BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MUSKEGO-NORWAY SCHOOL DISTRICT
EMPLOYEES, LOCAL 2414, AFSCME, AFL-CIO

and

MUSKEGO-NORWAY SCHOOL DISTRICT

Case 54
No. 52928
MA-9159

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council #40, on behalf of the Union.

Quarles & Brady, by Mr. Robert H. Duffy and Ms. Pamela M. Ploor, on behalf of the District.

## ARBITRATION AWARD

The above-entitled parties, herein "Union" and "District", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Muskego, Wisconsin, on February 14, 1996. The hearing was transcribed and the parties thereafter filed briefs which were received on May 7, 1996. Based upon the entire record and the arguments of the parties, I issue the following Award.

## ISSUES

Since the parties were unable to jointly agree to the issues, I have framed them as follows:

1. *Are the grievances arbitrable?*

2. *If so, are certain part-time employes entitled under Article XVII of the contract to either a tax-sheltered annuity or health, prescription drug, dental, and life insurance coverage after they initially declined health insurance coverage but who now want either a tax-sheltered annuity or insurance benefits.*

DISCUSSION

The District for about 20 years has offered health insurance coverage 1/ to its part-time employes who work a certain number of hours and since about 1982 it has paid a pro rata share of health insurance premiums to employes working between 25 and 30 hours per week. Since about 1987 it also has offered a tax-sheltered annuity to those employes who either had health insurance or later became eligible for it whereby it pays into the annuity an amount of money equalling 90% of its contribution for the health and dental insurance premiums.

If employes decline insurance coverage when it is initially offered, the District thereafter does not generally offer such coverage again, irrespective of how long employes are employed. 2/ Hence, there is no open enrollment period which allows them to receive such coverage or a tax-sheltered annuity at a later date.

As a result, the following part-time employes, (with their dates of hire), do not have either health insurance or a tax-sheltered annuity even though they currently work enough hours to qualify for those benefits under the contract:

Karen Ard (01/10/85)
Dorothy Dooley (05/03/78)
Shirley Ewig (09/02/88)
Darlene Felber (08/29/83)
Virginia Glowacki (08/29/83)
Marilyn Heikkinen (04/19/82)
Pat Jones (08/29/83)
Patricia Kirchoff (08/10/84)
Margaret Koopmeiners (08/29/84)
Dena Leary (09/01/71)
Mildred Luhmann (08/29/83)
Dzintra Musa (08/31/70)
Mary Scholfield (01/20/72)

All of these employes were not necessarily entitled to health insurance coverage on their dates of hire, as some of them did not initially work a sufficient number of hours until several

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1/ For purposes of simplicity, "insurance" hereinafter refers to health, drug and dental coverage.

2/ Exceptions to this general rule occur if there is a substantial change in an employe's job duties, if an employe involuntarily loses health insurance coverage offered to a spouse, or if premium contributions rise by a certain amount, issues which have no application here.

years after they began their employment. 3/

There is a question over exactly what the District told these employes when they initially declined health insurance coverage. 4/ Some employes signed insurance waivers which stated:

. . .

> In accordance with our contract agreement, part-time employees working 25 or more hours per week will be eligible for hospital-surgical, dental and life insurances upon application, on a pro-rated basis. Summer premiums would be included in the proration of the premium.
>
> Employees working between 20 and 25 hours per week may elect to participate in the hospital-surgical, dental and life insurance policies by paying the total premium cost of such insurances.
>
> Employees working 20 hours or more per week are also eligible for Wisconsin Retirement benefits and application has been completed for this benefit for you. This is a district-paid benefit.
>
> Please indicate below if you wish to participate in the insurance program(s) or if you do not wish to participate. Please sign and date this form and return it to the District Office as soon as possible. If you have any questions, please call the District Office.
>
> ____ Yes, I would like to participate in the group insurance program(s) checked.
>
> ____ Health Insurance (includes prescription drugs)

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3/ The record shows that Karen Borgman declined health insurance when she became a new employe in about 1986. According to Union Representative Michael J. Wilson, no grievance was initially filed on her behalf because her situation "slipped through the cracks". Since her situation is the same as the other 13 employes, she, too, is covered by the grievances because the contract allows the Union to file class grievances covering all affected employes.

4/ This question arises because the District does not have all of the pertinent paperwork regarding this matter. That, though, is largely the result of the Union's delayed filing of the instant grievances. As a result, it is unfair to blame the District for this state of affairs.

____ Dental Insurance

____ Life Insurance

Applications for these insurances will be sent to you upon receipt of this form.

. . .

Hence, there was nothing in those written waivers which stated that if employes declined insurance at that time, they would never be able to receive it at a later date. Director of Human Resources Jean Henneberry agreed that it might be a "fair statement" that this form was given to all the employes herein.

Other written waivers stated:

. . .

I understand that if I do not enroll or if I waive my rights to participate in any WEA Insurance benefit plans offered through my employer, I cannot enroll at a later date without underwriting approval of WEA Insurance. . .

. . .I understand that if I did not apply for coverage during an open enrollment period for either myself or my dependents, that I/we may apply at a later time, but will be required to meet very strict standards of insurability, and that there is no guarantee I/we would be accepted for coverage.

. . .

The District has never offered an open enrollment period to any of its employes, including teachers, up to the time the instant grievances were filed.

The Union raised the issue of an open enrollment period in 1991 and 1994 collective bargaining negotiations over successor contracts when it unsuccessfully sought contract language guaranteeing an open enrollment period.

The District's contract with the WEA Trust, its insurance carrier, states: "Group open enrollments for health plan allowed every three years rather than five years effective January 1,

1992."

The Union on May 2, 1995, grieved this situation by claiming: "Employer failed to provide and/or offer hospital/surgical insurance and/or dental and/or prescription drug and/or life insurance and/or TSA benefits to the above identified employes."

In support therein, the Union argues that the grievances are arbitrable because the District never raised the question of arbitrability prior to the instant hearing; because the District is guilty of a continuing violation which enables it to grieve at any time; because there "has been no disadvantage" to the District as a result of filing the grievances when it did; and because the Union in any event is seeking a remedy which is limited to thirty (30) days before it filed its grievances. On the merits, the Union contends that the contract "does not provide for forfeiture" of either benefit; that the grievants are eligible for these fringe benefits under "the terms of the insurance policy and in accordance with industry practice"; that bargaining history supports its position; and that the "grievants have not waived the right to enroll". As a remedy, it asks that the District be ordered to offer each of the insurances or a tax-sheltered annuity to each of the aforementioned employes and to make them whole up to 30 days from the date the grievances were filed.

The District, in turn, maintains that the grievances have not been timely filed and that they are not arbitrable because they "occurred many years ago", with several of them even arising before the Union and the District entered into their first contract. It therefore argues that Section 6.05 limits the authority of the arbitrator to rule on some of these grievances. The District further claims that the "grievants never became eligible for insurance under the current" contract; that it has not violated the contractual "me too" provision because the teachers did not get an open enrollment"; and that the Union in any event has not proven that any backpay remedy is proper.

Arbitrability is the first issue to be resolved here. As to that, Article V of the contract, entitled "Grievance Procedure", states in pertinent part:

> 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 such differences through the use of the grievance procedure.
>
> 5.02 Definition
> For the purpose of this Agreement, a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this Agreement.
>
> 5.03 Steps in Procedure

Grievances shall be processed in accordance with the following procedure:

5.031 Step 1. An earnest effort shall first be made to settle the matter informally between the employee and his unit principal within thirty (30) 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 unit administrator within thirty (30) days after the facts upon which the grievance is based first occur or first became known, or within five (5) days after the conference in 5.031. The unit administrator shall meet with the aggrieved employee, accompanied by a representative of the Union if the employee so chooses, within five (5) days of the submission of the written grievance and shall respond in writing to the aggrieved employee and the Union within five (5) days of such meeting.

5.032 Step 2. If not settled in 5.0311 above, the grievance may, within five (5) days, be appealed in writing by the employee to the Superintendent of Schools. The Superintendent shall meet with the aggrieved employee, accompanied by a representative of the Union if the employee so chooses, within five (5) days of the submission of the appeal and shall respond in writing to the aggrieved employee and the Union within five (5) days of such meeting.

5.033 Step 3. If not settled in 5.032 above, the grievance may, within ten (10) days, be appealed in writing by the employee to the School Board. The Board shall meet with the aggrieved employee, accompanied by a representative of the Union if the employee so

chooses, within fifteen (15) days of the appeal and shall respond in writing to the aggrieved employee and the Union within five (5) days of such meeting.

5.04 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.

. . .

5.11 Extension of Time Limits
Time limits contained in this Article shall be extended for an additional time up to ten (10) work days to accommodate reasonable handling in the event that one or more of the parties to the grievance is absent because of sick leave, vacation or approved leave of absence.

. . .

Since some of the affected employes originally turned down health insurance up to 10 and 20 years ago, it is readily understandable as to why the District alleges that they are untimely. But, the record also shows that the District first raised this timeliness issue at the instant hearing and that it was never raised in the underlying steps of the grievance procedure. Having failed to raise it then, the District is precluded from raising it now. See Elkouri and Elkouri, How Arbitration Works, p. 211 (BNA, 4th Ed., 1985). See also Celina City Schools, 94 LA 1001, (Dworkin, 1990); San Francisco Unified School District, 87 LA 1248 (Concepcion, 1986); Amoco Oil Co., 87 LA 493, (Goldstein, 1986).

The District also claims that the grievances are not arbitrable because some of them arose even before the District and Union established a collective bargaining relationship; because the acts complained about arose under prior contracts; and because any dispute concerning the "me too" open enrollment period in the contract was not pleaded when the grievances were filed.

Since the Union's brief at page 2 expressly disavows any challenge to the "me too" clause in this proceeding, this latter claim is without merit. 5/ Furthermore, the grievances herein have

5/ As a result, this Award does not in any way address this issue. If the Union wants to question the applicability of the "me too" clause, it must do so in a separate grievance. In

been filed to determine whether the District has violated Article XVII of the present contract. They therefore constitute proper grievances under Section 5.02 of the contract which states:

> "For the purposes of this Agreement, a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this Agreement."

That is exactly what the Union is doing here by questioning the District's application and interpretation of Section 17.01 during the contract's duration. The Union's case thus turns on the language of the present contract without regard to what prior contracts provided. It therefore is the District, and not the Union, which is relying on past events to support its position here -which it certainly has the right to do. The merits of the District's argument, however, is a separate question of whether the Union can grieve under Section 5.02, ante, over the current state of affairs, which it certainly can.

In light of the above, it therefore follows that the grievances are arbitrable.

As for their merits, Article XVII of the contract, entitled "Insurance", states:

> 17.01 Hospital and Surgical Insurance
> The Employer shall pay 90% of the premium for the current family or single hospital-surgical insurance coverage for all twelve (12) month full-time, ten (10) month full-time and school year employees.
>
> . . .
>
> 17.06 Part-Time Employees
> Part-time employees working twenty-five (25) or more 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. (Emphasis added).
>
> 17.061 Between Twenty (20) and Twenty-five Hours Per Week
> Part-time employees, as defined in

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addition, nothing stated herein goes to the question of whether the teachers have been accorded an open enrollment period. That question is not before me and hence it does not have to be addressed here.

Article VII, Section 7.04, working between twenty hours per week and 25 hours per week may elect to participate in the hospital/surgical, dental and life insurance policies by paying premium cost of such insurances. Section 17.061 will cover only those part-time employes who were enrolled in the insurance plan as of September 1, 1995.

. . .

17.08 "Me Too" Clause for Health and Dental Insurance

In the event there is an open enrollment for the Teachers Union (U.L.E. Muskego Caucus), the members represented under this three year contract would also be granted an open enrollment with the same duration as the teachers.

. . .

17.11 Option Plan

Current employees enrolled in the family medical insurance plans 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 in a tax sheltered annuity in the employee's name. The employee would waive family medical eligibility in order to qualify for the TSA Option. The maximum amount of the TSA contribution will not exceed the dollar cap for the Teacher's single premium.

. . .

17.111 Current employees enrolled in family dental insurance plans 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 in a tax sheltered annuity in the employee's name. The employee would waive family dental eligibility in order to qualify for the TSA Option. The maximum amount of the TSA contribution will not exceed the dollar cap for the Teacher's single premium.

On its face, Section 17.06 supports the Union because it states: "Part-time employes working twenty-five (25) or more hours per week will be eligible for hospital - surgical, dental and life insurance upon application to the Business Office." 6/ Here, since all 14 of the aforementioned employes work at least 25 hours a week, it would appear that they, indeed, are "eligible for hospital - surgical, dental and life insurance. . ."

The District therefore in effect argues that this proviso should be read to mean as follows:

> "Part-time employees working twenty-five (25) or more hours per week will be entitled to hospital-surgical, dental and life insurance upon application to the Business Office if: (1), they already have such coverage; or (2), they are newly hired and work the requisite number of hours."

The problem with this claim, of course, is that the contract cannot be amended and perverted in this fashion.

Rather, its provisions must be read and applied just as they are written, which in this case means that the phrase "will be eligible" must be given its ordinary meaning. The District nevertheless asserts that the employes herein are not "eligible" because all of them at one time declined health insurance coverage. There are two main problems with this claim.

One, the contract itself nowhere states that health insurance is to be denied in perpetuity to those employes who initially turned it down for a myriad of reasons, the primary one perhaps

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6/ The language in Section 17.06 has remained substantially the same for about the last decade, with the only major change being the reduction from 30 to 25 hours needed to qualify for this benefit.

being that they did not want to pay for all or such a large portion of the monthly health insurance premium at the time it was first offered.

Two, there is no proof in this record that the District ever told such employes at that time that they were forever waiving health insurance. 7/ To the contrary, some employes were provided with a form, (Union Exhibit 18C), which stated:

> "I understand that if I do not enroll or if I waive my rights to participate in any WEA Insurance benefit plans offered through my employer, I cannot enroll at a later date without underwriting approval of WEA Insurance. . ."
>
> . . .I understand that if I did not apply for coverage during an open enrollment period for either myself or my dependents that I/we may apply at a later time, but will be required to meet very strict standards of insurability, and that there is no guarantee I/we would be accepted for coverage.

The only reservation in this waiver thus turns on whether the WEA Insurance Trust will underwrite them at a later date.

In addition, other employes signed waivers which contained no provision stating that employes were forever waiving their right to receive health insurance if they declined it at that time.

Yet, that is what the District is arguing here. Absent any written waivers or contract language to that effect, however, this claim must be dismissed because it directly contradicts what the District itself told some of these employes at the time. As a result, the District should be held to exactly what it then told them: i.e., that "I/we may apply at a later time, but will be required to meet very strict standards of insurability. .." without any guarantee that they will receive it. Such eligibility is dispositive of this case because Section 17.06 on its face provides for insurance to those qualifying employes who are "eligible" for it.

Furthermore, acceptance of the District's contrary position in effect would mean that none of these long-term employes would ever receive this highly-valued benefit at the very same time that newly-hired employes coming in off the street can receive it if they work over 25 hours a week. While it may be theoretically possible for parties to penalize more senior employes in this

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7/ There was a claim at the hearing that the District's former bookkeeper told that to employes. However, since she did not testify, such a claim is hearsay which, in any event, is not supported by any documentary evidence.

fashion, there is no basis for doing so when, as here, they is no express contract language sanctioning such a result and when there is not one iota of bargaining history supporting such a view.

The question of insurability, however, is a separate question from whether any of these employes can obtain health insurance during an open enrollment period irrespective of their medical condition. For while the former limits insurance only to those whom the WEA Trust deems "eligible", the latter enables all employes to receive coverage irrespective of their medical condition.

As for open enrollment, the aforementioned waivers do not refer to it in any fashion. As a result, employes signing those waivers should not have had any reasonable expectations that one would be automatically provided.

Furthermore, the District's contract which the WEAC Trust only provides: "Group open enrollments for health plan allowed every three years. . ." It does not say it must be provided. Henneberry and Director of Business Services Charles Brenden both testified that the District has chosen not to exercise this option because of the cost involved.

In addition, there is no express guarantee to that effect in Section 17.06 which pegs eligibility to working 25 or more hours per week and "application to the Business Office." While the Union argues that the plain language of Section 17.06 supports its position, the fact remains that the District has never had an open period and that the Union in past negotiations was unsuccessful in getting one. Thus, the Union in the 1994 negotiations proposed language which read:

> "Add Section 17.11. Insurance. Allow open enrollment for all or allow allow [sic] enrollment into TSA. If marital status changes of if husband or wife's job or insurance status changes, said employees shall be allowed to enter group hospital-surgical and dental plans to be discussed."

While the Union states that it made that proposal for clarifications stake and that it ultimately withdrew it "without prejudice", the fact remains that it also was unsuccessful in obtaining such language in the 1991 negotiations and that the contract for at least the last ten (10) years has never been interpreted or applied in the way the Union urges here. Absent clear contractual language which expressly provides for an open enrollment period, it is improper to award such a substantial benefit via an arbitration proceeding when the Union was unable to get it in past negotiations.

Hence, employes here get only half of the proverbial loaf: while they can apply for health insurance at any time during the contract's duration pursuant to the District's own waiver forms

and the contract, their medical "eligibility" for same and perhaps even lowered benefits will be determined by the WEAC Trust. If they are medically fit, they get it; if they are not medically fit, they do not get it. In addition, they are entitled to dental and life insurance even if they are not eligible for health insurance since Section 17.06, ante, accords them these benefits without limitation and since the waivers herein do not bar these benefits in perpetuity.

This half-loaf may seem too little to the Union because the District has recently granted health insurance and/or a tax-sheltered annuity to teachers who previously declined health insurance when it was initially offered. However, those teachers received those new benefits only after their union agreed in negotiations to forego other contractual improvements and only after their union agreed to a new cost-saving health insurance delivery system which the District also offered to the Union here, but which the Union declined in negotiations.

That takes us to the separate question of whether any of the employes herein are entitled to the tax-sheltered annuity provided for in Section 17.11, ante.

As to that, the record shows that the Union in the 1991 and 1994 negotiations unsuccessfully sought contract language aimed at providing a tax-sheltered annuity to employes who did not have one. While the Union asserts that it withdrew those proposals "without prejudice", the fact remains that the Union is now attempting to secure a benefit in arbitration which it could not secure at the bargaining table and one which has not been provided to some of these employes since about 1987.

Furthermore, by agreeing to language in Section 17.10 which limits this benefit to "current employees enrolled in the medical insurance plan. . ." the Union agreed at the bargaining table that this benefit would be made available only to employes who already had medical insurance.

Given all of that, I conclude that the employes herein are not entitled to a tax-sheltered annuity even if they now qualify for health insurance.

By way of remedy, the District is hereby required to grant health insurance coverage to the employes herein who sign up for it if the WEAC Trust deems them eligible. The District also shall immediately offer them dental and life insurance if they sign up for such coverage even if they do not sign up for or qualify for health insurance.

Furthermore, since they have been denied these contractual benefits, the District is required to make whole all of the aforementioned employes who now qualify and sign up for health insurance and who are willing to pay any retroactive insurance premium to the date of the grievances by paying to them any out-of-pocket medical and drug expenses incurred since the date the grievances were filed and which otherwise would be covered under the District's health and drug plan. The District shall make whole the aforementioned employes who sign up for dental insurance and who are willing to pay any retroactive insurance premium to the date of the

grievances by paying to them any out-of-pocket dental expenses incurred since the date the grievances were filed and which otherwise would be covered under the District's dental plan.

In light of the above, it is my

AWARD

1. That the grievances are arbitrable.

2. That the employes herein are entitled under Article XVII of the contract to receive health insurance benefits if they are deemed eligible by the District's carrier.

3. That the employes herein are entitled under Article XVII of the contract to dental and life insurance irrespective of whether they are eligible for health insurance.

4. That to rectify the contractual breaches, the District shall undertake the remedial action stated above.

5. That the employes herein are not entitled under Article XVII of the contract to a tax-sheltered annuity.

6. That to resolve any questions arising over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 16th day of July, 1996.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator