

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**PEMBINE EDUCATION ASSOCIATION**

and

**SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE**

Case 32  
No. 57088  
MA-10516

---

Appearances:

**Ms. Carol J. Nelson**, Executive Director, Northern Tier UniServ-East, appearing on behalf of the Association.

Godfrey & Kahn, S.C., by **Attorney Robert W. Burns**, appearing on behalf of the District.

**ARBITRATION AWARD**

Pembine Education Association, hereinafter referred to as the Association, and the School District of Beecher-Dunbar-Pembine, 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 Association 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 Pembine, Wisconsin, on April 13, 1999. The hearing was transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on July 6, 1999.

**BACKGROUND**

The basic facts giving rise to the grievance are not in dispute. The District provides health insurance to its teachers and retired teachers which provides a \$100 deductible. After teachers pay the first \$50 of the deductible, the District reimburses the teachers for the next

\$50. The District has refused to reimburse retired teachers the second \$50 deductible so retired teachers pay the entire \$100 deductible. The Association grieved this denial and the matter proceeded to the instant arbitration.

### ISSUE

The parties were unable to agree on a statement of the issue. The Association stated the issue as follows:

Did the District violate the collective bargaining agreement when it refused to pay the \$50 deductible to the retired teachers where it does pay it to the current teaching staff?

If so, what is the appropriate remedy?

The District stated the issue as follows:

Is this grievance applicable to members of the current collective bargaining unit?

If so, did the District violate the agreement in its administration of the early retirement benefit?

If so, what is the appropriate remedy?

The undersigned frames the issues as follows:

1. Is the grievance arbitrable?
2. If so, did the District violate the parties' collective bargaining agreement when it refused to reimburse the second \$50 deductible to retired teachers?

If so, what is the appropriate remedy?

### PERTINENT CONTRACTUAL PROVISIONS

#### ARTICLE XI

## **INSURANCE PROVISIONS**

...

B. The Board shall provide, without the cost to the employee, health care protection, including hospital-surgical and \$50 deductible major medical insurance, for a twelve (12) month period for the employee's entire family. The deductible insurance plan will be self insured for the employee's entire family. The \$50 deductible insurance plan will be self insured by the District. A teacher who has paid over \$50 and up to \$100 toward his/her medical expense, excluding drugs and dental expense, shall be reimbursed no later than the second payday after submitting the voucher. The 1993-94 school year will be the base year to establish a dollar amount for the 1994-95 teacher insurance contribution. The teacher contribution will be based on the formula: 50% of the increase over 15% from the 1993-94 to the 1994-95 school year.

...

## **ARTICLE XIII-B**

### **EARLY RETIREMENT**

...

C. The District shall make the same contributions to health and dental insurance to retired teachers as it does to active members of the teaching staff until such time as the retired teacher reaches the age of sixty-five (65). At that time the District's responsibility for medical and dental benefits shall terminate.

## **ASSOCIATION'S POSITION**

The Association contends that the language of Article XIII-B, C was negotiated during the 1987-90 negotiations and is clear and unambiguous in that the benefit for retirees was the same as current employees. With respect to the issue of standing raised by the District, the Association argues that current employees have an expectation that the benefits negotiated and set forth in Article XIII-B will apply to them and the District has a legal and moral responsibility to honor the collective bargaining agreement and the Association has standing to raise the issue even where the grievant, a retiree, is no longer a current employee. It insists that if the District had any other intent, it was incumbent on the District to change the language or to bring it forth in the negotiation process.

The Association observes that the District has a long standing practice of paying the benefit to current represented employees. It submits that when early retirement was bargained, if the District did not intend to continue the benefit, the District would have acted to place language clearly stating that this benefit would no longer be offered. It cites the rules on custom and past practice generally enforced by arbitrators and argues that the intent of this clear and unambiguous language was that retirees would get the same medical and dental benefits as active employees. The Association insists that contributions to health and dental insurance include the \$50 deductible reimbursement. It maintains that the retiree, on behalf of whom the grievance was brought, was entitled to the \$50 deductible reimbursement, the same as active employees.

The Association claims that the District made a unilateral change in the language without notifying the Association. The Association points out that the District's own witness clearly identified the intent of the language and that was to make the same contributions to retirees as it does to current employees.

The Association concludes that the District violated the clear and unambiguous language of the collective bargaining agreement when it refused to reimburse retirees the \$50 deductible when they reached the \$100 deductible. It alleges that retirees spent many years in the District and felt the contract would be honored and it has not been and the Association has brought the grievance on their behalf. It asks that the grievance be sustained and for an order requiring the District to pay retirees the \$50 deductible.

### **DISTRICT'S POSITION**

The District contends that the grievance is not arbitrable and is untimely. It asserts that retirees are not parties to the current agreement and have no ability to arbitrate disputes and nothing in the record authorizes the Association to proceed on their behalf.

As to the District's claims that the grievance is untimely, it alleges that the Association had sufficient knowledge of the non-payment of the retirees' deductibles starting with Sandra Bale in 1997, and in August, 1998, the retiree whose deductible denial resulted in the grievance wrote a letter alleging the District was violating the contract, yet it wasn't until November 3, 1998, that a grievance was filed, almost three months after the Association was aware of the dispute. It points out that a grievance must be filed within ten (10) days after the grievant became aware of the problem and the Association failed to comply with this requirement, so the grievance is not timely.

As to the merits, the District contends that the language of the agreement does not guarantee that retirees receive the same deductibles as the current employees. It alleges that the bargaining history proves that the District was never required to pay the deductible for retirees. It states that in 1980-82, a retiree could remain a member of the insurance group by assuming payment, and in 1981, employees were required to pay a \$50 deductible. In 1983-84, the District notes the language was changed to provide a reimbursement for the amount over

the \$50 deductible up to \$100, but the retirees provision remained unchanged and in 1988 the early retirement language of Article XIII-B, C was adopted. The District points out that it has never paid the retirees' deductible. It claims the Association's contention that retirees were to receive reimbursement of the deductible goes against the clear meaning of the contract as well as bargaining history and past practice.

The District argues that the provisions related to insurance benefits for current employees and retirees are separate and distinct. It asserts that it is not required to pay the deductible on behalf of retirees. The District observes that the contract language with respect to insurance is located in two sections, Article XI for employees and Article XIII-B for retirees. It points out that Article XI states that the District will pay the premiums for each "employee" and will provide a \$50 deductible on major medical insurance for the "employee's" family. It notes that the term "teacher" is also used identifying that term with current employees. The District, referring to Article XIII-B, observes that it is required to make the same contributions to health and dental insurance to "retirees" as it does to active members of the teaching staff but it does not say anything with respect to deductibles. It points out any payment required is to insurance and not to an individual retiree. It insists that retirees are entitled to payment for insurance premiums, not the deductible, and if that were part of the benefit package for retirees, specific language should have been included in the article that deals with the retirees' benefit.

It contends that it was never the District's intent to provide retirees both paid premiums and deductibles. It argues that if the Association believed deductibles were to apply to retirees, it should have negotiated that item and the fact it did not should not fall on the shoulders of the District.

The District alleges that past practice supports its position. It observes that arbitrators use past practice to give meaning to ambiguous language. The District maintains that no retiree has received reimbursement for the deductible after the first six months of retirement and the Association never objected to the non-payment which indicates acceptance of the District's interpretation of that language.

In conclusion, the District seeks denial of the grievance because it is not arbitrable and untimely and is without merit because Article XIII-B, C is silent on deductibles and retirees should not get in arbitration what was not bargained for at the table. The District also relies on past practice over the last ten (10) years as supporting its position.

### **ASSOCIATION'S REPLY**

In response to the District's procedural arguments, the Association asserts that the grievance was timely filed. The Association cites court and arbitral authority for the proposition that the purpose of the grievance procedure is to effectively resolve disputes so the work place is not disrupted. It also contends that undue legalisms based on narrow technical grounds should not thwart the process the parties agreed to resolve disputes and the

Association has not purposely ignored nor abused the contractual time limits. It argues that the grievance was filed to protect the integrity of the contract as to the deductible for retirees and was well within the time limits. It alleges that the District did not comply with the grievance procedure in that the Superintendent claimed the principal and grievance committee could not waive Step II. It notes that where both parties commit procedural irregularities, a decision on the merits should not be foreclosed. It also observes that the District raised this defense at the “final hour” and it is merely an attempt to avoid the obvious merits of the grievance. It objects to the District’s reference to a letter which was not admitted into the record. It states that the timeliness objection by the District is wholly without merit.

As to the District’s arguments regarding the merits, the Association maintains that the clear and unambiguous language was understood by the parties that the intent was retirees would receive the same benefit as current employees. It observes that the question of standing is not applicable to employees who have the right to retire early and expect the benefits the District has the legal and moral responsibility to honor by the contract language. The Association reiterates the arguments in its main brief that the language of Article XIII-B, C was to give the retirees the same benefits as the teachers including the same contributions regarding health and dental. It asserts that the clear and ambiguous language means the retirees will receive the \$50 deductible as that was the parties’ intent. It asks that the grievance be granted and the District be ordered to pay the deductible to retirees just as it does to active members of the teaching staff.

### **DISTRICT’S REPLY**

The District contends that the Association’s claim that the intent of the parties and the clear and ambiguous language is to provide retirees payment of the deductible, cannot be supported by the record. It insists that the District must prevail based on the Association’s witness’ testimony, past practice, and contract language. It refers to the testimony of Association witness Zeeb as to the intent of Article XIII-B, noting he refers to “benefit” and “benefits”, but the language does not address the level of benefits and says “contributions to . . . insurance.” It claims this is done by way of insurance payments, whereas the deductibles are not contributions to insurance. It argues the benefits referred to by Zeeb are insurance premium contributions and not a secondary payment to existing employees under a different article.

The District maintains that Article XIII-B, C clearly states the benefits to be provided to retirees. It argues that the word “contribution” is defined as the premiums paid to an insurance or pension plan and the term does not include separate deductible reimbursement plans. It notes that there is no dispute that the District has paid the premiums toward health and dental insurance and thus has not violated the contract.

The District reiterates its arguments that bargaining history supports its position that when the retiree language came in, it did not include reimbursement of the deductibles and the District has never paid it to retirees.

The District, contrary to the Association's claim, denies that it unilaterally changed the contract language when it failed to reimburse retirees for the \$50 deductible. It insists the contract does not require it to reimburse the \$50 deductible to retirees and the past practice supports this. It again states that the Association was aware of the non-reimbursement as early as 1997 and was clearly notified of it in August, 1998, and did not file until November 3, 1998. It maintains that it is the Association's responsibility to add language to clarify its position. It concludes that the Association did not prove that the District failed to include language identifying the intent of the parties with respect to benefits to be provided to retirees, and thus the grievance must be denied.

### DISCUSSION

The District has raised two procedural issues; standing and timeliness. As to standing, the District claims retirees are not parties to the collective bargaining agreement and citing *ROSETTO V. PABST BREWING CO.*, 128 F.3D 538 (7<sup>TH</sup> CIR., 1997) asserts there is no authorization to proceed on their behalf. The District's reliance on *ROSETTO*, supra, is misplaced. *ROSETTO* stands for the proposition that a Union has no duty to represent retirees, but retirees can make the Union their agent if they so choose. *ROTH V. CITY OF GLENDALE*, 224 WIS.2D 800 (CtApp, 1999). A review of the grievance filed on November 3, 1998, does not list a retiree as the grievant, but is generic in that it was filed by the grievance committee on behalf of Association members (Jt. Ex.-2). The Association represents current employees who may retire during the term of the contract and as such may raise the issue as to their early retirement benefits under the collective bargaining agreement. Certainly, present employees covered by the collective bargaining agreement have the right to challenge the District's interpretation of the benefits they will receive upon retirement particularly where the retirement occurs during the term of the contract. Thus, the Association has standing on behalf of employees to proceed on the grievance. The issue of a remedy for retirees who retired some years ago may be defended on the basis of a lack of standing, however, issues of standing as to the remedy applicable to certain individuals does not mean that the Association lacks standing to prosecute the grievance. Therefore, the defense of lack of standing does not preclude a decision on the merits.

As to the District's assertion of untimeliness, it suffers the same infirmity as the standing defense. The issue presented involves an alleged continuing violation of the agreement which is that whenever a teacher retires, the issue is again raised as to reimbursement for the \$50 deductible. A grievance over a continuing violation may be filed at anytime and any lack of timeliness would go to the remedy, which may be prospective rather than retroactive. Thus, the defense of timeliness cannot defeat a decision on the merits but may be invoked should a remedy be directed.

Turning to the merits, the Association claims the language of Article XIII-B, C is clear and unambiguous and the intent was established from the testimony of Mr. Zeeb, which was as follows:

By Ms. Nelson

Q What was the intent of the language?

A This was negotiated at the time as a benefit to the retirees. And what we did at that time is we asked that the board consider the retirees as if they were active members of the union in such respect as insurance benefits. As we said that we would like to have language that would give the retiree the same medical and dental benefits as the active employees. So when it says here—so this is how we—the wording that we came up with is what’s in this language where it says the same contributions to health and dental insurance to retired people as it does to active members.

And we referenced that back to—we reference it back to the other article which had to do with insurance. In our most recent contract it was under Article XI here, section B, because when it says that the health and – the contributions to health and dental insurance to retirees should be the same as to active members, the active members receive this benefit under Article XI, section B which says “The board shall provide, without cost to the employee, health care protection including hospital-surgical and \$50 deductible major insurance.”

Mr. Zeeb’s testimony refers to a benefit to retirees and insurance benefits. The word “benefits” does not appear in Article XIII-B, C. The word “contributions” is used and requires the District to make the same contributions to health and dental insurance to retirees as to active employees. The term “benefits” can have several meanings. For example, with each insurance, health or dental, there is usually a schedule of benefits that the insurance provides. It is possible that retirees could have a different schedule of benefits under one insurance policy and active employees under another. Additionally, the prior agreement did not provide for the District to pay for insurance for retirees. An agreement that the District would pay for insurance would obviously be a benefit to retirees. Thus, benefit and benefits can have more than one meaning. Benefits could be equated with contributions as asserted by Mr. Zeeb and could include the \$50 deductible; however, the word “contributions”, which was used in lieu of benefits, can also have more than one plausible meaning.

The District uses the dictionary definition of contribution and asserts that it means premiums only. It argues that the clear and unambiguous language means premiums. Furthermore, the District has a ten (10) year past practice of not making deductible reimbursements to retirees. This evidence indicates another plausible meaning for “contributions”.

The undersigned finds that the word “contributions” used in Article XIII-B, C is not clear, rather it is ambiguous. It is susceptible to two separate meanings. To determine the meaning of ambiguous terms, reference may be made to bargaining history, past practice, the normal usage of the term, the context in which it is used or even the dictionary. Some of these may favor the Association and others the District, so these aids are not deemed to be definitive in this case.

The parties have used the term “contribution(s)” in both Articles XI and XIII-B, C with reference to insurance. In each of the last two sentences of Article XI, the term “contribution” appears as follows:

The 1993-94 school year will be the base year to establish a dollar amount for the 1994-95 teacher insurance contribution. The teacher contribution will be based on the formula: 50% of the increase over 15% from the 1993-94 to the 1994-95 school year.

The first sentence states that the 93-94 school year will establish the base dollar amount for the 1994-95 teacher insurance contribution. Clearly, the term “contribution” here refers to the premium paid. The second sentence states that the 1994-95 teacher contribution will be based on 50% of the increase over 15% above the base amount established in 93-94. If the insurance had gone up 21%, the District would have absorbed 18% and employees would pay 3%. Again, the parties are agreeing to the respective premium contributions toward the insurance. They cannot be referring to the \$50 deductible because it would not increase. Thus, it is concluded that “contribution” refers to premiums. In Article XIII-B, C, it states that the District shall make the same contributions to health and dental insurance as it does to active members of the teaching staff. The record fails to establish that the parties intended the word “contribution” to have a different meaning or connotation than that used in Article XI and thus, it means contribution towards premiums only. Had the parties intended to pick up the \$50 deductible, they could have easily said so in Article XIII or adopted Article XI by reference and included premium payments including the payment of the deductible. They did not. Inasmuch as the language of Article XIII-B, C only refers to contributions which by reference to Article XI means the premiums required of the District, the District had no obligation to pay the \$50 deductible to retirees.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following:

### AWARD

The grievance is arbitrable. The District did not violate the parties’ collective bargaining agreement when it refused to reimburse the second \$50 deductible to retired teachers, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 23rd day of July 1999.

Lionel L. Crowley /s/

---

Lionel L. Crowley, Arbitrator