

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHERN EDUCATIONAL SUPPORT TEAM

and

MERCER SCHOOL DISTRICT

Case 28
No. 58153
MA-10856

(Ruth Levenson Grievance)

Appearances:

Mr. Gene Degner, Executive Director, and **Mr. Steve Smith**, Northern Tier UniServ-Central, on behalf of the Northern Educational Support Team and Ruth Levenson.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Ms. Kathryn J. Prenn**, on behalf of the Mercer School District.

ARBITRATION AWARD

The Northern Educational Support Team, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant disputes between the Union and the Mercer School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the requests and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on January 6, 2000, in Mercer, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by February 9, 2000. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The District has raised the following procedural issue:

Is the grievance timely?

The parties stipulated at hearing to the statement of the substantive issues as follows:

If so, did the District violate the collective bargaining agreement when it rejected the grievant's request for an early retirement package? If so, what is the appropriate remedy?

(While the Union stated the issues somewhat differently in its brief, there was not a substantive difference.)

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE IV – NEGOTIATIONS PROCEDURES

...

C. This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties.

ARTICLE V- EMPLOYE RIGHTS

...

C. All rules and regulations governing the employe shall be interpreted and applied uniformly throughout the School District of Mercer.

ARTICLE VI – GRIEVANCE PROCEDURE

A. **DEFINITION:** The purpose of this procedure is to provide an orderly method of resolving differences during the term of this agreement. The "grievance" shall mean a complaint by an employe in the bargaining unit that there has been a violation in some aspect of the collective bargaining agreement or other condition of employment. "Days" are defined as district business days.

B. Grievances shall be processed in accordance with the following procedures:

1. Step 1:

- a. An earnest effort shall first be made to settle the matter informally between the employe and his/her supervisor.
- b. If the matter is not resolved, the grievance shall be presented in writing by the employe to the District Administrator within ten (10) days after the facts upon which the grievance is based first occurred. The District Administrator shall respond in writing within ten (10) days of the time the grievance was presented in writing.

2. Step 2:

- a. If not settled in Step 1, the grievance may, within ten (10) working days, be appealed to the School Board. The Board shall give a written answer within thirty (30) working days after receipt of the appeal. The written grievance shall give a clear and concise statement of the alleged grievance including the facts upon which the grievance is based, the issue involved, and the relief sought.

3. Step 3: If the employe is not satisfied with the School Board's disposition of the grievance, the employe or the Union's representative may proceed to arbitration in compliance with the following steps:

- a. Written notice of a request for arbitration shall be given to the School Board within twenty (20) days of receipt of the School Board's written disposition of the grievance.
- b. Grievances involving the same act or same issue may be considered in one proceeding provided the grievances have been processed through the grievance procedure by the time the arbitration hearing is held.

- c. The arbitrator shall meet with the representatives of both parties, hear evidence, and give an opinion.
- d. The arbitrator shall not have the power to subtract from, modify, or amend any terms of this agreement. The findings of the arbitrator shall be binding on both parties.

...

ARTICLE XX – FRINGE BENEFITS

- I. Retirement. Starting January 1, 1990, the School District of Mercer shall contribute 100 percent of the required contribution on total compensation on behalf of each eligible employe, in addition to the employer required contribution. Such entry into WRS shall not include prior service credit.

After fifteen (15) years of service to the Mercer District, employes retiring shall be allowed to continue group health insurance at their own expense by making timely payments on the premium.

BACKGROUND

The Grievant, Ruth Levenson, is employed by the District as a Library Aide. The Grievant has been employed by the District for 25 years. In June of 1999, the Grievant, wishing to retire, through the Union requested that she be given a “retirement package” from the District upon her retirement in the form of paid health insurance. Union President Bill Flesch made the request verbally to District Administrator Jack English in June. English took the request to the District’s Board of Education. The Board rejected the request and English so informed Flesch.

By letter of July 15, 1999 to the Board President, the Union’s representative, Gene Degner, indicated that the Grievant would be willing to retire prior to the 1999-2000 school year if the Board would offer her two years of paid family medical insurance. On July 19, 1999, English faxed Degner the following response:

7/19/99

Mr. Degner –

As I had told Bill, I did put the item on our June agenda and discussed the matter. The Board has no desire to consider offering a retirement package to Ruth.

Dr. Nehring is on vacation until 7/24 or 5.

J. English /s/

English, who has been the District Administrator for approximately 9½ years, testified that since he has been in the District, every teacher of retirement age who has retired from the District has received some type of retirement package that was negotiated through the teacher's bargaining representative (Association) on an individual and non-precedential basis. He further testified that no support staff has received any retirement package upon retiring from the District, although one such individual had made such a request in 1991 and the request had been denied. Neither the collective bargaining agreement covering the support staff, nor the agreement covering the District's teaching staff, contain a retirement benefit provision providing for paid health insurance after retirement.

The Grievant did not retire and a written grievance was filed on September 15, 1999 on her behalf alleging that the District is violating the Grievant's rights under Article V, Employee Rights, of the parties' Agreement. The grievance was denied both as untimely and on the merits. The grievance was processed through the grievance procedure and the parties arbitrated their dispute before the undersigned.

POSITIONS OF THE PARTIES

Union

With regard to the issue of timeliness, the Union asserts that this is a continuing violation as the Grievant has not yet retired and therefore continues to incur harm from the Board's decision not to grant her a retirement package. This is supported by arbitral authority that where a party announces an intention to do a certain act, but does not carry out the act until a later date, it is the date the act occurred that gives rise to the grievance. Further, Article VI, Grievance Procedure, does not indicate that a grievance is to be considered dropped if it is not appealed in a timely manner. Absent such a provision or evidence the parties intended such a result, the right to process the grievance to the next level should not be considered forfeited.

As to the substantive issue, the Union acknowledges that its position in this case hinges upon the interpretation of the language of Article V, Section C, of the Agreement, "All rules and regulations governing the employe shall be interpreted and applied uniformly throughout the School District of Mercer." *Black's Law Dictionary*, Fifth Ed. (1979), defines a "rule" as, "an established standard, guide, or regulation." It defines a "standard" to be "stability, general recognition, and conformity to established practice." Thus, a "rule" may be an unwritten standard that is grounded in custom and past practice by the District. The question then is whether the granting of an extension of health benefits upon retirement constitutes an unwritten rule or standard in the District. The record discloses the District has had such a policy since at least 1989. General recognition implies factual application which has been well documented in this case. Conformity to established practice implies that the practice (providing employes with an early retirement package) is an action in accord with custom, which has been established in this case.

The record establishes that since 1989, every teacher who has left the District by retirement or encouragement from the District, has received an "exit agreement" containing health insurance or a cash option. While only one support staff has retired since 1989, and that person's request for extended health insurance benefits was denied, it cannot be persuasively argued that the District has such a policy limited only to teachers, as that would be inconsistent with Article V, paragraph C. That is, unless the term "employe" as used in that provision, is construed to mean only employes in this bargaining unit. However, that term is ambiguous in its meaning in Article V, Section C. There are two bargaining units in the District, this unit-support staff, and the teachers' bargaining unit, as well as unrepresented employes. A review of the bargaining agreements covering the two bargaining units shows that the District utilizes specific language when referring to bargaining unit employes as opposed to all District employes. Given the evidenced ability to differentiate an "employe" from an employe covered by a specific collective bargaining agreement, and applying the converse of the rule "to express one thing implies the exclusion of others", it can be argued that the language "All rules and regulations governing the employe. . .", could be defined as standards applying to all employes of the District. The final wording of Article V, Section C, "throughout the School District of Mercer", permits the District to cross unit contracts in allowing uniformity in its practices.

The Union concludes that the granting of an extension of health benefits upon retirement constitutes an unwritten rule or standard in the District and that Article V, Section C, requires its uniform application throughout the District. Had the District wanted this policy to apply to teachers alone, it could have allowed language regarding the benefit to be included in their collective bargaining agreement. However, as English's testimony described, it is the District's stated preference regarding this unwritten policy to reserve the right to negotiate or grant these packages on a case-by-case basis, thus demonstrating the District is acting capriciously. The differences in the exit agreements themselves, demonstrates their arbitrary nature.

A review of the contractual benefit packages for the two bargaining units reveals that there are many similarities, including the absence of an early retirement provision in both agreements. By a silent policy, however, the Board provides the benefit to one unit (teachers) and denies it to the other (support staff). *Black's Law Dictionary* defines "discrimination" as, "the effect of an established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found." Here, the "large number of persons. . ." are the employees of the District. The "effect of an established practice which confers particular privileges on a class arbitrarily selected. . ." fits the granting of the privilege of extended health benefits upon retirement to teaching staff while denying same to support staff.

While the Arbitrator is restricted from modifying or amending the terms of the Agreement, sustaining this grievance only establishes that the practice of providing extended health benefits upon retirement is indeed a rule, and only requires that the District treat all of its employees uniformly in its application of rules and regulations. The Union requests that the Grievant be provided with retirement benefits equivalent to two years of family health and dental insurance as a remedy.

District

The District first takes the position that this grievance is untimely. Step 1 of the grievance procedure requires that the grievance be filed in writing with the District Administrator within 10 days after the facts upon which the grievance is based first occurred. Union President Flesch testified that English verbally advised him in June of 1999 that the Grievant's request for early retirement health insurance benefits was denied. That event triggered the 10 days under Step 1, but no grievance was filed. Moreover, on July 19, 1999, English faxed Degner a message in response to his written request on behalf of the Grievant stating, in part, "The Board has no desire to consider offering a retirement package to Ruth." Assuming *arguendo*, that the verbal denial in June did not trigger the 10 day time limit, certainly the written denial in July should have done so. The written grievance was not filed until September 15, 1999, well after the 10 days had run. The grievance procedure states that its purpose is to "provide an orderly method of resolving grievances" arising during the term of the Agreement. It is the rules the parties have agreed to follow in processing grievances. Here, the Union twice failed to follow those rules and offered no evidence in mitigation of that failure. Thus, the grievance should be dismissed as untimely.

With regard to the substantive issue, the District notes the Union relies upon the wording of Article V, Section C. It asserts that the Union's conclusion that the provision requires that the Grievant should have the same right to benefits other District employees have received upon retirement, ignores the fact that a "rule" or "regulation" is not a "benefit".

Black's Law Dictionary, Fifth Ed. (1979) defines "regulation" as, "a rule or order prescribed for management or government. . . A rule or order prescribed by superior or competent authority relating to action of those under its control." A "rule" is defined as "an established standard, guide or regulation. A principle or regulation set up by authority, prescribing action or forbearance. . . ." On the other hand, a "benefit" is defined as, "Financial assistance received in time of sickness, disability, unemployment, etc. either from insurance or from public programs such as social security." Thus, a rule or regulation is not a "benefit." Further, English's unrefuted testimony was that the District has no rule, regulation or policy which would provide the retirement benefits sought by the Grievant.

The parties' bargaining history also supports the District's position. Over the years, the Union has successfully negotiated several fringe benefits into the parties' Agreement, including the right of employees to continue in the District's group health insurance at their own expense after retirement, provided they had at least 15 years of service to the District. In negotiations for a 1991-93 agreement, the Union unsuccessfully sought to add a provision for conversion of unused sick leave to cash or credit towards health insurance upon retirement. The Union has made no further attempts to negotiate such a benefit.

The collective bargaining agreement covering the District's teachers also does not contain any provision for paid health insurance after retirement. Even if it did, negotiated benefits in one bargaining unit do not cross over to employees in another bargaining unit. The support staff employees would not be entitled to such a benefit unless they secure it at the bargaining table.

There is no past practice that supports the Union's position. While the Union produced several agreements reached between the District, individual teachers who were retiring, and the teachers' association, each of those agreements contained the statement that the agreement and its content would not have any precedential value with regard to bargaining or contract administration between the parties. English testified that the Board has guarded its right to treat each request on a case-by-case basis and would not have entered into those agreements without the express non-precedential language. The two agreements produced that did not contain such a provision involved teachers who were not retiring, but who were being asked by the District to leave. One of those teachers was not of retirement age and neither received five years of paid health insurance. Thus, none of those agreements support the Union's claim. Further, English's unrefuted testimony was that no support staff employee has ever been granted paid retirement health insurance benefits. The last time the Union made such an attempt was in 1991 when it unsuccessfully requested such a benefit for the retiring Head Cook. The Board refused to even consider such a request unless the Union verified that such a request would be non-precedential. The Union provided written assurance in that regard and the Board considered the request and ultimately denied it. The Union did not grieve the denial. Thus, the clear practice in the District is that the District has not provided paid retirement health insurance benefits to its support staff employees.

Lastly, the District asserts that the Arbitrator lacks authority to modify the parties' Agreement. Article IV, Section C, of the Agreement provides that the Agreement cannot be modified in whole or in part except by written agreement of the parties. There is no such document that would amend the Agreement to provide the benefit sought. Article VI, Section B(3)(d), provides that the Arbitrator shall not have the power to subtract from, modify, or otherwise amend the terms of the Agreement. To grant this grievance would do exactly that and therefore would violate that provision of the Agreement.

The District requests that the grievance be denied.

DISCUSSION

The parties' contractual grievance procedure states that the grievance shall be presented in writing within 10 days after the facts upon which the grievance is based first occurred. However, as the Union notes, the grievance procedure does not state what is to happen to the grievance if the 10 day time limit is not met, nor is there evidence in the record as to the parties' intent and practice in that regard. It is not necessary to resolve that question in this case, however, as the violation alleged continues as long as Levenson remains employed in the District and the District continues to refuse to offer her the retirement benefit being claimed.

The grievance being deemed to be properly before the Arbitrator, it is necessary to address the substantive issue. In that regard, it must be noted that an arbitrator's role is confined to interpreting the parties' labor agreement in order to determine their rights and obligations under that instrument. In this case, the Union is asserting that Article V, Section C, of the parties' Agreement requires the District to provide the Grievant with certain retirement benefits (the equivalent of two years of paid family health and dental insurance) not otherwise provided for in the Agreement, because it has in the past provided a similar benefit to employees in another bargaining unit of District employees (teachers). The provision in question states as follows:

“All rules and regulations governing the employe shall be interpreted and applied uniformly throughout the School District of Mercer.”

The Union essentially asserts that the terms “rules and regulations” can reasonably be interpreted to include the retirement benefit teachers have received. Arbitrators generally give words their “ordinary and popularly accepted meaning” absent evidence the parties intended them to be used in a different sense. Elkouri and Elkouri, *How Arbitration Works*, Fifth Ed., at p. 488. The “ordinary” meaning of a word is as defined by a reliable dictionary. *Id.*, at p. 490-491. In this case, both the Union and the District cite dictionary definitions to support their positions, albeit the Union resorts to definitions of a term (stability) used to define a term (standard) used to define the term “rule”, in order to arrive at its argued-for result. While one

might think he/she knows what the parties meant by the wording of Article V, Section C, the ability of both parties to cite dictionary definitions of the term “rule” in support of their respective positions demonstrates the ambiguity in the term. No evidence was presented, however, that would demonstrate that the parties have interpreted “rules” or “regulations” to include economic benefits. The evidence of what has occurred in the past with respect to the teachers would seem to cut against such an interpretation, as in the one instance that the issue of treating the support staff the same as teachers in this regard was raised in the past, the Board rejected that claim and the matter was dropped and has not been raised since until this case.

The difficulty with the Union’s position is further demonstrated by the difficulty in identifying what it is the District would be required to provide if the Union’s interpretation is accepted. The retirement packages negotiated between the District and the Association varied in terms of the time span covered, dollar value, and whether paid health insurance premiums or cash payments, or both, were included. In this case, the Union seeks the equivalent of two years’ paid family health and dental insurance for the Grievant upon her retirement, but that is a request or proposal the Union made on her behalf. That request is not the equivalent of what was negotiated in any of the retirement packages the District and the Association negotiated with respect to individual teachers that retired. There is simply no basis in the record for arriving at the figures sought on the Grievant’s behalf.

In conclusion, despite its efforts, the Union has been unable to establish that Article V, Section C, of the parties’ Agreement requires the District to provide retiring support staff employees with extra-contractual benefits similar to what the District and its teachers bargaining representative negotiated on an individual basis for individual teachers that retired from the District. Therefore, it is concluded that the District did not violate the parties’ Agreement when it rejected the Grievant’s request for an “early retirement package.”

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 14th day of April, 2000.

David E. Shaw /s/

David E. Shaw, Arbitrator

