BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CRANDON EDUCATION ASSOCIATION

and

CRANDON SCHOOL DISTRICT

Case 27
No. 60443
MA-11617

(Health Insurance Coverage Grievance)

Appearances:

Ms. Carol J. Nelson, Executive Director, Northern Tier UniServ Councils, P.O. Box 1400, Rhinelander, WI 54501, appearing on behalf of the Crandon Education Association.

O'Brien, Anderson, Burgy, Garbowicz & Brown, LLP, by **Attorney Steven C. Garbowicz**, Arbutus Court, P.O. Box 639, Eagle River, WI 54521, appearing on behalf of the Crandon School District.

ARBITRATION AWARD

The Crandon Education Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the parties. The Crandon School District, hereinafter the District, concurred in the request and the undersigned, Steve Morrison, was designated as the Arbitrator. Hearing was held in Crandon, Wisconsin, on December 13, 2001. The hearing was transcribed. Post-hearing briefs were exchanged by March 21, 2002, marking the close of the hearing.

ISSUES

The parties were not able to agree on a statement of the issues to be decided leaving it to the Arbitrator to frame the substantive issues in the award.

The Association did not propose a statement of the issues. The District would frame the issues as follows:

> Has a past practice existed in the Crandon School District for 24 years of granting only one family plan coverage for two spouses employed in the District? If not, what is the remedy?

The Arbitrator states the issues as follows:

> Did the District violate the collective bargaining agreement in failing to offer two separate family insurance plans to married couples, both of whom were employed by the District? If so, what is the remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE VII

VOLUNTARY EARLY RETIREMENT*

Refer to side bar agreement in Appendix F

A. Objectives: This plan shall provide the opportunity for School District of Crandon staff members to elect to take early retirement from the Wisconsin Retirement System as authorized by Wisconsin Statutes be with compensation under the following guidelines:

B. Qualifications:

1. Full time employment
2. Minimum age 62
3. Twelve (12) years consecutive in District (School District of Crandon) service.

C. Insurance Coverage:

1. Teachers who voluntarily retire, pursuant to this section, shall be eligible to remain in the group insurance coverages maintained by the District.
2. The Board shall make the same hospital, surgical and life insurance contributions on behalf of early retirees that is made on behalf of all

other unit employees; except that, where a retiring teacher becomes eligible for Medicare prior to age 65, the Board shall pay the cost of the Medicare policy plus the cost of additional insurance coverage which, when added to Medicare, is equivalent to the coverage provided all unit employees.

3. Early retirees who wish to maintain other insurance coverages shall, subject to the rules of the carrier, make the necessary payments to the Board for the desired coverages.

D. Application Procedure:

1. A written application is to be made for early retirement by May 29th of the previous school year. A later application may be made if it will not cause a serious inconvenience to the Board.

2. Upon receipt of the early retirement application, the District shall prepare a letter of agreement specifying the amounts to be paid to WRS in behalf of the retiring employee. Such letter shall bind the Board to make the payments as specified. The amount of the District payment shall be that calculated by WRS. Current actuarial tables used by WRS to determine the Board's contribution shall be appended to this agreement. The letter of agreement shall also contain a waiver of benefits clause in the event of death. It shall also be signed by the retiree and the Board President with copy provided to the Association upon request.

E. Effective Date:

This article shall become effective as the date of signing of this agreement.

F. General Provisions:

I. Employees electing this plan shall retain no rights to full time employment with the District.

2. A teacher receiving benefits under this provision who, because of other employment reestablishes eligibility for unemployment compensation benefits, shall have the amount of retirement payment to WRS reduced by the same amount of unemployment compensation benefits paid (as a secondary employer) by the District.

3. A teacher receiving benefits under this section who becomes eligible for unemployment compensation benefits by virtue of non-teacher employment with the District, shall not have the benefits of this provision reduced by any unemployment compensation benefits required or paid by the District.

APPENDIX F

SIDE BAR AGREEMENT
between the
CRANDON SCHOOL DISTRICT BOARD OF EDUCATION
and the
CRANDON TEACHERS' ASSOCIATION

The Crandon School District Board of Education (hereinafter referred to as the "District") and the Crandon Teachers' Association (hereinafter referred to as the 'Association") have reached the following side bar agreement regarding special retirement benefits for certain teachers in the School District during the 1996-1997, 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-02 and 2002-03 contract years.

1. The District and the Association each recognize that certain members of the Association would like to retire at the end of the 1996-1997, 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002 and 2002-2003 school years.

2. Commencing with retirements that are effective for the 1996-1997 school year, the District and Association agree that teachers who have taught full-time in the District for at least (15) years prior to retirement, will have reached age 57 prior to the first day of the next school year and who otherwise qualify for early retirement benefits pursuant to Chapter 40, Wisconsin Statutes are entitled to the following benefits:

   A. The District will make available the same group health insurance coverage as maintained by the District, with the premiums of such insurance being paid by the District being determined by the following table until the teacher reaches age 65 or until the teacher becomes eligible for Medicare/Medicaid, whichever comes first.

      a. 85% of the annual premium for all teachers who retire at age 57 or above with at least 15 years of service in the District.

      b. 87 1/2 % of the annual premium for all teachers who retire at age 57 or above, with at least 20 years of service in the District.

c. 90% of the annual premium for all teachers who retire at age 57 or above with at least 25 years of service in the District.

d. 92 1/2 % of the annual premium for all teachers who retire at age 57 or above with at least 30 years of service in the District.

e. 95% of the annual premium for all teachers who retire at age 57 or above with at least 35 years of service in the District.

B. The District agrees to pay the early retiree $30.00 for each unused accumulated sick day to a maximum of 100 days, payable in equal payments over three years. The payment for the first year will be made on September 1 following, retirement and payment for the second and third years will be made at successive one year intervals, payable on September 1.

C. If the teacher dies after retirement but before Medicate/Medicaid coverage begins, the teacher's spouse may remain in the group health program at his/her expense until reaching age 65 or becoming eligible for Medicare/Medicaid coverage, whichever comes first.

D. Teachers wishing to receive the benefits of this agreement must inform the District Administrator in writing by August 8, 1997 of their intent to retire at the end of the 1996-1997 school year. Teachers wishing to receive the benefits of this agreement must inform the District Administrator by April 15, 1998 of their intent to retire at the end of the 1997-98 school year, or April 15, 1999, of their intent to retire at the end of the 1998-99 school year, etc.

E. The District and the Association agree that his side bar agreement for certain teachers retiring at the end of the 1996-97, 1997-98, 1998-99, 1999-2000, or 2000-2001, 2001-02 and the 2002-03 school year does not obligate the Board to provide payments for any future retirees.

F. The District and Association agree that the provisions of this agreement will be in place of, and not supplemental to, benefits allowed underneath Article VII Voluntary Early Retirement, pages 6, 7, and 8 of the 1995-1997 Master Contract.

G. Early retirees must pay their share of premium costs prior to the 10'day of each month. Failure to do so for two (2) consecutive months shall result in the termination of all insurance benefits.

H. This program will not be used in conjunction with disability insurance or unemployment compensation provided by the District.

I. In the event the retiree obtains employment with another employer and is eligible for medical insurance, the District's obligation to provide continued insurance coverage will terminate upon the retiree's first month of eligibility with the new employer. If the retiree fails to inform the District about insurance through another employer, then the retiree shall be liable for the insurance premiums paid by the District during the period of time the retiree was eligible for insurance coverage through the new employer.

J. A teacher electing early retirement underneath this side bar agreement forfeits all re-employment rights with the District, except that the retired teachers will be eligible for substitute teaching positions and/or serve as a co-curricular advisor.

. . .

ARTICLE XV

GRIEVANCE PROCEDURE

A. Definition

1. A grievance is an allegation by an employee that a policy, practice or action is considered improper or unfair; where there has been a deviation from, or the misinterpretation or misapplication of a practice, policy or action, or where there has been a violation, misinterpretation or misapplication or provisions of any agreement existing between the parties based on wages, hours or working conditions.

2. A grievant is defined as a teacher, a group of teachers, or the Crandon Teachers' Association.

B. Steps

1. A grievance may be submitted, in writing, first to the principal for adjustment within 20 calendar days of the event giving rise to the grievance. If the grievant is not satisfied with the adjustment offered by the principal, the grievant shall submit the grievance in writing to the Superintendent. The Superintendent shall then set a mutually agreeable time for discussion with the principal, grievant and representative. Such discussion shall be held within (IO) working days of the receipts of the above.

2. If the grievance is not satisfactorily adjusted within ten (10) working days by the superintendent, the grievant may submit it to the Board of Education for adjustment.

3. a. The Board or a committee of the Board shall meet within twenty (20) days to consider the written grievance and hear arguments from both the administration and the grievant or their representatives. The decision of the Board along with the reasons therefore shall be delivered to the grievant within five (5) working days after such hearing.

   b. If not settled in Step 3 above, the grievance may be submitted to binding arbitration by the Association. The Association will notify the school District of an intent to submit the grievance to binding arbitration within 14 calendar days of the Board's decision during the school year or 60 working days during the summer months of June, July, and August. The arbitrator shall be appointed by the Wisconsin Employment Relations Commission from its members or staff. Any costs of the arbitrator, including Commission filing fees shall be split equally between the Board and the Association. The decision of the arbitrator shall be final and binding on all parties to the grievance.

4. If the grievance is affected by actions taken by an administrative level about the principal or superintendent, the grievant may submit the grievance directly to the acting parties without going, through the lower steps of procedure.

C. General Provisions

1. There shall be no loss of pay for the grievant and a representative attending meetings or hearings occasioned by the use of the grievance procedure.

2. Since the Association is a party to this agreement, it may have a representative in attendance at all meetings after the first informal step. This, however, shall not be interpreted to deny a teacher's right to representation of his/her choice at any and all steps of the procedure.

ARTICLE XXVIII

INSURANCE PROVISIONS

A. Starting on September 1, 1977, the Board shall make payment of insurance premiums for each employee to assure insurance coverage for a full twelve (12) month period for all employees who complete their contractual obligation.

. . .

> C. The Board shall provide the full cost of health care protection for family and single coverage, including, hospital-surgical-major medical insurance for all employees. . . .

. . .

BACKGROUND

The facts giving rise to this grievance are not contested. The District provides health insurance coverage to its teacher employees pursuant to the terms of a Collective Bargaining Agreement dated 1999–2001. This contract provides, among other things, that the District will pay for the full cost of health care protection for family and single coverage and that it will make payment of insurance premiums for each employee to assure insurance coverage for a full twelve (12) month period for all employees who complete their contractual obligation.

Since 1977, the year the insurance provision appearing in Article 28 was bargained into the contract, the District has maintained a policy of providing only one family policy to married couples employed by the District. Over the years, some married couples employed by the District have asked to be provided with two family policies, one for each spouse. In each such case, the District has denied the request. The record is cloudy on this point but it reflects that in 1993, the Association either filed a grievance with the District relating to this matter or considered filing a grievance. In any event, it did not process that grievance through the stages of the grievance procedure. The record also reflects that the Association has brought the matter to the bargaining table for the current contract's successor agreement and may have done so in the past.

POSITIONS OF THE PARTIES

The Association's Initial Brief

The Association argues that the collective bargaining agreement's language clearly mandates that the District pay the insurance premiums for each employee. This is the case, it argues, regardless of whether an employee is married to another District employee or not. In the case of a married couple where both spouses are employed by the District, this would mean that each spouse would be able to purchase, at the District's expense, a family policy thereby affording the employed married couple with two family policies versus one as has been the practice in the past. In support of its argument, the Association points to Article 28, Paragraph A of the contract, which states:

> Starting on September 1, 1977, the Board shall make payment of insurance premiums for each employee to assure insurance coverage for a full twelve (12) month period for all employees who complete their contractual obligation.

The Association argues that the District, by failing to pay for insurance premiums as outlined above, has arbitrarily chosen to prevent certain employees from receiving the benefit of paid medical insurance. It asserts that because the language fails to list "marital status to another employee" as an exclusionary condition, the District is barred from implementing the restriction absent negotiating it.

The Association also argues that issues relating to early retirement are raised by this grievance. The Association asserts that, in the case of a retired couple who were both employed by the District where only one has the family policy coverage, the death of the spouse with the coverage would leave the remaining spouse without coverage.

The District's Initial Brief

The District argues that since the language found in Article 28 was first incorporated into the collective bargaining agreement in September, 1977, it has interpreted that language to mean that two separate family plans to married spouses employed by the District would not be provided. In support of this interpretation, the District argues that the intent of the insurance provision is to "assure insurance coverage for a full twelve month period for all employees who complete their contractual obligation." By providing the family coverage to one of the spouses when both are employed by the District, it provides insurance coverage for both spouses and satisfies its commitment under Article 28.

The District argues that, although it sees the language in Article 28 and elsewhere in the contract to clearly support its interpretation, there must be some ambiguity in the language to allow the Association to arrive at such a contrary interpretation. Consequently, asserts the District, the Arbitrator should look to past practice to help resolve the dispute and past practice in this case supports the District's interpretation. In the 24 years since the insurance provision was added to the contract, there have been no grievances on this issue and "only in the most recent negotiations to achieve a successor Collective Bargaining Agreement has this issue been raised." Hence, the District argues that the Association has acquiesced in the District's interpretation and must now bargain for any change it desires. The District maintains that the Association may not achieve through the grievance process that which it has failed to achieve through the bargaining process.

The Association's Reply Brief

The Association essentially re-states the arguments made in its initial brief. It argues against any decision by the Arbitrator which would result in a forfeiture or penalty and reminds the Arbitrator that if the agreement is susceptible to two constructions he should adopt the one which avoids forfeiture. The Association urges the Arbitrator to find that the actions of the District in its implementation of the practice of limiting married District employees to one family plan of coverage "fails to meet even the minimum standards which would require a conclusion that the actions of the employer are a practice."

The Association argues against the District's rationale that if it were to allow married couples the ability to carry two family plans the increase in coverage would be minimal. This is not so, argues the Association, because the second policy would cover the gap in deductibles and also work to double the lifetime maximum of one million dollars.

The District's Reply Brief

The District's reply is directed solely to the question of arbitrability of the early retirement issue and to the Association's argument that Article VII (Voluntary Early Retirement) and Appendix F (a side bar agreement between the parties which provides for further retirement benefits) were violated by the District's actions. The District argues that this issue was first presented during the hearing and, as such, is not arbitrable because it was not processed through the grievance procedure. It urges the Arbitrator to rule that these matters are not subject to arbitration.

DISCUSSION

The controversy here relates to the treatment of individual employees of the District who are married to each other and who seek to purchase individual family plan insurance coverage packages. In the past, married couples who were both employed by the District have been limited to the selection of one family plan. This plan could be carried by the husband or the wife, but not by both. The Association argues that Article 28 clearly supports the right of each such employee to purchase his or her separate plan. Conversely, the District argues that the very same language clearly supports its practice of limiting jointly employed married couples to only one such plan. Consequently, the initial question relates to an examination of the language contained in Article 28 and whether, in the event that language is ambiguous, the past practice of the parties aids in its interpretation.

As a threshold observation, the very fact that the two sides have drawn virtually diametrically opposing interpretations of the same contractual language leads the Arbitrator to suspect some measure of ambiguity. An examination of the language of Article 28 itself supports that suspicion. The pertinent language is as follows:

> Starting on September 1, 1977, the Board shall make payment of insurance premiums for each employee to assure insurance coverage for a full twelve (12) month period for all employees who complete their contractual obligation.

The Association relies on the first part of the sentence which states "shall make payment of insurance premiums for *each employee*" (emphasis added) while the District argues that the operative language in that sentence is "to assure insurance coverage." In short, the District's position is that it meets its obligation to the employees once it "assures insurance coverage" for

each of them which it says it does once the family plan is in place for the employed couple. Once done, there is no need for *each employee* to have a separate plan because *each employee* is now insured. This portion of Article 28 is ambiguous because it is capable of different interpretations. Reading the contract as a whole, the Arbitrator is unable to find any other contract provisions which remove this ambiguity or shed light on the intent of the parties in this regard.

One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is the custom or past practice of the parties. Indeed, use of past practice to give meaning to ambiguous contract language is so common that no citation of arbitral authority is necessary. See, Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 648 (1997). In the instant case the past practice of the parties is well established and evidences the parties intent that married couples who are both employed by the District are only entitled to one family plan. This practice began in September of 1977 at the time the current insurance language was first bargained into the agreement and has been consistently followed to this day. It is a well established practice and, as such, entitled to considerable weight. The practice was a mutual one, as well, evidenced by the fact that it has not, until now, been challenged by the Association via the grievance procedure. The failure to process a grievance challenging a long term consistent practice known to the Association is indicative of the Association's tacit acknowledgement that the District's interpretation is correct and consistent with the intent of the parties. This conclusion is supported by the testimony of Thomas R. Thielke. He is now the Administrator of the Crandon School District but in September of 1977 he was a teacher at Crandon and was married to another teacher employed by the District. He recalls the negotiations leading to the inclusion of the Article 28 language in the contract and testified that to him the language meant that ". . .the district would pay the - the family plan that provided coverage for both members of the family" (Tr. 78) and in answer to the following question he gave the following answer:

> Q. Do you recall what the interpretation of Article 28, Section A was, back in 1977, as it applied to two employed families [sic] here in the district?
>
> A. Yes. The interpretation that—at that time was that the district would pay for one family insurance policy. That the insurance coverage would be provided for both spouses under that one family plan. (Tr. 78,79)

Witnesses called by the Association testified that, at various times in the past, they questioned the practice of the District. While they may have been unhappy about the practice they nonetheless accepted it. Shelly Lehman, a District teacher employee, testified that she brought her concerns to her union some four years ago and she thought that the issue may have been discussed with the District at the bargaining table but was unsure if the union actually pursued it. The record shows that Debra Mackowski and a co-worker, Barbara Packard, attempted to get individual family plan policies some twenty years ago. Their request was denied at which

time they brought the issue to their union. Mackowski testified that she wanted to pursue a grievance but that (referring to the Association) "They just dropped it then, yeah. They didn't pursue it any further." (Tr. 24) None of the witnesses called by the Association testified that they were ever denied medical coverage by the District.

By reason of the foregoing discussion and the record as a whole, the undersigned finds that the past practice of the parties establishes the intent of the contract provision found in Article 28 to be that married couples employed by the District are entitled to one family plan under which both spouses are provided insurance coverage. This language does not provide for an option of two family policies for a married couple who are both employed by the District. The ambiguity in the language of Article 28 is resolved by the consistent and well-known practice of the District in providing one insurance policy for married couples. The failure of the Association to challenge the practice equates to its acceptance of the practice and to its acceptance of the District's interpretation of the subject language.

Turning now to the questions raised by the District's objections at the hearing relating to the issue of retirement benefits and to the issue of procedural arbitrability, the Arbitrator notes that arbitration is simply the final step of the grievance procedure outlined in the parties' collective bargaining agreement. It is not a separate forum for bringing new complaints. Consequently, the Arbitrator's jurisdiction extends only to those grievances which have been properly advanced to the final step under the terms of the grievance procedure. The Association did not process the issue of an alleged violation of Article VII (Early Retirement) or its companion Appendix F through the contractual grievance procedure. The disputed grievance contains no express reference to an alleged violation of Article VII or Appendix F. For these reasons, the Arbitrator agrees with the District's arbitrability objection relating to this narrow issue and finds that it is not properly before me.

In light of the above, it is my

AWARD

The District did not violate the collective bargaining agreement when it failed to offer two separate family insurance plans to married couples, both of whom were employed by the District.

Dated at Wausau, Wisconsin, this 19th day of June, 2002.

Steve Morrison /s/

Steve Morrison, Arbitrator

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