BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1397, AFSCME, AFL-CIO

and

THE SCHOOL DISTRICT OF SUPERIOR

Case 123
No. 56414
MA-10279

(Grievance of Bus Drivers and Secretary)

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1701 East Seventh Street, Superior, Wisconsin 54880, appeared on behalf of the Union.

Mr. Kenneth Knudson, Hendricks, Knudson, Gee and Hayden, Attorneys at Law, 1507 Tower Avenue, Suite 312, Superior, Wisconsin 54880, appeared on behalf of the District.

ARBITRATION AWARD

On April 24, 1998, the Wisconsin Employment Relations Commission received a request from Local 1397, AFSCME, AFL-CIO, to provide an arbitrator to hear and decide a matter pending between the Union and the School District of Superior. Following jurisdictional concurrence, the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the grievance. A hearing on the matter was conducted on September 10, 1998, in the District offices, Superior, Wisconsin. At the conclusion of the evidentiary hearing, the parties made oral argument and rested.

This arbitration addresses the right of certain bus drivers and a secretary to District-paid health insurance benefits during the summer months.

BACKGROUND AND FACTS

School year bus drivers, considered seasonal by the Superior School District, and certain secretaries have historically received health insurance benefits for those school year months in which they are employed. Bus drivers and secretaries who do not work the summer

are responsible for one-half of their health insurance premiums in the months of July and August. By practice of the parties, for those bus drivers and secretaries who work the entire summer school, the District pays the other half of the July premium, leaving the employe responsible for one-half of the August premium. This premium payment arrangement is not applicable to teaching assistants.

In negotiations leading to a 1995-1997 collective bargaining agreement, the Employer took the following position: "Any and all practices which are not specified in the working agreement will be null and void." By letter of February 27, 1996, Gerald Peck, Assistant Superintendent for Personnel and Operations reiterated the District's view that its evaporation of practices was not a matter it was submitting for negotiation, but rather a notification to the Union of that fact. By letter of March 3, 1996, Union Representative James Mattson advised Peck that the Employer's position with respect to practices was unacceptable to the Union, and would prevent settlement of the ongoing contract negotiations. At some point the Employer withdrew its position relative to practices. On March 22, 1996, Mattson confirmed the Union's understanding that the District's notice relative to past practices had been withdrawn. By letter of April 1, 1996, Mattson requested the District provide him with a letter officially withdrawing the District's prior position relative to past practices. By letter of April 16, 1996, Gerald Peck wrote: "This is to notify you that the notification submitted to the Union bargaining committee on July 20, 1995, and reaffirmed in a letter to AFSCME president Marv Ronning on February 27, 1996, is hereby withdrawn."

As part of the ongoing exchange, Mattson, on April 18, 1996 wrote: "Mr. Peck. I am in receipt of a copy of your letter dated April 15, 1996, to Marv Ronning regarding 1995-1996 Grievance No. 10 and No. 11. At the conclusion of this letter, you state the District's intention to notice the Union on the cessation of a past practice at the conclusion of the next collective bargaining agreement. The proper time to make such a notice is during the next negotiation session with the Union. At that time, the party being noticed has the opportunity to bargain over the matter."

On June 10, 1996, Peck did provide notice to the Union that the practice involved in this grievance was to be terminated. Peck did so in a letter to Marv Ronning, Chief Steward of Local 1397. Peck's letter reads as follows:

> Dear Mr. Ronning:
>
> On September 6, 1995, a written response denying grievance No. 4 was provided to the Union. The letter contends "The Union leadership was notified that, effective July 1, 1995, the working agreement would be the determiner in all decisions pertaining to wages, hours and working conditions for all

classifications within the Union." Most recently, as a compromise to a tentative contract settlement agreement, the Board of Education withdrew the "Notice of Change in Practice" regarding the above statement.

As I indicated to you during our conversation, this grievance is another example of school bus drivers taking advantage of a practice they knew was not covered in the language and the Administration incorrectly authorized District payment of one-half month's family health insurance premium when a driver works the entire summer school. There is no language in the contract pertaining to summer school, and in fact, you know that AFSCME has unsuccessfully attempted to bargain this language during negotiation sessions.

After reviewing the action taken by the District pertaining to this grievance, I still maintain there was no violation of Article 14, Section 1, as identified in the grievance. In fact, Article 14, Section 5, clearly states the intent of health insurance premium payment for bus drivers in the summer. A review of past practice reveals that the District has paid the July premium of family health insurance for drivers who worked the entire summer school program. Based on that practice, and since the parties have finalized terms of a new agreement, the District will reimburse one-half's month (July, 1995) family health insurance premium to those drivers that worked the entire summer school program in 1995. Drivers eligible for reimbursement include Gladys Christiansen, Marge Clark, Wendy Johnson, Pat Lagro, Ramona Verdoljak, and Hansine Warring.

I am noticing the Union and school bus drivers that this practice will cease with termination of the 1995-1996 and 1996-1997 working agreement with AFSCME, Local 1397. As of July 1, 1997, the District will follow the language of Article 14, Section 5, which states: "The Board of Education agrees to pay the full cost of the single rate, and one-half the family rate of health insurance premiums for bus drivers, class 3 secretaries and teachers during summer vacations."

Since the above action is not in violation of the existing contract, the grievance is denied. No payment will be made to those drivers listed above.

Yours truly,

Gerald Peck /s/
Gerald Peck

In the negotiations leading to a contract to succeed the 1995-1997 agreement, neither party made proposals nor bargained on the topic of health insurance premium payment for bus drivers or secretaries who worked during that summer.

On or about July 1, 1997, the District terminated the practice of health insurance payment and paid bus drivers and secretaries who worked the entire summer the amounts of money set forth in Article 14, Section 5, which is set forth below. As of the hearing date, the parties did not have a collective bargaining agreement in effect. They stipulated that the existing provisions of the 1995-1997 collective bargaining agreement had been carried forward.

Peck testified that employes who work 25 hours per week are eligible for Employer-paid health insurance. Union witnesses indicated that the threshold is 22 hours per week. This Award does not attempt to reconcile the difference since the question prompting the answers came from the Arbitrator, and the parties did not have an opportunity to fully research the answer. The parties further stipulated that employes who do not work in the summer are provided with a full single, and one-half family premium for the summer months.

ISSUE

The parties did not stipulate the issue. I believe the issue to be:

> Did the Employer violate the collective bargaining agreement and accompanying practices when the District terminated the practice of paying bus drivers and secretaries who worked in the summer additional health insurance premiums?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 9 – Grievance Procedure

. . .

> Section 7. Nothing in the foregoing shall be construed to empower the Arbitrator to make any decision amending, changing, subtracting from, or adding to the provisions of this Agreement.

. . .

Article 14 – Insurance – Health, Life and Disability

Section 1. The Board of Education agrees to pay the entire cost of health insurance for each eligible employee in the plan, both single and family. The Board and the Union agree that the insurance plan shall have the plan benefits and standards as per the instructional staff.

Section 2. All eligible employees may take the single or family plan. Employee applications for health and dental insurance must be completed within thirty (30) days of initial employment or of other qualifying event(s).

. . .

Section 5. The Board of Education agrees to pay the full cost of the single rate and one-half the family rate of the health insurance premiums for Bus Drivers, Class 3 Secretaries and Teacher Assistants during summer vacation periods.

. . .

Article 22 – General Provisions

. . .

Section 3. The Board and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement of any subject or matter that arose as a result of either party's proposals during bargaining which were not agreed to. The Board expressly agrees that before effecting any unilateral change in wages, hours or working conditions not referred to or covered in this Agreement, it will notify the Union concerning the same and will provide it with the opportunity to bargain thereon, while the Union expressly recognizes the right of the Board to implement the same during the term hereof should the parties bargain to impasse thereon.

POSITIONS OF THE PARTIES

It is the position of the Union that that the Employer cannot unilaterally terminate this economic practice. The Union contends that the Employer must negotiate a change or live with the *status quo*. The Union points to the Employer's June 10 letter and says it is

inadequate to terminate the practice. It is the Union's view that the Employer is not free to notice and then evaporate a practice. The Union points out that negotiations are currently going on, and that the contract has yet to be concluded. Under the Union's view of this matter, the current contract is in effect, and controls the outcome of this proceeding. It is the Union's view that the hiatus *status quo* includes practices. Any change must be bargained.

It is the Employer's view that if the Union prevails, there is no way for an employer to terminate a practice under any circumstances. The Employer contends that if that is the case, there is no need for a written collective bargaining agreement. The Employer believes the question presented is how an employer terminates a practice. The Employer believes it has done a textbook job of terminating its practice. The Employer filed a notice, provided an opportunity to bargain, awaited the end of that collective bargaining agreement, and then terminated the practice.

The Employer poses the question as to who has a duty to bargain following the Employer's notification of its intent to terminate the practice. The Employer concludes that obligation falls to the Union. Under the Employer's view of this case, if the Union desired to maintain the existing benefit, it was incumbent upon the Union to negotiate that benefit.

The Employer acknowledges that the collective bargaining agreement has expired and that the terms of the agreement regulate the parties' relationship in the hiatus. The Employer contends that there exists a tacit agreement to make retroactive all economic changes negotiated in the agreement. Pursuant to that view, the Employer contends that the change in the compensation of bus drivers and secretaries for summer work will be retroactive to July, 1997.

The Employer points to the letter exchange between Peck and Mattson. The Employer points out that the Union objected to the blanket evaporation of practices, and suggested instead that the Employer be specific as to what it wanted deleted from the Agreement. The Employer responded to the Union's request, was specific, and followed up.

DISCUSSION

This dispute focuses on the question of when, if ever, this employer is free to terminate a long-standing practice relative to the compensation of certain employes who work during the summer. Arbitrators are divided on the question. Their division is further magnified by whether the practice is one which (1) provides the basis of a rule governing matters not included in the written contract, or (2) operates to indicate the proper interpretation of ambiguous contract language, or (3) serves to amend clear language of the written contract. Arbitral division is further magnified by whether the practice in question involves an economic

benefit, versus a managerial or operational regulation. Arbitrators have analyzed whether the conditions giving rise to the practice remain, or have changed. Common to this diversity of opinion is the arbitrator's desire to capture the parties' intent relative to the matters in dispute. The arbitral desire to remain true to the contract is reinforced in this proceeding by the parties' agreement reflected in Article 9, Section 7.

The parties to this agreement have addressed their bargaining obligations relative to economic practices. Article 22, Section 3 addresses the parties' rights and responsibilities in this area. Section 3 provides ". . . The Board expressly agrees that before effecting any unilateral change in wages, hours or working conditions not referred to or covered in this Agreement, it will notify the Union concerning the same and will provide it with the opportunity to bargain thereon, while the Union expressly recognizes the right of the Board to implement the same during the term hereof should the parties bargain to impasse thereon." To the extent that summer school health insurance premium is not referred to or covered in the Agreement, it falls squarely within the scope of Article 22, Section 3. The section conditions the employer's unilateral change on a notice and opportunity to bargain. Here, notice was given on June 10, 1996. The written notice was explicit. The contract expired, and the opportunity to bargain existed. Both sides declined to submit proposals. Section 3 recognizes the right of the Board to implement wage changes following exhaustion of bargaining.

If the benefit involved in this proceeding consisted solely of a matter unaddressed by the collective bargaining agreement, I believe the analysis would end here. However, that is not the case; the collective bargaining agreement addresses this benefit in two places.

The first sentence of Article 14, Section 1 provides: "The Board of Education agrees to pay the entire cost of health insurance for each eligible employee in the plan, both single and family. . ." Read literally, Article 14, Section 1 grants full employer paid premiums for all "eligible" employes. The record in this case establishes that one-half of the August premium is always the employe's responsibility. It appears that this is the case notwithstanding the number of summer hours worked by bus drivers and a secretary.

Article 14, Section 5 specifically regulates what the school board pays Bus Drivers, Class 3 Secretaries and Teacher Assistants during the summer "vacation". The clause describes the benefit level applicable to those classes of employes during their summer vacation. This is a period when they are not working. On its face, the clause is not applicable to this scenario, when those employes are working. The practice described by the parties is one applicable to Bus Drivers and a Class 3 Secretary, and not to Teacher Assistants.

Section 5 does not address the question posed in this proceeding; i.e., what if those employes work in the summer. If the employes work the threshold hours per week on average, they should be covered by Section 1. If they work fewer hours, they are not "eligible" within the meaning of Section 1.

I believe the Employer has successfully terminated the practice, insofar as the practice addressed a benefit level not identified by the contract. The Employer acted consistently with Article 22.

This practice is not freestanding, but rather has its origins in the provisions of Article 14. It has the potential to either enhance or diminish benefits otherwise called for by the contract. For those employes employed in the summer whose hours fall below the eligibility standards referenced in Section 1, the practice may serve to enhance the level of employer contribution to their health insurance premiums. On the other hand, for employes who work sufficient hours to satisfy the eligibility standards referenced in Section 1, the practice operates to diminish the employer contribution applicable to their benefit levels. For instance, an employe who works 22-25 hours per week through the summer is required to pay one-half of his or her August health premium.

In conclusion, effective July 1, 1997, the Employer has successfully terminated the historic practice relative to payment of health insurance premiums for certain employes who work during the summer. From that point forward, the Employer is obligated to pay the employes described by Article 14, Section 5 the full health insurance contribution where those employes average sufficient hours per week during the summer work period to satisfy the eligibility standard. Employes who fail to work the requisite number of hours are to be paid pursuant to Article 14, Section 5.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 15th day of October, 1998.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

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