BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLINTONVILLE EDUCATION ASSOCIATION

and

CLINTONVILLE SCHOOL DISTRICT

Case 42
No. 60743
MA-11708

(Contingent Insurance Premium Grievance)

Appearances**:**

Mr. David A. Campshure, Executive Director, Bayland and United Northeast Educators, on behalf of the Clintonville Education Association.

Davis & Kuelthau, S.C., by **Attorney Robert W. Burns**, on behalf of the Clintonville School District.

ARBITRATION AWARD

At all times pertinent hereto, the Clintonville Education Association (herein the Union) and the Clintonville School District (herein the District) were parties to a collective bargaining agreement covering the period July 1, 1999 to June 30, 2001, and providing for binding arbitration of certain disputes between the parties. On June 11, 2002, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the District's cancellation of a contingent premium clause in its health insurance policy and requested that the Commission provide a panel of WERC staff members from which to select an arbitrator. The parties selected the undersigned to hear the dispute and a hearing was conducted on October 17, 2002. The proceedings were transcribed and the transcript was filed on November 1, 2002. The parties filed briefs on December 23, 2002. The District filed a reply brief on January 21, 2003, and the Union filed a reply on January 24, 2003, whereupon the record was closed.

ISSUES

The parties stipulated to the framing of the issues, as follows:

Is the grievance moot?

If not, did the District violate the parties' agreement when it terminated the health insurance contingent premium arrangement with WPS?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

1.1 Collective Bargaining Rights
The Board recognizes the Association as the exclusive bargaining representative on wages, hours and conditions of employment for all contracted teaching employees. This includes classroom teachers, librarians, school psychologist, school nurse, guidance counselors and social workers, but excludes the following:

A. Administrators, supervisors, principals, assistant principals, local vocational education coordinator, guidance director, business manager, and other supervisory personnel.

B. Noninstructional personnel such as paraprofessionals and aides

C. Office, clerical, maintenance, and operating employees.

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ARTICLE II – MANAGEMENT RIGHTS

2.1 Management Recognition
The Association recognizes the Board of Education, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, authority, duties and

responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right:

A. To the executive management and administrative control of the school system and its properties and facilities, and the activities of its employees within the total school program.

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2.2 Limitation of Rights

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

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ARTICLE VIII – INSURANCE

8.1 Hospitalization – Major Medical Insurance and Dental Insurance

A. A joint insurance committee composed of two (2) Board members, two (2) teachers, and an administrator selected by the four, shall evaluate and select the carrier of the insurance and set the limits of coverage. The limits of coverage shall not be less than those provided by WPS/HMP Medical Insurance group number 30690.1 and WEA Trust Dental Insurance group number 7030421.0.

B. The coverage shall include a coordination of benefits clause.

C. There shall be an open season for enrollment as provided by the carrier.

D. The Board will pay 100% of the single monthly premium for individual health coverage and 92% of the monthly premium for family health coverage.

1. WPS/HMP Value Care Review Health Insurance Program shall be implemented on December 1, 1994.

2. The WPS/HMP Value Care Review Health Insurance Program shall contain a $100 per individual, $200 per family, front-end deductible.

E. The Board will pay 100% of the monthly premium for individual dental coverage and 88% of the monthly premium for family dental coverage.

F. District contributions will be prorated as in the teacher's contract in cases where employment is considered less than full-time but equal to or more than half-time.

G. Teachers shall enroll in either the individual or family coverage in order to be eligible for premium benefits.

H. If the parties agree to change insurance carriers during the term of the contract, all monies saved will be applied to the salary schedule.

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ARTICLE XXII – TERM OF AGREEMENT

22.1 Agreement Application

This Agreement shall supersede any rules, regulations or practices of the Board, which shall be contrary to or inconsistent with its terms.

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BACKGROUND

Article VIII, Section 8.1, Paragraph A of the parties' collective bargaining agreement creates a joint insurance committee to evaluate and select the District's health insurance carrier and set the limits of coverage. It also provides that the baseline for the limits of health insurance coverage shall be those provided in WPS/HMP Medical Insurance Group No. 30690.1. Under the terms of this clause, and pursuant to the action of the committee, the District has, for a number of years, utilized WPS as its health insurance carrier.

In 1997, Jenny Goldschmidt, the District's Business Manager, discovered that the WPS policy contained a contingent premium arrangement. Under the terms of this provision, if activated, the District would pay somewhat higher health insurance premiums in return for which, if the District's claims experience proved lower than anticipated, and thus the premiums paid were greater than deemed necessary, WPS would rebate the difference to the District. Goldschmidt advised the School Board of the existence of this provision and was instructed to activate it, which she did, without consulting the Union or the joint insurance committee. As a result, and due to a low claims experience that year, in February 1998 WPS reimbursed the District approximately $100,000.00, which was, in turn, paid out to the employees and retirees participating in the District's health insurance plan, again without consultation with, or objection by, the Union or the joint committee. The District continued the contingent premium arrangement in 1998, resulting in another rebate of more than $100,000.00 in 1999, which was again returned to the employees. Thereafter, the District continued the contingent premium arrangement from year to year, but no further rebates were received.

During the 2000-01 school year Goldschmidt reviewed the District's claims experience and escalating premiums and determined that the contingent premium arrangement would not generate a premium rebate and was no longer fiscally advantageous. Also during that year, the joint committee, of which Goldschmidt was a member, met to determine whether to continue with the same insurance carrier. The Union representatives voted to switch to the WEA Trust insurance plan, and the School Board representatives voted to stay with WPS. Goldschmidt also voted to stay with WPS, but without the contingent premium arrangement, but the Union members objected to including the status of the arrangement in the vote, so the final vote was to remain with WPS without addressing the issue of the contingent premium arrangement. Thereafter, Goldschmidt, at the behest of the School Board and without consulting the committee or the Union, cancelled the contingent premium arrangement for the 2001-02 school year. The effect of the cancellation was to reduce the District's premium increase for that year from 22.63% to 18.63%. This, in turn, generated savings of approximately $30,000.00, which was incorporated into the salary schedule.

The Union grieved the District's action, alleging violations of several contractual provisions and maintaining that, before taking such action, the District was obligated to

negotiate the matter with the Union and obtain the consent of the committee. As requested relief, the Union sought to reinstitute the contingent premium arrangement. The grievance was denied and proceeded through the steps of the contractual grievance procedure to arbitration. Additional facts will be referenced, as necessary, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the grievance is not moot, an issue the District raised for the first time at the hearing. The primary issue to be addressed is whether the District violated the contract by unilaterally canceling the contingent premium agreement and that is not a moot point, even though there would not have been a refund for 2001-02. It is still possible that refunds could be realized in future years. As to remedy, if the arrangement can be reinstituted, it should be, and if not, a calculation of what the potential refund would be should be made and the District should reimburse the members accordingly. Also, cancellation of the arrangement affected health insurance premiums, which, in turn, impacted the members' wages. As wages are a mandatory subject of bargaining, the District was required to negotiate the change with the Association because it affected wages.

The District violated the agreement by ignoring the vote of the joint insurance committee. The committee exists to select the District's insurance carrier and set limits of coverage. In 2001, the committee voted on switching carriers. Two Association members voted to switch to WEA; two Board members voted to retain WPS with the contingency and the Business Manager voted to retain WPS without the contingency. The Association members stated the Association's desire to retain the contingency, so that issue was removed from the vote. The District's subsequent action, therefore, did not have the committee's approval.

Apart from obtaining the committee's approval, however, the District had an independent obligation to negotiate the change with the Association. Sec. 111.70(1)(nc), Wisconsin Statutes, the Qualified Economic Offer law, requires school district professional employees to bargaining wages and benefits, including health insurance premiums, as a total package. According to the Memorandum of Agreement – Costing in the current contract, the parties agreed to a 3.8% total economic package for 1999-00 and 2000-01, with the salary schedule to be adjusted after costing changes in the health and dental insurance rates and other expenses. Because health insurance premiums affect the total economic package, any changes must be negotiated, regardless of whether the changes will result in more wages being added to the package. In this case, reducing the premiums in 2001-02 resulted in a correspondingly higher increase in 2002-03 than if the contingency had been left in place, resulting in a wage freeze that year. Thus, the gains achieved in 2001-02 were at the expense of salary increases in 2003-03. The District is required to negotiate such matters, not decide them unilaterally. The grievance should be sustained and the contingency ordered to be reinstituted.

The District

The District argues that, under the contract, the joint insurance committee does not have authority to remove or retain the contingent premium arrangement. The committee's role is restricted to evaluating and selecting the District's insurance carrier and setting the limits of coverage. There is nothing in the contract language indicating that the committee had any additional similar duties or authority over similar issues, thus restricting its role to the specific tasks identified in the contract. The Management Rights clause, however, is a broad delegation of authority, indicating the ability to the parties to delegate authority as narrowly or broadly as they saw fit.

The terms evaluate, select and set limits are very specific and their dictionary definitions do not encompass the meaning sought by the Union here, to cover decision-making regarding the contingent premium arrangement. Clearly, therefore, the parties intended, and created, a committee with a limited function. In no way does the contingent premium clause involve evaluation or selection of the carrier or setting the limits of coverage, as established by the testimony. The decision to activate or remove that policy provision goes beyond the committee's function and the District had no obligation to consult the committee or refer this matter to it.

The matter is also moot and not arbitrable. The arbitrator's authority is circumscribed by the contract and is limited to an alleged violation, misinterpretation, or misapplication of the contract. The arbitrator cannot, therefore, go outside the contract to expand the authority of the insurance committee beyond what the contract provides. To the extent, therefore, that the Union seeks to expand the committee's scope beyond the clear limit of Section 8.1, the arbitrator is without authority to grant the relief requested. Coverage issues and administration of the insurance contract are within the purview of the District and the mere mention of the insurance plan in the contract does not bring such issues within the arbitrator's authority. The arbitrator cannot, therefore, uphold the grievance.

The Union believes that the District had a duty to bargain over the cancellation of the contingency agreement, because the savings generated by the action impacted the wage schedule. Nevertheless, the Union cannot identify any contractual provision that has been violated, misinterpreted, or misapplied by the District. The Union cannot point to any violation of any contractual provision cited in the grievance. Further, no evidence suggests that cancellation of the provision was not a sound financial decision. The Union appears to argue that cancellation of the provision was a mandatory subject of bargaining, but the management rights clause confers the power to make financial decisions on the District, unless otherwise restricted by the contract, which this action was not. There was no violation of the contract in the District's action. Further, any duty to bargain issue is moot because the District's action did not harm the Union. In fact, the members benefited from the reduced

premiums in that their wages were correspondingly increased. The Union argued that the decision was short-sighted because of potential premium rebates in the future, but these are speculative and the decision was, ultimately, discretionary with the District. Further, this cause – duty to bargain – is appropriately brought as a prohibited practice, not as a grievance arbitration. Also, any duty to bargain argument is waived where, as here, no demand for bargaining was made after the Union received notice of the District's action. Finally, the Union did not seek to bargain the issue when the District activated the provision in the past. That acquiescence establishes a binding past practice which forecloses the Union from seeking to bargain it now. The grievance should be dismissed.

The Union in Reply

The District incorrectly states that it unilaterally activated the contingent premium arrangement in 1997. Under the provisions of the QEO law, it was required to return insurance savings to the employees as wages. The Union did not object because it agreed with the decision. Thus, the District cannot argue from the Union's lack of objection when its action was mandated by law and the Union agreed with the outcome.

It should also be noted that when the committee voted on whether to change carriers, only one voter of the five was in favor of canceling the contingency – Jenny Goldschmidt, the Business Manager. Later, Goldschmidt, alone, cancelled the arrangement.

The grievance is also within the arbitrator's authority. The Union identified several contractual provisions it believes were violated and the arbitrator can rule on those contentions. If a violation is determined, the arbitrator can also order reinstatement of the provision. Despite the District's assertion of broad management rights, those rights are limited by specific contractual restrictions. In this case, both Article VIII, Section A and the Memorandum of Understanding regarding costing restrict management's authority to unilaterally terminate the contingency.

It is also debatable whether there has been no harm to the CEA members, as the District contends. Eliminating the contingency reduced premiums slightly, but then led to a greater premium increase the next year, resulting in a reduced pay grid under an imposed QEO. Had the contingency been retained, there might have been a smaller premium increase in 2002-03, leaving some money to be added to the pay grid that year.

Contrary to the District's argument, the Union did seek to negotiate the issue, as reflected by the grievance, which specifically calls on the District to negotiate the issue. Thus, the Union put the District on notice at the outset of the process that removal of the contingency was an issue that the parties had to negotiate.

Finally, the District maintains that the proper posture for the case is as a prohibited practice complaint, rather than a grievance arbitration. The WERC, however, has a long tradition of deferring matters to arbitration when the are within the scope of the collective bargaining agreement. As noted, the grievance cites several violations of the contract and, therefore, the case is properly suitable for arbitration.

The District in Reply

The matter is moot and the District has not waived its arguments with respect to mootness. It is generally recognized that the right to contest issues such as arbitrability and mootness may be raised at the hearing. Furthermore, the only rational resolution, other than dismissal, would be to order the members to return the money distributed after the cancellation of the contingency. The union seeks calculation of whether a reimbursement is due and then order of the same, but the record does not support such an argument. There would have been no reimbursement from the contingency and the money that was reimbursed from the cancellation was paid out. The Association, in effect is entitled to no remedy beyond what has already been paid. If the Union wanted to bargain the issue, as it contends, it should have refused the refund, demanded to bargain and then filed a prohibited practice if the District refused.

The District, did not, as the Union suggests ignore the will of the joint insurance committee. The testimony reveals that the committee decided to stay with WPS, and that was all. It did not consider the issue of the contingent premium arrangement. It fulfilled its role under the contract language, but did not go beyond it because the contingency was outside its purview. Thus, the District did not act contrary to the will of the committee when it cancelled the contingency. Further, the record does not establish that the Union members on the committee raised any clear objection to canceling the contingency, although, even if they had it would have been advisory only. The decision was a financial administrative matter, reserved to the District, which benefited all groups. There was no contract violation and the grievance should be dismissed.

DISCUSSION

Mootness

At the outset, the question arises whether the grievance is moot. The District argues that this is so mainly because the remedy sought by the Union is not feasible. That is, the revocation of the contingency arrangement resulted in insurance premium savings, which were distributed to the bargaining unit members. Conversely, had the arrangement been left in place, as the Union desires, no savings would have been generated due to premium increases. Thus, a finding for the Union would not result in a reimbursement to the members, but might

require a reimbursement from them to the District of monies they received as a result of the termination of the contingency. The District also raises issues of arbitrability by maintaining that the grievance seeks to have the arbitrator confer new authority on the joint insurance committee, which he cannot do under the language of the contract, and seeks an order requiring the District to bargain the issue of whether to cancel the contingency, which is more properly the subject of a prohibited practice complaint than a grievance arbitration.

I find that the grievance is arbitrable and is not moot. It is arbitrable because the Union has made allegations of violations of specific contractual provisions by the District. It is within the power of the arbitrator to determine whether, in fact, such violations have occurred and, if so, to fashion an appropriate remedy. It is not moot because the arbitrator is not limited in fashioning a remedy to just the requests or recommendations of the parties. It may be that, if the grievance is upheld, reimbursement to the Union membership would not be appropriate and that a retroactive remedy might require distributed monies to be returned to the District. That is not to say, however, that the arbitrator is bound to do either and he may fashion a feasible remedy separate from those raised in the arguments of the parties. The fact that a specific remedy may not be practical under the circumstances, therefore, does not render the entire matter moot.

The Merits

The Union bases its arguments on the propositions that the District had a contractual obligation to defer to the joint insurance committee on whether to continue the contingent premium arrangement, or, failing that, to bargain with the Union over the issue. The first argument arises from Article VIII, dealing with health insurance. The joint insurance committee created by Article VIII, Section A. is specifically tasked to "evaluate and select the carrier of the insurance and set the limits of coverage." In interpreting these terms, absent evidence that the parties have interpreted them otherwise, they should be given their ordinary and popular meaning. The word "evaluate" refers to the carrier of insurance and, in this context, connotes assessing a particular carrier, either against a predetermined standard or other plans. "Select," which also refers to the insurance carrier, clearly means that the committee is to decide which among available insurance carriers the District is to utilize. "Set the limits of coverage" authorizes the committee to determine, within prescribed limits, the specific health benefits to be covered by the plan and the extent thereof. There is no evidence that the parties have expanded the definitions of these terms beyond the meanings I have listed. The function of the committee is, therefore, narrowly defined and, absent evidence to the contrary, is limited to its terms.

The contingent premium arrangement is a provision contained within the WPS health insurance plan. The arrangement presumably has been available since the joint committee first selected WPS as the District's health insurance carrier. There is no evidence that the

contingency played a part in the decision to contract with WPS, or that either of the parties was even initially aware of its existence. The testimony indicates that the provision was only discovered after the fact by the District's business manager, who activated it without consultation with, or objection by, either the committee or the Union. Suffice it to say, then, that on this record it does not appear that the contingency played any part in evaluating or selecting WPS as the District's health insurance carrier. Even if it did, however, this does not automatically authorize the committee to determine whether the clause should be activated. The existence of the contingency does not in any way involve the limits of coverage of the policy. Its purpose is entirely concerned with the level of premiums and the availability of a rebate should premiums outweigh claims. Assuming, therefore, that the provision was part of the committee's consideration in opting for the WPS plan, once the plan was chosen the committee's work ended. The decision whether to activate the contingency arrangement then fell to others, because it was outside the committee's mandate.

When the joint committee met in 2001 to discuss changing carriers there appear to have been two different plans considered, the existing WPS plan, which the District representatives favored, and a plan offered by the WEA Trust, preferred by the Union. At that time, Goldschmidt raised the issue of canceling the contingency, but the Union members demurred on the basis that the only business before the committee was the choice of carrier, not whether to continue the contingency arrangement. Thus, the committee voted to keep the WPS plan, but did not address the issue of the contingency arrangement. Clearly, therefore, Goldschmidt's subsequent action did not contravene the action of the committee. Furthermore, the fact that the committee did not want to discuss the contingency, combined with the fact that it had never considered it before, permits the inference that the committee members did not feel it was an issue properly before them. I find, therefore, nothing in the contract language or the practice of the parties that indicates that acting on the contingent premium arrangement was part of the committee's intended or actual responsibilities. Consequently, I do not find a violation on Article VIII of the contract.

The Union's second argument stems from an alleged failure on the District's part in its duty to bargain with the Union over the question of whether to cancel the contingency. This contention extends from the fact that under the Qualified Economic Offer Law, Sec. 111.70(1)(nc), Wis. Stats., the parties are restricted to total package bargaining on economic issues and had, under the instant agreement, agreed to a 3.8% total package for 1999-00 and 2000-01. In the Union's view, this required the District to not only return a portion of any insurance savings to the membership, but also to negotiate with the Union over any matter which would affect the premium rate and, by extension, the wage schedule. By unilaterally canceling the contingent fee arrangement without Union input, the District failed to do this.

I am not persuaded by the Union's arguments for a variety of reasons. First, as both parties have pointed out, the Arbitrator's function is to interpret and enforce the collective bargaining agreement. The QEO is a matter of state law, not contract, as is the District's duty to bargain. Therefore, if the District has violated the law with respect to implementation of the QEO or bargaining over wages, hours and conditions of employment, the Union's recourse is to demand that the District bargain the issue. If the District fails to do so, the Union may then file a prohibited practice complaint, which is the proper forum for alleged statutory violations. The Union has noted, and I am aware of, the Commission's practice of deferring to arbitration matters that arguably could arise under contract as well as statute. In this case, however, the contract sections cited by the Union, in my opinion, do not cover the subject matter raised herein. The Memorandum of Understanding regarding Costing merely states that the parties have agreed to a 3.8% package in each year and that the salary schedule shall be established after the insurance rates have been provided. This does not compel the District to bargain over a policy provision that may alter insurance rates, only to use the actual rates when setting the salary schedule. The Union concedes that the District applied the savings from canceling the provision to the schedule and, therefore, it fulfilled its obligation. The provisions of Article XXII cited by the Union likewise do not affect the District's ability to manage the insurance program in this instance, they merely forbid the District from acting inconsistently with the contract, which, in my view, it did not do. This is not, therefore, a proper case for deferral to arbitration.

Were it so, however, I would still have difficulties with the Union's position. The record reflects that on two previous occasions the District unilaterally acted to activate and continue the contingency agreement without Union input. In each case the Union made no objection. The Union states that it did not do so because it agreed with the decision and the outcome, which was a significant premium rebate in each year. It, therefore, had no reason to object. I see two difficulties with this proposition. First, at the time the contingency was activated, it was unknown whether there would be a rebate. Thus, the Union's statement that it did not object to the distributions because it agreed with the them misses the point because at the time the decision to activate the contingency was made it was unknown whether there would be a distribution, or how much. Second, whether or not the Union agreed with the distribution, it might have objected to the principle of the District making the decision, whatever its merits, unilaterally. That is the issue with which I have the greatest difficulty. Since I have determined that there is no contract language that governs on this point, I look to the practice of the parties. Here it appears that in the past the District has made decisions regarding the contingent premium arrangement without Union input and the Union has not objected to the practice, leading me to conclude that the District was within its management rights to act as it did.

For the foregoing reasons, and based upon the record as a whole, I hereby enter the following

AWARD

The grievance was not moot, however, the District did not violate the parties' agreement when it terminated the health insurance contingent premium arrangement with WPS. The grievance is, therefore, denied.

Dated at Fond du Lac, Wisconsin, this 9th day of July, 2003.

John R. Emery /s/
John R. Emery, Arbitrator

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