resolve disputes about the meaning and application of the remedy provided in this case, and the Arbitrator has not done so. The Arbitrator would, of course, address any such dispute at the joint request of the parties.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. The County did not violate Art. 18 by its prohibition against married employes both of whom work for the County receiving two family plans.

2. The County did violate Art. 18 by otherwise limiting married employes both of whom work for the County to one family plan as their only option, because in so doing it failed to provide each of those employes the choice of plans required by Sec. 18.1.

3. Section 3.1 of the Agreements authorizes the Arbitrator to consider the WFEA and related case law only to the extent necessary to determine:

a. whether one proposed construction or application of the terms of the Sec. 18.1 of the Agreements would be illegal while a competing construction or application would not; and

b. whether the WFEA and related case law provide persuasive guidance regarding the meaning of the term "discriminatory manner" in Agrements Sec. 1.2.

4. The Union's WFEA marital status discrimination contentions are not persuasive as guidance to the proper construction and application of the terms of the Agreements in this case. Except to the extent necesssary to determine whether those contentions provided such guidance, the Arbitrator has not determined whether the County has committed marital status discrimination within the meaning of the WFEA. The Arbitrator has not endeavored in this Award to remedy any WFEA violation.

5. By way of remedy for the violation noted in 2, above, the County, its officers and agents, shall, during the 1994 and subsequent open enrollment periods and at such other times after the 1994 open enrollment period when insurance options are customarily exercised, permit each married employe in the bargaining units covered by the Agreements whose spouse works for the County:

a. to opt for whichever of the two plans available to active employes under Art. 18 the employe prefers; and

b. to further opt for family or single coverage so long as two family plans are not provided and so long as neither employe is provided coverage both as a dependent and as an employe.

c. First example: one of the employes in a two-employee couple with no children could opt for single coverage under the Pyramid Plan and the other employe could opt for single coverage under the Flexible Spending Plan or under the Pyramid Plan.

d. Second example: one of the employes in a two employee couple with children could opt for family coverage under the Pyramid Plan covering that employe and the children but not the spouse, and the other employe could opt for single coverage under either the Flexible Spending Plan or the Pyramid Plan.

e. Third example: one of the employes in a two employe couple with children could opt for family coverage under the Flexible Spending Plan for that employe and the children but not the spouse, and the other employe could opt for single coverage under either the Flexible Spending Plan or the Pyramid Plan.

f. The Union's requests for other or additional relief are denied.

Dated at Shorewood, Wisconsin
this 20th day of June, 1994 by Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator