

BEFORE THE ARBITRATOR

IN THE MATTER OF THE ARBITRATION OF A DISPUTE BETWEEN

THE KENOSHA SCHOOL BOARD

and

THE KENOSHA EDUCATION ASSOCIATION

Case 151 No. 55040 MA-9874
(TSA Direct Deposit)

APPEARANCES

Mr. Clifford Buelow, Davis & Kuelthau, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin, 53102, for the Board.

Mr. Michael R. Bernier, Executive Director, Kenosha Education Association, 5610 55th Street, Kenosha, Wisconsin, 53144, for the Association.

ISSUE

The parties stipulated to the following issue:

Whether the District violated Article XI A of the Collective Bargaining Agreement between the parties. If so, what is the remedy?

STIPULATIONS

The parties agreed to the following stipulations:

1. That April 4, 1996 was the last bargaining session before WERC Mediator Dan Nielsen.

That the Kenosha Education Association rejected the mediator's March 8, 1996 proposal.

3. That January 13, 1996 was the last meeting held by the parties before their April 4, 1996 negotiations.

4. That the first bargaining session between the parties for the exchange of proposals occurred in July, 1995, that the parties had two negotiations sessions in August of 1995, that the parties agreed to ask for the services of WERC Mediator Dan Nielsen, that the first mediation session between the parties was November of 1995, the second mediation session was December of 1995. Those meetings and two mediation sessions plus the meetings on January 13, 1996 and April 4, 1996 were all the negotiations sessions held by the parties -- between the parties.

5. That part of the District's initial proposal was direct deposit of pay-checks and that the Kenosha Education Association proposal was immediate transfer of TSA monies.

RELATIVE CONTRACT PROVISIONS

Article XI - Payroll Deductions A

A. The following voluntary payroll deductions will be made:

1. U.S. Savings Bonds
2. Kenosha County United Fund
3. Tax sheltered annuity through the Wisconsin Retirement System and other companies, provided each company has at least twenty (20) teachers participating at the time of initial enrollment. New teachers with tax sheltered annuity plans may continue current coverage. Tax sheltered annuity deductions shall be transferred to the disbursal agent within ten (10) work days of the deduction or the receipt by the District of the invoice, whichever is later.
4. Group Life Insurance
5. Southern Lakes Credit Union
6. WEAC Insurance Trust
7. Group Dental Insurance
8. Educational Foundation
9. Health programs approved by the Wellness Committee.
10. AM Community Credit Union

Effective January 1, 1997, teachers will be allowed one change per calendar year at any time during the year in their tax sheltered annuity. Effective with the 1996-97 school year, those teachers who select a tax sheltered annuity which provides for direct deposit shall have their contribution direct deposited at the time of their paycheck. Notwithstanding, any other provision of this Paragraph A, when three-quarters or 75% of the dollar volume of the tax sheltered annuity contributions is being direct deposited by the District, contributions to those

tax sheltered annuities not offering direct deposit shall be made within thirty (30) days of the deduction or the receipt by the District of the invoice, whichever is later.

BACKGROUND

This grievance results from the allegation by the Kenosha Education Association (Association) that Kenosha Unified School District (District) violated Article XI A of the collective bargaining agreement by refusing to make direct deposit of teacher tax sheltered annuity contributions into individual teacher accounts.

The language in the existing contract that the Association wanted to amend is set forth above under Relevant Contract Provisions, A.3. (Joint Exhibit 1.)

The parties' initial bargaining session for a successor contract to Joint Exhibit 1 took place in July 1995. The parties then had two negotiation sessions in August 1995 prior to asking for the services of a Wisconsin Employment Relations Commission mediator. Initial mediation session between the parties occurred in November 1995, and the second mediation session occurred in December 1995. The parties held two additional negotiation sessions with the Mediator on January 13, 1996, and April 4, 1996. As part of their initial proposals, the District proposed a direct deposit of pay checks and the Association proposed immediate transfer of tax shelter annuity (TSA) monies.

During the course of those negotiations and mediation sessions, the parties discussed direct deposit of teacher payroll checks and direct deposit of TSA monies to individual teacher accounts with providers providing tax shelter annuity accounts. The District wanted direct deposit of payroll checks in order to facilitate the administration of their payroll and finance office function by allowing electronic transfer of a teacher's payroll check to an individual teacher account in the teacher's financial institutions of choice. Such a process required the teacher to give the School District the teacher's account number. This giving of the account number was resisted by many of the Association's members as an invasion of privacy. The Association wanted direct deposit of TSA monies to a provider in a manner which would protect but also allow the transfer of TSA monies on pay day to a teacher's account. In other words, the District would not be able to hold it for ten days as the existing contract allowed. (Joint Exhibit 1.)

Various mediator proposals were accepted or rejected in part with the relevant contract language set forth above ultimately being ratified by the Association and approved by the District. The Association's ratification meeting took place on May 1, 1996. (Joint Exhibit 10.) The Association filed its grievance on November 22, 1996, alleging that Article XI A "*requires direct deposit of tax shelter annuity contributions for any TSA provider offering direct deposit. Several providers currently offered direct deposit, but the District is not making direct deposits.*" (Joint Exhibit 3.) The grievance was processed through the appropriate steps in the collective bargaining agreement and ultimately denied by the School Board by letter to Union Executive Director, Michael Bernier, on March 13, 1997. (Joint Exhibit 3.) As will be set forth more fully in the statement of the parties' positions

below, the center of this dispute is grounded in the difference of opinion between the Association and the District as to the meaning of “*direct deposit*” of the TSA monies and what was intended by the parties when they negotiated Article XI A. Being unable to resolve the grievance, the parties made a request for a grievance arbitration to the WERC on March 25, 1997. A hearing in this matter was held by the arbitrator on May 22, 1997, in the City of Kenosha. The hearing was closed at 12:30 p.m. The hearing was transcribed, and the transcript was received on July 7, 1997. The parties were given the opportunity to file briefs which were received on August 5 (Association) and August 6 (District).

POSITION OF THE PARTIES

Association:

The main thrust of the Association’s argument is that the only potentially ambiguous term in Article XI A is the term “*direct deposit*.” The Association argues that it understood the term to mean, based on the parties’ contract negotiations and the common meaning of the language, that the District on payday would transmit a check to a particular provider for teachers’ accounts for their tax sheltered annuity contributions. The District would then send the necessary information so that the provider could divide the check from the District and transfer the teacher contributions to individual teacher accounts. The Association argues that the District’s interpretation of direct deposit, an electronic transfer immediately to an individual teacher account, would require that the District have access to the individual teacher account number, and that this procedure was rejected by the Association when the District proposed it for direct deposit of payroll checks. The Association argues that it would never have agreed, and the District knew that it would not agree, to direct deposit of TSA monies if in fact the direct deposit plan was same as the Association had rejected for direct deposit of payroll checks.

The Association further argues that the District never explained during the course of the parties’ negotiations, the difference between a wire transfer (deposit by the school district requiring it to send further hardcopy to inform the TSA provider how the money should be allocated between individual teacher accounts) and an electronic transfer, which would be a direct transfer electronically of teacher TSA contributions to an individual teacher account at the provider. The Association argues that its testimony proves that a long-standing bargaining goal of the Association was the direct deposit of Association members’ TSA contributions. Direct deposit would result in a transfer faster than the ten days allowed under the existing contract for the District to transfer the monies. The Association argues that it would have been illogical for it to have agreed to anything else.

The Association argues that the District’s interests would be enhanced because the direct deposit, as understood by the Association, would allow one check to be sent to the provider even though a hardcopy would have to follow from the District to tell the provider where the monies should be directed after reaching the provider. The

Association never agreed to the District's position that it would only do direct deposit if in fact it did not have to follow the transfer of the monies to the provider with a hardcopy designating how to divide the monies among individual teacher accounts. The Association lastly argues that if the District had wanted to modify the clear understanding of direct deposit by saying that it meant that it had to be to individual teacher accounts, it should have added that language to the collective bargaining agreement. The Association requests that the grievance be sustained and that the District be required to immediately direct deposit teacher TSA monies in line with the Association's understanding of the term direct deposit. The Association testified that there are in fact several providers that will currently take direct deposit as interpreted by the Association.

District:

The District takes the position that the grievance could and should be denied on the simple ground that the testimony, including the Association's testimony, conclusively established that at the time of the settlement of the relevant contract language to this grievance, no TSA provider would allow for the direct deposit of TSA monies directly into individual teacher TSA accounts. The District argues that direct deposit means a direct transfer of monies from the District to an individual teacher account, not indirect by the District having to provide additional hardcopy by FAX, phone, or other method to the TSA provider informing it of how much money should go into each individual teacher account. The District bolsters this argument by arguing that direct deposit in the banking industry is understood to mean an electronic transfer by an employer of an employee's money directly into an employee's checking account or other type of account without any additional effort by the employer. The District argues that its whole intent in proposing that payroll checks be direct deposited was to save its Financial Department administrative costs by allowing direct deposit of payroll checks by electronic transfer directly into an employee's account and that it would not have proposed anything different for direct deposit via electronic transfer of a teacher's TSA monies.

The District takes the position that the weight of the testimony at the hearing establishes that, contrary to the Association position, the direct deposit of TSA monies was extensively discussed during several collective bargaining sessions and the difference between wire transfer and electronic transfer was explained to the Association and its representative so there could not possibly be any misunderstanding by the Association as to the meaning of direct deposit as proposed by the District. Further, the District argues, the testimony by both parties during the hearing establishes that while the Association has fought long and hard to speed up the transfer of TSA monies and payroll checks to the accounts of its member teachers, the District has fought equally hard to cut down on administrative time, i.e., expense of doing the transfers of teachers' paychecks and TSA monies to accounts in banks and to TSA providers.

The District argues that a comparison of the settlement on the payroll check language and a settlement on the TSA language both indicate that nothing was going to happen until teachers provided individual account numbers, something the teachers were unwilling to

do for their paychecks. It is also clear from the testimony, the District argues, that both sides knew, and the Association admitted on the record, that at the time of tentative settlement and ratification amendment of Article XI A, no TSA provider took direct deposits. The District argues that the record proves that the Association had to understand the difference between an electronic and a wire transfer because the District checked into wire transfers being made by the Stevens Point School District and learned that those wire transfers did send a single check by Stevens Point to a TSA provider, but then Stevens Point followed that up with a second submission wherein Stevens Point told the TSA provider how to divide the money among various accounts of the Stevens Point School District teachers.

The District argues that the testimony of Association Representative Bernier clearly establishes that at the time the relevant language was settled, he knew that the Association had negotiated something that was only going to happen in the future.

The District's legal arguments are that since the Association proposed the TSA direct deposit language, any ambiguity in the contract language must go against it as the drafter under well established arbitral principles and secondly, that the arbitrator should not give the Association through arbitration what the Association could not achieve at the bargaining table. The District demands that the grievance be denied.

DISCUSSION

This is a case of contract interpretation. The provision at issue, Article XI A, was originally proposed by the Association at the start of the parties' negotiations in July 1995. The language was to provide direct deposit of teachers' contributions to a tax sheltered annuity (TSA) by means of an electronic transfer. At the time, the contract required the District to make transfers of TSA monies within 10 days of the date of the deduction, presumably from the teacher's paycheck. The Association reasoned that the transfer change it was proposing would get the contributions to the TSA provider faster. The District was not opposed to this concept as long as the provider allowed direct deposit as the District understood it which meant that there would be no additional effort needed by the District's financial staff. The difference in understanding as to the meaning of the words "direct deposit" led to this dispute.

The arbitrator finds that the accepted definition of the word "*direct*" is without "*intervention*". /1 The arbitrator also accepts that the common usage of the words "*direct deposit*" in the banking industry is an electronic transfer of an employee's pay directly to the employee's account at a financial institution without any follow-up action by the employer. This necessitates that the employer have the employee's account number. This in fact is what the District in this case proposed in its original proposal. The Association also proposed a direct deposit but of the teachers' TSA contributions. The teachers refused to go along with this concept of direct deposit of paychecks because enough of them expressed concern about giving the District their banking account numbers. This

proposal ultimately resulted in language in the contract that provided for direct deposit of paychecks when a majority of the teachers agreed with it. (Joint Exhibit 4.) The fact that the Association understood the meaning of direct deposit in this context lends weight to the District's position that the Association understood it in the context of the TSA proposal. The Association counters this argument by stating that why would it agree to this understanding in the TSA language if it opposed it in the payroll language. The answer is that the Association did understand and knew what it was agreeing to based on the hearing testimony.

The arbitrator finds that the weight of the testimony supports the position of the District that the difference between a wire and an electronic transfer were adequately explained and that what the District intended by direct deposit was clearly explained as well. The District's witnesses Johnson and Hein creditably testified that during the August 1995 and the April 1996 negotiation sessions the difference between wire and electronic transfers was fully explained in response to Association inquiries as to the difference and why the District could not make direct deposits of TSA monies as the Association wanted. A wire transfer meant a transfer of monies to the provider that would require follow-up information from the District as to how the money was to be allocated to the various teacher accounts. An electronic transfer meant a transfer of an individual teacher's contribution directly by the District to the teacher's account at the provider. The testimony is further clear that this latter type of transfer was the only type of transfer that the District would agree to. The District consistently throughout the parties' contract negotiations held to the position that it would not agree to a wire transfer because it would require more work by the District's Financial Department staff.

Representatives of both parties testified that they were not aware of any TSA provider that accepted direct deposits by electronic transfers. The Association checked with the WEAC to determine whether it did or if it knew of any provider that accepted direct deposits as understood by and explained by the District. The Association learned that neither WEAC or any other provider took direct deposits. A few providers, including the ones working with the Stevens Point School District, took wire transfers, but that required a second step by the school district; the district had to provide the names of the contributing teachers and the amounts to credit to each account. Following the Association's letter in October of 1996, in which it again raised the issue of direct deposit, the Association gave Johnson the names of three providers that it said would take direct deposit; Johnson called the three and learned that none accepted direct deposit as bargained by the District. Two would do wire transfers and the other would take an electronic transfer but only to a general account number not to an individual account. Johnson reiterated to Association representative Bernier the difference and that the District had not bargained the type of transfer that required additional intervention by the District.

Association witness Bernier's testimony in response to questions during cross examination is not inconsistent with the testimony of District witnesses. Mr. Bernier testified that he understood that no provider was taking direct deposits, not even the WEAC. Mr. Bernier

then testified that he understood that what he was negotiating in Article XI A was language that would provide for direct deposits in the future. 2/ Further, Mr. Bernier testified that *“what we got there was an agreement from the District that when direct deposit was available, it would happen and in the meantime, the existing procedure of ten-day transmittal would continue uninterrupted.”* 3/ The District had been trying to negotiate a thirty day transmittal to which the Association had consistently objected. The Association then counter proposed the language that ultimately resulted in the ratified amendment to Article XI A.

Given the foregoing, the Arbitrator finds that the Association understood what it was getting and not getting with the relevant contract language. As the Association testified, it felt that the language guaranteeing direct deposit when it was available was a *“win/win proposition.”* 4/ This language parallels the payroll deposit language in Article XI A, where direct deposit of paychecks would be provided in the future when more than 50% of the teachers would allow direct deposit of their paychecks to their individual financial institution accounts. 5/

The parties also acknowledged that at the time of the hearing, no TSA providers were accepting direct deposits.

The arbitrator finds that the direct deposit language is not ambiguous and that the weight of the evidence supports a finding that the Association had to have known what it was agreeing to notwithstanding the Association’s October 23, 1996, letter. 6/ Thus, the District is under no obligation to make direct deposits of TSA monies until such time as TSA providers will accept them in the manner agreed to by the parties as found in this decision. A careful review of the record in this matter, including an analysis of the briefs, finds that the Association grievance cannot be sustained.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 8th day of September 1997.

Paul A. Hahn /s

Paul A. Hahn, Arbitrator

ENDNOTES

1/ “*direct*” without intervention or deviation, Webster’s Third New International Dictionary (1993) Merriam - Webster Inc., Publishers.

2/ Transcript pgs. 25 and 26.

3/ Transcript pg. 27.

4/ Transcript pg. 27.

5/ Joint Exhibit #4, page 1, paragraph 4, Summary of Tentative Settlements and Joint Exhibit #10, page 2, paragraph III. B., Contract Proposals for Ratification.

6/ Joint Exhibit #3, October 23, 1996, letter from Michael R. Bernier to Jon Johnson.

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