BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MANAWA EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF MANAWA

Case 18
No. 60124
MA-11527

Appearances:

Mr. James Conlon, Esq., UniServ Director, Central Wisconsin UniServ Council, Unit #5, appearing on behalf of the Association.

Mr. Tony Renning, Attorney, Davis & Kuelthau, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Association and the District, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on October 18, 2001 in Manawa, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on February 27, 2002. Based on the entire record, the undersigned issues the following Award.

ISSUE

At the hearing, the parties agreed to the following substantive issue:

Did the District violate the collective bargaining agreement when it prorated the benefit packages of Debra Nelson and Doug Wilke? If so, what is the appropriate remedy?

In addition to the substantive issue just noted, the District also raised the following procedural arbitrability issue:

Was the grievance timely filed?

This threshold issue will be addressed first.

PERTINENT CONTRACT PROVISIONS

The parties' 1999-2001 collective bargaining agreement contained the following pertinent provisions:

GRIEVANCE PROCEDURE

. . .

2. Purpose

. . .

b. The grievant must process the grievance according to the prescribed time limits or the grievance is considered waived.

3. Procedure

a. Step One: The grievant shall file the written grievance with the building principal or immediate supervisor. The written grievance shall include the facts upon which the grievance is based, the issues involved, the agreement language alleged to be violated and the relief sought. The grievance must also be signed and dated by the grievant. An objective of this first step is to arrive at a resolution of the dispute in an informal, reasonable manner. The grievant may meet with the building principal or immediate supervisor informally to resolve the dispute, but such informal meetings shall not be construed to be a waiver of the time limit for filing the written grievance. Step One shall be initiated no later than five (5) workdays after the occurrence of the events giving rise to the grievance, but not in excess of twenty (20) calendar days of the occurrence of the action upon which the grievance is based. The principal or immediate

supervisor shall respond to the grievance in writing within seven (7) workdays.

. . .

COMPENSATION

5. Health and Dental Insurance: The District will pay a dollar amount at a similar percentage as family coverage for single plan monthly premium of health and dental, and long term care insurance, and up to a maximum of $707.40 (for the 1999-2000 school year) and $????? (for 2000-2001) for family plan monthly premium of health and dental, and long term care insurance on Employee Group Health and Dental Insurance. Those employees covered by their spouses health plan may take the TSA Option which is equivalent to the single health premium paid the District. ($272.00 per month for 1999-2000; $????? per month for 2000-2001). In changing insurance, the District agrees to obtain coverage, benefits and service which is substantially equivalent in the aggregate to existing plans. The employer shall notify the Union a minimum of ninety (90) days in advance of anticipated change of carrier if possible and a copy of the policy being considered shall be provided to the Union for its review. The amount exceeding the above figures will be a bimonthly payroll deduction.

. . .

ABSENCE WITH PAY

1. Ten (10) days sick leave shall be granted each year. The ten (10) days sick leave will be banked at the beginning of each teaching year, but will be earned at one day per month (Aug. – May). Upon termination of employment, sick days used but not earned will be deducted from the last check. Part-time contracts will be prorated. . .

BACKGROUND

The District operates a public school system in Manawa, Wisconsin. The Association is the exclusive collective bargaining representative for the District's certified teaching personnel.

The Association and the District have been parties to a series of collective bargaining agreements which govern the wages, hours and working conditions of the District's teachers. The agreement pertinent to this case is the 1999-2001 agreement.

That agreement contains a provision dealing with health and dental insurance. That provision has been in the contract for many years and has not been substantively modified in negotiations except for changes made to the dollar amounts listed therein and the reference to the contract's duration.

This case deals with the prorating of health and dental benefits for two part-time teachers. The teachers involved in this case were involuntarily reduced from full-time to part-time. This was the first time that happened in the District.

Aside from the two teachers involved here, the District has employed six other teachers on a part-time basis. Four of them were hired prior to the 1999-2000 school year, and two of them were hired subsequent to that. The identity of those six teachers, and their level of insurance benefits, is referenced below.

Judy O'Connell was hired as a part-time teacher in 1978. She worked in that capacity (i.e. on a part-time basis) until 1989. In 1989, she became a full-time teacher. She subsequently worked in that capacity (i.e. on a full-time basis) until 2001 when she retired from the District. It is unclear from the record whether her insurance benefits were prorated during the period between 1978 and 1988. In the 1988-89 school year though, the District did not prorate her health and dental benefits, but instead paid for 100% of same. Thus, that year, she received full health and dental benefits even though she was a part-time employee.

Delores Ferg was once employed by the District as a part-time teacher. It is unclear from the record when she started working for the District, but her last year of employment with the District was in the 1989-90 school year. In that year, the District did not prorate her health and dental benefits, but instead paid for 100% of same. Thus, that year, she received full health and dental benefits even though she was a part-time employee.

Patricia Reckrey was hired as a part-time teacher in 1989. She worked in that capacity (i.e. on a part-time basis) from 1989 until 2000, when she retired from the District. During that entire time period, the District did not prorate her health and dental benefits, but instead paid for 100% of same. Thus, she received full health and dental benefits for over a decade even though she was a part-time employee.

Thomas Burns was hired as a part-time teacher in 1992 and worked in that capacity for about a year and a half. During that time period, he did not receive any health and dental benefits from the District. Instead, he received his insurance benefits from the other school district that jointly employed him.

Sondra Reynolds was hired as a "50% EEN Teacher" for the 1999-2000 school year. During that year, she did not receive any health and dental insurance benefits from the District, nor did she participate in the District's tax-sheltered annuity plan. No grievance was filed contending that she was entitled to full benefits.

Jared Dalberg was hired as a "75% Time Health Teacher" for the 2000-2001 school year. The District prorated his health and dental insurance benefits for that year. Thus, it paid for 75% of his health and dental benefits and he paid the remainder. In the Spring of 2001, Dalberg filed a grievance contending that he was entitled to full-time benefits. The District denied the grievance. While the grievance was being processed, Dalberg was told by management that he was going to get a full-time position for the next school year with full insurance benefits. Dalberg subsequently dropped his grievance.

The District never told the Association at the time that it was prorating the insurance benefits of Reynolds and Dalberg.

FACTS

Prior to the 2001-2002 school year, Debra Nelson was employed by the District as a full-time teacher in the Family, Consumer Science and Art Departments at Manawa Middle School. Prior to the 2001-2002 school year, Doug Wilke was employed by the District as a full-time teacher in the Agriculture Department at Little Wolf High School.

On January 25, 2001, then-District Administrator Stephen Schiell met with Nelson and informed her that her teaching contract for the next school year (2001-2002) was going to be reduced from 100% to 50% as a result of declining enrollment. On January 26, 2001, Schiell met with Wilke and informed him that his teaching contract for the next school year (2001-2002) was also going to be reduced from 100% to 50% as a result of declining enrollment.

On January 30, 2001, Nelson and Wilke received written notification of this action from the district administrator. The documents which they received were almost identical. Nelson's document provided in pertinent part:

> This preliminary notice of reduction in force is being presented to you to notify you as a follow-up to the conversation that I had with you on January 25, 2001 regarding the need to reduce your teacher contract for the 2001-2002 school year to 50%.

This reduction to 50% means that all benefits will be reduced to 50%. . .

On February 19, 2001, the Board of Education officially approved this action. On February 22, 2001, Nelson and Wilke were given written notification of same. The documents which they received were almost identical. Nelson's document provided thus:

> This final notice of reduction in force is to notify you that on Monday, February 19, 2001 the Board of Education of Manawa took steps to officially reduce your contract to 50% for the 2001-2002 school year. This reduction means that all benefits will be reduced to 50% status.

On March 15, 2001, Nelson and Wilke were given their Individual Teaching Contracts for the 2001-2002 school year. Nelson's Individual Teaching Contract indicated that she was being hired at less than full-time as an art teacher and Wilke's Individual Teaching Contract indicated that he was being hired at less than full-time as an agriculture teacher. Both Nelson and Wilke signed and returned their Individual Teaching Contracts that same day.

On April 3, 2001, Nelson and Wilke initiated the instant grievance. As the grievance was being processed through the contractual grievance procedure, the District maintained it was untimely. When it raised this contention, the basis for same was that the grievance was not initiated within 20 calendar days of the occurrence on which it was based.

About the same time that the grievance was being processed, the parties commenced negotiations for a successor collective bargaining agreement. In bargaining, both sides made proposals pertaining to insurance benefits for part-time employees. The Association proposal was as follows:

> Proposal #4 Language to address reduction of positions; i.e., "full-time to less than full-time. Teachers with half-time or more would receive full benefits."

The District proposal was as follows:

> All benefits, health, dental, LTC, LTD, life and sick leave will be paid as percentage of the amount of individual's contract, i.e., a 50% teacher would receive 50% of the benefits that a full-time teacher receives.

Neither proposal had been adopted as of the date of the hearing.

POSITIONS OF THE PARTIES

Association

The Association initially argues that the District's timeliness contention is without merit. In its view, the grievance was filed in accordance with the 20 calendar day timeline which is contained in the grievance procedure. It contends that the District's reliance on the 5 work day timeline (which is also contained in the grievance procedure) is inapplicable in this particular case because the District itself used the 20 calendar day timeline when it responded to the grievance. Having initially used the 20 calendar day timeline, the Association believes the District is estopped from now using the 5 work day timeline. Building on that premise, the Association next maintains that the date for filing a grievance did not start to run on February 22, 2001 (the date which the District relies on), but rather on March 15, 2001. That was the date Nelson and Wilke were presented and signed their teaching contracts for the 2001-02 school year. Using that date (March 15) for the start of the 20 calendar day timeline, the Association avers that the grievance filed April 3, 2001 was timely filed because that date (April 3) was 19 calendar days later. The Association argues in the alternative that since the actual reduction in benefits for the two grievants did not occur until the start of the 2001-02 school year, a grievance filed months before that happened must be timely. In sum, the Association believes this grievance was timely filed, and therefore is properly before the arbitrator for a decision on the merits.

With regard to the merits, the Association contends that the District violated the collective bargaining agreement when it reduced the grievants' insurance benefits from 100% to 50%. According to the Association, the grievants should have continued to receive full insurance benefits (as they previously did). It makes the following arguments to support this contention.

First, the Association relies on the language contained in #5 in the Compensation section of the collective bargaining agreement. In the Association's view, that provision specifies, in clear and unambiguous language, that the District will pay the full premium for insurance for employees covered by the agreement. As the Association sees it, this language says nothing about prorating benefits for part-time employees. That being so, the Association avers that this language does not allow the District to pay a reduced premium based on whether the employee is full-time or part-time. To support this premise, the Association calls attention to the fact that that section indicates that the District will pay a dollar amount (which is equivalent to 100% of the insurance premium), but does not differentiate between part-time and full-time. The Association asserts that, with one exception, the District does not apply other sections of the agreement differently because an employee is full-time or part-time. The one exception deals with sick days wherein the contract language specifically gives the District the right to prorate sick days for part-time teachers. The Association again calls the

arbitrator's attention to the fact that nothing is said in the insurance language about prorating insurance benefits for part-time teachers. Building on that notion, the Association asks rhetorically why the District should be allowed to apply the health insurance provision differently to part-time and full-time employees. The Association asks the arbitrator to give the insurance language its intended meaning (i.e. that there be no prorating of insurance benefits), and not legislate a new meaning which the parties did not intend. It argues that the District's proposed interpretation of that provision (i.e. that the District can pro-rate insurance benefits for part-time employees) is not supported by the language itself.

Second, the Association argues in the alternative that if the arbitrator finds that the contract language is not clear and unambiguous, and therefore needs clarification, then he can look to the parties' past practice for guidance in deciding this case. As the Association sees it, the parties' past practice supports its position here. To support this premise, it notes that prior to the 2000-2001 school year, there were just four teachers who worked part-time, and three of them (O'Connell, Ferg and Reckrey) received full insurance benefits. The fourth (Burns), received his insurance benefits through another school district where he was also employed. According to the Association, the three instances involving O'Connell, Ferg and Reckrey (wherein they were paid full benefits while they were part-time) created a practice that part-time teachers received full benefits. The Association maintains this was the way it was done for 20 years.

Building on the premise that a practice exists, the Association avers that this practice is binding on the District. It asserts that in this instance, the District did not follow the practice and should have. It seeks to have the arbitrator enforce the practice.

The Association argues that this practice should not be overturned just because the District treated its two most recent part-time teachers differently. It acknowledges that those two teachers, Dalberg and Reynolds, had their insurance benefits prorated by the District. The Association makes the following arguments to distinguish their situation from what had happened previously. First, it asserts that the District did not tell the Association it was prorating the insurance benefits of those two teachers, and therefore the Association did not know about it until the instant grievance arose and the Association was doing research for same. Thus, it maintains that it was not aware of their reduced insurance benefits until the instant grievance arose. Second, it argues that the district administrator who did that (i.e. prorate their benefits) was a new administrator who was either not aware of the practice or simply chose to ignore it. Third, the Association notes that Dalberg replaced Reckrey. The Association asserts that since Reckrey had been getting full-time benefits as a part-time employee for over a decade, it assumed this would continue when Dalberg was hired as her part-time replacement. Fourth, the Association avers that a reason Dalberg dropped his grievance challenging his prorated insurance benefits was that he had been told by management

that he was going to get a full-time position for the next year with full insurance benefits. In the Association's view, it is not surprising that a probationary employee would not rock the boat under these circumstances.

Finally, the Association responds to the District's contention that the Association is trying to gain through arbitration what it could not gain through bargaining. It disputes that assertion. As the Association sees it, it has already bargained contract language that provides for fully-paid insurance benefits for all district teachers. Be that as it may, it acknowledges that it made a proposal in bargaining which dealt with the proration matter, but it notes that the District did too.

In sum, the Association claims that prorating the insurance benefits for part-time teachers conflicts with the existing contract language and the parties' past practice. That being so, the Association believes that the District violated the collective bargaining agreement when it prorated the grievants' insurance benefits. The Association therefore asks that the grievance be sustained.

District

The District initially argues that it is unnecessary for the arbitrator to address the merits of the grievance because it was not initiated within the prescribed time limits which are set forth in the contractual grievance procedure for filing grievances. Hence, the District avers that the grievance was untimely filed. According to the District, the event giving rise to the grievance was not the date that Nelson and Wilke received and signed their Individual Teaching Contracts for the next school year (i.e. March 15, 2001). It avers that using this date would be "contrary to the universally recognized interpretation of grievance clauses in labor agreements." Instead, the District maintains that the event giving rise to the grievance was the memorandum which Nelson and Wilke received on February 22, 2001 which gave them final notice that their teaching contracts and benefits were being reduced for the 2001-02 school year. Next, the District contends that the grievance should have been filed by 5 work days after February 22, 2001 which would have been by March 2, 2001. It claims that the 20 calendar day timetable (which the Association relies on) is irrelevant to this case because there is no prolonged period of time in which school was not in session during this time. Building on the premise that the grievance should have been filed by March 2, the District maintains that the grievance (which was actually filed April 3) was filed a month late. Next, the District calls the arbitrator's attention to the portion of the grievance procedure which provides that the failure to process a grievance in a timely manner results in the grievance being waived. The District maintains that this language is mandatory, not optional. It further asserts that the Association offered no evidence that the parties have not strictly applied the contractual time limits in the past. It submits that what the Association is essentially asking the arbitrator to do

here is to decide that the 5 work day deadline for filing a grievance is unreasonable and superfluous, and to rewrite the contract to cut the affected employees a little slack. The District asserts that is beyond the scope of the arbitrator's authority. The District therefore believes that the arbitrator has no option but to dismiss the grievance as untimely.

If the arbitrator finds otherwise, and addresses the substantive issue in dispute, it is the District's position that it has the authority to prorate the insurance benefits of those teachers teaching less than full-time to correspond to their less than full-time teaching status. Said another way, the District believes it has the authority to prorate the health and dental insurance benefits of part-time teachers. According to the District, the clear and unambiguous language in the collective bargaining agreement authorizes the District to do this. Specifically, the District relies on the phrase "**up to**" which is contained in #5. As the District sees it, the phrase "**up to**" provides the District with flexibility as to how much it will contribute towards the family plan monthly premium (and similarly the single plan monthly premium) for health and dental benefits. In other words, the District's contribution rate is stated as a variable rate to provide the District with flexibility depending on the circumstances. For example, during the 1999-2000 school year the District could contribute "**up to**" $707.40 per month towards the family plan monthly premium. The District submits that the payment it has to make corresponds with the amount of time teachers are actually teaching: if they teach full-time, the District pays the full amount; if they teach less than full time (i.e. they are part-time) the District pays a prorated amount. The District contends that notwithstanding the Association's assertion to the contrary, the contract language does not require the District to provide part-time teachers with full-time health and dental benefits.

The District asserts that the Association's bargaining proposal from the latest round of bargaining supports this interpretation. It notes that in bargaining, the Association proposed new contract language which specified that "teachers with half-time or more would receive full benefits." The District submits that the inference which should be drawn from this proposal is that the Association must believe that employees who are teaching less than full-time are currently not entitled to full-time benefits under the existing contract language. The District argues that if the arbitrator finds in favor of the Association, he would be giving the Association something through arbitration that they were not successful in obtaining through bargaining.

Next, if the arbitrator finds the insurance language to be ambiguous and unclear, and looks at what has happened in the past for guidance, the District avers that there has never been a past practice of providing individuals who teach less than full-time with full-time benefits. The District argues that the Association's contention to the contrary (i.e. that such a practice exists) was not established. It accuses the Association of attempting to mislead the arbitrator into believing that the District has a 20 year practice of providing part-time teachers

with full-time benefits. It avers that simply is not true. To support that contention, it characterizes what happened to O'Connell, Ferg and Reckrey (i.e. three part-time teachers who received full benefits) as "isolated and outdated instances." With regard to O'Connell and Ferg, the District claims that while those part-time teachers received full benefits in the late 1980's, this happened for just one year. In regard to Reckrey, it acknowledges that she also received full benefits (as a part-time teacher) in the 1989-90 school year, but it characterizes the evidence beyond that time frame as "conflicting". In the District's view, there is no "reliable evidence" of her getting full benefits for part-time work for any other school year. The District therefore urges the arbitrator to find that no binding past practice has been established.

If the arbitrator finds otherwise (i.e. that a binding past practice has been established), the District argues that the practice should not be broader than its underlying circumstances. It notes that those three part-time teachers who received full benefits were all hired as part-time teachers. Here, though, the two affected employees were full-time employees who were reduced to part-time status. According to the District, that distinction is important. As the District sees it, what the Association is attempting to do here is extend the (alleged) practice from one situation to a different situation with different circumstances. The District argues that the arbitrator should not allow that to happen.

The District's last argument on the past practice matter is that any practice should certainly be mitigated or diminished by the fact that the District prorated benefits for its two most recent part-time teachers: Dalberg and Reynolds. The District notes that Dalberg grieved this prorating, but Reynolds did not. The District further notes that Dalberg's grievance was subsequently dropped. As the District sees it, this action, plus the fact that no grievance was filed for Reynolds, should be interpreted as Association acquiescence to the District's authority to prorate benefits for part-time teachers.

Finally, the District makes an equity argument. In its view, equity does not support the Association's position that part-time employees should receive the same fringe benefits as full-time employees who work many more hours. It argues that what the Association is asking for (i.e. to give part-time teachers full benefits) is simply unfair to full-time teachers.

In sum, the District believes that the Association has not established a contract violation. It therefore asks that the grievance be denied.

DISCUSSION

Timeliness

Since the District contends the grievance was untimely filed, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance was timely filed.

I find that it was timely filed. My rationale follows.

Most contractual grievance procedures contain a timeline for filing grievances. Normally, there is just a single timeline for filing grievances. In this contract, though, two such timelines are established for filing grievances. One specifies that for a grievance to be timely, it needs to be filed within 5 work days "after the occurrence of the events giving rise to the grievance." The other one specifies that in order for a grievance to be timely, it needs to be filed within 20 calendar days "of the occurrence of the action upon which the grievance is based."

Since the contract contains two different timetables for filing grievances, one would expect that the contract would then go on to specify which timetable applies to which set of circumstances. It does not; it is silent on same. Additionally, there is nothing in the record which indicates how the parties have applied these timetables previously. That being so, the assumption made by the undersigned is that the parties are free to pick whichever timetable they want to use. Thus, either timetable can be applied to any grievance that is filed.

The parties must have known that by agreeing to two different timetables for filing grievances, that at some point one side would inevitably rely on one timetable while the other side relied on the other. In other words, a grievance would arise where each side relied on a different timetable because it was to their tactical advantage to do so in a procedural arbitrability situation. Obviously, that is what happened here.

In litigating this case, the parties essentially invited me to opine on which timetable applies under which set of circumstances. I decline to do so. Instead, I leave it to the parties to make that determination themselves. My rationale for doing so will become apparent in the discussion which follows.

As previously noted, when the District responded to the grievance and raised its timeliness defense, it could have relied on either of the aforementioned timelines. It initially chose the 20 calendar-day timeline. At the hearing though, the District changed positions and instead relied on the 5 work day timeline. Not surprisingly, the Association objects to this

switch by the District. The Association argues that having initially used the 20 calendar day timeline, the District is estopped from now using the 5 work day timeline. I agree. Arbitrators often hold that parties are stuck with the consequences of their earlier decisions. For example, when an employer disciplines an employee for misconduct, arbitrators usually hold that the employer is bound to the reasons it gave for the discipline at the time it was imposed, and cannot add new reasons for same at the arbitration hearing. Simply put, it is stuck with what it said earlier. That basic notion applies here. Having chosen at the outset to ride the 20 calendar day horse, so to speak, the District had to stay on that one for the duration and not change horses. Therefore, given the District's initial reliance on the 20 calendar day timeline, that is the timeline which will be applied here. The 5 work day timeline (which the District now relies on) is inapplicable here due to the District's initial selection and use of the 20 calendar day timeline.

The next question is what "occurrence" triggered the running of the 20 calendar day time limitation. Was it, as the District argues, the date that the grievants received the memorandum from the School Board notifying them that their teaching contract and benefits were being reduced for the next school year (February 22, 2001), or was it, as the Association contends, the date that they received and signed their Individual Teaching Contracts for the next school year (March 15, 2001)?

The reason the parties are fighting over this is because one date results in the grievance being untimely while the other date results in it being timely. The following shows this. If the 20 calendar day timeline starts to run on February 22, then the grievance was untimely because April 3 (the date the grievance was filed) was more than 20 calendar days later. Conversely, if the timeline starts to run on March 15, then the grievance was timely because April 3 was 19 calendar days later.

I begin my discussion on this point by noting that, on its face, there is nothing implausible about the date proposed by the District, namely, February 22. After all, that was the date that the grievants were formally notified that their teaching contract and benefits were being reduced for the next school year. From the District's perspective, it was a done deal as of that date. However, it was not finalized until the grievants actually accepted the District's offer of half-time employment with half-time benefits. That happened, of course, on March 15. I have therefore decided to use that date (March 15) as the starting point for the 20 calendar day timeline. In my view, using that date is not "contrary to the universally recognized interpretation of grievance clauses in labor agreements", notwithstanding the District's contention to the contrary.

It follows from this finding that the grievance was timely filed. As previously noted, the grievance was filed within 20 calendar days of the March 15 "occurrence".

Even if I am wrong about using the date of March 15 to start the 20 calendar day timeline, there is another good reason for finding this grievance to be timely. It is this: the grievance was filed months before the reduction in benefits actually occurred. By that, I mean that the grievants' reduction in benefits did not come to fruition until the start of the next school year. That was not until months later. While it is highly unlikely that any change in the District's position would occur in those intervening months, it was still theoretically possible for the enrollment numbers to increase or for the Board to change its position. In situations such as this where the employer announces its intent to do a given act, but the act does not occur or culminate until a later date, arbitrators have held that the occurrence for purposes of applying the contractual time limits is the later date. See, for example, Elkouri and Elkouri, *How Arbitration Works,* Fifth Edition, p. 280. The undersigned holds likewise.

In light of the above, it is held that the grievance was timely filed.

Merits

Attention is now turned to the substantive merits of the grievance. At issue here is whether the District has the authority to prorate the health and dental benefits of part-time teachers Nelson and Wilke, or whether the District is required to provide them with full-time benefits. The District contends it can prorate their benefits while the Association disputes that assertion. Based on the rationale which follows, I find that the District cannot prorate the health and dental benefits of part-time teachers.

My analysis begins with a review of the pertinent contract language. If that language does not resolve the matter, attention will be given to evidence external to the agreement. The undersigned characterizes that evidence as involving the parties' bargaining history and an alleged past practice.

Both sides agree that the contract language applicable here is #5 found in the Compensation Section. It is the Health and Dental Insurance provision and it provides thus:

> 5. Health and Dental Insurance: The District will pay a dollar amount at a similar percentage as family coverage for single plan monthly premium of health and dental, and long term care insurance, and up to a maximum of $707.40 (for the 1999-2000 school year) and $????? (for 2000-2001) for family plan monthly premium of health and dental, and long term care insurance on Employee Group Health and Dental Insurance. . .

My first interpretive task is to decide whether the meaning of this provision is clear and unambiguous, or whether it is ambiguous. Language is considered clear and unambiguous when it is susceptible to but one plausible interpretation/meaning. Conversely, language is considered ambiguous when it is capable of being understood in two or more different senses, or where plausible arguments can be made for competing interpretations. If the language is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous though, my job is to then interpret it to discern what the parties intended it to mean, and then to apply that meaning to the facts. Attention is now turned to making that call.

I begin my discussion of this language by noting what it explicitly says. On its face, it says that the District will pay a certain dollar amount toward the family plan monthly premium. The dollar amount which the District was obligated to pay for the 1999-2000 school year was "up to a maximum of $707.40." The dollar amount which the District was obligated to pay for the 2000-2001 school year was listed as a question mark because when the contract was signed in 1999, the parties did not know what the monthly insurance premium would be for the next school year. The testimony of Association witnesses was that the dollar amount which the District would pay for that year would be equivalent to 100% of the insurance premium.

Having just noted what the insurance language explicitly says, the focus now turns to what it does not say. What it does not explicitly say is whether insurance benefits are to be prorated for part-time employees, or whether full insurance benefits are to be paid to all employees (regardless of whether they are full-time or part-time). The District interprets the language to mean the former (i.e. that insurance benefits for part-timers can be prorated), while the Association interprets it to mean the latter (i.e. that insurance benefits for part-timers cannot be prorated).

In support of its interpretation, the District relies on the phrase "up to" (as in "up to a maximum of $707.40") which is contained in the aforementioned language. According to the District, that phrase gives it flexibility as to how much it will contribute towards the family plan monthly premium for health and dental benefits. In its view, the District's contribution is stated as a variable rate to provide the District with flexibility depending on the circumstances: if teachers teach full-time, the District pays the full amount; conversely, if they teach part-time, the District pays a prorated amount. Thus, the District reads the phrase "up to" to give it the authority to prorate the health and dental benefits of its part-time teachers to correspond to their less than full-time teaching status.

The District's proposed interpretation of the phrase "up to" certainly has a straightforwardness about it that is, on its face, appealing. However, as will be shown below, that is not the only possible interpretation.

It is also plausible that the phrase "up to" was included in the insurance language to specify that in the event of a contract hiatus, the District would pay up to, but no more than, the dollar amount specified therein, even if the insurance premium increased.

In my view, the foregoing analysis illustrates that the phrase "up to" is capable of being understood in at least two senses, and that plausible arguments can be made for different interpretations. Since the phrase "up to" is susceptible to alternative interpretations, I find that the insurance provision is ambiguous concerning whether it authorizes the District to prorate insurance benefits for part-time employees.

Another reason for finding that the insurance language is either ambiguous, or does not have the meaning proposed by the District, is this: the record indicates that the District does not apply other sections of the collective bargaining agreement differently because an employee is full-time or part-time except in one area. The one exception involves sick days. In that instance, the contract language specifically gives the District the right to prorate sick days for part-time teachers. This language shows that the parties know how to write language that prorates some benefits for part-time employees. That type of prorating language is not contained in the insurance provision.

Having found that the insurance language cannot be termed clear and unambiguous on whether insurance benefits are to be prorated for part-time employees, or conversely whether full insurance benefits are to be paid to all employees (both full-time and part-time), it is necessary for the undersigned to look beyond the words used in the insurance provision to determine what the parties intended it to mean.

In litigating their case, both sides relied on matters external to the labor agreement to buttress their interpretation of the insurance provision. Both sides relied on the parties' bargaining history. Additionally, the Association relied on an alleged past practice. Bargaining history and past practice are forms of evidence which are commonly used to help interpret ambiguous contract language. The rationale underlying their use is that they can yield reliable evidence of what an ambiguous provision means. Thus, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of its meaning. Accordingly, each of the foregoing will now be addressed.

Attention is focused first on the parties' bargaining history. In this case, the documentary evidence shows that once the instant grievance arose, both sides proposed new contract language pertaining to insurance benefits for part-time employees. Specifically, the Association proposed language that says that teachers who work part-time or more would receive full benefits. Conversely, the District proposed language that says that all (insurance) benefits will be paid as a percentage of the amount of the teacher's individual contract. While these bargaining proposals are certainly consistent with the positions staked out by the parties in this litigation, their existence does not help me resolve the instant dispute. The reason is this: they simply show that the parties recognize that the existing language is ambiguous, and that both sides therefore proposed changes to it to ensure that it says what they think it already says. However, this bargaining history does not help me interpret the meaning of the current insurance language, or show that the parties ever reached a specific understanding in bargaining concerning its meaning relative to prorating insurance benefits for part-time employees. That being so, this case will not be decided on the basis of the parties' bargaining history.

The focus now turns to the alleged past practice. As previously noted, evidence of past practice is used to give meaning to ambiguous contract language. It is generally accepted by arbitrators that for a practice to be considered indicative of the parties' mutual intent and be binding, the conduct must be clear and consistent, of long duration and accepted by both sides. The Association, contrary to the District, asserts that the record evidence meets all of these criteria and, thus, is entitled to be given effect herein.

The structure of the discussion on the record evidence is as follows. I will first address the part-time teachers who were hired prior to the 1999-2000 school year. The part-time teachers who were hired more recently will be addressed later.

Prior to the 1999-2000 school year, there were four teachers who worked part-time for the District: O'Connell, Ferg, Reckrey and Burns. These four teachers were hired in the order just listed. The first three received full insurance benefits while Burns received no insurance benefits. Burns' situation can be distinguished from the others on the following grounds: he received his insurance benefits from another school district where he was jointly employed. The District acknowledges that O'Connell, Ferg and Reckrey did, in fact, receive full insurance benefits when they were part-time, but it avers that this happened for just one year for each. While that appears to be the case with Ferg and O'Connell, it is not the case with Reckrey. As previously noted, Reckrey worked in a part-time capacity from 1989 through 2000. The District acknowledges that she received full benefits (as a part-time teacher) in the 1989-90 school year, but it characterizes the evidence beyond that time frame as "conflicting". That characterization is not supported by the record evidence. The uncontradicted testimony of Association witness Kristofer Kluever was that he talked personally to Reckrey, and she told

him that the District did not prorate her health and dental benefits while she was part-time, but instead paid for 100% of same. This testimony establishes that Reckrey got full insurance benefits for the entire time period that she was a part-time employee.

The next question is whether this record evidence establishes that a past practice exists concerning the prorating of health and dental benefits for part-time teachers. I find that it does. First, both historically and numerically speaking, the District has not had many part-time teachers. Prior to the 1999-2000 school year, there were just four of them. The District gave full insurance benefits to three of them: O'Connell, Ferg and Reckrey. The fourth part-timer, Burns, got his health insurance from the other school district that jointly employed him. Second, with regard to duration, it is unclear from the record how long O'Connell and Ferg got full insurance benefits. It was at least one year for each. Reckrey though got full insurance benefits (as a part-time teacher) for the entire time period she was so employed. That was over a decade. Third, in those three instances where the part-time teachers got full insurance benefits, management was no doubt aware of it and approved it. The point is that it was not something that simply fell through the proverbial cracks. The foregoing persuades me that notwithstanding the District's contention to the contrary, there is indeed a practice in this District of not prorating health and dental benefits for part-time teachers; instead, the District paid for 100% of same. This practice establishes how the insurance provision has come to be mutually interpreted by the parties themselves, namely, that part-time teachers do not have their insurance benefits prorated, but rather get full insurance benefits.

Having found the existence of that practice, the next question concerning same is whether that practice conflicts with the insurance provision. I find it does not. In my view, the practice can be reconciled with the insurance provision. Here is why. As previously noted, the parties have contract language which specifically gives the District the right to prorate sick days for part-time teachers. This language shows that the parties know how to write language that prorates benefits for part-time employees. That type of proration language is not contained in the insurance clause. The inference which I draw from this is that the parties did not intend, at the time the insurance language was written many years ago, for it to mean that insurance benefits are prorated for part-time employees.

The final question concerning the practice is whether it should be applied here. The District offers several reasons why it should not. Those reasons are addressed below. First, the District argues that the practice should not be broader than its underlying circumstances. What it means by this is that the three part-time employees referenced above who got full benefits were all hired as part-time teachers, while the two affected employees here were full-time employees who were reduced to part-time status. According to the District, that distinction is important. I disagree. In my view, it is a distinction without a difference. Second, the District argues that any practice should be mitigated by the fact that the District

prorated insurance benefits for its two most recent part-time teachers: Dalberg and Reynolds. I agree that if the District had given the Association notice that it was prorating the insurance benefits of those two teachers, then that would have been sufficient to, in the District's words, "mitigate or diminish" the practice of not prorating insurance benefits for part-time teachers. However, that simply did not happen. Specifically, the District never told the Association at the time that it was prorating the insurance benefits of those two teachers. That being so, the Association did not know about it until the instant grievance arose. Since the Association was not apprised of same, the fact that the District prorated insurance benefits for its two most recent part-time teachers is not sufficient to "mitigate or diminish" the existing practice of not prorating insurance benefits for part-time teachers. Turning now to the fact that Dalberg dropped his grievance challenging his prorated insurance benefits, I conclude that while that action certainly impacts on his ability to be reimbursed for the insurance benefits he paid, it does not change the outcome for the two employees involved herein. Finally, the focus turns to the District's equity argument. In the District's view, equity does not support the Association's position that part-time employees should receive the same fringe benefits as full-time employees. I agree. Be that as it may, it was the District that opened this "Pandora's Box" years ago when it decided to give full insurance benefits to part-time teachers O'Connell, Ferg and Reckrey. Given the foregoing, it is held that the existing practice will be applied here.

In sum then, it has been concluded that the insurance provision is ambiguous concerning whether insurance benefits are to be prorated for part-time teachers; that a past practice exists concerning same; and that the practice is that insurance benefits are not prorated for part-time teachers; instead, they receive full insurance benefits. This past practice establishes how the insurance provision has come to be interpreted by the parties themselves. Application of that practice here means that the insurance benefits of part-time employees Nelson and Wilke should not have been prorated; instead, they should have received full insurance benefits. Since that did not happen, the District violated the insurance provision (as interpreted by the parties themselves via their past practice.) In order to remedy this contract violation, the District shall reimburse the amount of money which Nelson and Wilke paid out of their pocket for their health and dental insurance benefits, and shall henceforth pay their full health and dental insurance benefits.

In light of the above, it is my

AWARD

1. That the grievance was timely filed; and

2. That the District violated the collective bargaining agreement when it prorated the benefit packages of Debra Nelson and Doug Wilke. In order to remedy this contract violation, the District shall reimburse the amount of money which Nelson and Wilke paid out of their pocket for their health and dental insurance benefits, and shall henceforth pay their full insurance benefits.

Dated at Madison, Wisconsin, this 30th day of April, 2002.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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