BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SEVASTOPOL EDUCATION SUPPORT PERSONNEL ASSOCIATION, WISCONSIN EDUCATION ASSOCIATION COUNCIL (SESPA)	Case 10 No. 49615 MA-8007
and	
SCHOOL DISTRICT OF SEVASTOPOL	

Appearances:
Mr. Dennis W. Muehl, Executive Director, Bayland Teachers United, on behalf of the Association.
Davis & Kuelthau, S.C., by Mr. Clifford B. Buelow, on behalf of the Distri

ARBITRATION AWARD

The above-entitled parties, herein "Association" and "District", are privy to a collective bargaining agreement providing for final and binding arbitration. Hearing was held in Sevastopol, Wisconsin, on June 24, 1994. The hearing was not transcribed and the parties thereafter filed briefs and reply briefs which were received by September 19, 1994.

Based upon the entire record, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

> Did the District violate the contract when it refused to pay health and dental insurance premiums on behalf of grievants Carol Olson, Mary Olson, Marsha Jacobson, and Martha Remington and, if so, what is the appropriate remedy?

DISCUSSION

The Association was recognized by the District in November 1990 as the collective bargaining agent for the District's support staff. At that time, it already represented the District's teachers.

Prior to 1990, the District for a number of years provided and paid for health and dental benefits on behalf of its non-union employes who worked at least 20 hours per week, including those employes who did not work in the summer months when school was not in session. The District's board policies for the 1990-1991 school year thus provided:

> III Insurance - The school board shall provide the following health and dental insurance benefits for any employee who is employed at least one half (1/2) time (20 hours per week): (Benefit per month):
>
> a. Single Health - 95.66
> b. Family Health - 228.18
> c. Single Dental - 16.44
> d. Family Dental - 46.50

The parties in 1992 engaged in negotiations for an initial collective bargaining agreement for the support staff and reached agreement. Article XXIV

of the contract, entitled "Duration", provides in pertinent part:

> "This Agreement shall be effective from July 1, 1992, through June 30, 1994."

The Association in negotiations twice proposed language similar to what the teachers' contract already provides and which requires the District to pay for health and dental insurance premiums from September-August. Thus, the Association on February 20, 1991, and in its February 25, 1992, preliminary final offer proposed the following language:

> A. The Board shall make payment of insurance premiums for each employee to assure insurance coverage for the full twelve month period commencing September 1 and ending August 31 for all employees.

The District on both occasions said no, and the Association ultimately dropped its proposal.

As a result, the parties ultimately agreed to Article VIII of the contract, entitled "Insurance", which provides:

> A. Employees who are regularly scheduled to work at least twenty (20) hours per week shall be eligible for health, dental and long term disability insurance.
>
> B. Effective July 1, 1993, the Board shall contribute $186.54 per month for a single health insurance plan and $423.56 per month for a family plan. The difference between the insurance premium and the Board's contribution shall be paid by the employee by payroll deduction.
>
> C. Effective July 1, 1993, the Board shall contribute $23.80 per month for a single dental plan and $55.74 per month for a family plan. The difference between the insurance premium and the Board's contribution shall be paid by the employee by payroll deduction.
>
> D. The Board shall pay the full premium for a long-term disability plan for each eligible bargaining unit member.

The parties in negotiations failed, however, to expressly agree or disagree as to whether the District would pay for health and dental insurance premiums for those employes who did not work during the summer months and/or who were laid-off. The Association therefore believed that the prior District policy providing for such payments remained in effect and that, as a result, the District would go on paying those premiums during the summer months. The District believed otherwise because the contract here does not contain language similar to what is found in the teachers' contract which provides:

> "A. The Board shall make payment of insurance premiums for each employee to assure insurance coverage for the full twelve month period commencing September 1 and ending August 31 for all employees who complete their contractual obligation."

In June, 1992, the District cut off summer health benefits for Carolyn Bauer. The Association did not grieve that action because it was unaware of it and Bauer did not complain because her husband had separate insurance via another employer. The District also cut off health benefits for Darran Bittfort and Don Bittorb when they were terminated in 1990 and 1991, respectively.

The District by letters dated May 13, 1993, informed Teacher Aides Carol Olson, Mary Olson, Marsha Jacobson, and Martha Remington that they would be laid-off effective June 3, 1993, "for educational and budgetary reasons". The District by letter dated May 28, 1993, also informed them that it would not pay for their health and dental insurance premiums past June 30, 1993, and it subsequently stopped such payments at that time.

On June 6, 1993, the four filed the instant grievance wherein they asserted, inter alia: "We earn summer month insurance coverage as a form of deferred payment for work that we complete during the previous school year. The fact that we were laid off effective at the end of the 1992-1993 school year should not affect summer insurance coverage."

The Association asserts in support of the grievance that summer insurance premiums are an accrued benefit to employes who have worked the preceding school year; that the contract read as a whole supports its position; that the District's position is not supported by the bargaining history; and that arbitrable precedent provides for payment of this benefit.

The District, in turn, contends that Article VIII, Section A, of the contract supports its position because the grievants were not working at least 20 hours per week after their layoff; that while parol evidence should not be considered, it nevertheless establishes that the Association is trying to obtain in arbitration what it unsuccessfully sought in negotiations; and that prior practice supports its position.

The resolution of this issue turns on Article VIII, A, which states that the District will pay monthly health and dental insurance premiums for employes "who are regularly scheduled to work at least twenty (20) hours per week. . ." Here, it is undisputed that the grievants did not work "at least twenty (20) hours per week. . ." after their layoff, thereby suggesting that the grievance should be denied on that basis.

Nevertheless, the Association rightly points out that the contract must be read as a whole and that this language does not expressly cover the situation found here; i.e. whether the District should pay health and dental insurance premiums for bargaining unit employes after they have been laid off.

Past practice is no help here because the Association has established that it was unaware of prior situations of where such premiums have not been paid to other employes during the summer months. Absent such awareness, the Association therefore never acquiesced to this prior practice since a binding past practice, by definition, requires such acquiescence. 1/

By the same token, there is no past practice supporting the Association's claim. For while the District did pay for the premiums of employes returning to work for the next school year, the situation herein apparently marks the first time that the District has laid off employees at the end of a school year and refused to pay for their health and dental benefits. As a result, there is

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1/ See How Arbitration Works, Elkouri and Elkouri, p. 439, (BNA, Third Edition, 1984).

no past practice of paying premiums for laid-off employees. 2/

In this connection, the Association relies on the testimony of former District Bookkeeper Joyce Schack in support of its past practice claim. She testified to several instances of where the District, prior to 1989, paid the health benefits for certain employes over the summer months and/or when they were on leave. However, Schack never testified that premiums were paid for laid-off employes which is the narrow focus of this dispute. What the District did in other situations therefore is not controlling.

Bargaining history is more on point. As to that, it is undisputed that the Association in negotiations twice proposed language patterned after the teacher's contract which expressly provides for the District to pay for insurance premiums during the summer months when teachers are not working. It is therefore clear that the District's payment for such premiums represents an accrued benefit flowing from the teacher's employment during the prior school year.

Here, though, no such agreement exists because the District twice rejected the Association's proposal, thereby establishing that the parties have never jointly agreed to make this an accrued benefit under this contract.

At best, then, we have a missing of the minds where the Association believed that this benefit would continue to be paid pursuant to the District's prior policy of paying it in other circumstances, while the District believed that it need not be paid because the Association failed in negotiations to obtain express contract language providing for it.

In such circumstances, it is clear that there was no mutual agreement over what should be done here. I therefore conclude that the District was not required to pay insurance premiums for laid off employes since the burden was on the Association to clearly secure such a valuable economic benefit. Having failed to do so in negotiations, the Association is now precluded from obtaining that benefit through arbitration.

In light of the above, it is my

AWARD

That the District did not violate the contract when it refused to pay health and dental insurance premiums on behalf of grievants Carol Olson, Mary Olson, Marsha Jacobson and Martha Remington; the grievance is therefore denied.

Dated at Madison, Wisconsin this 27th day of September, 1994.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

2/ The Association cites numerous arbitration cases in support of its claim that premiums should be paid for the grievants during the summer of 1993 under an "accrued benefit" theory. However, these cases are not on point since none of them involved laid-off support employees and the kind of bargaining history found here of where a union failed in negotiations to obtain clear contractual language providing for the benefit sought here. Instead, all of these cases involved teachers who - by virtue of their yearly teaching contracts - were entitled to such accrued benefits throughout the entire year of their employment. That is not the case here.