BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
MERRILL TEACHERS ASSOCIATION	:	Case 28 No. 50523
and	:	MA-8280
MERRILL AREA PUBLIC SCHOOLS	:	

Appearances:

Mr. Thomas S. Ivey, Jr., UniServ Director, Central Wisconsin UniServ Council, appearing on behalf of the Association.

Mr. David R. Friedman, Attorney at Law, Friedman Law Firm, appearing on behalf of the District.

ARBITRATION AWARD

The Association and the District 1/ named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear a grievance. Hearings were held in Merrill, Wisconsin, on May 10 and 11, 1994, during which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by September 24, 1994.

ISSUE:

The parties did not stipulate to the framing of the issues.

1/ The documents and testimony refer to the parties in several different ways. Where possible, the Arbitrator will refer to the Union as the Association and the Employer as the District. However, the parties call themselves MTA (Merrill Teachers Association) and MAPS (Merrill Area Public Schools).

The Association asks:

> Did the District violate the terms and conditions of the master agreement when it entered into a total package, salary increase/insurance, settlement in May of 1991 without providing accurate information with respect to the insurance premium? If so, what is the appropriate remedy?

The District raises several issues:

> First, the initial grievance was not properly filed by a person as required by the collective bargaining agreement. Second, no written contractual provision of the master agreement has been violated. Third, the grievance was not timely filed. Fourth, the requested remedy is not within the scope of the arbitrator to grant.

The Arbitrator will discuss the issues in the Award.

WHO MAY FILE A GRIEVANCE:

The 1991-93 collective bargaining agreement includes this language in Article 14, the Grievance Procedure:

> 14.1 Definition: For the purpose of this agreement, a grievance is defined as any problem involving the meaning, interpretation, and application of the provisions of this agreement.
>
> 14.2 Terms:
> (1) An "Aggrieved Person" is the person or persons making the claim.
> (2) A "Party in Interest" is the aggrieved person and any person who might be required to take action or against whom action might be taken in order to resolve the claim.
> (3) The term days when used in this article shall mean normal business day,s

Monday through Friday, excluding holidays and vacation days that occur during the teacher's work year.

14.3 Procedures: In order that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process.

STEP I - The grievant shall advise his/her immediate supervisor and present his/her grievance in writing identifying the issue and its relations to this agreement with or without counsel within twenty (20) days after he/she knew or should have known of the cause of such grievance. The immediate supervisor shall give his/her written answer within seven (7) days of the time it was presented to him/her. The written grievance shall include the facts of the grievance, the issue involved, the provisions of the contract allegedly violated, the remedy requested, and the signature of the grievant.

STEP II - If the grievance is not adjusted in a satisfactory manner to either party within two days after the response and discussion, then the signed grievance may be sent in writing by the grievant and presented to the Chairman of the Teacher Rights Committee (TRC) on a form provided by the Association. This Committee shall determine if the grievant has sufficient grounds for complaint. If the Committee feels the grievant's reasons are insufficient, the aggrieved party may demand a vote of the Board of Directors of the MTA to determine whether a grievance exists. If it is determined by the Board of Directors that a grievance does not exist, the grievance will be dropped. If the Board of Directors votes in the majority that a grievance exists, it shall be submitted in writing to all parties of interest and

> processed to Step III. A decision must be made within 10 days of the initiation of Step II.
>
> STEP III - The grievant and a member of the Board of Directors (appointed by the President of the Association) will present the grievance in writing to the superintendent of schools for discussion. If the grievance is not satisfactorily adjusted within five days after discussion with the superintendent, the recommendation of both parties shall be presented in writing to the Board of Education. Within 30 days from receipt of the written complaint the Board of Education shall give a written disposition of the grievance. The grievant and a member of the Board of Directions shall present the grievance before the Board.
>
> STEP IV - If the aggrieved person is not satisfied with the disposition of his/her grievance at Step III, he/she may, within five days after a decision by the Board of Education, request in writing that the Board of Directors submit his/her grievance to arbitration. The Board of Directors of the MTA must approve the request within ten days in order to initiate Step V.
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> . . .

Background on Who May File a Grievance:

The President of the Merrill Teachers Association (MTA or Association) is David Belfiori. Belfiori was a negotiator for the Association in the 1960's, 1970's, and 1980's, and served of the Board of Directors of the MTA. He was not on the negotiating team that negotiated the 1991-93 collective bargaining agreement.

On August 5, 1993, Belfiori filed two grievances and named MTA as the aggrieved person. The chief negotiator for the Association, Jeff Hetfeld, actually wrote the two grievances. Part of the District's response of August 17, 1993, was that the master contract does not recognize a union or MTA group grievance. On August 25, 1993, Belfiori sent a letter to Ralph Neale, the District Administrator, stating that he wanted to replace "MTA" with his own name, thus making the two insurance grievances individual grievances.

Past presidents of the Association have filed grievances on behalf of the Association on at least four separate occasions. On February 4, 1975, Robert Monti, then president of the Association, filed a grievance regarding the distribution of the Association newsletter. On June 3, 1980, Ira Rebella, then president of the Association, filed a grievance alleging a violation of the master contract. On February 4, 1982, Monti as president again filed a grievance alleging a violation regarding the insurance plan. On January 20, 1992, Terry Van Straten, then president of the Association, filed a grievance on behalf of 14 others regarding horizontal lane movement. And, following the filing of the instant grievance, Mike Hacker filed a grievance on December 17, 1993, on behalf of junior high school teachers.

The Parties' Positions on Who May File a Grievance:

The District: Individual Must File:

The District submits that the collective bargaining agreement does not afford the Association or its officers the right to file on behalf of the Association or in their capacity as officers of the Association. The fact that Belfiori substituted his name to that of the Association reinforces the District's position that the Belfiori had no standing to file the grievance in his official capacity. While the Association introduced Exhibits 19 through 23 to justify its position, there was no evidence to show the final determination of those grievances.

The Association: No Waiver of Right to Enforce Contract:

The Association submits that the right of the Association to file grievances to enforce its contract with an employer is well established, even when there is no specific language in a contract providing for an Association grievance. The Association points to many arbitration decisions where associations have been allowed to give

grievances involving contract interpretation, even though the language refers to individual grievants.

Discussion & Decision: The Association May File This Grievance

The contract, in Section 14.2, defines an "aggrieved person" as the person or persons making the claim, and a "party in interest" as the aggrieved person and any person who might be required to take action or against whom action might be taken in order to resolve the claim. Step I in Section 14.3 refers to "the grievant." Step II refers to a "party," as well as a "grievant" and "parties of interest." Step IV refers to the "aggrieved person." There is nothing in the reading of the contract that leads me to conclude that the Association is barred from bringing a group grievance and that only individuals may grieve. Certainly the Association may fall within the definitions of "aggrieved person or persons" or "party in interest." The Association as a whole, representing all individual bargaining unit members, is the aggrieved person or party in interest that brings this grievance.

IS THE GRIEVANCE TIMELY?

When Hetfeld became chief negotiator in 1992, the Association asked for a document called a master agreement between Blue Cross-Blue Shield and the District. When the document was received, the Association noticed a clause which included major organ transplant coverage or heart, heart-lung and liver transplants. This benefit had apparently been added on May 1, 1991. Hetfeld became curious, because this benefit had been offered during negotiations but the Association had turned it down. 2/

Gregory Kautza, the Director of Administrative Services, told Hetfeld in a meeting on May 24, 1993, that the major organ transplant coverage was in effect for 10 days. Hetfeld wondered about the fact that if the transplant coverage had been added and then dropped, the premiums should have decreased for that year, but there was no decrease in the premium.

In a meeting on July 26, 1993, Kautza told Hetfeld that the District had the option of accepting a decrease in premiums or adding some other coverage. Kautza told Hetfeld that dropping the transplant coverage could have decreased

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2/ Jt. Ex. 7 shows that the parties reached a tentative agreement for the 1991-93 contract, and on page 3 of the summary of tentative agreements, there is this statement: "The transplant coverage will not be included in the policy."

the premium by three percent. Kautza showed Hetfeld a letter from the Hedlund Agency, written February 21, 1991, which showed that the rate would go down 2.9 percent based on the experience of the group. Hetfeld got a copy of the letter by September 2, 1993.

The labor contract language quoted earlier gives a grievant 20 days (defined as normal business days) after he or she knew or should have known of the cause of the grievance to start the process as described in Article 14.

One of the grievances filed on August 5, 1993, (Bd. Ex. #24) stated:

> In July of 1992 MAPS negotiated a lower health premium with BC/BS. As a result, monies were due the MTA in the form of an adjusted 1992-93 salary schedule. However, because of the total pkg. cap not all monies due were received.
>
> Contract Provisions Violated:
> 1. Salary Schedule 1992-93.
>
> Action Requested:
> 1. The 1992-93 Salary Schedule be readjusted to reflect monies due the MTA.

Hetfeld testified that when the insurance premium originally came in for the 1992-93 school year, it was a 22.8 percent increase. But in the summer of 1992, Blue Cross-Blue Shield reduced the premium. When Hetfeld and the Director of Personnel, Jack Ader, met to generate a salary schedule for

1992-93, they agreed to use a figure of 19.4 percent premium increase and generate a salary schedule that include a 6.3 percent cap on the total package of salary and benefits.

The reduction of the premiums, from 22.8 percent to 19.4 percent, generated about $26,000. Hetfeld and Ader tried to fit all of that money into the salary schedule, but could fit only $23,000 in the schedule. The Association then filed the above noted grievance to get the other $3,000 back. This grievance (Bd. Ex. #24) was dropped on September 15, 1993, by a note from Belfiori to Neale (Bd. Ex. #27).

The other grievance (Jt. Ex. #2), dated August 5, 1993, the subject of this hearing, was written by Hetfeld as follows:

> In the spring of 1991 BC/BS Insurance Group informed MAPS of a reduction in premium for the insurance contract year of May 1, 1991 - April 30, 1992.
>
> In lieu of the lower premium, MAPS chose to accept a reverse retro agreement and additional coverage in the form of heart/heart-lung/liver transplant.
>
> The MTA had no knowledge of these transactions. The Association feels it should have been party to these discussions and decisions. Especially in light of the impact on wages the lower premium would have had.
>
> Transplant coverage was later deleted from coverage due to

> negotiations. However, MTA was unaware at the time that the coverage had already been added to the policy.
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> Contract Provisions Violated:
> 1. Salary Schedule: Exh. B.
> 2. Letter of Understanding: Appendix E.
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> Action Requested:
> 1. MAPS shall not make unilateral decisions regarding health/dental insurance premiums, coverages etc. without the input of the MTA. 3/
>
> 2. The 1991-93 salary schedules should be readjusted to reflect the wage impact that would have occurred had there been a lowering of premium. Backpay should be distributed accordingly.

The parties met and discussed the grievance on September 2, 1993. Belfiori and Mike Hacker sent letters to Neale, both dated September 15, 1993, which dealt with the action requested in number 1 and 2 above. Belfiori's letter dealt with the first action requested:

> This letter is a response to the discussion we had on September 2 regarding my grievance of August 5, 1993. This letter is a statement explaining my, as well as the MTA's, position on this issue. I believe that this is what we agreed to at our meeting.
> 1. The Merrill School District agrees to share all information concerning insurance with the Merrill Teacher's Association.
> 2. Any information from the

3/ A note in the margin next to this item states that "Letter response of 9/15/93 replaces this." This letter will be subsequently noted.

> insurance agent, insurance company, or any other representative of the insurance carrier will be shared promptly with the MTA.
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> 3. Any proposed changes in the insurance policy, premiums, or coverage will be shared with the MTA. Any changes in benefits or carrier should be brought to the attention of the MTA.

Hacker's letter dealt with the second action requested in the grievance:

> This memo is in regard to the second "Action Requested" item from Dave Belfiori's grievance of August 5, 1993. It's still our feeling that salary schedules should be readjusted. Because of this, we wish to proceed with the next part of Step III of the grievance procedure.
>
> We would like to present our grievance to the Board of Education as soon as possible. Could you set it up for us to be part of the Board's agenda for an upcoming meeting? Step III states that I should present something in writing to the Board. To my way of thinking, this would be the original grievance or a copy of it. Do you want me to send a copy to Bruce Giese or will you take care of it?
>
> Step III gives the Board thirty days from the time it is notified to give a written disposition of the grievance before any further action is taken.

David Bock is an account executive in agents and sales with Blue Cross and Blue Shield. He does not work directly with groups but works through agents who then work with individual employers. The agent for the District is Brian Hedlund of the Hedlund Agency. On February 21, 1991, Bock sent Hedlund the following letter:

As I mentioned to you recently, I am very pleased to advise you this group has continued to enjoy good claims experience on both their health and dental coverage. This is an excellent reflection of the School District's administration, employee health habits, and the Advantage Pre-Certification Program. I wish all my groups were this stable.

As you can see from the renewal calculations, the actual projected rate change would be a 2.9% decrease. However, we recommend the group not take advantage of this small rate decrease since our renewals normally have a 3% plus or minus error factor and if our calculations were understated, this could exacerbate their rate increase next year. Rather, I would suggest the following action for the renewal.

As you are well aware, this group was under the impression they had a Reverse Retrospective agreement in place for the last year. Our subsequent investigation showed that a new agreement had not been executed and, obviously, they were not eligible for a refund. It may be that some confusion occurred during the transition from Barb Bako to Ron Oschman, but I cannot say for certain. Whatever the case, Merrill Schools enjoyed this funding arrangement and had had some success with it in the past.

Normally, we charge 3.1% of the annualized premium for the risk involved in offering this program. If Merrill Schools so decided, we could provide this program for the upcoming year without that normal 3.1% charge. Furthermore, there had been a previous inquiry regarding offering the Family Security Benefits to Merrill Schools employees. As you remember, this costs 1% of the annualized premium. We would include

this at no cost also. 4/

> We are willing to give Merrill Schools a choice of electing to take the Reverse Retrospective agreement and the Family Security Program for the upcoming year at no additional premium cost, or they could request a 2.9% rate decrease. Once again, I believe the premium reduction is a riskier choice, but I would be happy to do whatever the group desires. They are a good and valued client and it is Blue Cross' strong desire to continue this relationship.
>
> I have included a couple of brochures on the Family Security benefit and also a brief description of the reverse retrospective agreement. If you have any additional questions, please feel free to call me.

A reverse retrospective agreement is a funding arrangement with the insurance company whereby an employer group pays slightly more than a calculated premium. If the claims come in under the anticipated claims level, the insurance company refunds the excess premium. Bock testified that 3.1 percent is charged to cover the cost of the risk the company assumes by offering to give money back. This reverse retro agreement must be specifically added to an insurance contract each year, it is not an automatic part of the insurance contract. The reverse retro agreement was in effect from November 1, 1988 to October 31, 1989, and the

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4/ Hedlund wrote some notes in the space following this paragraph. He made a note of 1.65 percent per month for a waiver of premium for 12 months, and 1 percent for heart, lung and liver transplant.

District received $104,121 back from Blue Cross & Blue Shield in May of 1990. The insurance company needs a six-month period to allow claims to run out following the reverse retro contract period. The reverse retro agreement was never negotiated with the Association.

Bock testified that when he spoke with the underwriter about the rates for the 1991-92 year, the underwriter preferred to leave the premium at the previous year's level, because the 2.9% difference is a small difference. Renewal rates may have a 3% plus or minus error factor, and if calculations were understated, the rate increase in the next year would be exacerbated. Bock talked with the underwriter about either giving the Merrill School District a rate decrease or give the group some benefit alternatives that would give the group back the value of 2.9% without increasing the risk tremendously. He did not want to tell the group that it would be eligible for a rate decrease but that the company would not grant it. However, Bock noted that going with the lowest possible rate may make the rate increase the following year that much larger. Accordingly, Bock recommended that the group not take advantage of the small rate decrease.

On April 15, 1991, Hedlund sent to Kautza a copy of

Bock's letter, with the message:

> BC/BS is presently offering a 2.9% decrease in rates, or 4.1% in added benefits at no additional premium increase. Dave Bock is trying to get 5.1% in added benefits if you want it. Keep in mind though that with the reverse retro agreement, you are receiving back unused funds or premium. If we add in both family security benefits and transplant coverage, there is more exposure to greater claims.

On the bottom of Bock's letter, Hedlund wrote a note: "To include heart/lung, liver, transplant, add 1% additional." Hedlund recalled discussing the waiver of premium benefit with the District, and both agreed that it was an expensive benefit. During the early part of 1991, Hedlund usually talked with Kautza or Robert Opsahl, who was the Superintendent at that time. Hedlund did not communicate with the Association. He works between employers and insurance companies to provide services to employers. He also works with employees to provide customer service when there are questions about terminology in master contracts or benefit books.

Hedlund had recommended the transplant coverage to the District for several years. Opsahl told him that it should be included in the renewal contract for insurance in the spring of 1991. Opsahl put the reverse retro agreement in

for budgetary reasons. Hedlund brought the renewal contract to the District, which included under option benefits the reverse retrospective premium agreement and heart - heart/lung - liver transplant benefit. Opsahl signed the form on April 29, 1991 and Hedlund forwarded it to Bock, who signed it on April 30, 1991. Bock was advised by Hedlund on May 20, 1991, that the group declined to take the transplant benefit, and Bock then deleted it from the group agreement.

Opsahl had been the business manager in the District for 18 years. He retired in 1989 or 1990, but returned temporarily as superintendent in the 1990-91 school year. Opsahl was responsible for working with insurance as business manager. He once told Elmer Hedlund of the Hedlund Agency that primary discussions regarding insurance were to be held with the District, not the Association, because the District was paying 90 percent of the premium.

In the initial negotiations for the 1991-93 collective bargaining, in February of 1991, the District proposed a health insurance increase in the package for 15 percent the first year and 20 percent the second year. William Bracken was Director of Employee Relations at the Wisconsin Association of School Boards, and he served as the negotiator for the District in this round of bargaining.

Hetfeld recalled that at the second or third negotiation session, Bracken offered to add transplant coverage to the insurance plan. Hetfeld testified that the District offered to add the transplant coverage at no cost the first year, but that there would be an additional cost of three percent the second year. The Association asked the District if there would be more money to add to the package if it did not take the transplant coverage, and Bracken replied no, that it was a take it or leave it deal. Since the parties were working under the concept of a total package cap, the Association declined the offer for transplant coverage.

The Association proposed that the insurance plan include a waiver of premium for people on long-term disability. The District wanted to negotiate over increasing the deductibles and establishing an 80/20 co-pay provision. The District made an offer on April 10, 1991, and the Association made a counter proposal in response, which was received by the District on April 25, 1991. The Association's counter proposal states, among other things:

> 3. MTA seeks further clarification of proposal 22.1(a) "Waiver of Premium" and/or utilization of the $25,000 surplus indicated by Blue Cross.

Both the District and the Association costed their own proposals as well as each other's proposals. The Association used information from the District when figuring insurance rates. Kautza was not aware of any surplus of $25,000. He guessed that the Association figured the reverse retro money was 3.1 percent of the total, which would be around $21,000, but he had no personal knowledge of any surplus.

The chief negotiator for the Association, Michael VanLieshout, confirmed that without the reverse retro agreement, there would be a $25,000 difference in insurance. During the April 1991 meeting, the Association was asking for a clarification -- was there in fact a $25,000 reduction?

Bracken recalled from his bargaining notes taken during the bargaining session held on May 7, 1991, that the Association talked about a $25,000 surplus from the reverse retro agreement and the Association wanted that money. Bracken's notes show that during a joint session between the District and the Association, the 2.9% decrease in premium was mentioned as was the 3% increase for the reverse retro agreement, which left the premium the same as the prior year. Bracken's notes do not indicate who made the statement regarding the 2.9% decrease in premiums, and Bracken did not recall who said that there was a 2.9% decrease as well as a

3% premium for the reverse retro agreement. Bracken assumed from his notes that VanLieshout was making these statements during the joint bargaining session, but he could not be certain by the time of the arbitration hearing. Bracken's notes also name Kautza during this discussion, but no one is certain whether Kautza made a statement regarding the insurance rates at this juncture in the joint session.

VanLieshout did not recall hearing the 2.9 or 3 percent figures, but recalled that dollar amounts were given for those numbers when they talked in joint session about that particular item. Negotiation notes from the Association reflect the figures of $10,000 to add transplant coverage to the plan and $10,000 for waiver of premium.

Bracken believed this meeting to be the first time the Association was aware that there would be no increase in the insurance premium. Bracken testified that the Board would not have agreed to put a potential decrease in insurance premiums on the salary schedule, and that the parties never discussed distributing the $25,000. The Association made no proposal regarding distributing the $25,000.

VanLieshout testified that the Association learned that Kautza had inadvertently left the reverse retro out of the

insurance agreement, a mistake when Kautza was new to the position. VanLieshout believed that in order to rectify the situation, Kautza had strong-armed Blue Cross and Blue Shield into adding coverages such as transplant and either the reverse retro or a waiver of premium. The Association was told that those items were in place for 1991-92, but the Association was concerned about how much extra the insurance would cost in the 1992-93 package with transplant coverage. VanLieshout testified that the Association was never told anytime before 1993 that the premium for 1991-92 could have been reduced by 2.9 percent.

Gene Bebel, a school principal and member of the District's negotiating team, met with Opsahl before the final negotiation session on May 7, 1991. Opsahl told Bebel that he had included some additional items in the insurance package, such as organ transplants. Bebel told Opsahl that it was inappropriate to do that unilaterally, and Opsahl said he would be talking to the Board members who were coming to the negotiation session shortly. Bebel recalled that the District negotiating team decided prior to meeting with the Association that the District was not going to bring up anything about the transplant coverage with the Association.

Board Member Tim Sandholm was present on May 7, 1991.

He recalled that he was very unhappy to hear that Opsahl put transplant coverage into the insurance plan, since he believed it was an experimental procedure that did not belong in the labor contract. The Board members were concerned because they felt the staff already knew about it, and that they had given away the ship before they even started. The Board members agreed that transplant coverage would not be part of a package and not be offered.

When the District and Association negotiating teams met, the fact that transplants had been included in the insurance plan came up. Hetfeld told the District that his group did not ask for it, did not need it, and did not want it. Sandholm said good, that they never had it in the first place because it was not approved at the Board level.

Bebel recalled that during the first joint session, he attempted to call a caucus with the District team members after the discussion on insurance started. Bebel testified that the District took such a caucus and came back into the joint session and notified the Association that the transplant coverage would not be offered.

However, Bracken's notes and testimony indicate that later in the evening of this negotiation session, the

District played with the idea of offering transplant coverage for an inservice day, at least in its own caucus.

The tentative settlement took place May 7, 1991. The parties agreed to a 6.3 total package increase for 1992-93 for salary and benefits. If insurance premiums ran higher than the estimate, salaries would go down in order to stay within the 6.3 package. The contract was signed on June 5, 1991. There was no increase in the insurance premium for the 1991-92 school year from the 1990-91 year. The parties agreed to add the waiver of health insurance premiums for people on disability. The parties did not agree to transplant coverage, higher deductibles, or co-pay provisions.

The contract language that uses the total package concept is the following in the Letter of Understanding, Appendix E, attached to the 1991-93 contract:

> **Salary Schedule** - The 1991-92 salary schedule will be built using a $21,725 BA base on the existing salary schedule structure. The parties have agreed to employ a total package approach in settling this contract. The total package costs of the first year will be $4,604 per teacher or 5.78% based on 216.9 FTE. The costing figures and components are as detailed on information

from Mr. Jack Ader dated May 8, 1991.

The 1992-93 salary schedule will be built once the health and dental insurance rates are known with certainty. Based on the assumptions contained in the communication described above, the BA base in the second year is projected to be at $22,660. This will change depending on the health insurance and dental insurance premiums actually received by the District in 1992-93.

The parties have agreed that the 1992-93 salary schedule will be adjusted upwards/downwards in the second year (1992-93) based on the health and dental insurance premiums.

In the second year, the health insurance premium increase is estimated at 12%; the dental insurance increase is estimated at 5%. The 1992-93 salary schedule shall be built when the insurance rates are known with certainty.

The total package increase per teacher in 1991-92 is $2,604 per teacher based on 216.9 FTE or 5.78%. The second year total package increase per teacher is $3,000 on the same 216.9 FTE or 6.30%.

The costing methodology (constant staff move forward) and components are accurate as also stated on the Mr. Ader's cost out as supplied by the Board dated May 8, 1991; the only "variables" that the parties agree to adjust will be the experience on health and dental insurance rates.

For example, if health insurance increases only 10% in 1992-93 instead of the projected 12%, there will accrue a "savings" of $13,703. This amount will be added to the salary schedule (and roll-up through the other components) so that the total package remains 6.30% and $3,000 per teacher average total package

> increase. In other words, the parties have agreed to an average total package increase per teacher at $3,000 or 6.30% specified above. The health, dental and salary schedule components (along with all other costing components) will be adjusted to bring about a total package increase at the numbers cited above.

Hetfeld received a copy of the group agreement between Blue Cross & Blue Shield and the District in either June or July of 1993. During the July 26, 1993 meeting between Hetfeld and Kautza, Hetfeld asked why the premium did not go down when the group rejected the transplant coverage. Kautza explained that transplant coverage was not part of the cost, it was just something negotiated in, and that the 2.9 percent referred to the reverse retro agreement.

The Association calculated that if the insurance premiums had actually been decreased for 1991-92 by 2.9 percent, there would have been $16,792 in dollars to put on the salary schedule. Similarly, in 1992-93, there would have been $17,459. In 1993-94, the Association calculated the difference as $18,447.

Nearly one year before the August 5, 1993, grievance was filed, members of the support staff and the District met with representatives of WPS on July 2, 1992. Kautza called Association members, particularly those on the MTA's

insurance committee, but was told that no one from the Association was going to show up. After WPS completed its presentation, representatives from the Wisconsin Education Association Insurance Trust (WEAIT) presented a proposal on insurance. Association representatives came with WEAIT representatives. Hetfeld and Edwards were present during the latter part of the meeting.

The parties settled a labor contract for 1993-95 without any discussion of whether the 1991-93 salaries should have been highway because of money available from the total package.

THE PARTIES' POSITIONS: 5/

The Association:

The Association states that it had no knowledge of the potential 2.9% health insurance premium reduction prior to July 26, 1993. Although Hetfeld was on the Association's bargaining team during the 1991 negotiations, he testified

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5/ While the basic question is what-did-they-know-and-when-did-they-know-it, the issue of timeliness is so completely interwoven with the merits of this case that the Arbitrator is treating the issues together for the purposes of stating the parties' positions.

that he had no knowledge of the potential decrease until July 26, 1993, when he was told of the premium reduction option. Hetfeld's recollection is that during the 1991 bargaining, the District offered to add transplant coverage for no cost the first year and 3% the second year. Moreover, the Association's chief negotiator, Mike VanLieshout, testified that at no time had he heard that there was a potential 2.9% reduction in premium in 1991, only that there would be no increase in the premium rate for 1991-92.

The Association suggests that it was highly likely that the District knew of the potential 2.9% decrease at the time the Board make its initial proposal to the Association which showed an anticipated 15% increase in premiums for 1991-92 contract year, but that the District did not communicate the reduction to the Association. Costing figures generated in May of 1991 show no increase in the premium.

The Association finds Bracken's testimony regarding a discussion of a potential 2.9% premium reduction to be unreliable, since his knowledge is limited to interpretation of his bargaining notes. Bracken admitted that his notes were incomplete, and that he did not remember who said certain things appearing on his notes. He recalled that the Board did not want to negotiate either the reverse retro

agreement or transplant coverage with the Association. Bebel found out about the transplant coverage only on May 7, 1991, from Opsahl. This indicates that the rate and coverage information was a closely held secret, not even shared with the District's own bargaining members.

VanLieshout testified that the parties referred to dollar figures instead of percentages, and that the Association was told that the transplant coverage would add roughly $10,000 to the plan and the waiver of premium another $10,000. Bebel's testimony indicates that Bracken did all of the talking, and Sandholm's testimony refers to 15 and 20 percent premium levels at the May 1991 bargaining session, even when the District knew there would be no increase in 1991-92. District representatives Ader and Kautza never testified that they told the Association about the 2.9% reduction. The Association submits that there are too many discrepancies in the District's case to conclude that the Association knew of the potential reduction.

The Association contends that the District has a history of keeping health insurance cost information from the Association. Former District Administrator Opsahl admitted that he told the insurance agents that primary discussions regarding the premium would be with management.

While the District implies that the Association should have known about a potential decrease in the premium where the premium stayed the same when benefits were added, the Association points out that the insurance company has flexibility in charging for benefits offered. The Association would not have proceeding to arbitration if it knew of the premium reduction at the time of bargaining.

As a remedy, the Association seeks readjustment of salary schedules based upon a review of the actual total package amount agreed to by the parties and the subsequent decrease in the insurance premium by 2.9% as it should have been applied in 1991.

The District:

The District submits that no contractual provision of the collective bargaining agreement has been violated. The grievance is really claiming that money that could have resulted from lowering of the premium rate should have been applied to the salary structure, and this is a negotiations type of argument, not one involving the meaning, interpretation and application of the bargaining agreement. The grievance alleges that more money should have been placed

on the salary schedule as a result of negotiations, that sufficient money was not placed into the package which is to be administered by the letter of understanding. There is no allegation that anything was done improperly under Appendix E, but rather that Appendix E does not contain enough money. This type of allegation is not contemplated by the grievance procedure.

The District argues that the grievance is not timely and that the Association is now trying to renegotiate the 1991-93 bargaining agreement. The Association's claim that it did not know of the premium reduction that might have taken place had not the reverse retro been put in the 1991-92 insurance contract is unfounded. It strains credibility to believe that the Association never questioned why insurance rates for 1991-92 did not increase, given the fact that the parties were bargaining a total package concept.

The District points out that during the course of bargaining, the Association asked the Board to clarify the $25,000 Blue Cross surplus. Both VanLieshout and Bracken testified that this money referred to the reverse retro agreement. Further, the District asserts that Bracken's notes clearly indicate that the concept of a reduction in premiums by not placing the reverse retro into the insurance

plan was discussed. At the same time, the parties discussed the transplant coverage, coverage that Opsahl unilaterally put in the insurance contract.

Therefore, the District maintains that the Association's knowledge included Strick's letter on reverse retro, the Association's own counter proposal regarding the $25,000, as well as the May 7, 1991 bargaining discussion regarding transplant coverage and reverse retro premiums. All of this shows that the Association knew there would be a premium reduction if the reverse retro had not been placed in the insurance contract, and the Association then settled the bargaining contract.

Even if the Association did not have actual knowledge, the District argues that the Association should have known of the cause of the grievance under the reasonable person standard. The Association's bargaining team was not a group of neophytes and was represented by a WEAC UniServ Director, Jermitt Krage. Moreover, in July of 1992, the District bid its insurance coverage with the concept of reverse retro. WPS understood the bid to require reverse retro, and WEAIT refused to discuss the concept with Kautza. Edward attended the insurance meeting with a WEAIT representative.

The District contends that the grievance filed on August 5, 1991, over the issue of reverse retro is beyond the 20 days set forth in the labor contract. Even if the Association believed the more money should have been placed on the salary schedule during the 1991-93 contract, it could have and should have made that argument during negotiations for the 1993-95 bargaining agreement, regardless of what bargaining law was in effect.

Moreover, the District asserts that the Arbitrator lacks the authority to grant the remedy being sought. The bargaining history shows a reluctance to add $25,000 to the salary schedule even if it had been available. The Association has waived its right to adjust the salaries of the 1991-93 collective bargaining agreement. VanLieshout was not even asking at the table to apply the $25,000 to the 1991-92 salaries, but to the 1990-91 salaries. The waiver clause in the contract, Section 32.1, further forecloses the Association from coming back to rebargain the contract. The purpose of this clause is to preclude the parties from renegotiating the agreement after it has been settled, especially where a party knew of the issue which was not resolved to that party's satisfaction.

Finally, the District submits that the Association

should be estopped from bringing up the 1991-93 salaries where it never brought the matter up in bargaining for the 1993-95 contract. By failing to make any demand during the last round of bargaining, the Association waived its right to request any remedy in the matter. The District concludes that this is a grievance that is designed to try to get more money for the Association, something it could not achieve in bargaining.

The Association's Reply:

The Association claims that the District has confused the issue of reverse retro with the 2.9% potential premium reduction offered by Blue Cross & Blue Shield for the 1991-92 year. VanLieshout heard about the failure of the District to include reverse retro in the 1990-91 insurance contract prior to the April 10, 1991 bargaining session. The Association figured that either the District paid about $25,000 too much for insurance or saved that amount because the reverse retro agreement was not included in the insurance contract. However, this $25,000 was not related to the 2.9% premium reduction for 1991-92.

The bargaining history does not support the District's contention that the Association should have known about the

2.9% savings. While Association negotiators were told that the premium would not go up, they were never told that the premium could have been reduced by 2.9% The insurance company was even contemplating adding up to 5.1% in new benefits while maintaining the premium at the previous year's level. The District's bidding of insurance for 1992-93 did not inform the Association of the misrepresentation in the spring of 1991.

The Association asserts that the settlement of the 1993-95 contract did not waive the remedy sought here, as the District was aware of the grievance and pending arbitration at the settlement of the 1993-95 contract. The Arbitrator does not have to reinterpret the 1993-95 bargain.

The Association states that the District enriched itself at the expense of 231 bargaining unit members by misrepresenting true health insurance costs. There must be a remedy which holds the District accountable for the violation of Article 31.4.

DISCUSSION AND DECISION:

The Grievance is Timely:

This case illustrates one of the primary underlying reasons for time limitations on bringing grievances forward. Memories fade.

Three years after the parties negotiated a labor contract, they can barely remember who said what to whom when. Small wonder.

The issue of timeliness centers on the May 7, 1991 bargaining session, where the parties reached full tentative agreement on the 1991-93 collective bargaining agreement, and whether the Association knew by the end of the bargaining session on May 7th that there was a possibility that insurance premiums could be decreased by 2.9 %. If the Association had any such knowledge by that time, or if the Association should have known of the potential decrease, the grievance is untimely.

There is no clear evidence that the Association knew that it was possible for the premium to go down by 2.9% during the spring of 1991 when the bargaining took place. The evidence falls short of showing that the District told the Association that it was a possibility to have a lower premium, even though the insurance company wanted to keep the same premium in place. The only evidence that the 2.9%

figure was mentioned to the Association is on the face of Bracken's negotiation notes. However, Bracken could not recall who said what about this 2.9% figure.

No one else recalls having told the Association that the insurance company stated that the District might be eligible for a 2.9% decrease in premiums.

While I do not discount Bracken's notes, there should be some corroborating evidence, given the number of people involved. However, all of them seem to have focused on other things. Bebel and Sandholm were upset that Opsahl had put the transplant coverage into the insurance contract without bargaining over it or having Board approval of it. They were focused on getting rid of it without feeling as if they had to give the Association a quid pro quo for it, since it was already put into place. The Association was focused on a potential surplus of $25,000 which it figured should have been available given the fact that the District did not have the reverse retro agreement in place the prior year. The Association was also focused on obtaining a waiver of premium benefit, rather than transplant coverage.

Everyone knew sometime during this bargaining session that the insurance premiums were staying the same as the

prior year. It is possible, in accord with Bracken's notes, that someone stated that the premium was remaining the same because of the fact that while there was a 2.9% decrease in the rate, the addition of the reverse retro agreement wiped out the decrease and left the premium level flat. Such an item could have been easily overlooked as both parties focused their attention regarding insurance on other matters.

The matter of whether the Association had actual knowledge of the potential decrease in premium rates is not established with any degree of certainty.

While the District argues that the Association should have known of the potential decrease, it was the District's obligation to make the Association aware of the facts. The District held the source of information to itself. It effectively prevented the Association from discussing premium matters with its agent, the Hedlund Agency, through Opsahl's administration of insurance matters at least. There is no evidence that the District ever gave the Association a copy of Bock's letter or Hedlund's faxed cover with Bock's letter. The members of the District's negotiating team were prepared, before the start of the May 7th negotiating session, to withhold information regarding transplant coverage that Opsahl added without Board approval. However,

the Association bargaining team already knew about it and brought it up during the first joint session.

The Association should have known of the potential decrease only if the District had enabled it to have this knowledge. The District appears to believe that matters involving insurance premiums are its exclusive domain. But the District wants the Association to share in the problem of rising insurance costs without sharing relevant information regarding the insurance rates. Ah, the perils of package bargaining.

The District argues that the Association was aware of the fact that the District did not have the reverse retro agreement in place for 1990-91. This is true, but it does not establish the fact that when the insurance company notified the District of the potential 2.9% decrease in premiums for 1991-92, the District in turn notified the Association of the potential decrease. It also does not follow that the Association should have known of a potential decrease. The matter of the reverse retro agreement, the potential of a $25,000 surplus, the potential of increased levels of benefits for the same premium -- these are all related to the actual premium rate. However, it was impossible for the Association to determine what the premium

rate was going to be without the District's help. The District should not complain now that the Association should have known more about the premium rates, when it was the District that prevented the Association from becoming a full partner who would have been knowledgeable about insurance rates. 6/

The District contends that the Association's knowledge about the lack of the reverse retro agreement for 1990-91 shows that the Association should have known of a potential rate decrease for 1991-92. However, the Association was under the mistaken impression that without the reverse retro agreement, money should be refunded to the District. In fact, just the opposite is true. Without the reverse retro agreement, no money would have been refunded to the District. This reverse retro agreement strikes the Arbitrator as similar to taxpayers who do not want a big tax bill in April and allow the government to withhold more than necessary in order to get a refund. Under the reverse retro agreement, a refund is possible if claims do not rise to a certain level.

6/ The Arbitrator does not wish to belabor this point, since it appears that the era of secrecy belongs to past administrations, not the present one, and that the parties have agreed to share all pertinent information in the future. The only point is that the party who kept information from the other party should not be complaining now that the grieving party should have known more.

But no refund is available at all without the reverse retro agreement.

However, before the hearing in this matter, it is almost certain that the Association had no in depth knowledge of how the reverse retro agreement worked or how the premium payments were structured. Even using a reasonable person standard, there is nothing about this funding arrangement between the District and Blue Cross that would lead a reasonable person to be aware of the actual premium structure. There is no reason that the Association should have known about a potential decrease unless the District took the trouble to lay out all the information to the Association. Instead, the District considered the reverse retro agreement to be non-negotiable. The District's total conduct -- including the fact that it did not want the Association to know that Opsahl added transplant coverage, and the limitations placed on the Association in trying to get information from the insurance agency directly -- shows that the District was less than forthright with the Association at times regarding insurance rates. While it remains uncertain that the Association had actual knowledge of a potential 2.9% increase, there is nothing in the record that leads me to believe that the Association should have known about it.

Two other contract sections come into play here -- Section 31.4, under the general heading of "Procedure for Negotiating Next Agreement," and Section 32.0, called "Waiver." They read as follows:

> 31.4 All pertinent facts (including financial resources of the District, trends in salary schedules, trends in fringe benefits, and so forth) opinions, proposals and counter proposals will be exchanged in good faith by the parties freely during or between the negotiating meetings in an effort to achieve full understanding and a mutually satisfactory agreement. Both parties agree to bargain in good faith and all items which both parties agree to include in the master agreement shall be included in the master agreement.
>
> 32.1 The parties acknowledged that during the negotiations which resulted in this Agreement, each had the unlimited rights and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement.

The District argues that it is too late for the Association to renegotiate the 1991-93 contract, and that it has waived the right by contract to do so. However, it would have been impossible to the Association to waive the right to make a proposal regarding a 2.9% decrease in insurance

premiums, where the District might not have told the Association that such a decrease was possible. The District's first proposals included estimated increases in premiums, and the final information given to the Association was that there would be no increase for the first year of the bargaining agreement. Moreover, under Section 31.4, the District clearly had an obligation to disclose "trends in fringe benefits" and exchange information with the Association.

While there is some doubt of whether the Association had actual knowledge, based on the fact that Bracken's notes may have correctly portrayed the discussion, it is better is most cases of doubt that the grievance proceed on its merits. The burden of proof needed to show that the grievance is untimely rests on the District, and the proof falls short in order to call the grievance untimely. It is also possible to consider the grievance as a continuing violation given the fact that the allegations, if sustained, continue to effect the salaries. However, the date of filing may also affect any potential remedy.

The Grievance Lacks Merit:

The Association contends that the District violated

Section 31.4 by not giving it the true information regarding the potential rate decrease offered by Blue Cross & Blue Shield in the spring of 1991 for the 1991-92 year. The burden of proof now shifts to the Association. While doubt regarding this runs to the Association's benefit in the consideration of the timeliness of the grievance, it runs against the Association in consideration of the merits. The Arbitrator should not find a contract violation and impose a remedy upon the District without solid proof that the District did violate the contract as alleged by the Association.

It is impossible to resurrect what happened the evening of May 7, 1991 with any accuracy. If I were to speculate over the meaning of Bracken's notes (particularly page 3 or Exhibit 37-B), I would guess that when VanLieshout was talking about a $25,000 surplus, Kautza jumped into the conversation and noted that there was no reverse retro agreement for the previous year, and that due to the 2.9% decrease but a 3% premium for the reverse retro agreement, the premium stayed flat. As noted above earlier in the discussion regarding the timeliness issue, the parties had focused in on different aspects, and a statement made once by Kautza or anyone else from the District that a 2.9% decrease, combined with a 3% increase leaving the premium flat, would

have been unworthy of much note in the bargain where the District sought to get rid of the added transplant coverage and the Association sought the waiver of premium benefit and any potential refund from the lack of the reverse retro agreement. However, this is speculation and the events cannot be known with any certainty now.

The grievance fails for two reasons -- the proof falls short of demonstrating that the District violated Section 31.4 or any other section of the contract, and the remedy sought is too speculative to impose without such proof. Even if the evidence were conclusive that the District violated Section 31.4, the remedy would not necessarily be the relief that the Association seeks through this grievance.

In its grievance, the Association initially sought two remedies: (1) that the District would not make unilateral decisions regarding insurance premiums without the input of the Association, and (2) that the 1991-93 salary schedules be readjusted to reflect what they would have been had the premium actually been lowered, and back pay be distributed accordingly. The first remedy sought was satisfied in September of 1993 and the only part of the grievance left is the remedy regarding the salary schedule.

Thus, the remedy is based upon the following speculation: if the Association had known during the bargaining in the spring of 1991 what it knows now, it might have negotiated a different salary and insurance package than the one it negotiated.

But it is unlikely that even if the Association knew that the District had the option of a 2.9% decrease in premiums, the Association could have successfully bargained with the District to take that decrease and place the difference on salary. In fact, the evidence swings to the opposite conclusion, that the District never had any intention of taking a premium decrease, but only to maintain premiums at a flat level or no increase for 1991-92.

It is not even clear that had both parties eventually agreed to the 2.9% premium decrease, that Blue Cross & Blue Shield would have agreed to it, since Bock noted that a 2.9% decrease is so small that it was within the margin of error for renewal rates, and the insurance company did not want to give a decrease which may only have exacerbated premium rates the following year.

Therefore, two out of the three parties involved in the insurance rates did not want to take advantage of the 2.9%

decrease. It is highly speculative that the Association alone could have driven the premium rate down and added the money to its salary schedule. Once the District put the reverse retro agreement back into the insurance rates for 1991-92, the 2.9% decrease virtually evaporated. 7/

All in all, the grievance lacks merit. The Association's burden is a difficult one, because it must both be able to demonstrate that the District failed to give the Association the correct premium rate information and that the remedy it seeks for such a failure is to adjust the salary schedules. It cannot sustain this burden, with conflicting evidence that is mostly resurrected from bargaining history that took place more than three years ago. Also, the remedy is too speculative, and becomes punitive more than remedial. To increase the salary schedules at this time, based on the District's failure to give out information, would be unduly harsh to the District even if the Association could prove that the District failed to give out the information. The Association did not suffer a decrease in salary due to the

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7/ This should not be interpreted to mean that the District does not have to negotiate over the reverse retrospective agreement. While the District appears to take that stance, the Association has not raised it as an issue in this grievance, and the Arbitrator does not have to determine whether the reverse retrospective agreement is negotiable or not. It is possible that such an item is as negotiable as every dollar that makes up the premium.

insurance premium rate. Both parties received some benefit in the premium rate staying flat for one year. Ultimately, the parties got the benefit of their bargain.

AWARD

The grievance may be brought by the Association, it is timely, and it is denied.

Dated this 2nd day of December, 1994, at Elkhorn, Wisconsin.

By Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator