BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MUSKEGO AREA PUBLIC EMPLOYEES UNION
LOCAL 2414, AFSCME, AFL-CIO

and

MUSKEGO-NORWAY SCHOOL DISTRICT

Case 58
No. 54736
MA-9774

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Quarles & Brady, S.C., Attorneys at Law, by Mr. Robert H. Duffy and Mr. Michael Aldana, appearing on behalf of the District.

ARBITRATION AWARD

Muskego Area Public Employees Union Local 2414, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the Muskego-Norway School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Muskego, Wisconsin, on April 8, 1997. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on June 25, 1997. The parties waived that portion of the arbitration procedure calling for a decision by the arbitrator within thirty (30) days of the close of the hearing.

BACKGROUND:

In the 1995-96 negotiations between the District and the teachers' union, a change in health insurance was an issue. The District and the teachers' union agreed to convert the indemnity plan to a point-of-service plan through the same insurance provider, WEA Insurance. During these negotiations, the District and the teachers' union agreed that six named teachers, but no other teachers, would be given a one-time opportunity to enroll in the insurance program by February 1,

1996. 1/ WEA Insurance held a number of meetings to explain the difference between the indemnity plan and the point-of-service plan and to make it clear to employes that were covered by a plan, that the conversion was not an open enrollment. 2/ John Maglio, Staff Representative for Wisconsin Council 40, AFSCME, AFL-CIO, attended the January 8, 1996 meeting and asked the WEA Insurance representative about open enrollment and was told that there was not an opportunity for open enrollment. 3/ Dorothy Dooley, the Vice President of Local 2414, AFSCME, heard rumors that some teachers were able to get into the insurance plan so she called Jean Henneberry, the District's Director of Human Resources, and asked if there was an open enrollment for teachers. Henneberry said there was no open enrollment but six teachers were able to get into the program.

On March 12, 1996, Dooley filed a grievance on behalf of herself and eleven other employes claiming that the District violated Section 17.08 of the agreement by failing to provide the grievants an open enrollment for health insurance. Peggy Koopmeiners filed a similar grievance that same day. On March 18, 1996, the grievances were denied as untimely and on the basis that the teachers had no open enrollment. The grievances were processed to the instant arbitration.

ISSUES:

The parties were unable to agree on a statement of the issues. The Union frames the issue as follows:

> Did the District violate, and does it continue to violate, Section 17.08 of the collective bargaining agreement when it failed to offer the grievant(s) health and dental insurance, including the tax sheltered annuity option, when a similar group of previously ineligible teachers were given the ability to enroll in the health and dental plans, including the tax sheltered annuity option, without the

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1/ Ex. 24.

2/ Ex. 25.

3/ Tr. 133.

need to establish proof of eligibility or any other restrictions?

If so, what is the appropriate remedy?

The District views the issues as follows:

1. Are the grievances timely under the parties' collective bargaining agreement?

2. If so, did the District violate Section 17.08 of the collective bargaining agreement when it did not offer an open enrollment on February 1, 1996 to employees identified in this grievance?

3. If so, what is the appropriate remedy?

The undersigned frames the issues as follows:

1. Are the grievances timely?

2. If so, did the District violate Section 17.08 of the parties' collective bargaining agreement when it failed to offer the grievants the ability to enroll in the health insurance plan when the District agreed to allow six (6) teachers to enroll in the insurance plan?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE V. GRIEVANCE PROCEDURE

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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 the unit principal 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 unit administrator within thirty (30) calendar days after the facts upon which the grievance is based first occur or first become known, or within five (5) work days after the conference in 5.031.

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ARTICLE XVII. INSURANCE

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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.

. . .

UNION'S POSITION:

The Union contends that the grievances are timely. It points out that Section 17.08, the "me too" clause, states that if the teachers are extended an open enrollment, then the Union will be granted an open enrollment "with the same duration as the teachers." It notes the Union heard rumors that the teachers had an open enrollment in early 1996, but the effective date was unknown and the Union did not learn of the six teachers until the District confirmed it on February 14, 1996, at an arbitration hearing. It submits that the District never notified the Union that previously ineligible teachers could now enroll in the insurance plan during a certain window of time. It refers to the stipulation that no one ever told the Union there was an open enrollment extended to teachers. It argues that the record fails to establish that the Union was fully aware of what the District and teachers had agreed to until February 14, 1996. The Union observes that the

grievances were filed on March 12, 1996, which was within thirty days of February 14, 1996. Alternatively, the Union submits that the District's conduct is a continuing violation of Section 17.08 as the transaction giving rise to the grievance is repeated from day to day. The Union seeks rejection of the District's timeliness argument.

The Union contends that the District violated Section 17.08 by failing to offer insurance benefits to bargaining unit members when it afforded the benefit to teachers. The Union states that for years it has sought an agreement to allow an open enrollment for the grievants. The Union points out the result was the "me too" clause and it is not conditioned on an agreement to change from the indemnity plan. The Union asserts that the evidence establishes that when the Union discussed open enrollment in negotiations, it never represented that it be the blanket ability of all members to change; rather, open enrollment could include allowing only a select group into the plan. It submits that an open enrollment means a person is not subject to proof of insurability and open enrollment can be extended to a single individual. It notes the evidence demonstrates that individual life style changes could result in an individual open enrollment. The Union maintains that it never attached its star to the teachers bargain and the "me too" did not require it to change plans or pay for the language kicking in. The sole issue, according to the Union, is whether or not the teachers received an open enrollment. It claims they did and so the same benefit applies to the grievants under Section 17.08. The Union asserts that the Greco Award does not address the instant matter and did not apply Section 17.08 or determine whether the teachers were accorded an open enrollment. The Union takes the position that six teachers were allowed into the program during the open enrollment period to obtain insurance or the tax sheltered annuity without proof of insurability and that is what the grievants are seeking in this proceeding. The Union asks that the grievances be sustained and employes be made whole.

DISTRICT'S POSITION:

The District contends that the grievances are untimely. The District notes that the grievances were filed on March 12, 1996, alleging a violation of the "me too" clause based on the District's agreement to allow six (6) teachers in the plan which occurred on February 1, 1996, more than thirty days before the grievance was filed. It submits that under Article V, Section 5.031, the grievances are untimely and must be considered dropped. The District insists that the undisputed facts establish that the Union knew the facts on which it based its grievance more than thirty (30) days before it filed the grievances. The District maintains that it proposed to the Union language changing from an indemnity plan to a point-of-service plan, but the Union rejected it. According to the District, it told the Union that it was pursuing the same proposal with the teachers' union and kept the Union advised of the progress of those negotiations and after agreement was reached, it invited the Union representatives to the meetings with WEA Insurance. It notes that John Maglio attended and was told by the WEA representative that the buy-in of the six teachers was not an open enrollment. Also, it asserts that Dorothy Dooley was advised by Jean Henneberry, at least a week or two before February 14, 1996, that the conversion from indemnity

to the point of service had taken place and that six employes had bought in for TSA benefits and the District did not consider this to be an open enrollment. It states that the Union knew as early as January 8, 1996, and no later than February 7, 1996, of the buy-in of the six teachers, yet the Union failed to file a grievance within the thirty day timeline specified in the contract. It seeks dismissal of the grievance.

The District denies that it violated the "me too" provision because no open enrollment period was provided to the teachers' union. The District insists the conversion from an indemnity plan to a point-of-service plan and a TSA buy-in for six specific teachers did not constitute an open enrollment and the Union's grievance is meritless. It asserts that the Union must demonstrate that the WEA administrator, as well as the teachers' chief spokesman, were incorrect in their conclusions that there was no open enrollment and that the deal negotiated with the teachers constitutes an open enrollment. It also claims the Union must demonstrate that this is not another back door attempt to obtain TSA benefits for the grievants who had tried but failed to procure them in two bargaining sessions in the last six years and in another arbitration.

As to what constitutes an open enrollment, the District points out that the District has never offered one. It adopts the insurance company's definition which is a period, generally of thirty days, when an employer offers all of its employes the right to enroll in a health plan, without any questions of pre-existing conditions or other eligibility requirements. It submits that in the instant case no teachers were allowed to switch plans, to opt into health insurance or to opt out of TSA benefits and only six named teachers were allowed to opt in with the cost borne by the teachers' union, yet a number of other ineligible teachers were not allowed to enroll in the new plan or receive TSA benefits. It maintains there was no open enrollment and the six teachers who came in did so under a limited exception. As there was no open enrollment, the District claims that the "me too" clause was not triggered. The District observes that the Union is attempting to secure TSA benefits for the grievants in this arbitration after it failed to obtain these in negotiations or before Arbitrator Greco. It concludes that the Union cannot circumvent its failure or refusal to effectively bargain through a tortured interpretation of the "me too" clause and the grievances must be dismissed.

DISCUSSION:

With respect to timeliness, Article V, Section 5.031 requires a grievance be submitted within thirty (30) calendar days after the facts upon which the grievance is based first occur or first become known. 4/ In the instant case, the grievances were filed on March 12, 1996. 5/ The

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4/ Ex. 1.

5/ Exs. 2 and 3.

incident or event on which the grievances are based occurred on February 1, 1996, when the six named teachers had to enroll in the plan. 6/ The issue here is when did the Union become aware of the facts on which the grievances were based. Dorothy Dooley testified that she heard rumors that certain teachers were able to get into the insurance plan and she phoned Jean Henneberry to find out if there was an open enrollment for teachers. 7/ The date of this call is unclear. Henneberry could not recall whether the date of the call was before February 14, 1996. 8/ Henneberry told Dooley that it was not an open enrollment but that six teachers were able to get into the program. 9/ Even if this conversation occurred prior to February 7, 1996, it is not evident that Dooley knew or understood the actual facts. She heard a rumor and Henneberry told her there was no open enrollment and six teachers were allowed in the program which could have been the point-of-service insurance plan. The record does not establish that Dooley knew the facts on which the grievance is based prior to February 14, 1996. The District asserts that Maglio knew the facts because he attended the January 8, 1996 informational meeting. Henneberry sent a memo to school board members on December 1, 1995, indicating the parties reached an agreement but did not mention the six teachers. 10/ The District did not send the Union any notice of the agreement on the six named teachers. 11/ At the January 8, 1996 meeting, the teachers' union's negotiator told Maglio that some people were joining the unit but the District was careful in not terming it an open enrollment and that the teachers' union purchased these teachers joining the unit. 12/ Mary Horton, the WEA Insurance representative, told Maglio there was not an open enrollment but could not recall if the question related to the six teachers or the conversion from indemnity to point of service. 13/

Maglio essentially attended a meeting where the conversion from an indemnity plan to a point-of-service plan was explained and, in a conversation with the teachers' representative, he was told that the teachers' union bought six teachers into the plan but there was no open enrollment. The insurance agent also confirmed that there was no open enrollment. There is

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6/ Exs. 24 and 25.

7/ Tr. 22.

8/ Tr. 144.

9/ Tr. 22.

10/ Ex. 13.

11/ Tr. 23 and 171 and Ex. 24.

12/ Tr. 120-121.

13/ Tr. 133-135, 141.

nothing in the record to indicate the District took part in these conversations. It is not clear that Maglio was told the six teachers could get the TSA option. In the 1994 negotiations, the Union was offered a change to the point-of-service plan and turned it down. 14/ Maglio's conversation with the teachers' union's representative could have related solely to the conversion and buy in of teachers to the conversation and is not sufficient evidence to establish that Maglio knew the facts giving rise to the grievance. In short, the evidence with respect to when the Union had sufficient knowledge of all the facts on which to base its grievance is not enough to conclude that the grievance is untimely.

Turning to the merits of the instant grievances, Section 17.08 provides that in the event there is an open enrollment for the teachers' union (U.L.E. Muskego Caucus), the members represented by the Union would also be granted an open enrollment with the same duration as the teachers. The Union is correct that there are no preconditions attached and there is thus no requirement that the Union switch plans, pay for or buy into the plan or make any changes that teachers might have agreed to. The only issue is whether there was an open enrollment. The Union is contending that allowing the six teachers into the plan was an open enrollment. The District, the teachers' union and the WEA Insurance representative all testified that there was no open enrollment. What is meant by an open enrollment in Section 17.08? The language of Section 17.08 must be given its ordinary meaning.

The Union has asserted that there can be an open enrollment for one employe or a small group of employes rather than all. The Union argues that because it did not seek a blanket open enrollment but a selective open enrollment, an open enrollment under Section 17.08 allows individual open enrollment. The evidence fails to support this and while the Union proposed an open enrollment that was not across the board, the District never agreed to such a proposal. 15/ The Union also relies on changes in status such as death of spouse, divorce, layoff, etc., as being an open enrollment. Also, changes in job status or hours is an open enrollment. These are defined exceptions and not an open enrollment. None of the above defined exceptions applied to the six teachers or any of the grievants. The undersigned concludes that plain meaning of the term "open enrollment" was provided by the WEA Insurance representative as "a period generally that would be a 30-day period in which an employer would offer employees the right to sign up, enroll in one of the -- in a health plan without any question of preexisting condition or any other eligibility." 16/ She also testified that the six teachers did not come in under an open enrollment but rather under an exception. 17/ Not all teachers were given the opportunity to enroll in the

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14/ Tr. 153, Ex. 19.

15/ Ex. 27.

16/ Tr. 135.

17/ Tr. 136.

health plan but only six named individuals under a defined exception. The undersigned finds that the open enrollment under Section 17.08 must apply to all teachers, not just a few named individuals. The evidence establishes that there was no open enrollment for the teachers, so the "me too" clause of Section 17.08 did not become operable and the District did not violate the collective bargaining agreement by not extending benefits to the grievants. Although there are defined exceptions, none applied to the grievants.

On the basis of the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

1. The grievances are timely.

2. The District did not violate Section 17.08 of the parties' collective bargaining agreement when it failed to offer the grievants the ability to enroll in the health insurance plan when it agreed to allow six teachers to enroll in the plan, and therefore, the grievances are denied.

Dated at Madison, Wisconsin, this 30th day of July, 1997.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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