

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**UNITED LAKEWOOD EDUCATORS**

and

**MUSKEGO-NORWAY SCHOOL DISTRICT**

Case 57  
No. 54393  
MA-9665

*(Bonita Berg grievance regarding teacher early retirement benefits)*

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Appearances:

**Mr. Michael McNett**, Executive Director, Lakewood UniServ Council, 13805 East Burleigh Road, Brookfield, Wisconsin 53005, appearing on behalf of United Lakewood Educators.

Quarles & Brady S.C., Attorneys at Law, by **Mr. Robert H. Duffy** (with **Ms. Heidi B. Retzlaff** on the brief), 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the District.

**ARBITRATION AWARD**

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Marshall L. Gratz to arbitrate a dispute concerning the above-noted grievance under the grievance arbitration provisions of their 1995-97 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments at a hearing held at the District's office in Muskego, Wisconsin November 22, 1997. At the hearing, the parties waived the contractual time limit for award issuance. (tr. 223-4). The hearing was transcribed, and briefing was completed on January 22, 1997, marking the close of the hearing.

On the basis of the record, the Arbitrator issues the following award.

### **STIPULATED ISSUES**

At the hearing, the parties authorized the Board of Arbitration to decide the following issues:

1. Is the grievance timely?
2. Did the District violate the collective bargaining agreement when it failed to provide Bonita Berg with a benefit option equal to 90 percent of the District's single health insurance contribution as part of her early retirement package?
3. If so, what is the appropriate remedy?

### **PORTIONS OF THE AGREEMENT**

#### ARTICLE III INSURANCE

##### 3.02 Hospital-Surgical Insurance

The Board will provide either family or single hospital-surgical major medical insurance coverage for each contracted teacher, as elected.

During this contract, the Board will provide ninety (90) percent of the premium for the hospital-surgical insurance.

3.021 The Board retains the right after consultation with the ULE to provide such coverage with an insurance carrier of the Board's choosing, provided:

3.0211 The standard of coverage will be the same as that in 1995-1996 contract, as outlined in the certification of insurance from the WEAIG. The original certificate of insurance will be on file in the Muskego-Norway School District Office.

3.0212 Current employees enrolled in family medical insurance plans may participate in the Tax Shelter 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.

3.0213 The standard of present service is maintained.

3.0214 The ULE is notified (in advance of any contemplated change and is given an opportunity to present its views).

3.022 The present standard of coverage is the insurance presently in force. The WEAIG Point of Service Plan shall be made a part of this agreement by reference.

3.023 It is understood by the parties hereto that the insurance policy issued by the insurance carrier will contain a provision for the coordination of insurance benefits.

3.024 The Board will continue in the hospital-surgical group those members of the teaching staff who will retire at, or after, age 55, providing such individual affected prepays monthly premiums.

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## ARTICLE V EARLY RETIREMENT

### 5.01 Participation

Any teacher may participate in the following voluntary retirement program, provided that:

- (1) Attain the age of 55;
- (2) Have completed a minimum of fifteen (15) years of continuous service in the district and;
- (3) Have not reached sixty-second birthday.

"Age" for all purposes of this policy is defined as the employee's age as of the first teacher day of the school year in which the retirement becomes effective.

#### 5.02 Health Insurance

Teachers electing early retirement will be provided District hospital/surgical (medical) insurance for period of up to four (4) years following the effective date of retirement, at district expense. The teacher will be provided the same level of coverage available to teachers under the terms of the collective bargaining agreement. The amount of the district contribution will be the same as that provided to regularly employed teachers.

#### 5.03 Notice

A teacher must provide to the District Office on or before February 1, in the year preceding the next contract year, written notice of intent to retire early. If the State of Wisconsin offers an early retirement window during the term of this contract, the parties agree to reopen Article V.

#### 5.04 Pay Plan "A"

The District will pay to the employee in monthly payments for period of three years an amount equal to the amount paid to the employee's Wisconsin Retirement System account.

#### 5.05 Pay Plan "B"

The District will pay for hospital-surgical insurance benefits for the retiree in an amount equal to the dollar value of the retirement benefit as stated in 5.04.

Benefits under this article shall cease upon death, but will continue after the age of 65, providing the retiree has not exhausted his/her insurance fund.

#### 5.06 Refusal of an Early Retirement

The District may refuse to grant an early retirement only if a certified replacement cannot be found for the teacher requesting early retirement. Before refusing an early retirement, the District must make every reasonable effort to find a certified replacement.

#### 5.07 Employment Status and Resignation

Upon receipt of notice granting the early retirement, the teacher will provide the District, by April 15, with a written letter of resignation for retirement purposes, to be effective with the first day of the next contract year.

#### 5.08 Payment of Retirement Benefit

The District will begin to make payments to the employee in the amounts specified in 5.04 no later than thirty (30) days following the first day of the next contract year.

#### 5.09 Limitations

The payments and benefits made under the Early Retirement Program are to be reviewed annually and the program shall be terminated at any point when the cumulative total cost of the program entered into equal or exceeds the cost which would have been experienced if all the teachers retiring under the program had continued to work. The limitations stated in this article will in no way affect those presently receiving benefits through early retirement.

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### ARTICLE XI

#### GRIEVANCE & BINDING ARBITRATION PROCEDURE

##### 11.01 Purpose

The purpose of this procedure is to provide an orderly method of resolving differences arising during the term of this agreement. A determined effort shall be made to settle such differences through the use of the Grievance/Complaint procedure.

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##### 11.03 Procedure

Grievances and complaints shall be processed in accordance with the following procedure:

Step I. If a grievance or a complaint is brought to the attention of the administration immediately involved within ten days after the facts upon which it is based first occur or first become known, a conference with the immediately involved administration shall be held within five days after such notice.

Step II. If the matter is not resolved at the Step I conference, the problem shall be presented in writing to the administrator immediately involved within ten (10) days after the conference. Such administrator shall respond to the problem in writing within seven (7) days of receipt of the written statement.

Step III. If not resolved at Step II, the matter may be appealed to the Superintendent of Schools if a written appeal is received in his or her office within ten days of receipt of the Step II response. Upon receipt of the appeal, the Superintendent shall meet promptly with the grievant/complainant and his or her representative. The Superintendent shall give a written answer no later than ten (10) days after receipt of the appeal or conclusion of the conference, whichever is later.

Step IV. If not resolved in Step III, the matter may be appealed to the School Board if a written appeal is received in the office of the Superintendent within ten (10) days after receipt of the Step III decision. The Board shall conduct a hearing on the grievance within fourteen (14) days after the receipt of the appeal, with the presentation of information and argument by the grievant/complainant shall choose an open or closed hearing. The School Board will respond in writing within fifteen (15) days after the hearing.

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11.05 The parties agree to follow each of the foregoing steps in the processing of a grievance. However, if the dispute arises from actions originating at the Superintendent's level, the grievance or complaint may be initiated at Step III, within ten (10) days after the facts upon which the matter is based first occur or first become known.

11.06 Only the days when school is in session shall be counted in computing the time limits under this article. Time limits may be changed by mutual agreement to expedite processing over the summer months or for any other reason.

11.061 If the employer fails to give a written answer within the established time limits at any Step, the grievance or complaint will be considered advanced to the next step. The process shall commence at the step following notification and the advancement of the written grievance or complaint.

11.062 Grievances or complaints not processed to the next step within the established time limits shall be considered dropped.

11.07 To process a grievance to Binding Arbitration, the following must be compiled with:

11.071 Written notice of a request for such arbitration shall be filed in the Superintendent office within ten (10) days in receipt of the Board's written response.

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

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11.11 It is understood that the function of the arbitrator shall be to interpret and apply specific terms of this agreement. The arbitrator shall have no power to arbitrate salary adjustments, except improper application thereof, not [sic] to add to, subtract from, alter or amend any term of this agreement.

### **FACTUAL BACKGROUND**

On January 19, 1996 the Grievant, Bonita Berg gave District preliminary notification of her intent to retire at the end of the 1995-96 school year. The District responded by notifying her that the Board was willing to accept her request for early retirement and directing that she submit a formal letter of resignation for retirement purposes. In the same time frame, Ms. Berg's husband, who was also employed by the District as a teacher, was also in the process of early retiring from the District.

On March 21, 1996, the Bergs met, at their request, with Jean Henneberry, the District's Director of Human Resources, to discuss the benefits the Bergs would be receiving upon their early retirements. Henneberry went over various calculations and benefit choices available to each of them as Henneberry routinely does with all employes approaching retirement.

Prior to the conclusion of that meeting, the Bergs submitted to Henneberry their respective formal letters of resignation for retirement purposes. Ms. Berg's letter contained the following additional statement: "It is my understanding that I will continue to receive the optional TSA amount equal to a single plan insurance premium which I am currently receiving and which should continue for the next 4 years." (As of that time, Ms. Berg was receiving dependent coverage under family plan District health insurance coverage for which her husband was enrolled, and Ms. Berg was receiving District Tax Sheltered Annuity contributions in lieu of insurance benefits of her own.)

The Bergs and Henneberry reviewed and discussed the contents of those letters during the March 21 meeting. During the course of that meeting, Henneberry told the Bergs that, although it was the subject of disagreement between the ULE and the District, the District did not consider Ms. Berg eligible for any post-retirement option in lieu of insurance but that the District did consider her eligible to enroll for post-retirement insurance benefits. Although Henneberry gave Ms. Berg a worksheet with handwritten notations concerning the early retirement benefits the District considered her entitled to receive, Ms. Berg asked Henneberry to provide her with the District's position in writing regarding Ms. Berg's above-noted request "to continue to receive the optional TSA amount" for four years following her early retirement.

On April 4, 1996, Berg received a letter from the District dated April 2, 1996 confirming that the Board had formally approved Berg's resignation. As regards retirement benefits, the letter stated only, "The benefits payment equivalent to the Wisconsin Retirement System contribution will be computed later this year and you will be provided with a statement of the amounts and the dates those payments will begin. Please contact me if you have questions regarding the retirement program under Article V of the collective bargaining agreement."

The instant grievance, in the form of a memorandum from Berg to Henneberry, and signed by Berg and ULE Teacher Rights and Contract Enforcement Committee Chairperson Robert Nuszbaum, was then delivered to the District on April 17, 1996. It read, in pertinent part, as follows:

Re: Early Retirement Benefits  
Date: April 16, 1996

I am in receipt of your letter dated April 2, 1996, (which I received April 4, 1996) regarding retirement benefits. Your response does not clarify or resolve the issue discussed at our meeting in March. Therefore, I wish to pursue this matter through the grievance procedure. I am initiating the grievance pursuant to Article 11.03 (Step II).

STATEMENT OF CONCERN:

I am currently enrolled in the Tax Shelter Annuity (TSA) program provided under Article 3.02 (especially 3.0212) of the Bargaining agreement. Upon retirement at the conclusion of the current school year, I wish to be paid the equivalent amount of money due to retiring employes as per Article V (Early Retirement) especially 5.02 Health Insurance and 5.05 (pay Plan B).



RATIONALE:

All employees are entitled to equal benefits. Election of a TSA program which has benefited both the district and the employee through insurance cost savings should not become a liability at retirement. It is discriminatory to provide one employee a benefit denied another. Accordingly, the equivalent dollar amount of either the TSA or the hospital/surgical premium cost should be paid to the retiring employee who has previously elected the TSA option.

When Henneberry did not respond to the written grievance, ULE presented it to the Superintendent. When the Superintendent did not respond, ULE submitted it to the School Board. (tr. 121-22).

On June 24, 1996, the District Board met, heard, considered and denied Ms. Berg's written grievance. By letter dated July 1, 1996, the Board explained that it was denying the grievance both on the grounds that it was untimely (stating, "Although the step I conference under Article 11.03 occurred on March 21, 1996, the matter was not submitted to a written grievance until after the ten day timeline required under Step II") and that the Board found no violation of the Agreement on the merits of the dispute, based on Agreement 3.0212 and 5.02.

The instant arbitration subsequently ensued, with the parties submitting the Stipulated Issues as noted above. At the arbitration hearing, the Union presented testimony by Berg, Frederick Schuler and Nuszbaum. The District responded with testimony by Henneberry and District Director of Business Services Charles Brenden.

The evidence adduced at the hearing shows that the concept of provide an option for employees who did not wish to or need to receive insurance coverage offered by the District was first included in an agreement between the parties during 1985 reopener bargaining. At that time, the parties agreed to language that is materially parallel to that now contained in Agreement 3.012. They did so in part to resolve a then-pending grievance that had been initiated by Schuler. Schuler's grievance challenged the District's refusal to provide him with any insurance benefits besides those he enjoyed as a dependent under the family coverage the District was providing to Schuler's wife whom it also employed as a teacher. As a result of the 1985 agreement, Schuler continued to enjoy dependent coverage under his wife's family plan of District health insurance, but the District also made contributions to a tax deferred annuity account in Schuler's name in lieu of providing him with any contractual insurance benefits of his own.

During the 1994 negotiation, the ULE initially proposed to add a sentence at the end of Agreement 5.02 that would have read, "Teachers currently enrolled in the TSA Insurance option will have the right to continue that benefit for three years." That proposal was rejected by the

District on the stated grounds that it constituted a new benefit that the District was unwilling to agree to provide and that, in any event, the District could not provide such a benefit because the Internal Revenue Service regulations do not authorize TSA contributions on behalf of retired employees. ULE thereafter proposed that the District make a TSA deposit equal to three years of the TSA option amount just prior to the time the employe early retires. Again, the District rejected that proposal stating that it was unwilling to grant an additional benefit not then provided for by the Agreement.

During the 1995-1997 contract negotiation, the ULE proposed adding language to section 5.02 which would allow a teacher currently receiving a TSA option to receive a TSA deposit equal to five years of the current premium immediately prior to the time of early retirement. The District rejected that and a similar proposal for a deposit equal to four years of insurance premiums, stating that it would not agree to grant that additional benefit to early retirees. The TSA language of 5.02 remained unchanged, however the parties did increase the maximum number of years of health insurance coverage provided for in 5.02 from three to four.

During each of those bargains, the ULE's representatives variously asserted that they were merely seeking to clarify what they asserted was the existing right of early retirees under the Agreement to continue to receive option plan payments upon early retirement. In response, the District's representatives variously asserted that the Agreement provided early retirees with only insurance benefits and not with the option of receiving alternative District payments in lieu of insurance benefits.

## **POSITIONS OF THE PARTIES**

### **District Position**

The grievance in this matter should be denied because it was not submitted within ten school days following the Step I conference held between Henneberry and Ms. Berg and was therefore untimely.

Alternatively, the grievance should be denied on its merits because the plain language of the contract states that only current employes can take advantage of the TSA option and further states that teachers electing early retirement lose their employment status as of the effective date of their retirement. The ULE has presented no admissible or reliable evidence to establish a contrary meaning, and, even if it had, the plain meaning of the contract must prevail. The ULE's attempts during the last two negotiation periods to add language to the contract permitting an early retiree to receive the TSA option contradicts its claim that the contract already grants that benefit. Finally, the ULE seeks an equitable remedy that is not provided for in the agreement and that is unjustified in the circumstances.

For those reasons, the grievance should be denied.

### **ULE Position**

The grievance was submitted within the contractual timelines as required by Agreement 11.03 and 11.06. Prior to filing the grievance, Ms. Berg had requested a written response from the District regarding her request for continuation for four years of her retirement of the TSA contributions then being made on her behalf by the District in lieu of insurance. Henneberry's response to that request in her letter dated April 2, 1996 and received April 4, 1996 constituted the grievable event in this case. The March 21 conference was solely for the purpose of explaining and calculating early retirement benefits. It was not a part of the grievance process. The written grievance was submitted to the District on Tuesday, April 16, 1996. Because school was not in session on April 5 and April 8-12, 1996. Therefore the calculable elapsed time between the grievable event and the filing of the grievance was two days.

In any event, the grievance should also be deemed timely because it was initiated more than four months prior to Berg's retirement after which she was first adversely affected, and because the contractual violation involved is an on-going one, and because the District failed to raise its timeliness objection at its earliest opportunity during the processing of the grievance. The Arbitrator should therefore answer Issue 1 in the affirmative.

The Arbitrator should also answer Issue 2 in the affirmative. The bargaining history evidence shows that, in 1985, the parties agreed to provide a comparable benefit and equitable treatment to individuals who would otherwise be receiving duplicative insurance coverage from the District. That agreement was reached in the context of the pendency of the Schuler grievance. As a result of the 1985 agreement, Schuler received a comparable benefit and equitable treatment in the form -- not of duplicative insurance -- but of an alternative benefit of equal value. That is what Ms. Berg is asking for and entitled to in this case.

While the ULE learned after 1985 the option plan dollar amount agreed upon in 3.0212 cannot appropriately be paid into the TSA account of someone no longer actively earning an income, the contractual right of the individual to receive this specific amount of money has not evaporated. Nothing prohibits the District from making payments of equivalent value to Berg as requested by the ULE in this case. Such equivalent payments would both fulfill and be entirely consistent with the evident intent of the parties in Article V to provide a flexible package of early retirement incentives that limits the District's cost to that which it would pay toward a single insurance policy, and with the continuation of the early retirement program subject to the cumulative total cost limitations specified in 5.09.

The ULE's 1994 and 1995 bargaining proposals cited by the District were merely efforts to clarify the right of early retirees -- established in the 1985 reopener negotiations -- to receive an alternative benefit of equal value in lieu of insurance. Once that 1985 agreement was in place, Schuler was granted such a benefit and was not forced to accept redundant insurance coverage. Grievant should likewise be granted such a benefit, and should not be forced to accept redundant insurance coverage instead.

The District's proposed interpretation of the Agreement must be rejected because it would lead to the harsh, absurd and nonsensical result that the District is required to provide Ms Berg with redundant insurance rather than an alternative benefit of equal value to the recipient.

By way of remedy, the Arbitrator should direct the District to provide an amount of money equal to 90% of the health insurance single rate premium, for four years in lieu of the retiree insurance to which the District limited her options when she early retired. To avoid potential tax complications, the ULE suggests that the payment be placed in an Agreement 5.05 "Pay Plan 'B'" account from which Grievant Berg could purchase medical insurance after the early retirement insurance benefits of her spouse have expired.

## **DISCUSSION**

### **Timeliness of the Grievance**

The Arbitrator concludes that the grievance was timely filed.

The District's contention that the March 21 meeting was for purposes that included initiation of a grievance is not factually persuasive because no mention was made by anyone at that meeting that the meeting constituted initiation of a grievance. It does not serve the parties well nor forward the purposes reflected in their agreed-upon grievance procedure for a grievant to be surprised to learn that he or she initiated a grievance when he or she expressed no intention to do so.

Technically speaking, then, there was no Step I meeting held with regard to the grievance prior to its being initiated (as it states) at "Step II" on April 17, 1996. However, the District did not challenge the grievance or its arbitrability on that basis at the Board step hearing (tr. 118) or at any other time. Had the District done so promptly, the ULE could simply have obviated that challenge by requesting and convening a Step I meeting to assert the claim that the District was violating the agreement by its on-going unwillingness to provide Berg with the payments in lieu of insurance following her retirement that she was requesting.

In those circumstances, it would be inconsistent with the Agreement 11.01 purposes of the parties' grievance procedure to deem the grievance non-arbitrable on the basis that there was no Step I meeting held regarding it prior to the filing of the grievance in written form on April 17, 1996.

The Arbitrator therefore concludes that the grievance was timely submitted when it was filed on April 17, 1996, and that the grievance is procedurally arbitrable. Hence, the Arbitrator's answer to Issue 1 is "Yes."

### **Merits of the Grievance**

The parties have defined the Arbitrator's function as interpreting and applying specific terms of the Agreement. Agreement 11.11 expressly prohibits the Arbitrator from adding to, subtracting from, altering or amending any term of the Agreement.

Agreement 5.02 expressly requires that the District provide eligible teachers electing early retirement with "District hospital/surgical (medical) insurance for a period of up to four (4) years following the effective date of retirement, at district expense." The remaining two sentences in 5.02 describe the level of coverage of that insurance and the amount of the District's contribution toward that insurance, but they do not require the District to make tax sheltered contributions or any other payments to or on behalf of the early retiree in lieu of that insurance. Tax sheltered contributions and other payments to or on behalf of an early retiree are sufficiently different than insurance coverage that the parties would need to have expressly provided such options in lieu of the above-described early retirement insurance benefits if they mutually intended to make any such option available to early retirees.

Reading the Agreement Early Retirement article (5.01-5.09) together with 3.0212 does not support ULE's position that the parties mutually intended that early retirees have such an option available to them. It is true that 5.02 requires that the level of coverage of insurance provided to early retirees be "the same level of coverage available to teachers under the terms of the collective bargaining agreement." It is also true that 3.0212 makes available a TSA option in certain circumstances. More specifically, 3.0212 provides that "Current employees enrolled in family medical insurance plans may participate in the Tax Shelter 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." However, upon her retirement, Grievant Berg ceased being an "employee" as that term is ordinarily used, especially in light of the confirmation in 5.07 that early retirement involves the teacher's resignation from employment. Even more significantly, the ULE's contention that the parties mutually intended the Agreement as written in 5.02 and 3.0212 to make early retirees be eligible for the option in lieu of insurance provided for in 3.012 is fatally undercut by the facts that the only such option provided in 3.012 is a TSA option. For, the WEA Insurance Trust policies do not extend the

TSA option to retirees and the Internal Revenue Service regulations prohibit the payment of tax sheltered annuity contributions to retirees. In other words, the only option in lieu of insurance provided for in the Agreement is the TSA option, but the TSA option is not lawful for or therefore available to retirees.

Therefore, for the Agreement to provide a lawful option in lieu of insurance to early retirees, a modification of the language of the Agreement was necessary. While the ULE negotiators sought to characterize as "clarifications" their efforts in subsequent bargains to make such modifications in the language of the Agreement, the Arbitrator finds those characterizations unpersuasive. The Arbitrator so concludes because without modifications of the sort proposed by the ULE, the language of the Agreement does not provide for any option in lieu of insurance other than the TSA option for which early retirees are ineligible as a matter of IRS regulations.

Therefore, any remaining doubt in this case is resolved in the District's favor by the bargaining history evidence. The Schuler grievance that led to introduction of the TSA option language did not involve an early retiree situation, and there is no evidence that the communications between the parties' bargaining representatives in 1985 addressed the question of whether early retirees would have an option of any kind in lieu of insurance in 1985. However, when the subject of an option in lieu of insurance for early retirees did arise in two subsequent bargains, in each instance the District rejected the ULE's proposals to add language that would have expressly provided early retirees with such benefits.

No matter how logical or equitable it may be that early retirees should have an option in lieu of insurance available to them, the Agreement as written does not provide one, and Agreement 11.11 precludes the Arbitrator from adding such a provision where the parties have not done so.

For the foregoing reasons, then, the Arbitrator has answered Issue 2 in the negative.

### **DECISION AND AWARD**

Based on the record as a whole, the Arbitrator's decision and award concerning the Stipulated Issues noted above is as follows:

1. Yes, the grievance is timely.
2. No, the District did not violate the collective bargaining agreement when it failed to provide Bonita Berg with a benefit option equal to 90 percent of the District's single health insurance contribution as part of her early retirement package.

3. The subject grievance is denied, such that no consideration of a remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin, this 2nd day of April, 1998.

Marshall L. Gratz /s/  
Marshall L. Gratz, Arbitrator

