BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150, AFL-CIO

and

SCHOOL DISTRICT OF MUSKEGO-NORWAY

Case 53
No. 52595
MA-9036

Appearances:

Mr. Steve Cupery, Staff Representative, Service Employees International Union, Local 150, AFL-CIO, appearing on behalf of the Union.

Quarles & Brady, Attorneys at Law, by Mr. Robert Duffy and Ms. Pamela Ploor, on the brief, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the District or Employer, respectively, were signatories to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was transcribed, was held on September 26, 1995, in Muskego, Wisconsin. Afterwards the parties filed briefs which were received by January 4, 1996. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the statement of the issues. The Union proposed the following issue:

> Whether or not the Employer violated the contract, or otherwise unjustly failed to offer health, dental (and, in the case of grievant Novak, life insurance), benefits to the grievants Novak and Kasch? If so, what would the remedy be?

The District proposed the following issues:

1. Are the grievances of Novak and Kasch arbitrable under the 1993-95 contract?

2. Did the District violate the 1993-95 collective bargaining agreement by not providing health, dental (or in Novak's case, life) insurance benefits to Novak and Kasch during the term of the 1993-95 contract?

3. If so, what is the appropriate remedy?

Having reviewed the entire record, the undersigned finds the District's framing of the issues appropriate for purposes of deciding this dispute.

PERTINENT CONTRACT PROVISIONS

The parties' 1993-95 collective bargaining agreement contained the following pertinent provisions:

ARTICLE V
Grievance Procedure

5.01 Purpose
The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any differences through the use of the grievance procedure.

5.02 Definition
Grievance shall mean any disputed matter pertaining to conditions of employment, including the meaning, application and interpretation of this Agreement.

5.03 Steps in Procedure
Grievances shall be processed in accordance with the following procedure:

5.031 Step I. An earnest effort shall be made to settle the matter informally between the employee and the immediate supervisor within thirty (30) calendar days after the facts upon which the grievance is based first occur or first become known.

5.0311 If the matter is not resolved, the grievance shall be presented, in writing, by the employee to the Food Service Director within thirty (30) days after the facts upon which the grievance is based first occur or first become known, or within ten (10) work days after the conference in 5.031. The director shall meet with the aggrieved employee, accompanied by a representative of the Union if the employee so chooses, within ten (10) work days of the submission of the written grievance and shall respond, in writing, to the aggrieved employee and the Union within ten (10) work days of such meeting.

. . .

5.05 Effect of Time Limits

The parties agree to follow each of the foregoing steps in the processing of a grievance. If the Employer fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped.

. . .

ARTICLE VI
Binding Arbitration

6.01 Requirements

In order to process a grievance to Binding Arbitration, the following must be complied with:

6.011 Written notice of request for such arbitration shall be given to the Board within ten (10) work days of the receipt of the Board's last answer.

6.012 The matter must have been processed through the grievance procedure within the prescribed time limits.

. . .

6.05 Limited Authority

It is understood that the function of the arbitrator shall be to interpret and apply specific terms of this Agreement. The arbitrator shall have no power to arbitrate salary adjustments, except improper application thereof, nor to add to, subtract from, alter or amend any terms of this Agreement.

. . .

ARTICLE XVI
Insurance

16.01 Hospital and Surgical Insurance

The Employer shall pay 90% of the premium for the current family hospital-surgical insurance coverage or 90% of the premium for single hospital-surgical insurance coverage for all full-time employees.

. . .

16.02 Life Insurance

The Employer shall continue to provide Group Term Life Insurance Policy currently in effect, or equivalent coverage, for all employees covered by this Agreement. The Employer shall pay ninety (90%) percent of the premium cost of such insurance.

16.03 Dental Insurance

The Employer shall continue to provide the Dental Insurance policy currently in effect, or equivalent coverage, for all full-time employees covered by this Agreement and shall pay 90% of the premium cost of either the family or single plan.

. . .

16.05 Part-time Employees

Part-time employees working twenty-five (25) or more hours per week but less than 37.5 hours per week will be eligible for hospital-surgical, dental and life insurance upon application to the Business Office. The School Board will pay a prorata share of the premium.

16.051 Between Twenty (20) - Twenty-Five (25) Per Week

Part-time employees as defined in Article VII, Section 7.01 and 7.02, working between twenty (20) and twenty-five (25) hours per week may elect to participate in the hospital/surgical, dental and life insurance policies by paying the premium cost of such insurances.

. . .

16.07 Notice of Eligibility and Status

For all new employees and those employees who change their job status such that it would change their eligibility to be insured, the District will notify the employee of eligibility for life, health and dental insurance. Such notice will inform the employee of the consequences of failing to choose enrollment at the time of open enrollment and will indicate employee contribution amounts. Notice of the consequences of failing to choose insurance during open enrollment will include the employee's ability or inability to obtain insurance through the Board as a result of a non-job related status change such as marriage, divorce, death or unemployment of spouse who provides coverage, or the birth of a new child. Newly eligible employees will also be informed of the benefits of participation in the TSA Option plans.

16.08 Option Plan - Health and Surgical

Employees enrolled in family medical insurance plans may participate in the Tax Sheltered Annuity Option. Employees with a spouse also employed by the District and eligible for family plans will be entitled to participation in one family plan and the TSA Option. The TSA Option would be an amount of money equal to the Employer's contribution for a single premium placed into a tax sheltered annuity in the employee's name. The employee would waive family

medical eligibility in order to qualify for the TSA Option except for status changes referred to in Section 16.07 above. The maximum amount of TSA contribution will not exceed the dollar cap for the teacher's single premium.

16.09 Option Plan - Dental
Employees enrolled in the family dental insurance plan may participate in the Tax Sheltered Annuity Option. Employees with a spouse also employed in the District and eligible for family plans will be entitled to participation in one family plan and the TSA Option. The TSA Option would be an amount of money equal to the Employer's contribution for a single premium placed into a tax sheltered annuity in the employee's name. The employee would waive family dental eligibility in order to qualify for the TSA Option except for status changes referred to in Section 16.07 above. The maximum amount of TSA contribution will not exceed the dollar cap for the teacher's single premium.

BACKGROUND

The Union became the bargaining representative for the District's food service employes in 1987. Prior to that, said employes were not represented.

Before the District and the Union executed their first labor agreement, food service employes were eligible for insurance when they worked a minimum of four hours a day. An employe who worked four hours a day paid the full cost of the insurance premium. When an employe worked five hours a day, the District paid a pro-rata share (namely 66 percent) of the insurance premium, and the employe paid the remaining premium cost. The District's historical practice was that if an employe did not enroll in insurance when he or she was first eligible, the employe was barred from enrolling in insurance and could never enroll in same.

In 1987, the parties executed their first labor agreement. Under that agreement the District covered the same percent of the premiums as it had covered before the existence of the labor agreement. The parties' first agreement did not contain a contract provision dealing with insurance eligibility. The record indicates that after the contract was negotiated, the Employer continued to apply the same insurance eligibility requirement that existed prior to the contract, namely that if an employe did not enroll in insurance when he or she was first eligible, the employe could never enroll in insurance.

The eligibility policy just identified continued in that fashion until 1992. Effective that

year, the District's health insurance contract with its carrier (WEA Trust) changed concerning insurance eligibility. Under the new provision, if the District's premium contribution increased at least 25 percent, the employe was newly eligible for insurance for a 30 day period.

When the parties negotiated their second labor agreement in 1990, they inserted a new contract provision dealing with insurance eligibility. This provision was entitled "Notice of Eligibility and Status" and was denominated as Section 16.07. The parties also inserted two other new provisions into the labor agreement that year which were entitled "Option Plan--Health and Surgical" and "Option Plan--Dental." These two new provisions were denominated respectively as Sections 16.08 and 16.09. These two provisions became known as the TSA Option. Under this option, if an employe was either already receiving insurance or later became eligible to receive it, the employe could elect to forego insurance coverage and have the District contribute a prorated amount of the single premium into a tax sheltered annuity for the employe. This money was in lieu of the District's contribution for a single insurance premium. This was a new contractual benefit.

When the parties negotiated their third labor agreement in 1993, they did not change Sections 16.07, 16.08 or 16.09. This agreement had a term of 1993 through 1995, and is the labor agreement applicable here.

Lois Novak was on the Union's bargaining team for each of the contracts noted above.

FACTS

Lois Novak started working for the District as a utility food service worker in 1979. When she started, she worked three hours a day. Since she did not work four hours per day (the minimum number of hours to trigger insurance eligibility), she was not eligible for insurance at that time.

On August 9, 1983, Novak started working six hours a day at Muskego Elementary School as the cook manager. Since she worked more than four hours per day (the minimum number of hours to trigger insurance eligibility) she became eligible for insurance for the first time. If Novak had elected insurance coverage, the District would have covered 80 percent (6 hours divided by 7.5 hours) of the premium and Novak would have been responsible for the remaining cost. It is unclear if Novak was ever informed of her eligibility for insurance or whether she was offered same by the District. In any event, Novak did not enroll in insurance in 1983 or any time thereafter. Novak testified that if she had been offered insurance in 1983, she would not have taken it because she would have had to pay part of the cost of the premium and she already had health insurance through her husband's health insurance coverage. The record indicates that Novak has remained covered under her husband's insurance up to the present. Insofar as the record shows, Novak never waived her right to participate in insurance.

Novak continued to work six hours per day for the 1984-1985 and the 1985-1986 school years. In 1986, the District cut her daily hours to 5.5 hours. Her daily hours were increased back to six in 1987. Novak then worked six hours a day for about three years. Her daily hours were increased to 6.25 on December 7, 1990. When her hours were increased in 1990,

Administrator Jean Henneberry completed a status form which listed Novak's new rate of pay. That document also contained the following chart with the following entries concerning insurances:

BENEFITS AVAILABLE, IF ELECTED. PLEASE CONTACT DISTRICT OFFICE FOR DETAILS WITHIN 30 DAYS OF START DATE.

Insurances:	District 100%	Prorated		Not Eligible
		District %	Employee %	
Hospital:				x
Dental:				x
Life:	--			x
Disability:				x
TSA Opt.				x

Four years later (1994), Novak's hours were increased to 6.5 hours per day. This half hour daily increase (i.e. from 6 to 6.5 hours per day) was not sufficient to make her newly eligible for insurance under the 1992 change in eligibility. As of the time of the hearing, Novak was still working 6.5 hours a day.

Karen Kasch started working for the District as a utility food service worker in 1985. When she started, she worked three hours a day. Since she did not work four hours per day (the minimum number of hours to trigger insurance eligibility), she was not eligible for insurance at that time.

At the start of the 1986-87 school year, Kasch's hours were increased to 4.5 hours per day. Since she worked more than four hours per day (the minimum number of hours to trigger insurance eligibility), she became eligible for insurance for the first time. If Kasch had elected insurance coverage, she would have had to pay the full cost of the insurance. It is unclear if Kasch was ever informed of her eligibility for insurance or whether she was offered same by the District. In any event, Kasch did not enroll in insurance in 1986 or any time thereafter. Kasch testified that if she had been offered insurance in 1986, she would not have taken it because she would have had to pay the entire cost of the premium, and she already had health insurance through her husband's health insurance coverage. The record indicates that Kasch has remained covered under her husband's insurance up to the present. Insofar as the record shows, Kasch never waived her

right to participate in insurance.

In 1988, Kasch's hours were increased to five hours per day. At that time, District Administrator John Eagan completed a status form which listed Kasch's new rate of pay. That document also contained the following chart with the following entries concerning insurances:

> BENEFITS AVAILABLE, IF ELECTED. PLEASE CONTACT DISTRICT OFFICE FOR DETAILS WITHIN 30 DAYS OF START DATE.

Insurances:	District 100%	Prorated		Not Eligible
		District %	Employee %	
Hospital:				x
Dental:				x
Life:	--	66%	34%	
Disability:				x
TSA Opt.				x

Kasch never enrolled in life insurance. About two and one-half years later in 1991, Kasch's hours were increased to 5.25 hours per day. Four years later in 1994, her hours were increased to 5.5 hours per day. As of the time of the hearing, Kasch was still working 5.5 hours per day.

The record indicates that beside Novak and Kasch, there were two other bargaining unit employes who did not elect insurance when they were first eligible and thereafter were considered ineligible for same by the District. These two employes were Audrey Willms and Barbara Mucha. Willms worked three hours a day prior to 1985. Since she did not work four hours per day (the minimum number of hours to trigger insurance eligibility), she was not eligible for insurance at that time. In 1985, her hours were increased to four hours per day. This made her eligible for insurance for the first time. Unlike Novak and Kasch, Willms was expressly informed of her eligibility for insurance and offered same by the District. She expressly decline to enroll in insurance. Willms retired from the District in 1994, and is no longer an employe. Mucha apparently worked less than four hours per day prior to 1982, and was therefore ineligible for insurance. In 1982, her hours were increased to four hours per day. This made her eligible for insurance for the first time. Like Novak and Kasch, it is unclear if Mucha was ever informed of her eligibility for insurance or whether she was offered same. In any event, she did not enroll in insurance in 1982 or any time thereafter.

The record also indicates that in September and October, 1993, the Union tried to get the District's insurance carrier (WEA Trust) to give four bargaining unit employes who were not covered under the District's insurance plan an open enrollment so they could enroll in same. The WEA Trust did not offer the requested open enrollment period for the four named employes. If it had, this would have allowed those employes to enroll in insurance or the TSA Option. The Union subsequently informed bargaining unit employes via a written memo that in order to be eligible for the TSA Option, employes had to be eligible for insurance. The Union has never attempted to bargain an open enrollment provision into the parties' labor agreement.

On December 12, 1994, and December 27, 1994, Novak and Kasch, respectively, filed grievances alleging that the District never offered them insurance benefits when they were eligible for them. Their grievances were processed to arbitration.

Additional facts will be set forth in the Discussion section.

POSITIONS OF THE PARTIES

Union's Position

The Union contends at the outset that Novak's and Kasch's grievances are timely. In support thereof, it first asserts that the Employer did not raise timeliness as an issue until the arbitration hearing. It notes in this regard that the Employer's step 2 response to the grievances dealt with the question of whether the employes were offered insurance; timeliness was not raised. Additionally, the Union argues that the instant grievances allege a continuing violation of the contract. According to the Union, the grievances are of a continuing nature because the Employer never offered the grievants the opportunity to participate in the insurance plan pursuant to Section 16.05. The Union claims that the Employer's failure to offer insurance to the grievants has continued up to the present.

Next, the Union argues that the grievances are arbitrable. To support this premise, it cites Section 5.02 of the grievance procedure. According to the Union that section permits it to grieve any disputed matter with the District. The Union further calls the arbitrator's attention to Section 6.01 of the arbitration provision which establishes two requirements to process a grievance to arbitration: giving written notice to the Board and processing the matter through the grievance procedure within the proscribed time limits. The Union believes it complied with both of these requirements here. It therefore contends the arbitrator has the authority to decide the issue herein on the merits.

With regard to the merits, the Union argues that the Employer failed to provide insurance to Novak and Kasch as required by Section 16.05. The Union reads that section to provide that

employes who work a certain number of hours, namely 25 or more hours per week, will be eligible to receive certain benefits (namely health, dental and life insurance). According to the Union, no exceptions are named. The Union believes that so long as the insurance company will accept the employes under its own rules, the employes are entitled to those contractual benefits. The Union acknowledges that under the insurance company's enrollment policy, if an employe is offered insurance and declines, the employe cannot jump in at a later date. That said, the Union believes that if an employe is never offered the opportunity to participate, they should not be forever barred from insurance benefits. The Union asserts that it is the Employer who holds the key to whether employes are offered insurance. According to the Union the weight of evidence herein supports the conclusion that Novak and Kasch were never offered insurance by the Employer. It cites the following to support this premise. First, it cites the testimony of Novak and Kasch that they were never told they were eligible for insurance benefits and never offered health insurance either. Second, it notes that neither employe ever signed an explicit waiver of insurance benefits, nor did the Employer offer any signed waiver into evidence.

The Union also contends that the Employer's policy on open enrollment prior to collective bargaining is unclear and, in any event, should not bar a remedy. To support this premise it notes that the Employer's 1983-84 handbook for food service employes says nothing about open enrollment.

In conclusion, the Union argues that the Employer has refused to own up to its responsibility to do the right thing. In the Union's view, there are employes who are junior to the two grievants who have insurance coverage while the grievants do not. According to the Union, this is an inequitable situation for which the District bears responsibility. The Union contends that so long as the Employer continues to fail to offer the grievants coverage for the insurance benefits specified in Section 16.05, it is violating the parties' labor agreement.

In order to remedy this contractual breach, the Union asks the arbitrator to uphold the grievances and make the grievants whole. The Union specifically asks the arbitrator to order the Employer to offer insurance benefits to the grievants retroactive to 30 days prior to the filing of their grievances provided the grievants would not otherwise be barred from participating in such plans by insurance company rules.

District's Position

The District contends at the outset that Novak's and Kasch's grievances are not arbitrable for two reasons. First, it submits that the District's alleged failure to notify Novak and Kasch of their insurance eligibility occurred before the District and the Union established a collective bargaining relationship. It notes in this regard that Novak became eligible for insurance in August, 1983, when she started working six hours a day, and that Kasch became eligible for insurance in August, 1986, when she started working 4.5 hours a day. The District submits that

since the parties entered their first labor agreement in 1987, the grievances of Novak and Kasch did not arise under a collective bargaining agreement. Second, the District asserts that even if their grievances did arise under a collective bargaining agreement, their claims accrued long before the grievances were filed and therefore should be barred as untimely. It makes the following arguments to support this proposition. According to the District, the best credible evidence demonstrates that the District notified Novak and Kasch of their eligibility for insurance at the time they became eligible, but each declined such coverage because they did not need it and it would have cost them money to obtain the duplicate coverage. The District avers that when both Novak and Kasch became eligible for insurance, they received a form from the District (known as a change in status form) instructing them to review the food service employe handbook concerning their entitlement to fringe benefits. The District notes that after Novak and Kasch decline to enroll in insurance, it was subsequently indicated on their status forms that they were ineligible for insurance. The District asserts that both Novak and Kasch knew about their eligibility and subsequent ineligibility long before they filed their grievances. According to the District, the timing of their grievances in relation to the Union's inquiries about the TSA Option and their failure to grieve the District's alleged breach of contract sooner support the inference that both knew about their eligibility when they became eligible and they are denying knowledge of it in order to get the TSA Option. The District submits that because Novak and Kasch knew about their eligibility several years ago, their grievances accrued as of those dates. It cites Article 5.03 of the contract for the premise that grievances must be raised within 30 days. The District avers that did not happen here so the grievances are therefore untimely. The Employer summarizes their arbitrability argument by contending that since Novak's and Kasch's grievances antedate any collective bargaining agreement between the parties and are also untimely, Sections 5.01 and 6.05 prohibit the arbitrator from addressing the grievances' merits.

Next, if the arbitrator finds the grievances to be arbitrable, the District argues it has not violated the 1993-95 collective bargaining agreement. To support this premise, it notes that Section 16.07 (the notice provision) requires the District to give employes notice when they become eligible for insurance. The District asserts that here, though, it was not obligated to provide notice to Novak or Kasch under this provision either during the 1993-95 collective bargaining agreement or the two predecessor labor agreements because they never became eligible for insurance. According to the District, neither employe was eligible for insurance because neither elected to enroll when they first became eligible for insurance (i.e. Novak in 1983 and Kasch in 1986). The District avers that if an employe does not enroll in insurance when they first become eligible, they can never enroll in insurance. The District further contends that it was not required to give notice to Novak or Kasch pursuant to the notice provision because neither employe ever underwent a change of status. That being so, the District submits it did not violate the labor agreement's notice provision.

Next, the Employer argues that by pursuing these grievances, the Union is attempting to bypass bargaining. It makes the following arguments in support thereof. First, it notes that the Union did not raise the grievances until after the WEA Trust refused to grant an open enrollment

period for several employes. Second, the Employer submits that what the Union is trying to get for the two grievants is an open enrollment that it will then use as precedent for a demand that there be open enrollment for other bargaining unit employes who are also not eligible for insurance. Third, the Employer notes that it has never had an open enrollment period. In its view, the cost of granting an open enrollment to allow employes to opt into the TSA Option would be prohibitive. The Employer submits that if the Union wants an open enrollment, the proper forum for changing the status quo is through bargaining--not arbitration. The Employer calls the arbitrator's attention to the fact that the Union has never requested to bargain about an open enrollment.

Finally, the District contends in the alternative that if it did violate the 1993-95 collective bargaining agreement, no remedy is proper. It cites the following to support this premise. First, it avers that when Novak and Kasch became eligible for insurance, they would not have opted to enroll in it (i.e. insurance) because they were already covered by their husbands' health insurance and they would have had to pay some or all of the cost. Second, it notes that the tax sheltered annuity (TSA Option) did not exist and was not available when they became eligible for insurance. The District therefore submits that no remedy is proper here because Novak and Kasch were not damaged. It therefore requests that the grievances be denied.

DISCUSSION

Inasmuch as the District contends the grievances are not procedurally arbitrable, it follows that this is the threshold issue. Accordingly, attention will be focused first on the question of whether the grievances are procedurally arbitrable.

My analysis of this matter begins with a review of the following historical context. Novak and Kasch became eligible for insurance in 1983 and 1986, respectively. Each became eligible for insurance when they started working more than four hours per day. Neither enrolled in insurance at that time because they did not need it since they were covered by their husband's insurance and it would have cost them money to obtain the duplicate coverage. By not enrolling in insurance when they first became eligible, the District thereinafter considered them ineligible for insurance.

The events noted above occurred when the food service employes were unrepresented. Thus, these events occurred before the District and the Union established a collective bargaining relationship. After the Union came on the scene in 1987, the parties negotiated their first labor agreement. In doing so, they negotiated an article on insurance which consisted of seven separate sections. Two of the sections dealt with insurance for part-time employes. One section (Section 16.05) provided that those part-time employes who worked more than 25 hours per week were eligible for insurance with the District paying a prorata share of the premium, while another section (Section 16.051) provided that those part-time employes who worked between 20 and 25 hours per week could elect to participate in insurance at their own cost. Novak was on the Union's bargaining team when this language was negotiated. As previously noted, the District

considered Novak ineligible for insurance because she had not enrolled in same when she first became eligible. Her presence on the Union's bargaining team gave the Union constructive notice that although the parties had negotiated language in Section 16.05 which provided that employes who worked more than 25 hours per week were eligible for various insurances, there was at least one employe (namely Novak) who met that hours threshold and thus was eligible, but was nonetheless considered ineligible for insurance by the District because she had not enrolled in same when she first became eligible.

Three years later in 1990 the parties negotiated a successor agreement. In doing so, they again negotiated new insurance language. This time, they added a notice provision (Section 16.07) and two TSA provisions (Sections 16.08 and 16.09). Novak again served on the Union's bargaining team. The insurance language which was added to the labor agreement did not address the situation of employes who were otherwise eligible for insurance, but were nonetheless considered ineligible for insurance by the District because they had not enrolled in insurance when they first became eligible.

Three years later in 1993, the parties negotiated another successor agreement. This time they did not negotiate any new insurance language. Novak again served on the Union's bargaining team.

This bargaining history establishes that the parties never negotiated about those employes who were otherwise eligible for insurance, but were nonetheless considered ineligible for insurance by the District because they had not enrolled in insurance when they first became eligible. Consequently, those employes who had not enrolled in insurance when they first became eligible continued to be considered ineligible for insurance by the District. This status has continued unchanged the entire time the Union has been the bargaining representative for the food service employes. There has never been an open enrollment for those employes who are currently ineligible for insurance to become eligible for insurance. Insofar as the record shows, four bargaining unit employes were so situated.

In 1993, the Union requested that the District's health insurance carrier offer an open enrollment for the four employes whom the District considered ineligible for insurance. The Union attempted to get an open enrollment period for these employes so they could enroll in the TSA Option. One of the four employes covered by this request was Novak. The Union was unsuccessful in obtaining the requested open enrollment period for the four named employes. Afterwards, the Union informed the bargaining unit employes via a written memo that in order to be eligible for the TSA Option, employes had to be eligible for insurance.

A year later in 1994, Novak and Kasch filed grievances alleging that the District never offered them insurance benefits when they were first eligible for them. The grievants seek, via their grievances, to become eligible for insurance so that they can get the TSA Option.

The Union concedes that if an employe was offered insurance and does not enroll in same when they first become eligible, the employe is not subsequently eligible for insurance. 1/ As the Union puts it in their brief "if an employe is offered insurance and declines, he/she cannot simply jump in at a later date." That being so, the question here is whether the two grievants were each informed of their eligibility for insurance by the District and offered the opportunity to participate when they first became eligible. The District contends that they were while the Union disputes that assertion. For purposes of discussion herein, it is assumed that Novak and Kasch were not specifically informed of their eligibility for insurance by the District and offered the opportunity to participate in same when they first became eligible. If they were not informed of their eligibility for insurance when they first became eligible and offered the opportunity to participate in same, they should have been.

The District contends that given the historical backdrop noted above, the instant grievances are not procedurally arbitrable. Based on the reasons set forth below, the undersigned agrees.

To begin with, the claims which Novak and Kasch have against the District (i.e. that they were not informed of their eligibility for insurance and offered the opportunity to participate in same when they first became eligible) predate the parties' first collective bargaining agreement. This is because their claims arose when the District failed to do these things. As previously noted, this occurred when Novak and Kasch became eligible for insurance (1983 and 1986, respectively). Certainly the District has cause to complain about the timeliness of grievances which predate the parties' first contract. This is because claims which predate a labor contract are not arbitrable unless the parties have an agreement to the contrary. No such agreement was shown to exist herein.

Second, even if Novak's and Kasch's claims arose under a collective bargaining agreement, their claims still accrued years before the instant grievances were filed. The following shows this. Kasch's status form for 1988 indicated she was not eligible for health, dental, disability and the TSA Option, but that she was eligible for life insurance with the District paying 66 percent of the premium and her paying 34 percent of the premium. Kasch admits she chose not to enroll in the life insurance program when it was offered to her in 1988. When Novak's hours were increased in 1990, the District's Human Resources office completed a status form for her

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1/ Prior to 1992, no exception existed to this statement. In 1992, the District's contract with its health insurance carrier changed concerning insurance eligibility. Under the new eligibility provision, if the employe had a change in job status or an increase in hours resulted in an increase in the District's premium contribution of at least 25 percent, then the employe became newly eligible for a 30 day window in which to elect insurance. Here, though, Novak and Kasch did not have a change in job status after 1992, nor did they have an increase in their hours which corresponded to a 25 percent premium contribution increase, so this exception is inapplicable.

which indicated she was not eligible for hospital, dental, life, disability or the TSA option. Kasch admitted receiving this form. These forms demonstrate that Novak and Kasch were given notice years ago that the District considered them ineligible for insurance. The notation on these forms that Novak and Kasch were "not eligible" for certain insurances certainly implies that they had previously been eligible, chosen not to enroll in those insurances, and consequently became ineligible for same. If their ineligible status is grievable now, it logically follows that it must have been a grievable matter years ago as well. However, the grievants sat on their contractual rights so to speak for years until they finally grieved it in 1994.

Third, even if their claims arose during the term of the 1993-95 collective bargaining agreement (as required by Section 5.01 of the grievance procedure), their claims are still untimely under that agreement. The parties' contractual grievance procedure (Article V) contains timelines for filing grievances. Step 1 of that procedure provides that grievances are to be discussed with the employe's "immediate supervisor within thirty (30) calendar days after the facts upon which the grievance is based first occur or first become known." It then goes on to provide that if no solution is reached, the employe shall reduce the grievance to writing and present it to the Food Service Director. The timetable for doing so is identical to that just referenced (i.e. "thirty (30) days after the facts upon which the grievance is based first occur or first become known"). In this case, "the facts upon which the grievance is based" occurred either when the employes became eligible for insurance and did not enroll in same, or when the District notified the employes that the District considered them ineligible for insurance. Either act occurred years before the instant grievances were filed.

The Union does not even attempt to argue that the instant grievances were filed within the 30 day time period referenced in Step 1 of the grievance procedure. The reason for this is obvious: there is no conceivable way that the instant grievances were filed within 30 days after the facts upon which the grievances are based first occurred or became known. Knowing this, the Union takes a different tact and contends that the grievances are timely under the continuing violation theory. Under that theory, "continuing" violations of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to be repeated from day to day. As a practical matter, this theory allows grievances to be filed at any time during the continuing violation, even outside the time limits stated in the contractual grievance procedure. In the latter situation (i.e. outside the contractual time limits), the continuing violation theory permits what would otherwise be an untimely grievance to continue. The continuing violation theory is typically applied by arbitrators when there is not a single event, incident and/or occurrence. Here, though, there is a single event, incident and/or occurrence which can be readily identified, to wit: either when the District failed to inform Novak and Kasch of their eligibility for insurance and offer them the opportunity to participate in same, or when Novak and Kasch received actual notice from the District of their ineligible status. Either way, both events occurred years ago. As previously noted, the former happened for Novak and Kasch in 1983 and 1986, respectively, while the latter occurred in 1990 and 1988, respectively. The District has not taken any further action toward Novak and Kasch

relative to their insurance ineligibility since then. That being so, the undersigned finds that the continuing violation theory is not applicable here. Accordingly, that theory will not be used as a rationale for overlooking the critical fact that years have elapsed between the District's actions and the filing of the grievances.

Finally, although the District did not raise a procedural objection to the grievances until the hearing, their failure to do so did not preclude it from raising it at the hearing. This is because a parties' right to contest arbitrability before the arbitrator is not waived merely by failing to raise the issue of arbitrability until the arbitration hearing. 2/

Based on all of the above, and absent any persuasive evidence or argument to the contrary, the arbitrator finds that the answer to the procedural issue, as framed by the District, is that the grievances are not arbitrable under the 1993-95 contract. Section 5.01 provides that the purpose of the grievance procedure is to resolve differences "arising during the *term of this Agreement*." (emphasis added). This language expresses the parties' intent that grievances under the current collective bargaining agreement arise during the 1993-95 school years. The claims which the grievants raise occurred years ago. No evidence was offered by the Union to justify or explain why there was such a long delay in filing the grievances. Given the length of the delay and the absence of a valid reason for the delay, it is held that the grievances are untimely. As a result, they are not procedurally arbitrable. Because the grievances are not procedurally arbitrable, the undersigned is precluded from considering the merits of same.

In so finding, the undersigned is well aware that this conclusion will be viewed as a harsh result by both the grievants and the Union because it freezes them in their current status as ineligible for insurances. Be that as it may, this result simply continues their individual status quo. If the Union desires to change their status quo, it can do so in bargaining. To date though, the Union has had three contracts to remedy an act which occurred long ago, and it has not done so.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the grievances of Novak and Kasch are not arbitrable under the 1993-95 contract. As a result, their grievances are denied and dismissed.

Dated at Madison, Wisconsin, this 1st day of July, 1996.

2/ Elkouri and Elkouri, How Arbitration Works, 4th Ed. 1985, p. 220.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator