BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CHIPPEWA FALLS FEDERATION OF TEACHERS, LOCAL 1907, WFT, AFT, AFL-CIO	Case 104 No. 49843 MA-8077
and	
CHIPPEWA FALLS AREA UNIFIED SCHOOL DISTRICT	

Appearances:

Mr. William Kalin, Staff Representative, Wisconsin Federation of Teachers, appearing on behalf of the Union.

Mr. Mike McCarthy, WASB, Membership Consultant, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and District or Employer, respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on January 5 and February 11, 1994, in Chippewa Falls, Wisconsin. The hearing was transcribed. The parties filed briefs on May 2, 1994. The record was closed May 10, 1994 when the Arbitrator was notified that the parties would not be filing reply briefs.

ISSUES

The parties stipulated to the following issues:

1. What is the correct implementation date of the agreed to change in the insurance deductible?

2. Did the District violate the collective bargaining agreement when it unilaterally changed the insurance coverage provided by Group Health Cooperative of Eau Claire?

3. Did the District violate the collective bargaining agreement when it unilaterally changed the insurance coverage provided by BAAI?

PERTINENT CONTRACT PROVISIONS

The parties' 1992-94 collective bargaining agreement contained the following pertinent provisions:

ARTICLE VIII

Salary and Teacher Welfare

. . .

Section F. Fringe Benefits, Insurance

1. The Board agrees to pay 90% of the cost of hospital-surgical and major medical insurance premium with a $100.00 single/$200.00 family deductible for all full time members of the instructional staff. The policy shall reflect semi-private room rate coverage and shall include chiropractic coverage. This will also include transplant insurance coverage beginning with the 1987-88 calendar year at a cost not to exceed .75 per policy.

2. The Federation and the Board shall review hospitalization coverage periodically and mutually select a carrier and terms of coverage which adequately serve the needs of the teachers in the school system. It is further agreed that the coverage to teachers under the new carrier will be equal to or greater than the coverage afforded by the policy now in force. Further, the teacher shall have the option of joining the Group Health Cooperative of Eau Claire, in which case the Board will pay 90% of the premium, not to exceed 90% of the existing group insurance premium.

. . .

Appendix B

SALARY AGREEMENT

Year One (1992-1993)

A 4.8% per cell increase will be used in the computation of the increase based on the salary schedule in place at the end of the 1991-1992 contractual year.

Year Two (1993-1994)

A 4.8% per cell increase will be used in the computation of the increase based on the salary schedule in place at the end of the 1992-1993 contractual year. In addition a flat increase of $100.00 per cell will be added to the salary schedule on the 14th pay period of the 1993-1994 contractual year.

(For those teachers choosing to be paid in twenty installments, the $100.00 change will occur after the first ten payments).

FACTS

There are two District-sponsored health insurance plans available to District teachers: Benefit Administrators of America, Inc. (hereinafter BAAI) and Group Health Cooperative of Eau Claire (hereinafter GHC-EC). The former is a self-funded plan administered by BAAI while the latter is a health maintenance organization (HMO). Teachers can pick one plan or the other. In this District the insurance year for both plans runs from July 1 to June 30. Premiums and benefit changes are traditionally adjusted July 1.

From at least 1981 to July, 1993, there was a $50 (single)/$100 (family) deductible for both insurance plans. Under the BAAI plan the deductible applied to the major medical portion of the plan. Under the GHC-EC plan the deductible applied only to prescription drugs.

In early 1992, the parties entered negotiations for a successor to their 1990-92 collective bargaining agreement. In these negotiations the District made the following proposals relative to health insurance: 1) raise the deductible to $250 (single)/$500 (family); 2) that employes pay 20% of the first $3,750 of claims with 100% coverage thereafter; and 3) that the reference to a specific HMO (namely GHC-EC) be deleted so that a specific HMO would not be named in the agreement.

A mediation session was held on December 8, 1992. The Union's spokesman was WFT Staff Representative Bill Kalin and the District's spokesman was WASB Staff Counsel Bob Butler. One of the District's proposals during the mediation session was to increase the deductible on health insurance from $50 (single)/ $100 (family) to $100 (single)/$200 (family).

During a Union caucus a question arose therein as to whether the proposed $100 (single)/$200 (family) deductible would take effect on July 1, 1993 or January 1, 1994. The Union negotiators thought it was January 1, 1994. In order to clarify the matter though, Kalin left the Union caucus and went out into the hallway where he talked with the mediator and Butler. Kalin asked the mediator and Butler to verify that the deductible year ran from January 1 to December 31. After meeting with the District's bargaining team, Butler told Kalin that the deductible year runs from January 1 to December 31. Following this colloquy with Butler and the mediator, Kalin thought the deductible implementation date was January 1, 1994, and that is what he told the other Union negotiators. David Licht, co-chair of the Union's negotiating committee, confirmed that Kalin left the Union caucus during the mediation session to clarify when the proposed higher deductible was to take effect. Licht testified that when Kalin returned to the Union caucus he said "it starts January 1." Gary Hjelm, president of the local, agreed with Licht's testimony on this point. He testified it was his understanding as well that the implementation date for the proposed higher deductible was to be January 1,

1994. Kalin testified that none of his bargaining notes from the mediation session pertain to the subject matter involved here. Licht's bargaining notes from the mediation session contain the following pertinent entry:

> 1st 4.8 2 Teach
> 2nd 4.8 2 Teach $100 - 200
>
> Section 125 Effective begin 2nd yr. + 100 per cell in 2nd half.

Butler testified he does not recall discussing a delayed implementation of the higher deductible with Kalin in the hallway during the mediation session. Butler also testified that if he did have such a hallway discussion regarding delaying the implementation of same to January 1, 1994, he would have written it in his bargaining notes. There is nothing in his bargaining notes indicating that the higher deductible would be implemented January 1, 1994. Butler's bargaining notes from the mediation session contain the following pertinent entry:

> 4.8% 1993-94 2 specialists
> 100/200 deductible - 1993-94 begins
>
> . . .
>
> $100 more will be added onto the schedule after 1st semester of 1993-94 school. $100/teacher.
>
> Section 125 Plan will be implemented in 1993-94.

Butler testified that the reference in his notes to "100/200 deductible - 1993-94 begins" meant that the $100/$200 deductible was to begin with the 1993-94 contract year. WASB representative Mike McCarthy, who was also present at the mediation session, testified there is nothing in his bargaining notes from the mediation session about delaying the implementation of the increased deductible. Butler and McCarthy both testified that when the District proposed the $100/$200 deductible, it never limited its application to just BAAI; instead the District intended the higher deductible to apply to both BAAI and GHC-EC.

Later that evening the parties reached tentative agreement on the terms for a 1992-94 labor agreement. After the tentative agreement was reached, the parties met face-to-face in a wrap up session to review the terms of their tentative agreement. One of the items in the tentative agreement was to increase the health insurance deductible to $100 (single)/$200 (family). Another item in the tentative agreement was that $100 per cell was to be added to the (teacher) salary schedule after the first semester of the 1993-94 school year. Insofar as the record shows, during this wrap up session the parties did not discuss or confirm the implementation date for the new (higher) deductible. Also, insofar as the record shows, during the wrap up session the parties did not discuss or confirm whether the new (higher) deductible applied to both BAAI and GHC-EC, or just BAAI. Finally, insofar as the record shows, during the wrap up session the parties did not discuss or confirm changing the deductible on the BAAI plan from a major medical deductible to an up-front deductible, nor did they discuss or confirm extending the deductible on GHC-EC from prescription drugs to other areas.

The next day, District Superintendent Larry Annette told District Accountant Shirley Sippel (who had not been at the mediation session) what he thought the terms of the tentative agreement were. In doing so, Annette did not refer to any notes from the prior evening's mediation session; instead he

relied on his memory. Sippel wrote down what Annette said. Her notes from this conversation contain the following pertinent entry:

4.8 1992-93
4.8 1993-94

+ 2 special teachers both years

Deductible from $50 & $100 on health
July 1, 1993 $100 & $200

1993-94 add at semester $100 to every cell. Jan. 94

There is nothing in Sippel's notes about the deductible on the GHC-EC plan being expanded to cover areas other than prescription drugs. Additionally, there is nothing in Sippel's notes about the deductible on the BAAI plan being changed from major medical to an up-front deductible.

The parties ratified their tentative agreement in December, 1992. When the Union negotiating committee took the tentative agreement back for a vote, they told bargaining unit members that the higher deductible would be implemented January 1, 1994.

After the agreement was ratified by both sides it was typed up. Butler reviewed the document before it was signed while Kalin did not.

The District implemented the $100 (single)/$200 (family) deductible for both the BAAI and GHC-EC plans on July 1, 1993. Also on that date BAAI started applying this deductible up-front rather than to major medicals (as it had done previously). BAAI made this change at the District's direction. Also on that date GHC-EC started applying the deductible to the following areas:

- inpatient hospital admission
- outpatient hospital services
- emergency room care
- services received out of area
- prescription drugs

Prior to that date, GHC-EC applied the deductible only to prescription drugs. GHC-EC made this change at the District's direction.

A grievance was filed concerning the action noted in the preceding paragraph which is the subject of the instant arbitration.

POSITIONS OF THE PARTIES

Union's Position

It is the Union's position that the Employer has not complied with the agreement made in bargaining on the health insurance deductible.

The Union's first contention is that the change in deductible was to have occurred January 1, 1994, and not as instituted by the District on July 1, 1993. The Union believes the parties' bargaining history supports this position. In this regard, it cites the testimony of Union negotiators Kalin, Licht and Hjelm who all testified that it was their understanding that the higher deductible was to be implemented January 1, 1994. According to the Union the testimony of these witnesses regarding the implementation date was detailed, while Butler's testimony on this point was simply that he did not recall any discussion concerning same. The Union also cites Licht's bargaining notes of the mediation session and contends they accurately reflect the parties' agreement on a January 1, 1994 implementation date. It specifically points to the reference in Licht's notes to "the second half." At the hearing

Licht interpreted the reference to "the second half" to mean the second half of the 1993-1994 year (which would be January 1, 1994). With regard to Butler's notes of the mediation session, the Union asserts that they contain several "errors." The "errors" which the Union references are that the sentences Butler wrote in his notes dealing with the extra $100 and the Section 125 plan are worded differently there than in the actual contract language. The Union further notes in support of a January 1, 1994 implementation date that no one from the District testified that the parties specifically agreed to a July 1, 1993 implementation date. Next, it notes that one of the settlement terms was an extra $100 on the salary schedule effective approximately January 1, 1994. The Union reasons that the higher insurance deductible was to be effective at the same time as the higher salary so that the higher deductible would be offset. Finally the Union argues that the information which Annette gave to Sippel (which Sippel in turn wrote down) is not an accurate representation of the agreed-upon settlement. To support this premise it notes that Annette did not have notes of the mediation session with him when he talked with Sippel. Additionally, the Union questions the authenticity of Sippel's notes because one of the items contained therein indicates that the new Section 125 plan was to become effective October 1, 1993. The Union wonders how this date could be listed on a document prepared in December, 1992 when District witness David Lindahl testified that the October date was not determined until May of 1993. The Union asks rhetorically that if the October date was added to this document after it was written, what other dates/notes were also added?

The Union's next contention is that the new deductible applied just to the BAAI plan and did not apply to the GHC-EC plan. To support this premise it cites the testimony of District and Union bargainers who said that GHC-EC was never mentioned by name during bargaining. The Union argues that since GHC-EC was never mentioned by name during these discussions, the higher deductible should not apply to it.

Next, the Union contends the District should not have directed BAAI to apply the new deductible up front. According to the Union the parties never discussed changing any part of the BAAI insurance coverage except the deductible. The Union submits that since there was no discussion on any other matters, there certainly was no agreement to apply the deductible up front rather than applying it to major medicals. The Union therefore asserts that the new deductible should be applied as it was previously (i.e., the deductible applied to just major medicals).

The Union makes the same argument with respect to the GHC-EC plan. The Union submits that the parties never discussed changing any part of the GHC-EC coverage or applying the deductible to any additional areas or benefits. The Union reasons that since there was no discussion on these matters, there certainly was no agreement to apply the deductible to areas other than prescription drugs. The Union therefore contends that the deductible should be applied to the GHC-EC plan as it was previously (i.e., the deductible applied to just prescription drugs).

In order to remedy these alleged contractual breaches, the Union asks the Arbitrator to uphold the grievance and make all affected employes whole for losses incurred. As part of the remedy the Union asks the Arbitrator to find that the correct implementation date for the new deductible was January 1, 1994; that the new deductible applied to just BAAI and not to GHC-EC; that the deductible applies just to major medicals on the BAAI plan; and that the deductible applies just to prescription drugs on the GHC-EC plan.

District's Position

It is the Employer's position that it has complied with the agreement

made in bargaining on the health insurance deductible.

The Employer contends at the outset that the new insurance deductible was to have been implemented on July 1, 1993 since that was the policy renewal date. It notes in this regard that the applicable contract language (Article VII, Section F, 1) does not contain the date of January 1, 1994. That being so, it asserts there is no contractual support for the Union's contention that the new deductible was to be implemented January 1, 1994.

The District also argues that the bargaining history supports its position on this issue. It submits that no agreement was made at the December 8, 1992 mediation session to delay the implementation of the new deductible to January 1, 1994. To support this premise, it first cites the testimony of District negotiators Butler and McCarthy who both testified it was their understanding that the new deductible was to be implemented July 1, 1993. The District also cites Butler's bargaining notes from the mediation session and contends they accurately reflect the parties' agreement to a July 1, 1993 implementation date. It points in this regard to the reference in Butler's notes where he wrote "$100/$200 deductible - 1993-94 begins." It notes that Butler's bargaining notes do not contain any reference whatsoever to a delayed implementation of the deductible change, specifically a January 1, 1994 implementation date. With regard to Union bargainer Licht's notes of that mediation session, the District asserts that nowhere in those notes does it specifically say that the deductible was to be implemented January 1, 1994. Finally the District argues that its version of the agreement is supported by the notes Sippel made of her conversation with Annette the day after the mediation session. It submits that Annette told Sippel what the settlement terms were, and she in turn wrote them down. The District makes specific reference to that part of Sippel's notes which have the phrase "July 1, 1993" directly next to "$100 and $200." The District argues these notes also confirm that the new $100/$200 deductible was to be implemented July 1, 1993.

Next, the District contends that the new deductible applied to both the BAAI plan and the GHC-EC plan. It first relies on the contract language to support this premise (namely Article VII, Section F, 1). According to the District this language is clear and unambiguous where it refers to "all full-time members of the instructional staff." In its view this sentence covers employees under both the BAAI plan and the GHC-EC plan.

The District also argues that the bargaining history supports its position on this issue. It submits that in negotiations it proposed a generic increase in the deductible for both District-sponsored insurance plans (i.e., BAAI and GHC-EC). It acknowledges that it never said at the bargaining table that this proposal (to increase the deductible) applied to GHC-EC as well as BAAI, but it argues that it was implicit that it did. From its perspective, it wanted consistency on the deductible and it would not have been consistent to have one deductible figure for BAAI and another figure for GHC-EC. It therefore contends that since the parties never limited the coverage of the new deductible to just BAAI, the deductible listed in Article VII, Section F, 1 applies to both of the District's insurance plans (i.e., both BAAI and GHC-EC).

Finally, with regard to the changes which the District made in applying the deductible, it notes that the contract language does not specify what the deductible applies to (for example, if it applies on the BAAI plan up front or to major medicals). The District asserts that since the contract language is silent on this point, there is nothing that prohibits it from making the changes that it did.

The Employer asserts that what the Union is attempting to do here is get in arbitration that which it failed to obtain in bargaining, namely a

January 1, 1994 implementation date for the higher deductible and application of the deductible to just the BAAI insurance plan. It therefore requests that the grievance be denied.

DISCUSSION

In the negotiations which led to the parties' 1992-94 agreement, the parties changed the health insurance deductible. Specifically, they raised the deductible from $50 (single)/$100 (family) to $100 (single)/$200 (family). Although this change was probably considered uncomplicated at the time, a number of questions subsequently arose concerning this change. One question is when the higher deductible was to be implemented. The Union contends the implementation date was to be January 1, 1994, while the Employer actually implemented same on July 1, 1993. Another question is whether the changed deductible applied to both BAAI and GHC-EC. The Employer contends it applied to both while the Union disagrees. According to the Union the higher deductible applied just to BAAI, not GHC-EC. A final question is whether the Employer was authorized to change how the deductible was applied. What happened was that when the District implemented the higher deductible, it directed BAAI to apply it (the deductible) up front. Prior to this, the deductible on BAAI coverage applied just to major medicals. At the same time the District directed GHC-EC to apply the new deductible to five areas, one of which was prescription drugs. Prior to this, the deductible on GHC-EC coverage applied just to prescription drugs. The District contends it was empowered to make these changes while the Union disputes this contention. Each of the foregoing matters will be addressed below.

In the discussion that follows, attention will be focused first on the applicable contract language. If the language does not resolve the matter, attention will be given to evidence external to the agreement, namely the parties' bargaining history and/or past practice.

Both sides agree that the contract language applicable here is Article VIII, Section F, Nos. 1 and 2. Those paragraphs are as follows:

> 1. The Board agrees to pay 90% of the cost of hospital-surgical and major medical insurance premium with a $100.00 single/$200.00 family deductible for all full time members of the instructional staff. The policy shall reflect semi-private room rate coverage and shall include chiropractic coverage. This will also include transplant insurance coverage beginning with the 1987-88 calendar year at a cost not to exceed .75 per policy.
>
> 2. The Federation and the Board shall review hospitalization coverage periodically and mutually select a carrier and terms of coverage which adequately serve the needs of the teachers in the school system. It is further agreed that the coverage to teachers under the new carrier will be equal to or greater than the coverage afforded by the policy now in force. Further, the teacher shall have the option of joining the Group Health Cooperative of Eau Claire, in which case the Board will pay 90% of the premium, not to exceed 90% of the existing group insurance premium.

Before giving an overview of these paragraphs, it is noted at the outset that District teachers can have health insurance coverage with either BAAI or GHC-EC. The former is the administrator of the District's self-funded plan while the latter is an HMO. The paragraphs cited above specify, among other things, how much of the insurance premium is paid by the Employer, what types of coverage are included and a deductible amount. GHC-EC is specifically named in the second paragraph. BAAI though is not mentioned by name in either paragraph.

Attention is focused first on whether the deductible referenced in the first paragraph (namely $100 single/$200 family) applies to both BAAI and GHC-EC (as argued by the Employer) or just BAAI (as argued by the Union). I find that the deductible referenced in the first paragraph applies to both BAAI and GHC-EC. My rationale in reaching this conclusion is that there is nothing in paragraph 1 that limits the deductible to just BAAI (which, as noted above, is not even named). Instead, the language specifically indicates that the deductible applies to "all full time members of the instructional staff." The reference to "all . . . staff" covers those teachers who have their insurance coverage with BAAI as well as those whose coverage is with GHC-EC. Additionally, I do not read paragraph 1 as just applying to BAAI coverage and paragraph 2 as just applying to GHC-EC. In my view, both paragraphs apply to both insurance plans. To illustrate this point, it is noted that paragraph 1 mandates certain coverage, namely chiropractic and transplant. If paragraph 1 was read as only being applicable to BAAI coverage, then this coverage would not apply to those with GHC-EC. However, the record indicates that this coverage is provided to those with GHC-EC, as well as those with BAAI. Since the second and third sentences of paragraph 1 (which specify chiropractic and transplant coverage) apply to those with GHC-EC, it logically follows that the deductible referenced in the first sentence of that paragraph likewise applies to those with GHC-EC. It is therefore held that the plain meaning of the language is that the deductible applies to both BAAI and GHC-EC. Since the Employer has, in fact, applied the deductible to both BAAI and GHC-EC, that part of its actions here are consistent with the contract language. Given this holding that the applicable language is clear and unambiguous, the undersigned sees no need to resort to the parties' bargaining history to interpret same.

Having so found, the focus now turns to the question of when the new deductible was to be implemented.

A review of the previously cited contract language indicates it does not address when the deductible listed in paragraph 1 was to implemented. Stated simply, no date is mentioned. Thus, the contract language is silent on this point.

Since no implementation date is mentioned, the initial presumption is that the new deductible became effective on the same date as the other contract terms. The cover page of the labor agreement indicates that the 1992-94 agreement ran from July 1, 1992 through June 30, 1994. The terms of the agreement therefore became effective July 1, 1992 unless specifically indicated otherwise. As noted above, there is nothing in the agreement concerning when the (new) deductible was to be implemented. That being the case, the initial presumption is that the (new) deductible was to be implemented July 1, 1992.

That said, there are several problems with applying this presumption here. First and foremost, neither side contends that the (new) deductible was to be implemented July 1, 1992. The Employer implemented that (new) deductible on July 1, 1993, so it is apparent it felt that was the correct implementation date. The Union submits that the (new) deductible should have been implemented instead on January 1, 1994. Second, nothing in the record indicates that the parties intended the (new) deductible to be applied retroactively. It is noted in this regard that the parties reached agreement for a 1992-1994 contract on December 8, 1992, well into the 1992-93 school year. Had they wanted to

implement the (new) deductible on July 1, 1992, it would obviously have to be done retroactively. While insurance changes can certainly be applied retroactively, that is not the norm in public sector labor negotiations. Usually such changes are applied prospectively. Given the foregoing then, it is held that the parties did not intend the (new) deductible implementation date to be July 1, 1992.

Attention is now turned to other evidence in an effort to determine what implementation date was intended. That evidence of course is the parties' bargaining history. Bargaining history is a form of evidence commonly used by arbitrators to interpret ambiguous or silent contract language. It can be a useful guide in interpreting the meaning of ambiguous contract language. According to the Union the bargaining history shows that the deductible was to be implemented January 1, 1994. The basis for the Union's premise is that the parties allegedly reached an agreement to this effect during a hallway discussion at the December 8, 1992 mediation session. The Employer disputes this contention. It contends there was no agreement for a January 1, 1994 implementation date.

Based on the rationale which follows, the undersigned finds that the bargaining history does not support a January 1, 1994 implementation date. To begin with, while the Union negotiators testified it was their understanding that the higher deductible was to be implemented January 1, 1994, none of the Employer negotiators who testified agreed. If the parties had reached an agreement in negotiations to delay the implementation of the deductible to January 1, 1994, as the Union asserts, it is logical to assume that the Employer's negotiators would recall agreeing to it or, at a minimum, discussing it. They recall neither. Specifically, the Employer's negotiators testified they never discussed delaying the implementation date to January 1, 1994, nor did they agree to same. Second, if the parties had agreed in negotiations to delay the implementation of the changed deductible to January 1, 1994, it is logical to assume that there would be reference to same in their bargaining notes. There is not. With regard to the Employer's bargaining notes (namely Butler's and McCarthy's), nothing therein confirms agreement on a January 1, 1994 implementation date for the higher deductible. With regard to the Union's bargaining notes, Kalin testified there was nothing in his notes which pertain to the matter involved here. Consequently, the Union relied on the notes of bargaining team member Licht. After reviewing Licht's notes, the undersigned is persuaded that they also do not support the existence of an agreement to implement the deductible on January 1, 1994. In point of fact, that date is not found in Licht's notes. While the phrase "2nd half" is found in Licht's notes, those words are preceded by the phrase "$100 per cell." Thus, the entire phrase reads "$100 per cell in 2nd half." My reading of this phrase is that the reference to "2nd half" has nothing to do with the deductible issue involved here, but rather deals with a completely separate matter, namely adding $100 per cell to the salary schedule in the 2nd half of the 1993-94 school year. Third, after the tentative agreement was reached on the 1992-94 contract the night of the December 8, 1992 mediation, the parties met for a face-to-fact wrap up session to review all the terms of their agreement. If the parties had agreed in negotiations to delay the implementation of the changed deductible to January 1, 1994, it is logical to assume that it would have been mentioned during this wrap up session. It was not. Finally, oftentimes after a tentative agreement is reached the terms are written up before each side ratifies same. Insofar as the record shows, that did not happen here. Consequently, there is nothing in the record (other than the parties' bargaining notes referenced above) which summarizes the agreed upon changes. Thus, there is no documentation to support the Union's assertion that the parties agreed to a January 1, 1994 implementation date for the changed deductible.

That said, where did the Union negotiators get the mistaken impression that the deductible was to be implemented January 1, 1994? The misunderstanding resulted from the hallway conversation between Kalin, Butler and the mediator during the mediation session. During this discussion the date of January 1 was mentioned. The critical question is whether this date referred to an implementation date or whether it referred to something else. Insofar as the undersigned can determine, the date of January 1 that was referenced in this hallway discussion did not refer to an implementation date, but instead identified when the deductible year began to run for purposes of counting deductible expenses.

Having found that there was no agreement to implement the higher deductible on January 1, 1994, the next question is whether an agreement was reached that the implementation date would be July 1, 1993. The undersigned is convinced that no such agreement was reached. In making this call, it is noted again that while the Union negotiators thought the implementation date was January 1, 1994, the Employer negotiators never agreed to that date. The converse also applies. While the Employer negotiators thought the agreed-upon implementation date was July 1, 1993, and made reference to that date in their bargaining notes, there is nothing in the record that confirms that the Union negotiators agreed to that date. To illustrate this point, it is noted that the Union negotiators did not specifically agree during the mediation wrap up session to a July 1, 1993 implementation date. Insofar as the record shows, the matter of the deductible implementation date was not raised during the wrap up session. As a result, it is held that the Union negotiators never agreed to a July 1, 1993 implementation date for the changed deductible.

This leaves the question of when the higher deductible could be implemented. The record indicates that the Employer implemented it on July 1, 1993. Aside from their belief that the parties agreed to this date, a reason the Employer implemented the change on that specific date is because it was the policy renewal date for both the BAAI plan and the GHC-EC plan. The record indicates that changes to the District's health insurance plans are traditionally implemented on July 1. That is what happened here, so the Employer had a sound historical basis for implementing the higher deductible on that date. Since the contract language is silent on the implementation date for the (new) insurance deductible, and the Employer has traditionally implemented changes to insurance plans on July 1 (the insurance policy renewal date), and the parties did not intend the (new) deductible implementation date to be July 1, 1992, the undersigned finds that it was not a contract violation for the Employer to implement the higher deductible on July 1, 1993.

The final question is whether the Employer was authorized to change how the deductible was applied. In making this call attention is focused first on the language itself.

A review of the previously cited contract language indicates it does not address how the deductible is to be applied or what it covers. Instead, it simply references the amount of the deductible. This of course means that the parties have not included language in their agreement concerning how the deductible is to be applied or what it covers.

Given this contractual silence on the topic, the undersigned has looked elsewhere in the record for guidance in how the deductible has been applied in the past. Specifically, the undersigned has looked to see if there is a past practice that is applicable. Arbitrators oftentimes look to past practice to help them interpret the contract when there is no contract provision applicable. In those situations, unwritten practices can supplement the written contract as an implied provision of that agreement and be binding on the parties. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract is silent on a

specific topic. Arbitrators have historically cited a variety of guidelines or standards that a course of conduct must meet before it is found to be a binding past practice. Some of the variables which lead an arbitrator to accept or reject the existence of a past practice are: 1) knowledge of the practice, 2) it must have been mutually accepted by the parties, and 3) it must have existed over a reasonably long period of time and been repeatedly followed.

The Union asserts, and the District does not deny, that prior to July 1, 1993 the deductible on the BAAI plan applied just to major medicals and the deductible on GHC-EC coverage applied just to prescription drugs. Since the foregoing is undisputed, I find that it meets the previously identified criteria for a binding past practice. When the higher deductible was implemented July 1, 1993, the District directed BAAI and GHC-EC to make certain changes in how the deductible was applied and what it covered. Specifically, the District directed BAAI to apply the deductibles up front (rather than just to major medicals as in the past) and it directed GHC-EC to apply the deductible to five areas, one of which was prescription drugs (rather than just to prescription drugs as in the past). Given the foregoing, it is clear that the District changed the practice after July 1, 1993 concerning how the deductible was applied and what it covered.

Unwritten practices are held to be binding during the term of the agreement where the evidence of their existence is clearly established in the record. This flows from the assumption that the parties cast their bargaining proposals in terms of the entire network of agreements and understandings between them, and intend to be bound by them unless explicit notice to the contrary is given in negotiations. Thus, if a particular practice is not repudiated during negotiations, it may be said that the labor agreement was entered into upon the assumption that this practice would continue in force. In this way, practices may by implication become a part of the labor agreement with as much binding effect as a written provision.

In the last round of bargaining the District never proposed changing how the deductible was applied or what it covered. Specifically, it never proposed applying the deductible up front on the BAAI plan and to five areas for GHC-EC. It never made any proposals of the sort. Instead, all the District proposed, and all the parties ever discussed, was raising the deductible amount. Under these circumstances the undersigned believes it was reasonable for the Union to assume that the then-current practice of how the deductible was applied and what it covered would continue into the 1992-94 contract.

Since the District never repudiated or proposed to change the existing practice in the last round of negotiations, it could not unilaterally change that practice during the term of the 1992-94 agreement. However, that is exactly what it did. That being the case, the District failed to abide by the aforementioned practice. Inasmuch as the District failed to abide by that practice it violated an implied term of the agreement. In order to remedy this contractual breach the District is directed to reinstate for the duration of the 1992-94 contract the previously existing practice concerning how the deductible was applied and what it covered. Specifically, the District shall direct BAAI to apply the deductible only to major medicals, and it shall direct GHC-EC to apply the deductible only to prescription drugs.

To summarize then, the grievance is sustained in part and denied in part. The District did not violate the agreement when it implemented the higher deductible on July 1, 1993. Additionally, the District did not violate the agreement when it applied the higher deductible to both BAAI and GHC-EC. It did violate the agreement though when it changed how the deductible was applied to both BAAI and GHC-EC. Specifically it violated the agreement when it applied the deductible on the BAAI coverage up-front, and when it applied the

deductible on the GHC-EC coverage to five areas.

In light of the above, it is my

AWARD

1. That the correct implementation date of the agreed to change in the insurance deductible was July 1, 1993;

2. That the District violated the collective bargaining agreement when it unilaterally changed the insurance coverage provided by GHC-EC; and

3. That the District violated the collective bargaining agreement when it unilaterally changed the insurance coverage provided by BAAI.

In order to remedy this contractual breach the District shall reinstate for the duration of the 1992-94 contract the previously existing practice concerning how the deductible was applied and what it covered. It shall direct BAAI and GHC-EC to apply the deductible as it did prior to July 1, 1993 (namely, just to major medicals on the BAAI plan and just to prescription drugs on the GHC-EC plan). Additionally, the District shall make all employes whole for losses incurred.

Dated at Madison, Wisconsin this 7th day of September, 1994.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator