BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MERTON SCHOOL DISTRICT EMPLOYEES UNION LOCAL 3833, AFFILIATED WITH DISTRICT COUNCIL #40, WCCME, AFSCME, AFL-CIO	Case 25 No. 50286 MA-8204
and	
MERTON SCHOOL DISTRICT	

Appearances:
Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. Robert W. Butler, Staff Counsel, Wisconsin Association of School Boards

ARBITRATION AWARD

Pursuant to a request by Merton School District Employees Union Local 3833, affiliated with District Council #40, WCCME, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by Merton School District, herein the District, the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission on January 25, 1994 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 2, 1994 at Merton, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on April 14, 1994.

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

ISSUES:

The parties stipulated to the following:

1. Did the District violate Article 14, Section 14.01 of the collective bargaining agreement by failing to retroactively pay the grievant the difference between eighty five (85) percent of the family plan premium and one hundred (100) percent of the single plan premium the District had previously paid?

2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

John Nettesheim, hereinafter the grievant, is a full-time, calendar year maintenance/custodial employe with the District. When the grievant was initially hired, he discussed with then District Administrator Robert Gilpatrick the level of health insurance benefits which would be provided. Administrator Gilpatrick informed the grievant that the District offered both single health insurance coverage and family health insurance coverage, but that the District only paid toward the cost of the single health insurance premium. The grievant decided to take the family plan and the difference between the cost of the single health insurance premium paid by the District and the cost of the family health insurance premium was thereafter deducted from his paycheck.

The parties' initial collective bargaining agreement was concluded by Ms. Rose Marie Baron in Merton Joint School District No. 9, Dec. No. 27568-A, August, 1993. The Union's final offer was the award of the Arbitrator. Section 14.01 of the agreement was part of the tentative agreements and was not at issue per se in the interest arbitration proceeding.

The grievant was on the Union negotiating committee which agreed to the contract language set forth in Article 14, Section 14.01. The grievant testified that Union bargaining representative Michael J. Wilson informed him during bargaining that premiums for family health insurance would be paid retroactive to July 1, 1991. The grievant also admitted at hearing that the District never told him at any time material herein that they would pay eighty five (85) percent of the family health insurance premium on a retroactive basis.

Both District Administrator Bruce Connolly and School Board President Dean Dobbertin testified that they were members of the District's negotiating committee which agreed to the contract language set forth in Article 14, Section 14.01. They both testified that the mediator involved in the contract negotiations informed them that there would be no retroactive payment of health insurance premiums. They also indicated that at no time during negotiations with the Union did the District represent to the Union that family health insurance coverage would be offered on a retroactive basis. They also stated that at no time material herein during negotiations did the Union represent an intent that family health insurance be applied retroactively to the grievant or anyone else in the bargaining unit.

Section 14.01 was tentatively agreed to and initialed by the parties' principal representatives on September 24, 1992. The tentative agreement contract language in Section 14.01 reached on that date represents the present language in the collective bargaining agreement.

On November 4, 1992, Administrator Connolly wrote to Robert Butler, District Legal Counsel, with respect to the instant support staff negotiations. In that letter, Administrator Connolly raised three (3) concerns regarding Section 14.01:

. . .

> 2) 14.01 - The date needs to reflect our anniversary date and changes made in the interim. We cannot go back to a prior agreement level. Our current date is Sept. 1, 1992. Please make that change.
> 3) 14.01 - We still do not have official agreement on the open enrollment and amount of time open.
>
> 4) 14.01 - Last sentence 3rd paragraph need to remove "without restriction" to 30 days before or after open enrollment date.

. . .

On November 5, 1992, Administrator Connolly wrote to the insurance carrier "requesting an open enrollment period for our support staff based upon

the completion of negotiations or arbitration."

The grievant had family coverage at all times material herein and did not have to again enroll for family plan coverage after the settlement of the collective bargaining agreement.

By letter dated December 2, 1992, Union representative Wilson wrote to District Legal Counsel Butler as follows:

> Enclosed is a copy of the September 24, 1992, tentative agreement, first and second paragraphs of 14.01. As you can plainly read, the language as initialed, is identical to the language forwarded to you on November 9, 1992. What, if any changes in coverage are you attempting by revising the date from July 1, 1992, to September 1, 1992. Why are you now on hold with regard to the second paragraph? I would appreciate a prompt response.

The two costing exhibits submitted by the District at the interest arbitration hearing listed five individuals enrolled on single health insurance and no individuals enrolled on family health insurance. The Union did not object to the District's costing listing the designation of individuals receiving health insurance. The Union also did not present a costing exhibit at the hearing to indicate how the health insurance issue was to be interpreted under the tentatively agreed to contract language of 14.01 or to indicate that employes would be entitled to retroactive family health insurance premium payments under their final offer.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 14 - INSURANCE

> 14.01 Hospitalization and Surgical Insurance: The Employer shall pay the full premium cost of the single plan for all calendar year and school year employees who equal or exceed twenty (20) hours per week. The Employer shall pay eighty five (85) percent of the family plan for full-time calendar year and school year employees. Employees who equal or exceed twenty (20) hours per week during the calendar or school year, but less than full-time shall be entitled to the eighty

five (85) percent Employer contribution toward the family plan on a prorated basis. The level of benefits shall be based on the COMPCARE coverage available to employees on July 1, 1991.

Insurance coverage shall not be offered on a retroactive basis. There shall be an open enrollment period of fourteen (14) days following the implementation of this Agreement.

14.02 Life Insurance: The Employer shall provide a group term life insurance plan for employees who work twenty (20) or more hours per week based upon the next highest $1,000 of anticipated annual wages.

14.03 Dental Insurance: The Employer shall pay the full premium cost of the dental insurance plan for either single or family coverage, as appropriate, for all full-time calendar year employees. Part-time calendar year employees working twenty (20) or more hours per week shall be permitted to carry the dental insurance with the employee paying a prorated amount of the premium. School year employees shall receive the full single dental plan. The benefit level shall be the same as that available to the Teachers.

14.04 Long Term Disability Insurance: The Employer shall provide for each employee the WEAIT Long Term Disability Income Insurance plan. The full premium shall be paid by the Employer. The benefits will be paid by the Employer. The benefits will be equal to ninety percent (90%) of the employee's salary, and coverage shall begin after the sixtieth (60th) consecutive day of disability and continue until the employee is able to work or reaches the age of 65. This benefit shall be provided only to employees working sixteen (16) or more hours per week.

14.05 Change of Carrier: The Employer shall have the right to change the insurance carrier(s) provided the insurance coverage is equal to or better than the existing coverage.

14.06 Early Retirement: Employees who retire prior to age sixty-five (65) may continue to carry coverage under the group hospitalization and surgical insurance by paying the premiums for such insurance pursuant to the procedure required of the carrier.

14.07 Dental Insurance Enrollment: Employees who have been offered group dental insurance coverage and declined same, in order to now enroll, will need to provide evidence of insurability as a prerequisite to enrollment. The District will not bear the cost of preconditions for such employees.

New hires shall be entitled to enroll without regard to preconditions and shall not be required to provide evidence of insurability during the initial enrollment period. Bargaining unit employees who prior to the implementation of the first collective bargaining agreement who were never previously offered

group dental insurance coverage shall be treated the same as new hires for enrollment purposes for the first enrollment period following implementation of this Agreement.

. . .

ARTICLE 31 - SAVINGS CLAUSE

If any article or section of this Agreement or any addenda thereto shall be held invalid by operation of law or by a tribunal of competent jurisdiction, or if compliance with or enforcement of any article or section should be restrained by such tribunal, the remainder of this Agreement and addenda shall not be affected thereby.

ARTICLE 32 - DURATION

32.01 Term: This Agreement shall become effective July 1, 1991, and shall remain in full force and effect through and including June 30, 1994.

PARTIES' POSITIONS:

The Union basically argues that the contract language is clear and unambiguous and supports its position that the grievant is entitled to retroactive payment of the District's contribution toward the family health plan option.

The Union notes that the contract is for a specified term -- "shall become effective July 1, 1991 . . ." (Article 32 - Duration) -- and that the amount of the District's contribution is clearly specified -- "The Employer shall pay eighty five (85) percent of the family plan for full-time calendar year and school year employees." (Article 14 - Insurance). The Union rejects the District's reliance on bargaining history ("The Employer's exhibits do not demonstrate mutual understanding or a commitment on the Union's part to the Employer's proposition.") and/or the interest arbitration proceeding record as evidence of the parties' intent not to pay retroactive health insurance premiums and, in any event, argues that "if an agreement is not ambiguous, it is improper to modify its meaning by invoking the record of prior negotiations" citing Elkouri and Elkouri, How Arbitration Works, 4th Edition, p. 358 (1985) in support thereof. Also contrary to the District's assertion, the Union argues that the District did offer family health insurance coverage under its auspices as a benefit of employment to the grievant. Because the grievant carried family plan coverage in the period July 1, 1991, through the implementation of the parties' initial collective bargaining agreement, and because the agreement provided for retroactive payment of health insurance premiums by the District, and based on all of the foregoing argument, the Union requests that the grievance be sustained and the grievant be awarded $5,436.77, the amount representing 85% of the District's cost for his out-of-pocket expenses for family coverage during the time in question.

The District, on the other hand, maintains that bargaining history and past practice supports its position that no health insurance coverage was to apply on a retroactive basis. Regarding bargaining history, the District first argues since Section 14.01 provides that "coverage" will not be offered on a retroactive basis it follows that the premium payment will not be offered on a retroactive basis. The District adds that its bargaining representatives took this position at the bargaining table and that the grievant admitted on cross-examination "that the District had never told him that they would pay eighty five (85) percent of the family health insurance premium on a

retroactive basis." The District claims the manner in which the parties presented the cost impact of their respective offers in arbitration also supports its interpretation of bargaining history. In this regard, the District points out that under its costing of both offers the District listed five employes as being covered under the District's single health insurance plan and no employes covered under the family plan. The District also points out that the Union did not enter any evidence at the interest arbitration hearing to indicate the grievant should receive family health insurance coverage and premium payments on a retroactive basis and that the Union did not object at any time material herein to the District's characterization of the total cost of both side's offers.

With respect to past practice, the District points out that it had a policy on health insurance coverage for maintenance and custodial employes prior to the organization of the bargaining unit which entitled the grievant "to only single health insurance coverage from the District." The District acknowledges that the grievant was allowed to opt through the carrier for family health insurance as a "convenience" for the employe. However, the District concludes that since family health insurance was not provided by the District as a benefit or as renumeration for the employe the grievant is not entitled to any retroactive payment of the premium for the family plan.

Based on all of the above, the District argues that the grievance should be dismissed.

DISCUSSION:

The record is undisputed that the grievant is a full-time calendar year employe. The record also supports a finding that the grievant received family health insurance coverage through the District during the period of time in question. From July 1, 1991, through the end of September, 1993, the District paid the equivalent of the single plan premiums toward the grievant's family plan while the grievant made up the difference between the family plan and the single plan premium through payroll deduction.

The crux of this dispute is whether the grievant is entitled to retroactive payment of the District's share of the family plan premium. The Union argues that the grievant is entitled to retroactivity while the District takes the opposite position.

To answer the above question, the Arbitrator must first look at contract language and then bargaining history and past practice.

The District argues that the word "coverage" in Section 14.01 is synonymous with premium and as set out therein "shall not be offered on a retroactive basis." However, as pointed out by the Union, the words themselves have different meanings. 1/ In addition, the terms are used differently throughout Article 14. In this regard, the Arbitrator points out that even the District Administrator testified that he understood that there was a difference between coverage and premium as those terms are used throughout Article 14. Finally, since the parties expressly provided in Section 14.01 that insurance "coverage" would not be offered on a retroactive basis, the Arbitrator opines that if the parties had also intended no retroactivity for family plan premiums they would have so stated in a clear manner. Based on the foregoing, the Arbitrator rejects this argument of the District.

Even though parties to an agreement disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce the clear

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1/ The American Heritage Dictionary, Second College Edition, (1985) page 334 defines coverage as "2. The extent of protection afforded by an insurance policy." Premium is defined on page 978 as "5. The amount paid or payable, often in installments, for an insurance policy."

meaning. 2/ As pointed out by the Union, the contract language in the instant case is clear and unambiguous. Article 32 - Duration provides for a specified term: "This Agreement shall become effective July 1, 1991, and shall remain in full force and effect through and including June 30, 1994." The amount of the District's contribution is also clearly specified. In this regard, Article 14, Section 14.01 provides "The Employer shall pay eighty five (85) percent of the family plan for full-time calendar year and school year employees."

The District instead argues that the Arbitrator should look to bargaining history and past practice to interpret Section 14.01. However, since the Arbitrator has applied clear and unambiguous contract language in reaching the above result, it would take very strong extrinsic evidence to support a different conclusion. The record evidence, however, is mixed on bargaining history and past practice. As set out in the Factual Background section of this Award, both parties presented equally persuasive examples of bargaining history to support their positions. In addition, what little evidence of past practice that exists (the grievant received family health coverage because of his employment with the District) actually supports the Union's position. Therefore, the Arbitrator rejects the District's reliance on bargaining history and past practice herein.

In reaching the above conclusions, the Arbitrator also rejects the District's contention that it did not offer family health plan coverage to the grievant as a "benefit" when he was hired as an employe of the District. In this regard, the Arbitrator notes that the grievant testified, unrebutted by the District, that he was offered the opportunity to take family health insurance coverage by then District Administrator Robert Gilpatrick as a "benefit" of his employment with the District when he was hired. Not directly contradicting this testimony, current District Administrator Bruce Connolly acknowledged that "the District offered the grievant the family plan option and the opportunity to make up the difference." Board President Dean Dobbertin, who participated in the grievant's hire, thought it was more "a matter of convenience" to the grievant to allow him to take family coverage through the District, but admitted the hiring details were worked out between Administrator Gilpatrick and the grievant and conceded that it was "possible" Administrator Gilpatrick had offered the grievant family coverage in finalizing the grievant's employment with the District. The District failed to call Gilpatrick as a witness.

Accordingly, based on all of the above and, in particular, the contract language and record evidence, the Arbitrator finds that the answer to the issue as stipulated to by the parties is YES, the District violated Article 14, Section 14.01 of the collective bargaining agreement by failing to retroactively pay the grievant the difference between eighty five (85) percent of the family plan premium and one hundred (100) percent of the single plan premium the District had previously paid. The parties stipulated that this figure is $5,436.77.

In light of the above, it is my

AWARD

1. That the grievance is sustained and the District is ordered to pay the grievant, John Nettesheim, the sum of $5,436.77, the amount representing 85% of the family health insurance premium paid on a retroactive basis.

Dated at Madison, Wisconsin this 22nd day of June, 1994.

2/ Elkouri and Elkouri, How Arbitration Works, 4th Edition p. 349 (1985).

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