BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ST. FRANCIS FEDERATION OF NURSES AND HEALTH PROFESSIONALS, LOCAL 5001

and

ST. FRANCIS HOSPITAL

Case 23
No. 54044
A-5477

Appearances:

Ms. Carol Beckerleg, Field Representative, Federation of Nurses and Health Professionals Local 5001, AFT, AFL-CIO, 9620 West Greenfield Avenue, West Allis, Wisconsin 53214-2645, appearing on behalf of the Union.

Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, by Mr. Thomas W. Scrivner, appearing on behalf of the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all time relevant to this proceeding, and which provides for final and binding arbitration of certain disputes. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed Arbitrator Herman Torosian to hear and decide a grievance involving the interpretation and application of the terms of the agreement as it relates to the assignment of non-nursing duties to a nurse. Hearing in the matter was held in Milwaukee, Wisconsin, on August 2, 1996. A stenographic transcript was made of the hearing and briefs were received by October 11, 1996. After consideration of the evidence and arguments by the parties, the Arbitrator issues the following Award.

ISSUE:

The parties were unable to stipulate to a statement of the issue and agreed to have the Arbitrator frame the issue.

The Union states the issue as follows:

Did the Hospital violate the contract when it eliminated health insurance coverage for family planning services?

If so, what should the remedy be?

The Employer proposes the following issue:

Was Section 16.01 of the 1994-1996 collective bargaining agreement violated because coverage for contraception and sterilization was not included in the health insurance plans effective January 1, 1996, and where those services would be undertaken for family planning purposes?

If so, what remedy, if any, is appropriate?

The Arbitrator frames the issue as follows:

Did the Employer violate Article 16.01 of the parties' collective bargaining agreement when it eliminated the family planning services benefit from the health insurance plans effective January 1, 1996?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 16
Health Insurance

16.01.

. . .

. . . The Hospital may implement alternative insurance plans, change carriers, or become self-insured, provided that substantially equivalent benefits are made available to employees. A Joint Labor/Management Committee will be established to modify

existing contract language with regard to health insurance premiums, co-pays, and deductibles as necessary.

. . .

ARTICLE 24
Problem-solving

A. Definition: Problem-solving will be the means of resolving a dispute with respect to the interpretation or application of this Agreement.

B. The problem-solving process shall be subject to the following procedure:

Step One: The employee shall present and discuss the problem either orally or in writing, at the employee's option, with her area/Union representative and immediate supervisor within fourteen (14) calendar days of the occurrence of the event giving rise to the problem or within fourteen (14) calendar days of the date the employee became aware or should have become aware of the event giving rise to the problem. The supervisor shall respond in writing within seven (7) calendar days.

. . .

Step Five: If a problem is not resolved in Step Four, it may be resolved by arbitration if (1) it involves the meaning of application of this Agreement and (2) demand for arbitration is made within thirty (30) calendar days from the receipt by the Union steward of the decision of the Hospital's President. . . .

A. Within ten (10) calendar days following timely receipt of a demand for arbitration. The (sic) Human Resource Department will contact WERC.

Amedeo Greco
Marshall L. Gratz
Douglas Knudson
Herman Torosian

WERC
P.O. Box 7870
Madison, WI 53707-7870

The arbitrator who has the earliest availability shall serve as the arbitrator. The expense of the arbitrator shall be borne equally by the Union and the Hospital.

. . .

C. The decision of the arbitrator, if within his authority, shall be final and binding upon the employee, the Hospital and the Union. The arbitrator shall have no authority to add to, modify or alter any of the terms or provisions of this Agreement; the sole authority of the arbitrator is to render a decision as to the meaning and interpretation of this Agreement with respect to the grievance. If a matter is beyond the scope of the arbitrator's authority, s/he shall return the submission to the parties without action.

. . .

PERTINENT CATHOLIC CHURCH DIRECTIVES:

PART ONE
The Social Responsibility of Catholic Health Care Services

. . .

Directives

. . .

5. Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition of medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel.

. . .

8. Catholic health care institutions have a unique relationship to both the Church and the wider community they serve. Because of the ecclesial nature of this relationship, the relevant requirements of canon law will be observed with

regard to the foundation of a new Catholic health care institution; the substantial revision of the mission of an institution; and the sale, sponsorship transfer, or the closure of an existing institution.

9. Employees of a Catholic health care institution must respect and uphold the religious mission of the institution and adhere to these Directives. They should maintain professional standards and promote the institution's commitment to human dignity and the common good.

. . .

PART FOUR
Issues in Care of the Beginning of Life

Introduction

. . .

Catholic health care ministry witnesses to the sanctity of life "from the moment of conception until death." The Church's defense of life encompasses the unborn and the care of women and their children during and after pregnancy. . . .

. . .

For legitimate reasons of responsible parenthood, married couples may limit the number of their children by natural means. The Church cannot approve contraceptive interventions that "either in anticipation of the marital act, or in its accomplishment or in the development of its natural consequences, have the purpose, whether as an end or a means, to render procreation impossible." Such interventions violate "the inseparable connection, willed by God . . . between the two meanings of the conjugal act: the unitive and procreative meaning."

. . .

Directives

38. When the marital act of sexual intercourse is not able to

attain its procreative purpose, assistant that does not separate the unitive and procreative ends of the act, and does not substitute for the marital act itself, may be used to help married couples conceive.

39. Those techniques of assisted conception that respect the unitive and procreative meanings of sexual intercourse and do not involve the destruction of human embryos, or their deliberate generation in such numbers that it is clearly envisaged that all cannot implant and some are simply being used to maximize the changes of others implanting, may be used as therapies for infertility.

40. Heterologous fertilization (that is, any technique used to achieve conception by the use of gametes coming from a least one donor other than the spouses) is prohibited because it is contrary to the covenant of marriage, the unity of the spouses, and the dignity proper to parents and the child.

41. Homologous artificial fertilization (that is, any technique used to achieve conception using the gametes of the two spouses joined in marriage) is prohibited when it separates procreation from the marital act in its unitive significance (e.g., any technique used to achieve extra-corporeal conception).

. . .

45. Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers.

. . .

52. Catholic health institutions may not promote or condone contraceptive practices but should provide, for married couples and the medical staff who counsel them, instruction both about the Church's teaching on responsible parenthood and in methods of natural family planning.

53. Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution when its sole immediate effect is to prevent conception. Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present pathology and a simpler treatment is not available.

(footnotes omitted)

FACTS:

At issue in this case is the Employer's exclusion from the 1996 health insurance plans the voluntary planning services benefit previously employed by the employes. The history at St. Francis Hospital relative to family planning services is as follows.

From at least 1988 through January 31, 1991, the parties had in effect an insurance plan by Wisconsin Health Organization Insurance Corporation (WHO). Said plan specifically provided family planning services as a covered benefit (Union Ex. 2, p. A-6). The plan excluded abortions but included sterilization by a rider dated February 1, 1988 (Union Ex. 2). The 1988-91 plan was extended by agreement for the period February 1, 1990 through January 31, 1991. The original plan was signed by the President of St. Francis Hospital and the amendment extending the plan by the Vice-President of Human Resources.

During the same period, 1988-1991, a plan provided by Wisconsin Physicians Service (WPS) was also in effect. Said plan specifically included oral contraceptives (Union Ex. 3, p. 1 of drug plan) and sterilization but not reversal of sterilization (Union Ex. 3, p. 2). The plan agreement was signed by the President and CEO of St. Francis Hospital.

In 1991, the parties agreed to replace WHO and WPS with PrimeCare effective February 1, 1992. PrimeCare offered both a HMO plan and a plan by United Health and Life Insurance Company, that allowed employes to go outside the HMO plan to a doctor of their choice. Family planning services was a covered benefit, at either 100 percent or 80 percent, under the HMO plan (Joint Ex. 23, p. 17 and Union Ex. 4, p. 4). If employes chose to go outside the HMO plan, said services were not covered (Joint Ex. 23, p. 14 and 32 of United Health Plan and Union Ex. 4, p. 4).

In addition to PrimeCare there is also available a plan by Family Health Plan. Family Health Plan has been a provider since at least 1988. The February 1, 1991 - January 31, 1992 plan (Union Ex. 1) did not exclude family planning services and the 1995 plan specifically included coverage (Joint Ex. 22, p. A-4). The plan was signed by current President Greg Banaszynski 1/ on behalf of the Hospital.

It is undisputed that the benefit of family planning services was not specifically discussed in any of the parties' collective bargaining negotiations.

In late September, 1995, Greg Banaszynski, President of St. Francis Hospital, became aware that voluntary 2/ family planning services was being provided to the employes in this unit. He asked the Human Resources Manager to verify the coverage. When he found out that coverage was indeed being provided, he called Bill Bazan, Executive Director of Public Policy and Educational Development at Catholic Health Association of Wisconsin, to confirm that such coverage was against the teachings of the Catholic church and prohibited. Having confirmed what he already thought, Banaszynski discussed the matter at a meeting held on October 4, 1995 with the Union. The meeting was scheduled to discuss changing insurance plans from the current PrimeCare plan to Covenant Health Plan. Banaszynski advised the Union that the family planning services benefit would have to be discontinued because it was contrary to Catholic teachings. Attending the meeting were Candice Owley, President, Federation of Nurses and Health Professionals, Local 5001; Barbara Janusiak, Chief Steward of the Union and a registered nurse with St. Francis Hospital; Deborah Johnson, Director, Human Resources; Richard Yurkowitz, an Actuarial Consultant; as well as Banaszynski.

After the October 4 meeting, Owley and Janusiak decided another meeting would be helpful with a side-by-side presentation of the two plans highlighting what the changes would be. Such a meeting was held on October 18 attended by Owley, Janusiak, and Pat Skonieczny, Chapter Chair, Local 5001, for the Union. Attending on behalf of the St. Francis Hospital were Banaszynski, Johnson, Yurkowitz and Therese Fitzpatrick, Vice-President of Administration. A side-by-side overhead presentation was made of the proposed Covenant Health Plan and the current PrimeCare Plan. Additionally, Banaszynski reiterated his surprise that family planning service was part of the existing plan and that he proposed to discontinue the coverage because it was contrary to Catholic teachings.

1/ Banaszynski began working for St. Francis in July, 1991. He was Executive Vice-President and Chief Operations Officer until January 1, 1994, when he became President.

2/ Involved herein is voluntary, not medically required, family planning services. Included are oral contraceptives, diaphragms, IUDs and sterilization (tubal ligations or vasectomies).

Another meeting was held on October 30. Skonieczny requested the meeting because she feared the plan proposed by the Employer would be rejected as proposed. Skonieczny, Owley, Susan Schrank, an RN, attended representing the Union and Banaszynski, Johnson, and Fitzpatrick attended on behalf of St. Francis. Again the plans were discussed as well as the elimination of family planning services coverage.

The Union advised the Hospital that acceptance of the Hospital's Covenant Health Plan would be difficult for the nurses but that they would present the plans side-by-side to the nurses for a vote without a recommendation by the Union. The vote was held on November 1. The Hospital's plan was rejected; the nurses preferred to stay with the current PrimeCare Plan.

On November 7, Banaszynski met with Owley and Schrank and expressed his disappointment of the nurses' vote. He showed the Union the letter he was going to send out that day to the nurses (Joint Ex. # 7).

Pursuant to a request by Skonieczny, she met with Banaszynski and Johnson to indicate her surprise and disappointment of the tone of the November 7 letter. Again the plans were discussed as well as the family planning services. No further meetings were held.

On December 31 Skonieczny received calls from several employes, including Janusiak, complaining that they had received their PrimeCare Health Insurance packets and that the plan was drastically changed. They said it appeared to be like the Covenant Plan they had rejected. In early January, Skonieczny called Harriet Spona, their liaison with PrimeCare, and Johnson about the packets. Both responded that the material sent was a mistake. Spona indicated that new packets would be sent.

By letter dated January 23, 1996, to Johnson, Owley requested that she be notified, in writing, of any changes to the PrimeCare or Family Health Plans. As of the date of the letter, employes had not yet received new health insurance material.

By letter dated February 6, 1996, Johnson advised Owley that both plans effective January 1, 1996, excluded the following:

1. oral contraceptives;

2. voluntary sterilization or reversal of sterilization;

3. abortions, except in situations where the life of the mother would be endangered if the fetus were carried to term.

A grievance was filed on February 19 alleging that the changes made by St. Francis Hospital were in violation of the parties' collective bargaining agreement.

POSITIONS OF THE PARTIES:

Union

Timeliness

The Union acknowledges that the issue of coverage for voluntary family planning services was discussed at the October 4th and October 18th meetings. It was perfectly clear that the

Covenant Plan presented by the Hospital would not cover these services. There is also no dispute that voluntary family planning services continued to be provided through the end of the year (December, 1995).

The Union notes that Elkouri & Elkouri (4th Edition, pp. 196-198) address the issue of timely filing and note several instances in which grievances may be considered to have met time limits because of the circumstances involved.

> A party sometimes announces its intention to do a given act but does not do or culminate the act until a later date. Similarly, a party may do an act whose adverse effect upon another does not result until a later date. In some such situations arbitrators have held that the "occurrence" for purposes of applying time limits is at the later date. For example, where a company changed a seniority date on its records as a correction, a grievance protesting the change was held timely though not filed until nine months later; the arbitrator stated that the basis of the grievance would be the employee's frustrated attempt to exercise seniority rights based upon the old date, rather than the mere change in the company's records.

It is clear in this case, it is argued, that the Union had no obligation to file the grievance until an actual change took place. In fact, the Union could have waited until it had an actual member who suffered adverse consequences as a result of the change. A violation such as this can be considered a continuing violation of the contract and a grievance filed anytime after the change occurred is timely.

When the new year came, employes began receiving new copies of the insurance plan and according to the Union were shocked to discover the plan received by them looked very similar to the Covenant Plan. When the holiday weekend was over, the Union contacted the insurance company and the Hospital and were told the plan was sent in error and the correct plan would be sent out shortly. The Union argues that it was waiting for the plan to come in order to determine whether, in fact, the Hospital had eliminated voluntary family planning services. When the plan was not forthcoming, a letter was sent to the Hospital (Joint Ex. 6) requesting information on any changes made in PrimeCare and Family Health Plan. The Union received a response from the Hospital on February 9, 1996 (Joint Ex. 3). The response included letters from the insurance companies confirming that voluntary family planning services had been eliminated. Then, it is argued, the Union filed a timely grievance on February 19, 1996.

The Union relies on Elkouri & Elkouri (4th Edition, p. 194) as follows:

> It has been held that doubts as to the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the right to process the grievance. Moreover, even if time limits are clear, late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the agreement.

The Union argues that in the instant case circumstances warrant a ruling that the grievance was timely filed.

With respect to the history of the language, the Union notes that the parties' first agreement (Union Ex. 5) ran from April 10, 1985 to April 1, 1986. The language remained essentially the same until the 1991-92 contract term (Union Ex. 6). The Union argues that during negotiations for the 1991-92 contract the Hospital proposed "more flexibility in terms of types and varieties of available insurance plans." (Union Ex. 7). The Union also made a proposal on health insurance (Union Ex. 8) which included a freeze on employes' contribution and a joint labor-management committee to address ways to contain health care costs.

The Union notes that during the course of negotiations the Hospital clarified their insurance proposal (Union Ex. 9). The proposal would have allowed the Hospital to implement alternative insurance plans with different terms provided the same changes applied to non-represented employes. The Union's response (Union Ex. 10) called for a committee with an equal number of labor and management representatives with any changes requiring committee approval. According to the Union, the Hospital then modified their proposal (Union Ex. 11) slightly, including a committee on insurance that would have included non-represented employes but maintaining the Hospital's right to make unilateral changes in the insurance.

The final contract included the current language allowing the Hospital to change the insurance plan provided substantially equivalent benefits were maintained.

The Union agrees it made no specific proposals for coverage of voluntary family planning services. It argues that these services had been included for years and, therefore, there was not a need to make any proposal to include them (Union Exs. 1-4). In addition, the Union contends, there are numerous benefits included in the insurance plans and it is certain not each and every one was discussed prior to its inclusion. Both parties had the opportunity to not only review the summary documents, but also the insurance contract itself. The Union argues that it is the responsibility of both parties to know what the contract covers. When reviewing the Covenant plan it was noticed immediately by Union representatives that voluntary family planning services were not included. Considering the amount of time spent at the hearing on the issue of voluntary

family planning services and the Catholic Church's stance on the issue, it is incredible, according to the Union, that the Hospital and Banaszynski may now claim the benefits were included in error or included unilaterally by the Hospital and, therefore, can be excluded unilaterally. The Union argues that Banaszynski is responsible for knowing what is in the contract he signed. If St. Francis planned to follow the teachings of the Catholic Church on the issue of voluntary family planning services, it was his responsibility to pass that information on to the people who negotiate with the insurance companies and the Union.

In fact, it is argued, the most recent insurance documents clearly provide coverage for voluntary family planning services. The PrimeCare Plus insurance plan for 1995 (Joint Ex. 23) included coverage for voluntary family planning services when using physicians in the PrimeCare network (Joint Ex. 23, p. 17, Section 3.4.10). When using physicians outside the net work benefits for voluntary family planning services were not covered (Joint Ex. 23 - beginning at the fifth page after p. 41. Exclusions for out of network providers is at page 14 of this second section). The Union claims that the Family Health Plan insurance contract for 1995 (Joint Ex. 22, p. A-1) also included coverage for voluntary family planning services (Joint Ex. 22, p. A-4, #9). The Union notes that the Family Health Plan documents are signed by Greg Banaszynski (Joint Ex. 22, p. 28).

The contract language regarding health insurance is found under Article 16. The Union notes that while the language allows the Hospital to implement alternative insurance plans, change carriers or become self-insured, they must provide substantially equivalent benefits. The issue for the arbitrator to resolve is whether the elimination of voluntary family planning services in the current insurance contract leaves employes with substantially equivalent benefits.

In the instant case it is alleged that the Employer unilaterally eliminated benefits from the current insurance plan. It is argued that they did not implement an alternative plan, they didn't change carriers and they did not become self-insured. According to the Union, there certainly was no anticipation that this language would allow the Employer to unilaterally reduce benefits in the current insurance plan. For that reason alone, the Union argues, an award should be issued in favor of the Union.

The Union points out that approximately 29 people could be expected to use oral contraceptives at an additional cost of $300 per year. An employe choosing tubal ligation or vasectomy will incur even greater costs. The Union contends this additional cost is significant and a violation of Article 16.01.

The Union maintains the elimination of voluntary family planning services does not leave the employes with a substantially equivalent health care plan, and respectfully requests the Arbitrator to rule in favor of the Union and restore voluntary family planning services. In addition, the Union requests the Arbitrator to make whole any employe affected by this change.

Employer

It is the Employer's position that the instant grievance is untimely because at the October 18 meeting Banaszynski specifically explained that family planning services would not be covered in 1996 under the PrimeCare Plan, Family Health Plan and/or Covenant Health Plan. The Employer argues that the only reason termination of family planning services was not made sooner (as soon as St. Francis learned that family planning services had mistakenly been provided) is that St. Francis would not mechanically have been able to enact that change any sooner than January 1. At the October 18 meeting, Banaszynski made it very clear that the exclusion of family planning benefits would occur on January 1, 1996. The Union, it is argued, knew very well that it would be effective for insurance plans as of January 1, 1996, and indicated that they would pursue it. Banaszynski reiterated this fact at the October 30, 1996 meeting.

This, it is argued, is supported by Skonieczny who testified that Banaszynski explained at both the October 18, 1995 and October 30, 1995 meetings that ". . . the hospital could not -- could not -- would not provide coverage for birth control." (Tr. 39)

When presented with the untimeliness of the grievance in this case, the Union has argued that it did not file a timely grievance because of some confusion created by the erroneous mailing of an incorrect plan to Union members.

The problem with this argument, the Employer contends, is that any confusion occasioned by the incorrect mailing out of erroneous information occurred, even by the Union's account, after the grievance in this case was already untimely. The Union has admitted at various times that Banaszynski stated at the october 18 and/or October 30 meetings that, in the future, St. Francis would not offer any family planning services under any plans.

Moreover, the Employer points out that in the Union's own correspondence on November 10, 1995, with its members, Union President Candice Owley informed members that, at the October 18 meeting: "Mr. Banaszynski stated that the ethical guidelines for Catholic institutions dictated the exclusion of family planning (birth control and sterilization) services," and that ". . . We also indicated we would have to challenge the hospital's position on birth control pills and sterilization regardless of the health insurance plan chosen by the nurses." (Joint Ex. 12)

The Union knew, it is argued, that, "regardless of the health insurance plan chosen by the nurses," family planning services would not be available. And, the Union knew, a challenge was ahead. The Employer submits that this is the essence of what it means in Article 24 of the agreement when an "employee became aware or should have become aware" of the event giving rise to the problem.

With respect to the merits of this dispute, the Employer first argues that the family

planning services benefit in issue here was never specifically negotiated by the parties and that it was inadvertently in the various plan coverages. Therefore, it is argued, the Employer by discontinuing said coverage did not change the plans negotiated by the parties in violation of Article 16. This, it is claimed, is confirmed by the testimony of Union representatives Barbara Janusiak who admitted that neither side in negotiations made any proposals regarding family planning services.

Notwithstanding the above, the Employer contends that the change in question is so minor on impact that the two plans (with and without the family planning services) are "substantially equivalent." Relying on a study conducted by Richard Yurkowitz, an actuarial consultant and an expert in the health care field, the Employer claims that family planning services cost only $14,000 out of $1,116,000 total claims, or 1.21 percent. Financially, it is argued, there was no appreciable change in the plans at all.

The Employer reasons that the agreement could have been negotiated to require "identical" benefits should the Hospital change plans or carriers. It was not. Instead, the parties agreed that the Hospital could change plans or carriers so long as coverage is "substantially equivalent." The Employer argues that if the Arbitrator finds a violation in this case, he would in essence be equating "substantially equivalent" with "identical," which, of course, would be improper. Here, the Employer avers, the Arbitrator should conclude that the plans are substantially equivalent because the monetary impact is so minor. The impact is so little, it is argued, that the insurance premium for coverage without family planning services did not go down because of its elimination.

Anticipating a past practice argument by the Union, the Employer argues that no past practice exists with respect to family planning services and therefor such an argument must fail. First, it fails because for a practice to be binding it must be known to the parties and that was not the case here because the benefit in question was inadvertently included. Secondly, it fails because under the contract, notwithstanding past practice, it has a right under Article 16 to change plans if substantially equivalent. Since the plans are substantially equivalent, past practice does not come into play.

Further, the Employer argues that what the Union is seeking in this case is prohibited by the Directives of the Catholic Church.

The Roman Catholic Church has issued Directives which relate to Catholic health care institutions. These directives, which were published by the National Conference of Catholic Bishops in November, 1994, are referred to as the "Ethical and Religious Directives for Catholic Health Care Services."

Under the Directives, it is argued, hospitals such as St. Francis are not permitted to offer the type of family planning services at issue in this case. The Directives are not "voluntary" in this regard. The Directives apply directly to Catholic health care institutions in their capacity as

Employer. Thus, the Employer claims, a Catholic health care institution's actions are proscribed both with respect to patients, and with respect to employes.

The Employer notes that the Directives are "nonnegotiable"; they are "not a guideline" (Tr. 204). Rather, they are mandatory for Catholic health care institutions. As a Catholic institution, the Employer contends, St. Francis is proscribed by the Directives from either promoting or condoning the types of family planning services at issue in this case. Were St. Francis actually to pay for or allow those family planning services at issue, St. Francis would, in contravention of the Directives, be condoning those services. This would, it is argued, constitute "promoting" those services by St. Francis. Thus, were the Union to obtain the relief it seeks, it is uncontroverted, the Employer argues, that a real prospect exists for a religious doctrinal confrontation between such a decision and the Directives. Further, it is argued, it would be contrary to the First Amendment of the United States Constitution.

Lastly, it is the Employer's position that the State of Wisconsin, through the Wisconsin Employment Relations Commission, and through the Arbitrator in this case, may not lawfully enmesh itself in an internal dispute at St. Francis regarding a clearly doctrinal religious issue. It is argued that under established Supreme Court precedent, where an adjudicative body is presented with one method of resolving a dispute which would require resolution of a constitutional issue, and another method of resolving a dispute which would obviate the constitutional issue, the adjudicator should select the method of adjudication which avoids the constitutional issue. In order to avoid the substantial constitutional issues presented in this case, it is argued that the Arbitrator should determine that the grievance is untimely and/or that, under Section 16.01 of the agreement, St. Francis was within its contractual rights to effect the change in question. Alternatively, as set forth in Article 24 of the Agreement: "if (the) matter is beyond the scope of the Arbitrator's authority, s/he shall return this submission to the parties without action." In any event, St. Francis submits, the Arbitrator may not lawfully award the relief sought by the Union in this case (i.e., restoration of family planning services to St. Francis' health insurance policies). The Employer cites numerous cases in support of its position.

Based on all of the above, the Employer urges the Arbitrator to deny the Union's grievance in its entirety.

DISCUSSION:

There is a threshold issue of timeliness in this case. The Employer argues that the Union was made aware of the Hospital's intention of discontinuing the family planning services benefit at both the October 18 and 30, 1995 meetings between the parties. It is argued that the grievance to be timely should have been filed at the latest within 14 days of October 30.

The collective bargaining agreement provides that grievances be filed ". . . within fourteen

(14) calendar days of the occurrence of the event giving rise to the problem or within fourteen (14) calendar days of the date the employee became aware or should have become aware of the event giving rise to the problem." The critical determination, then, is when was ". . . the occurrence of the event giving rise to the problem . . ."? Was it October 18 and 30 when the Union was advised of the Hospital's intention, as argued by the Employer, or was it February 6, 1996, when the Union was advised in writing that the change had actually been requested and implemented, as argued by the Union, or was it January 1, 1996, when the change actually became effective?

First, I do not think October 18 or 30 is the appropriate date because at that point in time the Hospital was making its intention known but the ". . . occurrence giving rise to the problem . . ." had not taken place. In the opinion of the Arbitrator, it is not reasonable to interpret the contractual language to equate "occurrence" with "intent." 3/ The earliest occurrence date one could argue is January 1, 1996, but given the confusion at that time surrounding the insurance plans, the Union was not sure exactly what changes, if any, were made in the new plans. The confusion was caused by PrimeCare having sent employes insurance packets indicating massive changes. Pat Skonieczny, on behalf of the Union, called the insurance carrier and was advised that the material was in error and that there were no changes in benefits. 4/ This led Candice Owley, Local 5001 President, to write Deborah Johnson, Director of Human Resources for the Hospital, on January 23, 1996, specifically requesting notification of any changes in the two health plans available to the nurses (Joint Ex. 16). Johnson responded with the February 6 letter (Joint Ex. 3) with letters from PrimeCare and Family Health Plan indicating that, in essence, voluntary family planning services coverage had been discontinued effective January 1, 1996.

Given the confusion surrounding what the actual changes in insurance were, I believe the most reasonable interpretation of "occurrence of the event giving rise to the problem . . ." under the facts herein is when the changes were identified in writing by the February 6 letter. Furthermore, the second part of the timeliness language, i.e., ". . . employee became aware or should have become aware . . ." does not come into play, as argued by the Employer, because said awareness is also tied to ". . . the event giving rise to the problem." Since the event has been determined to have occurred on February 6, the fourteen days is measured by said date.

Based on the above, the instant grievance is found to be timely.

With respect to the merits of the dispute, the Employer argues (1) that the family planning services benefit was not negotiated and was inadvertently included in the plans and therefore its exclusion did not change the plans negotiated by the parties in violation of Article 16, and (2) notwithstanding the outcome of (1) above, the 1996 plans without the family planning services

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3/ See, Elkouri and Elkouri (4th Edition, pgs. 196-198).

4/ Whether this representation by the insurance spokesperson was accurate is not important here, only that it was said.

benefit were "substantially equivalent" to the 1995 plans with its inclusion.

As to the Employer's first argument, a look at the parties' history regarding their insurance plans is instructive.

The Family Health Plan has been in effect since at least 1988. The record establishes that the February 1, 1991 - January 31, 1992 plan specifically included family planning services (Union Ex. 1, p. 29, #9) with no exclusions relevant herein. This health plan contract was signed by the President of St. Francis Hospital. The January 1, 1995 - December 31, 1995 plan also specifically included family planning services (Joint Ex. 22, p. A-4, #9) with no exclusions relevant herein. This contract plan was signed by the current President Gregory Banaszynski.

The WHO Health Plan was in effect beginning at least in 1988, and through January 31, 1992. In 1988, the plan specifically included family planning services (Union Ex. 2, p. A-6, #9) and by rider included sterilizations. The contract plan was signed by the President and the February 1, 1990 - January 31, 1991 extension was signed by the Vice-President/Human Resources. In the February 1, 1991 - January 31, 1992 plan, family planning services were specifically included (Employer Ex. 4, p. A-6, #11) and elective abortions and sterilizations specifically excluded (p. B-3, #20). The Contract Plan was signed by the Vice-President/Human Resources on behalf of St. Francis Hospital.

The Hospital and nurses also had a WPS Plan beginning at least in 1988 through January 31, 1992. The record establishes that the 1988 plan specifically included sterilizations (Union Ex. 3, p. 2) and contraceptives (p. 1 of Drug Section). The only relevant exclusion here was abortions (p. 7). The plan was signed by the St. Francis President.

Effective February 2, 1992, the parties replaced WHO and WPS with PrimeCare. The January 1, 1995 - December 31, 1995 plan specifically included family planning services (Joint Ex. 23, p. 7) with no relevant exclusions. Under this plan, if employes went outside the network (United Health) then birth control pills and family planning services were not covered (p. 14, #6).

The Arbitrator acknowledges that the parties did not specifically negotiate the inclusion of family planning services in the above plans, but it is not uncommon for parties negotiating health plans to not discuss every feature and aspect of the plans. At some point in time in the negotiation process, the plan is made available, as in this case, for the parties' review. At some point the plan speaks for itself.

It is noteworthy here that we are not talking about a plan recently negotiated and applied for a short period of time. Here the plans date back to at least 1988, involve four different carriers, and involve at least six specific plans (with renewals), all of which cover the benefit in dispute and all signed by the President or Vice-President of Human Resources of the Hospital. The January 1, 1995 - December 31, 1995 Family Health Plan was signed by the current President

of St. Francis Hospital, Gregory Banaszynski. Each plan that was signed was a comprehensive written document with specific inclusions and exclusions easily ascertainable with just a simple reading. Further, the 1988 WHO Plan had a one-page rider that specifically included sterilization. This plan was signed by the President of St. Francis Hospital.

In conclusion, the fact that the plans with family planning services have been in existence since at least 1988, that the plans were almost all signed by the President of St. Francis Hospital, including the current president, and the fact that even a routine reading of the

insurance plans by its signators would reveal the inclusion of family planning services as a benefit covered by the plans leads the undersigned to conclude that the Employer by agreement, has agreed to provide said benefits and services.

The Employer argues, however, that even so, it complied with Article 16.01 of the agreement because the new benefits plans effective January 1, 1996, were substantially equivalent to the 1995 plans.

The resolution of this dispute, then, turns on the meaning of the words "substantially equivalent." No evidence with respect to the definition of the words used by the parties was presented. In such cases, words will be given their usual and ordinary meaning as defined by a reliable dictionary. 5/ Webster's New World Dictionary (Second College Edition) provides the appropriate definition of "substantially equivalent" as "to a large degree, equal in substance, or practically equal." Further, each case must be decided on its own peculiar facts; there is no easy bright line test to apply.

At the outset it is noted that this case is not typical of cases dealing with the issue of a change of carriers or plans and a determination of whether the plans are substantially equal. Typically, an employer in an attempt to reduce its insurance costs changes carriers or plans and in so doing there may be a diminution of benefits in one area under the new plan but there is also an improvement of a benefit(s) in another area. Typically, the issue is whether the two plans on balance, as a whole, are substantially equivalent. Here, unlike in the typical case, the Employer did not change carriers or plans in an attempt to reduce its costs but instead simply discontinued one specific benefit covered by its existing plans. In fact, an argument is made, although the Arbitrator does not base his decision on same, that there was no change to an "alternative plan" at all as required by the contract; just a discontinuance of a specific benefit in an existing plan. In any event, the Employer contends this one change did not violate Article 16.01 of the agreement as alleged by the Union.

The parties' contract provides that it is the benefits that have to be kept "substantially equivalent" in any change of plans. Thus, the determinative issue is whether the benefits provided in the 1995 and 1996 plans are substantially equivalent. The Employer claims they are because the discontinued benefit only amounts to about $15,000 which represents about 1 percent of the estimated total amount of the annualized insurance claims. But, is the monetary impact on all the individuals covered by the insurance plans as a whole the only factor? I think not. For example, the need for a liver transplant among unit employes may occur only once every 20 years unit-wide, but does the elimination of such coverage become insignificant or minor because the cost impact unit-wide spread over 20 years is insignificant? I think not. Also important is the value of the benefit itself to those that are affected.

5/ Elkouri and Elkouri, How Arbitration Works, Fourth Edition, p. 352.

Here, the unit-wide cost is not significant but for those using the family planning services, the average benefit of $25 per month ($300 annually) cannot be said to be insignificant or minor. There are about 29 individuals 6/ utilizing the benefit and depending on exactly who they are, this could impact about 10 percent of the 271 employes. I recognize there are approximately 623 individuals covered by the 271 employe plans when spouses and dependents are counted, but I find the 271 number more significant because without the family planning services coverage the employe would face the monetary impact regardless of whether she/he, spouse or dependents are the ones using the service. An annual $300 impact on possibly 10 percent of the employe plan holders cannot be deemed to be "equal in substance" or "practically equal."

Thus, when viewed in its totality, I conclude that the 1996 plans without family planning services are not substantially equivalent in benefits to the 1995 plans which cover family planning service.

Lastly, much testimony and argument was presented regarding the teachings of the Catholic Church and how said teachings prohibit the family planning services in issue here. The Arbitrator's role, however, is limited to determining the interpretation and application of the parties' agreement. In short, in this case the Arbitrator must decide what the Employer's obligations are under the parties' collective bargaining agreement with respect to family planning services. The issue of whether providing said benefit is contrary to the teachings of the Catholic Church and therefore should not be part of the insurance plan is a separate matter and not one for the Arbitrator to decide. The Arbitrator is limited to deciding exactly what the agreement is, not what it should be.

The same basic logic applies to the Employer's constitutional law argument regarding the government's 7/ interference with the Hospital's religious freedom.

This case is not like the cases relied upon by the Employer to establish improper government interference. Here, unlike those cases, the parties have agreed, by contract, to have the undersigned act as an Arbitrator and hear and decide the issue herein. Specifically, the parties mutually agreed that "If a problem is not resolved in Step Four, it may be resolved by arbitration if (1) it involves the meaning of application of this Agreement . . ." (Article 24, B, Step Five) Further, it is pursuant to the parties' agreement (Article 24, B, Step Five, B) that the undersigned was appointed. The undersigned has limited his involvement to the determination of the "meaning of application" of this agreement. In so doing the Arbitrator has not acted outside the scope of his

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6/ This figure actuarial derived.

7/ The Employer argues that the Arbitrator stands as a representative of the State of Wisconsin and because this dispute has been deferred by the NLRB, a representative of the government of the United States.

authority, as defined by the parties. Further, the remedy I have awarded does not "add to, modify or alter any of the terms or provisions of this Agreement" but rather makes the grievants whole for expenses incurred by the Employer's violation of the agreement and put the parties back to where they were before the violation. Having acted within the framework and scope of the parties' agreed-upon process, the Arbitrator has not unlawfully enmeshed himself in a religious doctrinal as argued by the Employer.

Based upon the above facts and discussion thereon, the Arbitrator renders the following

AWARD

1. The Employer, by not continuing in the 1996 health insurance plans the 1995 voluntary family planning services benefits, violated Article 16.01 of the parties' collective bargaining agreement.

2. The Employer shall immediately reinstate the voluntary family planning services to the 1996 health insurance plans.

3. The Employer shall immediately make whole all individuals who incurred expenses due to the elimination of voluntary family planning services in the 1996 health insurance plans that they would not have incurred had the 1995 health insurance plans been renewed and extended by payment of money equal to said incurred expenses.

Dated at Madison, Wisconsin, this 29th day of January, 1997.

By Herman Torosian /s/
Herman Torosian, Arbitrator