BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 1925, AFSCME, AFL-CIO

and

TOWN OF DELAVAN

Case 10
No. 51420
MA-8603

Appearances:

Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union, and Mr. Laurence Rodenstein, submitting a brief on behalf of the Union.

Mr. Steven R. Wassel, Attorney at Law, Wassel, Kilkenny & Danz, appearing on behalf of the Town of Delavan.

ARBITRATION AWARD

The Union and the Employer named above are parties to a 1994-95 collective bargaining agreement 1/ which provided for final and binding arbitration of certain disputes. The Union requested, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission appoint an arbitrator to hear a dispute involving insurance claims. The undersigned was appointed and held a hearing on December 20, 1994, in the Town of Delavan, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by January 17, 1995.

ISSUE:

The issue is:

> Did the Employer violate the collective bargaining agreement by not paying the out-of-pocket medical expenses incurred by James Wolfgram? If so, what is the appropriate remedy. 2/

1/ The 1994-95 collective bargaining agreement had not been signed by the parties at the time of the arbitration hearing, apparently for reasons unrelated to the instant dispute. However, both parties had ratified the agreement, wages were paid retroactively according to this contract, and both parties stipulated that this was the appropriate bargaining agreement, despite a lack of signatures.

2/ The Union also combined another grievance in this case, one filed by John Eslick. Before the hearing in the matter, the parties agreed that the Town would re-submit insurance claims on behalf of Eslick, and that should any out-of-pocket medical expenses remain after WPS paid its portion and should those expenses not be covered under the insurance policy, such claims would be governed by the outcome in this proceeding.

BACKGROUND:

The Town provided insurance to its employees through Blue Cross & Blue Shield for many years. In addition to paying the insurance premiums, the Town's practice was to reimburse employees for all medical expenses, whether those expenses were deductibles, co-pays or expenses not covered by the insurance carrier. The Town did not pay out-of-pocket expenses for dental expenses.

In 1991, the Town sought to change carriers. The Union agreed to the change after being assured that the new plan would be equal to or better than the Blue Cross & Blue Shield plan, and that nothing would change from the employees' perspectives.

WPS became the insurance carrier on January 1, 1992, and during the years of 1992 and 1993, the Town continued to pay all medical bills, such as deductibles, co-pays or any other expenses not covered.

Negotiations for the 1994-95 collective bargaining agreement took place in late 1993. The Town had become concerned about the potential liability it had assumed by paying all out-of-pocket medical expenses, whether or not they were covered by the insurance policy. It was concerned about everything from small items such as whether it should pay for bandages to large items such as transplants that were not covered under the WPS policy. The Town sought to bargain a change in the existing contract language regarding insurance.

The collective bargaining agreement, before the negotiations concluded for 1994-95, contained the following language regarding health insurance:

ARTICLE XIV - HEALTH INSURANCE

> Section 1. Except as provided in Section 4 below, the Employer agrees to pay one hundred percent (100%) of the premiums of the employee's health insurance under the single plan and one hundred percent (100%) of the premiums under the family plan. The medical plan in effect for 1983 shall provide the same coverage as the plan in effect during the term of the previous labor agreement. Any out-of-pocket expenses (deductible or co-insurance amounts charged to the insured employee) shall be paid by the Employer. Employees hired after January 1, 1992 will be subject to a maximum of $250 for single plan and up to $750 for the family plan for out of pocket expenses.
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> Section 2. The Employer agrees to pay one hundred percent (100%) of the premiums of the employees dental plan under the

> single plan and one hundred percent (100%) of the premiums under the family dental plan. The present dental plan has a co-pay feature whereby the dental plan will pay eighty percent (80%) of the cost of dental services. Any other cost than that included in the plan plus a twenty percent (20%) deductible will be paid by the employee.
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> Section 3. There shall be no change in insurance coverage unless said change is negotiated between the parties.
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> Section 4. For employees hired after January 1, 1990, the Employer agrees to pay one hundred percent (100%) of the premiums of the employee's health insurance under the single plan and one hundred percent (100%) of the premiums under the family plan provided that the employee shall be responsible for any increase in the premiums occurring after the employee's hiring date.

During negotiations for the 1994-95 labor contract, the parties entered into interest arbitration proceedings in which the Wisconsin Employment Relations Commission assigned a mediator/investigator. The Town submitted a preliminary final offer to the investigator which proposed to change Article XIV as follows:

> Full time employees shall be provided with comprehensive medical, hospitalization and dental insurance by the employer. This insurance coverage will be of an adequate nature so as to properly insure the employees and their families. The employer will assume the expense of the policy and hereto agrees during the duration of this agreement not to lower, alter, or change the benefits as set forth. The Employer will pay the cost of health insurance deductible ($100) and the employee will pay the deductible for the dental coverage (Delta Dental deductible $50).

The highly skilled and very respected mediator/investigator Daniel Nielsen met with the parties on February 14, 1994. At the end of the meeting, the parties reached a tentative agreement on all outstanding issues, including wages and insurance, and agreed to the following insurance changes as noted in the tentative agreement:

> 4. Insurance Art XIV
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> Change Section 3: The standard for eligible expenses shall be the benefits and limitations in the 1994 WPS Health Insurance plan. The Town agrees to pay the co-pay and deductible amounts, except as provided in Section 1 of this article. There shall be no change in

insurance coverage unless said change is negotiated between the parties.

Change Section 4: Commencing January 1, 1994, the employees will contribute 5% of the monthly premium for health insurance (not to exceed $50.00 per month).

The matter in dispute revolves around the bargaining, and what the parties believed they were achieving or conceding in this bargain.

There are only five employees in this bargaining unit, and all five sat in on the mediation/investigation session. The grievant James Wolfgram, part of the bargaining unit, recalled that the Town did not want to continue its practice of paying for everything as it had in the past. The Town wanted to have the WPS plan set the guidelines for what it would cover. Wolfgram testified that the Union did not agree to change the Town's practice of reimbursements. Wolfgram did not care whether or not the Town wanted to put language about the WPS plan into the labor contract, because it made no difference to him as long as the Town paid for any out-of-pocket expenses. He understood that the Town Chairman wanted to put the WPS standard into the contract because the contract did not specify it before.

Michael Petkoff, also a bargaining unit member present at the mediation session in February of 1994, had a different understanding of the bargain. He testified that he understood the changes in the contract language to mean that if the insurance company did not cover something, then it was up to the individual to pick up the tab.

Petkoff was one of two newer employees who would have to pay increases in premiums according to the 1992-93 labor contract, Article XIV, Section 4. Another employee, John Eslick, resigned later in 1994 and the Town was aware by the time of negotiations that he might retire in the near future. If Eslick retired and were replaced by a new employee, a majority of the bargaining unit would have been obligated to pay increases in premiums under the 1992-93 agreement.

Wisconsin Council 40 Staff Representative Laurence Rodenstein represents the Union. When the Town changed from Blue Cross & Blue Shield to WPS in 1992, he talked by telephone to bargaining unit members and understood that the same benefit levels would be maintained.

Rodenstein was chief spokesman for the Union at the bargaining talks for the 1994-95 contract as well as at the mediation/investigation session. A major problem for the Union was Section 4 of Article XIV, whereby new employees would have to pay the full amount of premium increases, which could amount to $160 - $170 a month. The Town had also raised its desire to eliminate its reimbursement policy for covered and uncovered medical expenses during

negotiations, so the Union was dealing with two matters on insurance -- the premium contribution issue and the out-of-pocket expenses issue. Neither of these was resolved before the mediation session in February of 1994.

Rodenstein testified that during the mediation session, the Union attempted various ways to alleviate the impact of rising premiums on the two new employees. The Union agreed to a five percent premium contribution for everyone, for single and family plans, with a $50 limitation, in order to take out the contractual reference to new employees picking up all of the premium increases. Rodenstein testified that no one said there were any additional changes. He considered the five percent premium contribution to be a major concession, because the rest of the AFSCME bargaining units in Walworth County have insurance fully paid by the employers.

As to the addition of the language regarding the WPS standard, Rodenstein's recollection is that the Union said the Town could identify a standard so long as it continued to pay the out-of-pocket expenses.

The Chairman of the Town Board is David Stebnitz. One of the Town's goals in negotiations was to get all employees on the same plan and benefits levels. The police are on a different system than the highway employees. The Town felt it was important to have a policy to determine what was covered and what was not covered, because there was no predecessor policy or copy of the Blue Cross plan from which to base payments. The office simply paid any bill that was brought in by employees. Stebnitz agreed that the Town had promised that the WPS benefits would be equal to or better than Blue Cross when the employees agreed to allow the Town to switch carriers.

Stebnitz testified that the Town negotiated to have WPS be the base policy in the labor contract and that those items not covered by that insurance policy would not be paid by the Town. Stebnitz considered the elimination of Section 4's language that new employees pay premium increases to be a concession by the Town, because two employees were already caught in that language and a third might be, pending Eslick's retirement.

Stebnitz believed that the language in Section 1 of Article XIV pertaining to out-of-pocket expenses refers to deductibles and co-insurance and not other expenses, but that got forgotten somewhere along the line when the office interpreted it as paying for all expenses. Stebnitz felt that the additional language stating the standard for eligible expenses was clear, and that the Town made a large concession regarding new employees and the employees' contributions being limited to $50.00.

Actually, the new employees had not been paying any premium contributions, because the rates had gone down. The five percent contribution was more than anyone had paid, but the two new employees knew what their future bills would be.

Uwe Niemetscheck is a Town Board Supervisor, as well as the Walworth County Undersheriff. He was present when the tentative agreement was ratified by the Board, and he agreed to vote in favor of ratification because the Town Board was told that the clause about the out-of-pocket expenses would be removed in exchange for deleting new hirees' premium contributions. The Town was not as concerned with the wage portion of the bargain as the

insurance portion.

Article XIV in the 1994-95 labor agreements states:

> Section 1. Except as provided in Section 4 below, the Employer agrees to pay one hundred percent (100%) of the premiums of the employee's health insurance under the single plan and one hundred percent (100%) of the premiums under the family plan. Any out-of-pocket expenses (deductible or co-insurance amounts charged to the insured employee) shall be paid by the Employer. Employees hired after January 1, 1992 will be subject to a maximum of $250 for single plan and up to $750 for the family plan for out of pocket expenses.
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> Section 2. The Employer agrees to pay one hundred percent (100%) of the premiums of the employees dental plan under the single plan and one hundred percent (100%) of the premiums under the family dental plan. The present dental plan has a co-pay feature whereby the dental plan will pay eighty percent (80%) of the cost of dental services. Any other cost than that included in the plan plus a twenty percent (20%) deductible will be paid by the employee. The standard for eligible expenses shall be the benefits and limitation in the 1994 WPS Health Insurance Plan. The Town agrees to pay the co-pay and deductible amount, except as provided in Section 1 of this Article. There shall be no change in insurance coverage unless said change is negotiated between the parties.
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> Section 3. There shall be no change in insurance coverage unless said change is negotiated between the parties.
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> Section 4. Commencing January 1, 1994, the Employees will contribute 5% of the monthly premium for health insurance (not to exceed $50.00 per month.)

Wolfgram had a physical in 1994 which was not reimbursed by the Town. His son also had some immunizations for school which were not reimbursed by the Town. In the past, these expenses would have been paid by the Town.

THE PARTIES' POSITIONS:

The Union asserts that the practice of paying all out-of-pocket medical expenses arose from the clause in Section 1, Article XIV, regarding the out-of-pocket expenses, and the Town Treasurer consistently interpreted that clause to mean that all health related claims, even those

rejected by the insurance company, were to be paid by the Town. This was a long standing past practice which was never repudiated directly by the Town. When the Town proposed to eliminate that practice, it prepared a preliminary final offer which eliminated the reference to the out-of-pocket expenses.

However, the Union submits, when the parties settled on the new language, the language regarding out-of-pocket expenses stayed the same and ensured the continuation of the practice. The new language inserted the name of the current WPS plan because the Town wanted to name the insurance carrier in the bargaining agreement. The Union contends that the Town failed to secure the Union's assent to drop the past practice regarding out-of-pocket expenses. Putting the WPS plan into the contract did not relieve the Town of its obligation to maintain the past practice of paying all medical expenses, because only eliminating the specific clause which gives rise to the practice can relieve the Town from its obligation. Changing other language does not change the practice and the contract language giving rise to the practice.

The Union notes that a party cannot get in arbitration what it failed to get in negotiations. The Town was the moving party to discontinue the out-of-pocket payments, and it must be responsible for the apparent divergence in the parties' understanding of the terms of the 1994-95 labor agreement. There was no discussion in a face-to-face meeting regarding the elimination of any out-of-pocket expenses. The Town failed to clarify any doubt by keeping the out-of-pocket language and remaining silent during the final face-to-face meeting. Where doubt exists, ambiguities are construed against the party who proposed it.

The Town asserts that the out-of-pocket language in Section 1 of Article XIV is limited to deductibles or co-payments, as a reasonable interpretation of the contract, and the Union's assertion that the Town was contractually obligated to pay all out-of-pocket costs in the past is erroneous. The fact that the Union relies on a past practice shows that the contractual terms were not being adhered to and employees relied on past practices as opposed to a strict construction of the contract language.

The Town points out that the single issue most important to it in bargaining was which medical expenses would not be paid by the Town when they were not covered by insurance. The Town would not have ratified the contract had it not been for the steps taken to limit the Town's liability on medical costs.

According to the Town, the past practice of paying all medical expenses arose when the Town was unable to obtain a copy of the insurance policy, despite repeated requests. Chairman Stebnitz realized that it was necessary to do away with any assertion that this past practice would become binding upon the Town. The Town submits that the more specific language of the insurance clause takes precedent over the more general language of the maintenance of standards clause.

The Town believes this case turns on the issue of credibility. The testimony of Wolfgram and Rodenstein that they had no notice that the Town's practice had been altered was contradicted by Stebnitz, Niemetscheck as well as Union member Petkoff. Petkoff's testimony is adverse to his

own interests since he would benefit by the Union's position.

Moreover, the Town notes that it sought the Union's approval to change insurance carriers, and it would make no sense to do so if the Town were obligated under the contract to pay all health insurance expenses. What difference would it make to employees which insurance carrier was selected by the Town if all their expenses were paid in any event?

While the Union asserts that ambiguous terms in a contract are ordinarily construed against the drafter of that contract, the Town did not draft the final language and therefore, the above principle does not apply. Further, construction of contracts only takes place when language is ambiguous, and the Town believes that no reasonable interpretation of the contract language could lead a person to conclude anything other than the fact that the Town would be liable to pay only those amounts that were covered by the insurance policy.

The Town further states that the Union supposes that the Town must come in with a sledge hammer and hit every employee on the head and say that the contract provision was being changed. The Town submits that where the contract itself is clear but the past practice deviates from that clear language, it is only necessary to show that the issue relating to the past practice was raised and bargained for in the exchange that led to the production of the existing bargaining agreement. Petkoff's testimony provides ample support for the Town's position. If the Town failed to inform the Union that it was not going to continue the reimbursement of expenses not covered by insurance, why would Petkoff offer this understanding of the change? The Union was informed of the change of the past practice and the grievants now do not like the result.

The Union replies that the new benefits and limitations language is not different, although more specific, than the old language. The Town's past practice to pay all out-of-pocket expenses, even beyond the plan's deductibles and co-pays, was based on the mutually understood determination that all expenses were paid, notwithstanding the language, which on its face is limited to payment on the terms of the current insurance plan. Nothing in the last bargain altered the longstanding practice of paying all out-of-pocket medical expenses.

DISCUSSION:

The second sentence in Section 1 of Article XIV of the 1994-95 labor agreement, as well as the predecessor agreement, states: "Any out-of-pocket expenses (deductible or co-insurance amounts charged to the insured employee) shall be paid by the Employer." The Town believes that the language is clear enough that those out-of-pocket expenses are for deductibles and co-insurances amounts, and not for other matters, and the fact that the Town paid for expenses other than deductibles and co-insurances is a matter of past practice, and not a matter of contract language.

The language would have been perfectly clear and unambiguous if the parties had only stated: "Any out-of-pocket expenses for deductible or co-insurance amounts charged to the insured employee shall be paid by the Employer." The use of parentheses around "deductible or co-insurance amounts charged to the insured employee" could mean such as deductible or

co-insurance amounts, or it could mean including deductible or co-insurance amounts. It could also be read in the manner being advocated here by the Town, but the problem is that the parties never interpreted it that way in the past. The Town believes the language is clear and unambiguous as it is -- but it was the Town itself that paid for out-of-pocket expenses other than deductibles or co-insurance amounts.

The Town claims that the office people simply started paying any bills presented by employees because they had no copy of the Blue Cross & Blue Shield policy and did not know what was covered or not. However, Blue Cross & Blue Shield is a big company and is able to supply its clients with policies that it sells to them, and any medical expenses that were not covered by its policy with the Town would be rejected as such. Moreover, the office people are agents of the Town and spend money on the Town's authorization, not on their own.

Therefore, the past practice aids in interpreting the language in Section 1 which could have different meanings. The past practice exists in conjunction with the contract language and as an aid to interpreting it. It does not exist as a practice by itself. Accordingly, when the Town sought to abolish the paying of out-of-pocket expenses for expenses other than co-pays and deductibles, those matters not covered by its insurance carrier, the Town had to change the second sentence of Section 1, Article XIV, that was the source of the problem.

Both parties believe they made concessions during the bargaining to obtain their goals. The Town believes it made a concession by not having new employees pay increases in premiums after they are hired and limiting premium contributions to $50.00, and that it made this concession to get rid of the out-of-pocket expenses. The Union believes that it made a concession by having all employees pay a portion of the premium, and that it made this concession in order to get rid of new employees picking up increases in premiums. The Union considered the agreement to have all employees pay five percent of the premium to be a major concession where none had done so in the past and no other bargaining units in the area had made this concession. However, the Union denies making any other concession on insurance, such as getting rid of the reimbursement for out-of-pocket expenses.

In a sense, both parties did make a concession. The Town would have gained more in real dollars over time if it had retained the language regarding new employees picking up increases in premiums. The Union members lost something they had enjoyed before, fully paid insurance premiums. It is not necessary for the grievance arbitrator to determine what tradeoffs were made in the bargaining and whether they were adequate in the give and take of bargaining. The grievance arbitrator is left to determine what rights exist under the contract, given the language remaining. The history of negotiations is helpful to the extent that it aids in the interpretation of the language at hand.

It is clear -- no matter what happened in bargaining and mediation -- that the language in Section 1 remained intact for the 1994-95 labor contract. An arbitrator would be hard pressed to

delete the benefit where the parties did not delete the language giving rise to the benefit.

The language that is new and placed at the end of Section 2 of Article XIV states: "The standard for eligible expenses shall be the benefits and limitation in the 1994 WPS Health Insurance Plan. The Town agrees to pay the co-pay and deductible amount, except as provided in Section 1 of this article. There shall be no change in insurance coverage unless said change is negotiated between the parties."

Actually, the last sentence is not new and was in the prior labor contract at Section 3 and is now repeated in both Sections 2 and 3. Apparently the parties really meant it.

The sentence that says: "The Town agrees to pay the co-pay and deductible amount, except as provided in Section 1 of this Article" refers to the last part of Section 1, which states that employees hired after January 1, 1992 will be subject to $250 for the single plan and up to $750 for the family plan for out-of-pocket expenses.

The question is -- what is the meaning of the sentence that states: "The standard for eligible expenses shall be the benefits and limitation in the 1994 WPS Health Insurance Plan"? How does it fit with the sentence regarding out-of-pocket expenses paid by the Town in Section 1? The Town wanted to name the insurance carrier in the labor contract, which it had not done before. The Union did not care, since it was under the distinct impression that it would continue to receive the benefit in Section 1 for reimbursement of all expenses.

The Town at least put the WPS standard in the contract and named the carrier. The Town did gain something by adding the WPS as the standard in the labor contract -- it has effectively eliminated its prior promise that the WPS plan would be equal to or better than the Blue Cross plan. If Blue Cross would have paid an item in the past and WPS had not, the Town was under an obligation to make the benefit level equal or better. That obligation is gone. The Blue Cross plan is history. While this may seem like a moot point to the Town when it continues to pay all expenses whether covered by a carrier or not, it is not a moot point. It has a standard which it did not have before. Moreover, this standard will be of more significance if and when the Town successfully negotiates to limit its reimbursement of out-of-pocket expenses or clarifies it.

However, the burden was on the Town to get rid of its obligation for out-of-pocket expenses under Section 1 of the insurance language, and the Town knew or should have known that it had to change that language. It proposed different language in a preliminary final offer to the Union, but when the deal was done, it left the language regarding out-of-pocket expenses unchanged. At a minimum, the Town needed to change the language to clarify its real intent of interpreting this language.

Where the parties kept the language in Section 1 intact at the close of bargaining, the Arbitrator finds no basis to disturb the past interpretation of the language of Section 1. The Town may have kept its silence regarding its interpretation of the additional language now seen in Section 2, and the Union may have kept its silence regarding its interpretation of the language of Section 1 in conjunction with the new language of Section 2, but the burden was squarely on the Town to obtain the change. The Town has argued that the language was clear but the past practice was contrary to the language. If that were true, the past practice would be unenforceable because the practice cannot be enforced where it runs contrary to the language. That is not the case here.

In many cases, an employer may rid itself of a past practice by simply repudiating the practice during the bargaining for a successor agreement. Under those circumstances, the obligation falls on the union to seek language to protect the past practice, and if the union fails to do so, the practice is then wiped out by the employer's action. However, where the practice gives meaning to ambiguous language, the practice cannot be unilaterally terminated by repudiation at the bargaining table -- the language must be rewritten or deleted.

The proper procedure for repudiating types of past practice has been described by Arbitrator Richard Mittenthal as follows:

> Once the parties become bound by a practice, they may wonder how long it will be binding and how it can be terminated.
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> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For, as I explained earlier in this paper, if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
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> The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.
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> Consider next a well-established practice which serves to clarify

some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of the provision. As such it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.

> It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc. 3/

The latter scenario is the case here -- the burden was on the Town to delete or rewrite the sentence in Section 1 of Article XIV regarding out-of-pocket expenses. The Town's failure to do so leaves the Arbitrator no choice but to sustain the grievance.

Article IV, Section 6(e) contains the common prohibition that the Arbitrator shall not modify, add to or delete from the express terms of the Agreement. Even where the terms of the Agreement do not live up to the full expectations of one of the parties or the full implications of the Agreement may not have been realized at the time of ratification of the Agreement, the Arbitrator may not now delete or modify the language of Section 1 of Article XIV.

AWARD

The grievance is sustained.

The Town is ordered to reimburse James Wolfgram for the out-of-pocket medical expenses submitted to the Town.

Dated at Madison, Wisconsin this 6th day of March, 1995.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

3/ Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements", Proceedings of the 14th Annual Meeting of NAA 30, 56 (BNA Books, 1961).