

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ASHWAUBENON EDUCATION ASSOCIATION

and

ASHWAUBENON SCHOOL DISTRICT

Case 34
No. 63609
MA-12644

(Mary Luckey Grievance)

Appearances:

Ms. Priscilla Ruth MacDougall, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin, appearing on behalf of the Ashwaubenon Education Association.

Mr. Dennis W. Rader, Attorney, Davis & Kuelthau, S.C., 200 South Washington Street, Green Bay, Wisconsin, appearing on behalf of the Ashwaubenon School District.

ARBITRATION AWARD

Ashwaubenon Education Association, hereinafter "Association," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the Ashwaubenon School District, hereinafter "District," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the Undersigned on December 1, 2004, in Ashwaubenon, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on March 28, 2005, at which time the record was closed. Based upon the evidence and arguments of the parties, the Undersigned makes and issues the following Award.

ISSUE

The parties stipulated that there were no procedural issues in dispute, but were unable to agree to the substantive issue.

The Association deferred to the Arbitrator to frame the issue based on the Association's opening statement and argument.

The District proposes the issue as:

Must the District pay the single premium for the Medicare carve-out plan for Mary Luckey after she became eligible for Medicare in March, 2004, pursuant to Article XXI, Sections E and F of the relevant contract agreement? If so, what is the appropriate remedy?

Having considered the facts and arguments of the parties, I frame the issue:

What shall be the disposition of the grievance dated February 25, 2004?

RELEVANT CONTRACT LANGUAGE

ARTICLE III DISPUTE RESOLUTION PROCEDURES

Purpose:

The purpose of these two (2) procedures is to provide an orderly method of resolving differences arising during the term of this Agreement. The parties to this Agreement are encouraged to attempt to resolve their issues informally with their direct supervisor prior to accessing either of these procedures.

Definition:

For the purposes of this Agreement, a dispute (grievance) is defined as any complaint by an employee involving the interpretation, application, or alleged violation of a specific provision of the Agreement where policy or practice is primarily and directly related to wages, hours, or conditions of employment is considered improper or unfair or where there has been a deviation from or the misinterpretation of or misapplication of a policy or practice primarily and directly related to wages, hours, or conditions of employment. A grievant may be an employee or at the mutual agreement of the employees and administration, disputes (grievances) involving the same act or same issues may be consolidated in one proceeding.

...

Section B: Procedure Option #2 – Formal Resolution Process:

The number of days indicated at each step should be considered a maximum and every effort should be made to expedite the process. The time limits may be extended by mutual consent. The term “days” will mean days when school is in session or Mondays through Fridays during summer recess. A grievance may be waived to the next step by mutual agreement of the parties involved.

Step 1: A “grievant” will submit the grievance clearly stating that it is a formal grievance by oral discussion with their immediate supervisor or building principal within twenty (20) days after the grievant knew of the occurrence giving rise to the grievance or the grievance will be deemed waived. The grievant may be accompanied by a representative of the Association.

Step 2: If the grievance is not satisfactorily resolved in Step 1, the grievant will reduce the grievance to writing on the grievance form (see appendix) and forward it within five (5) days, to the immediate supervisor or building principal, superintendent, and the Association’s designated representative.

The written grievance should be specific and will be signed by the grievant involved. It should contain a statement of the facts upon which the grievance is based and should state the action requested. The immediate supervisor or building principal will, within three (3) days, call a meeting of the grievant, the grievant’s representative, the immediate supervisor or building principal, and the Association’s designated representative.

Within five (5) days of this meeting, the building principal will communicate the decision in writing, together with the supporting reasons, to the grievant the grievant’s representative, and the Association’s designated representative, and the superintendent.

...

ARTICLE XXI EARLY RETIREMENT

Section A: Definition:

Early retirement benefits will be available to employees who resign from their regular full-time duties and have reached the age of fifty-five (55) on or before August 31st of the calendar year in which they retire.

Section B: Eligibility:

Employees who have been employed at least fifteen (15) years in the District will be eligible to receive early retirement benefits under this provision.

Section C: Notice:

Employees who plan to take early retirement under this provision will notify the District of their intent to do so prior to March 15th of the current school year. Retirement eligibility will begin following the expiration of any contractual obligations the teacher may have to the District.

Section D. Compensation:

The District will provide compensation at the rate of one-half (1/2) the teacher's final annual individual teacher's contract divided by three (3) years. This compensation will be paid bi-monthly beginning January 5 of the calendar year following retirement.

If the employee returns to full-time employment with the District after retirement under this Agreement, upon re-employment, no further benefits will be payable under this Agreement and the employee will forfeit any right to further compensation under this Agreement.

Section E. Insurance Coverage:

Employees who voluntarily retire pursuant to this article, will be eligible to remain in the group health and dental insurance plan until eligible for Medicare. Effective 07/01/00, the District will offer a Medicare carve-out plan. (Complete carve-out

information contained in Section F.) The District will contribute a portion of the premium consistent with its contribution toward the single premium for active bargaining unit members at the time of payment.

If the retired employee or covered spouse and/or dependent(s) becomes covered by another medical/dental plan, the coordination of benefits of the District plan will apply.

If the retired employee elects greater than single coverage, the retired employee will pay one hundred and two percent (102%) of the difference between the single and greater coverage premiums. Effective 07/01/00, the retired employee will then pay one hundred percent (100%) of the difference between the single and greater coverage premiums. Payment is to be made to the school district on or before the first of each month.

In the event of failure to make payments, a thirty (30) day grace period will commence. Should payment not be received during the grace period, coverage will be discontinued. No bills, invoices, or statements will be rendered by the school district, as the responsibility for payment rests with the retired employee.

In the event of the death of a retired employee prior to being eligible for Medicare, the spouse and/or dependents will be entitled to the survivor benefits of the insurance plan under the terms of this Article at their own cost until the spouse would be eligible for Medicare, (effective 07/01/00, this no longer applies) remarries or the spouse and/or dependents are no longer "dependents" as specified in the Plan, but in no case longer than eight (8) years from the retirement of the employee. Upon involuntary loss of medical and/or dental coverage, including COBRA continuation provisions provided through the spouse's employer, the spouse may be covered under the District's medical and dental plan at their own cost, but in no case longer than eight (8) years from the retirement of the employee. Effective 07/01/00, the eight year limit will be eliminated.

The provisions of the insurance programs will prevail if ever in conflict with the above.

Section F: Carve-out Benefit:

A Carve-out Benefit will be available to employees through outside sources, i.e., WEA MedPlus Plan. The District will not be separately responsible for providing benefits under this section.

If the Carve-out Plan is no longer outsourced, the parties agree to return to the Carve-out Health Plan Benefit that was negotiated beginning with the 1997-98 contract as follows:

- Employees who voluntarily retire after fifteen (15) years of service will be eligible to purchase, at their own cost, carve-out health and/or dental insurance coverage while they are eligible for Medicare provided the employee was participating in the District's health benefit plan at the time of eligibility.
- The employee may purchase either single or family coverage and such purchase must include the Part B portion of the Medicare portion. This benefit will be available only through the District's carrier, or through the self-funded plan.
- If the retired employee elects the "carve-out plan", the retired employee will then pay one hundred and two percent (102%), one hundred percent (100%) effective 07/01/00, of the difference between the single and greater coverage premiums. Payment is to be made to the District on or before the first of each month. In the event of failure to make payments, a thirty (30) day grace period will commence. Should payment not be received during the grace period, coverage will be discontinued. No bills, invoices, or statements will be rendered by the District as the responsibility for payment rests with the retired employee.
- The District will not be separately responsible for providing benefits under this section if the carve-out benefits are not available through the District's carrier or the District's self-funded plan.

Effective 07/01/00, the District will provide a Medicare carve-out benefit. Any payment of claims will occur after the Medicare liability has been determined. These claims will then be

subjected to the health and or dental plan of the District. In all cases, coordination of benefits with Medicare will conform to federal statutes and regulations.

Section G: Validity:

If any aspect of the provision is found to be discriminator or violative of the Federal Age Discrimination In Employment Act, the Wisconsin Fair Employment Act, or any other state or federal law by any court of competent jurisdiction or administrative agency, only the specific portion of the article found to be invalid will be null and void and the parties will immediately bargain in successor clause to replace the voided language.

BACKGROUND AND FACTS

The Grievant, Mary Luckey, was hired by the District in 1988 as a Guidance Counselor. The Grievant experienced a series of medical ailments beginning in August, 2001, when she was diagnosed with cancer. A hysterectomy, surgery to her scalp and another cancer diagnosis followed. The Grievant did not work during either all or a portion of both the 2001-2002 and 2002-2003 school years due to her medical conditions and was on long-term disability.

During the 2003-2004 school year while on leave from the District, the Grievant filed a claim with the Social Security Administration for disability benefits. On April 25, she received notice from SSA that she had been awarded Retirement, Survivors and Disability Insurance effective July 13, 2001, but that benefits would be awarded beginning March, 2002, and that she would be eligible for Medicare after 24 months. As such, the Grievant became Medicare eligible on March 1, 2004.

The Grievant submitted a letter of resignation to District Administrator Sue Alberti and copied David Kundin from Bayland UniServ on June 2, 2003. The letter read in pertinent part:

. . .

Please accept this as my letter of resignation from teaching at the Ashwaubenon School District, which I am submitting today to be effective immediately.

My resignation is for purposes of retirement so please accept this as my notice of intent to retire, thus making me eligible for retirement benefits under Article XXI of the AEA Master Agreement.

. . .

The District Board of Education accepted the Grievant's resignation and provided the Grievant a memorandum addressing "Rights, Limits and Timelines" and a Retirement Agreement which she signed June 20, 2003. The memorandum read as follows:

RIGHTS, LIMITS TIMELINES

This Agreement binds the District and its successors to provide the benefits promised as of the date this memo is signed and, in exchange, for the waiver of claims against the District. If this document is signed before the employee's final workday, the employee will complete the terms of his or her individual contract. If the individual contract is not completed, this Agreement will be null and void.

The specifics of the Agreement are set forth as follows:

- **When Benefits Begin:**

An employee who completes the term of his or her contract has District paid health, dental and life insurance benefits (disability insurance coverage ends the end of the month of the employee's last workday) continued until August 31 in the calendar year of the employee's last work day. An employee who does not complete the term of his or her individual contract has paid insurance coverage only through the last day of the month the employee worked, or is credited to have worked (i.e. on leave, etc.).

- **Health/Dental Insurance Coverage:**

Employees who voluntarily retire under this Agreement will be eligible to remain in the group health and dental insurance plan following August 31 of the year of retirement. The District will contribute a portion of the premium consistent with its contribution toward the single premium for active bargaining unit members until the retiree is covered under another plan of insurance or until November 1, 2012, whichever is first to occur. If the retired employee or covered spouse and/or dependent(s) becomes covered by another health/dental plan prior to the applicable date in the preceding sentence, the coordination of benefits provisions of the District's health/dental plan shall apply.

If the retired employee elects greater than single coverage, the retired employee will pay one hundred (100) percent of the difference between the single and family premium rates. Payment may be made as a payroll deduction from the retired employee's first early retirement compensation or it can be paid directly to the District on or before the first of each month. In the event of the failure to make the required payments, a thirty (30) day grace period will be allowed.

Should payment not be received during the grace period, coverage will be discontinued. No bills, invoices, or statements will be rendered by the District as the responsibility for payment rests with the retired employee.

In the event of the death of a retired employee prior to November 1, 2012, or coverage under another health or dental plan prior to such date, the spouse and/or dependents of the retired employee will be entitled to survivor insurance plan benefits under the terms of this Agreement, at their own cost until the spouse remarries or the spouse and/or dependents are no longer "dependents" as defined in the plan. Upon an involuntary loss of health and/or dental coverage from another source, including COBRA continuation provisions provided through the spouse's employer, the spouse may be covered under the District's health and/or dental plan at their own cost.

A Medicare carve-out benefit will be available to retirees and their dependents currently covered under the health plan of the District. To be eligible for this benefit the retiree and/or dependents must be enrolled in the Plan at the time they are eligible for Medicare. The retiree and/or dependents will be responsible for one hundred (100) percent of the insurance premium cost. Any payment of claims under the Plan will occur after the Medicare liability has been determined. These claims will then be subject to the terms and conditions of the health and/or dental plans of the District. In all cases, coordination of benefits with Medicare will conform to federal statutes and regulations.

The coverage under this Agreement will constitute an election by the employee to exercise his/her rights to continuation of insurance coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") and/or applicable State law regarding the continuation of insurance coverage. Accordingly, the employee's period of continuation coverage will run concurrently with his/her period of health and dental insurance plan participation under this Agreement, commencing with the employee's date of retirement. After the expiration of the employee's period of continuation coverage, the employee will no longer have any right to continuation coverage under COBRA and/or applicable State law.

The provisions of the insurance plan will prevail if ever in conflict with the above.

- **Is Long Term Care a covered health benefit?**

Long Term Care (LTC) is not a benefit the District provides.

- Life Insurance

The District will provide Basic Life Insurance Benefits for retired insured persons at the rate of 100% of his or her final annual salary rounded to the next higher multiple of \$1,000.

Basic Life Insurance Benefits for retired insured persons reduces to 75% of the pre-retirement benefit upon attainment of age 65, further reduce to 50% of the pre-retirement benefit upon attainment of age 66, and further reduce to 25% of the pre-retirement benefit upon attainment of age 67. Coverage will remain at 25% until death.

Optional Life Insurance Benefits for insured persons terminate on the first day of the policy month coinciding with or next following the date of retirement or termination of employment.

Basic and Optional Accidental Death and Dismemberment Benefits on retired insured persons terminate on the first of the policy month coinciding with or next following the attainment of age 65.

ECONOMIC PAYOUT

- Compensation

This District will provide compensation at the rate of one-half (1/2) the teacher's final annual individual teacher's contract divided by three (3) years. This compensation will be paid bi-monthly beginning January 5, 2004.

If the Employee returns to full-time employment with the District after retirement under this Agreement, upon re-employment, no further benefits shall be payable under this Agreement and the Employee will forfeit any right to further compensation under this Agreement.

Following are two copies of your Retirement Agreement. Please complete one copy, return it to me in the Human Resources Office within 14 days of June 11, and keep the other copy for your personal files. If you have any questions, please feel free to contact me.

The Grievant's Retirement Agreement read as follows:

...

Retirement Date: June 9, 2003

Insurance:

You will receive a single insurance policy of health and/or dental coverage for yourself commencing September 1, 2003 and ceasing the first of the month you are covered by another health and/or dental insurance plan or November 1, 2012, whichever is first to occur. (When you and/or your dependents become Medicare eligible, the Medicare Carve-out benefit will become available in lieu of the active employee plan.) The 2002-2003 monthly insurance premiums are as follows:

Single Health	\$394.80	Family Health	\$896.44
Single Dental	\$30.95	Family Dental	\$82.07
Single Medicare Supplement		\$323.84	

If you elect to take family coverage, you will be responsible for the family premiums, less the cost of a single premium, which is provided by the District. These rates are reviewed and adjusted annually.

...

Compensation

The amount you will receive as a benefit under this Agreement is \$29,460.63 over a period of three (3) years beginning on January 5, 2004.

TERMS AND CONDITIONS

- A. The employee agrees to release and forever discharge the District from any and all claims, complaints, demands, actions, rights of actions, costs, damages, wages, expenses, compensation, or any other relief arising out of or under the Age Discrimination in Employment Act ("ADEA") by virtue of his/her employment, including benefits as a retiree, with the District. The employee agrees to waive any and all rights or claims he/she has arising under the ADEA, and its state law counterpart, for benefits under this Agreement and acknowledges, understands, and agrees that he/she is knowingly and voluntarily waiving all of his/her rights or claims under such laws. The employee further understands and agrees that this Agreement is full and final settlement of all claims, complaints, demands, actions, rights

of actions, costs, damages, wages, expenses, compensation, and any other relief he/she may have against the District and the employee agrees not file suit and directly or indirectly cause any other litigation, suit, proceeding, complaint, claim, or charge of any kind including under the ADEA, including any state law counter-part, to be filed by the employee, or on his/her behalf, against the District.

For purposes of this paragraph, "District" shall mean the District, its board of education, its members individually and collectively, its officers, agents, and insurers, and their heirs, personal representatives, successors and assigns.

- B. The employee will have 14 days from June 11, 2003, to consider its terms and decide whether to sign it. This period is designed to allow the employee time to consult with an attorney, or anyone else whose advice he/she may need or want. If this document is signed prior to the expiration of the 14 day period, such execution was voluntary with such additional period of consideration being waived.
- C. After signing this Agreement, the employee will have seven days to revoke his/her acceptance of this Agreement. Any revocation shall be in writing and received by the Ashwaubenon School District, Human Resources Office, at 1055 Griffiths Lane, Green Bay, WI 54304-5599 by the seventh day. The employee understands and agrees that, should he/she exercise this right of revocation, he/she will not be entitled to any right (including employment), payment or consideration under this Agreement or otherwise with or from the District.
- D. The parties agree that the provisions of this Agreement shall be deemed severable, and the invalidity or unenforceability of any one or more of the provisions or clauses hereof shall not affect the validity or enforceability of the other provisions or clauses hereof.
- E. IN ENTERING INTO THIS AGREEMENT, THE EMPLOYEE EXPRESSLY STATES THAT HE HAS READ AND FULLY UNDERSTANDS THE TERMS OF THIS AGREEMENT, THAT IT HAS BEEN FULLY EXPLAINED TO HIM/HER BY HIS/HER RESELECTIVE ATTORNEY, AGENT, OR REPRESENTATIVE, THAT HE/SHE ENTERS INTO THIS AGREEMENT VOLUNTARILY AND OF HIS OWN FREE WILL AND THAT HE/SHE UNDERSTANDS THAT THIS AGREEMENT CONSTITUTES A FULL, FINAL AND BINDING SETTLEMENT OF THE MATTERS COVERED BY THIS AGREEMENT. THE EMPLOYEE FURTHER STATES THAT ITS**

WILLINGNESS TO ENTER INTO THIS AGREEMENT WAS NOT INDUCED BY, OR BASED UPON, ANY REPRESENTATION BY ANY OTHER PART, OR ITS AGENTS OR REPRESENTATIVES, WHICH IS NOT CONTAINED IN THIS AGREEMENT.

...

The Grievant consulted with Kundin regarding the content of the Agreement and subsequently signed it on June 20, 2003. At the time she signed the Agreement, the Grievant believed she would receive paid health insurance until age 65 and her emeritus pay as identified in subsection D of the Agreement.

In a letter dated February 16, 2004, the District informed the Grievant of the following:

...

Madison National Life Insurance Co., Inc. has notified the District that a ruling was made in which you became eligible for Social Security Disability Insurance effective March, 2002. SS disability payments must be received for 24 months before the individual is Medicare eligible. Therefore, March, 2004, you will become Medicare eligible.

During the week of February 9, 2004 you and I spoke about what the ramifications were in regards to your health and dental insurance premiums being paid by the District when you became eligible for Medicare. I notified you that in becoming Medicare eligible, the District paid premiums would cease and you would be terminated from the insurance plan of the District. You could remain covered under the plan of the District however, if you purchased a Medicare Supplement. You then contacted Social Security and were told that you did not have to enroll in Medicare even though you were eligible. However, upon consulting our attorney, Article XXI - Early Retirement of the AEA Master Agreement states,... "Employees who voluntarily retire pursuant to this article, will be eligible to remain in the group health and dental insurance plan until eligible for Medicare." Therefore, because you will be eligible for Medicare March, 2004, the District paid health and dental insurance will be terminated.

If you wish to remain covered by the plan, a Medicare Supplement must be purchased. The cost of a single Medicare Supplement for the 2003-2004 school year is \$359.82 per month and a single dental insurance premium is \$35.12 per month. Payment is to be made to the school district on or before the first of each month. In the event of failure to make payments, a thirty-day grace period

will commence. Should payment not be received during the grace period, coverage will be discontinued. No bills, invoices, or statements will be rendered by the school district, as the responsibility for payment rests with the retiree.

I have included a Termination form which must be completed if you intend to terminate from the plan effective March 1, 2004. If you intend to remain covered by the plan via a Medicare Supplement, please notify me by February 23, 2004.

If you have any questions, please feel free to contact me.

. . .

The Grievant contacted the District and indicated her desire to purchase the Medicare supplement and dental insurance plan which was effective March 1, 2004. The monthly cost to the Grievant was \$394.94.

On February 25, 2004, the Grievant filed a grievance alleging that the District was violating Article XXI, Section F, by terminating her health and dental insurance because of the Grievant's eligibility for Medicare. The requested remedy was for the District to pay the single premium for Medicare Carve Out health insurance plan until November 1, 2012. The District denied the grievance at all stages.

ARGUMENTS OF THE PARTIES

The Association

The Association first argues that the District violated Article XXI, Section E of the collective bargaining agreement in as much as the bargaining history demonstrates that both the District and Association intended "eligible for Medicare" to mean age 65. The words "until eligible for Medicare" became part of the parties' 1995-97 labor agreement at a time when the age for Social Security eligibility was being raised and the parties included the "until eligibility" phrase for the purpose of ensuring that retirees did not experience a lapse in benefits. In 2001, again as a result of federal governmental intervention, the parties negotiated and removed the upper threshold of age 65 for District paid insurance benefits, but at no time was there ever any discussion regarding the impact of this change on someone retiring from the District due to disability. Two members of the Association negotiations team testified that the only reason that the reference to age was removed in 2001 from the contract language was to prevent an age discrimination challenge. The District has not offered any evidence to

challenge the conclusion that when the phrase “eligible for Medicare” was included in the labor agreement, both parties understood the term to mean a particular age at which Medicare benefits would be accessible to the retiree.

The Exit Contract that the District provided the Grievant obligates the District to pay the Grievant’s single health insurance until 2012, when the Grievant reaches age 65.

The District has discriminatorily denied the Grievant single health insurance benefits. The District has interpreted the phrase “eligible for Medicare” to mean age 65 for every retiree except the Grievant. It is unlawful pursuant to Wis. Stats., Sections 111.31-37, to discriminate between and among employees and Article II of the parties labor agreement commits the District to abide by state and federal law.

As to the remedy, the Arbitrator has the authority to award the Grievant equitable relief. The District is contractually mandated to comply with anti-discrimination laws based on disabled status. Although the parties did not contemplate a situation like the Grievant’s, they did contemplate the possibility of differential treatment and included a prohibition in Article II of the labor agreement. In order to remedy the unlawful discrimination, the Arbitrator should order the District to pay the Medicare supplement (carve-out) health insurance premium for the Grievant.

The District

The District properly interpreted the early retirement provision of the parties’ collective bargaining agreement when it did not pay the carve-out premium for the Grievant after she became Medicare eligible. The contract language is clear and unambiguous and sets forth who is responsible for payment of the Medicare carve out plan premium. Article XXI provides that employees who voluntarily retire “will be eligible to purchase, at their own cost, carve-out health and/or dental insurance coverage when they are eligible for Medicare, provided the employee was participating in the District’s health benefit plan at the time of retirement.” The Grievant was participating in the District’s health plan at the time of her retirement and she became eligible for Medicare. There is not evidence to indicate that “Medicare eligibility” means anything other than “Medicare eligibility” and the contract language clearly states that the retiree is to pay the carve-out premium cost.

The labor agreement must be construed in light of statutes and administrative regulations. The parties, when faced with potential age discrimination litigation from the Equal Employment Opportunities Commission, prudently removed all references to age 65 from the labor agreement. To now interpret “Medicare eligible” to mean “age 65” would place the District and the Association back into the morass it climbed out of when it changed the language to avoid illegal discrimination.

The bargaining history supports the District's position. Association witness Shalkhauser testified that the reason age 65 was deleted from the labor agreement was to make sure that if the Medicare eligibility date went above age 65, the teachers would be covered until Medicare benefits began. The goal was ensure that no retiree lost benefits. "Medicare eligible" cannot have two meanings.

The District has interpreted the contract language consistently with respect to prior instances in which retirees became eligible for Medicare. All retirees who reach age 65 and become Medicare eligible are notified that they must purchase a Medicare supplement if they desire to maintain coverage. There was one retiree, Janet Nauman, who became eligible for Medicare prior to age 65 due to disability and the District treated her in the same manner that it has treated the Grievant. The District has never paid the premium for a carve-out insurance plan for any retiree who became Medicare eligible.

Finally, the Association's equity argument must be rejected. The parties' labor agreement, Article II, Section B, Subsection 5, limits the Arbitrator's function to "interpret and apply specific terms of this agreement." The Association was correct when it concluded that this matter should be resolved through bargaining. The Arbitrator would be exceeding her authority and adding to or modifying the terms of the labor agreement if the remedy ordered was to require the District to pay the carve-out premium for the Grievant.

The Association, In Reply

The Association maintains the Grievant was not treated fairly by the District; first, she was required to teach in an area for which she was not certified; second, she was pushed into retirement by District representatives and told that she had to apply for Social Security; third, the District reneged on her exit contract which assured her of single health insurance benefits until 2012; fourth, the District reported her emeritus compensation to the income disability carrier; and fifth, the District refused to pay her carve-out premiums until 2012.

The District has consistently interpreted "until eligible for Medicare" as meaning until age 65. The District's retirement agreement for Terrlyn Brunmeier is reflective of this interpretation. The District cannot argue that "Medicare eligibility" is just that when it is "reading back" age 65 into the exit contracts of the non-disabled teachers.

In terms of the District's brief, it contains numerous inaccuracies. None of the retirees that the District stopped paying the carve-out benefit for due to Medicare eligibility were disabled. As far as Nauman, the District did not offer carve-out benefits at the time she became eligible for Medicare.

The Association asks the Arbitrator to uphold the grievance and rectify the District's discriminatory treatment of the Grievant by awarding the Grievant District-paid carve-out premiums pursuant to Article XXI, Section F.

The District, In Reply

The District first challenges the Association's false statement of the facts. The Grievant was not coerced into retirement. The Grievant was responsible for investigating the interplay between the long-term disability carrier, Social Security and the contractual retirement benefits.

The Association's argument that "eligible for Medicare" means age 65 is in error. The parties' bargaining history establishes that the parties removed age 65 for a valid reason and inserted "eligible for Medicare." It is illogical for the Association to argue that the language that was removed from the agreement was actually what the parties intended the new language to mean.

The failure of the parties to discuss or even consider during bargaining what the impact of "eligible for Medicare" would be on disabled retirees does not create a benefit for those same retirees. The ordinary and popular meaning of the phrase "eligible for Medicare" is clear and need be applied.

As far as the Association's focus on November, 2012, in the Grievant's Retirement Agreement, it is an attempt by the Association to ignore the remainder of the Retirement Agreement. The Agreement clearly states that Medicare eligibility is the triggering factor to determining when the District's obligation to pay for insurance benefits ceases.

For all of the above reasons, the District maintains that the grievance must be dismissed as having no merit.

DISCUSSION

The Association did not propose an issue or issues in this case, but rather left it to the Arbitrator to analyze Association's arguments, offered at hearing and in written briefs, and based on that, frame what was in dispute. In attempting to ascertain and succinctly state the Association's position, I have concluded that the appropriate place to start and end is the grievance. The grievance filed in the case challenges the District's interpretation and application of Article XXI, Section F, Early Retirement, Carve-out Benefit. The grievance did not allege a violation of Section E nor did it allege that the District was unlawfully discriminating against the Grievant on the basis of her disabled status. The District's framing of the issue encompasses both Sections E and F of Article XXI. I, therefore, conclude that it is reasonable and appropriate to include and address both Section E and F, but that any other contractual sections are beyond the scope of the grievance.

Article XXI is the Early Retirement provision of the parties' labor agreement. The District did not dispute the Grievant's eligibility for early retirement and accepted her retirement request with benefits in early June of 2003.¹ The first paragraph of Section E addresses insurance coverage and provides that:

Employees who voluntarily retire pursuant to this article, will be eligible to remain in the group health and dental insurance plan until eligible for Medicare. Effective 07/01/00, the District will offer a Medicare carve-out plan. (Complete carve-out information contained in Section F.) The District will contribute a portion of the premium consistent with its contribution toward the single premium for active bargaining unit members at the time of payment.

The Grievant voluntarily retired and thus remained in the District's health and dental insurance plan, at the District's expense, until she was eligible for Medicare.² The Grievant filed for Social Security benefits and became eligible for Medicare in March, 2004.³ Thus, effective March, 2004, the District's contractual obligation to pay the premium for the Grievant's insurance premiums terminated and the carve-out plan provisions became effective.

Section F, provides the carve-out provisions for early retirees. The pertinent part of the section indicates that:

Employees who voluntarily retire after fifteen (15) years of service will be eligible to purchase, at their own cost, carve-out health and/or dental insurance coverage while they are eligible for Medicare provided the employee was participating in the District's health benefit plan at the time of eligibility.

The Grievant was eligible for Medicare and therefore, if she chose to participate in the District's health insurance plan, it was at her own expense. As such, the District did not violate the labor agreement.

¹ The notice section of the early retirement article provides that individuals planning to take early retirement must inform the District of their intent prior to March 15 of the current school year. The Grievant did not meet this requirement, but the District has not challenged the Grievant's ability to utilize the early retirement option.

² The Association asserts that the Grievant was "pushed" into retirement by the District. There is no evidence to support this conclusion. Although the Grievant testified that she did not want to retire, I attribute that to her desire to continue teaching when faced with the reality of medical ailments that would not allow her to continue in her profession.

³ There is no evidence to support the Association's assertion that the District told the Grievant that she was required to apply for social security disability benefits. Jody Smits, District Human Resources Coordinator, testified that she told the Grievant that she did "did not advise on Social Security" and that she (the Grievant) needed to contact the Social Security Administration regarding the Grievant's Medicare situation. Tr. p. 95. Although the Grievant's testimony alleges that Smits told the Grievant "had to take Social Security," the context of that testimony coupled with the facts of this case indicate that Smits was referring to the Grievant's automatic eligibility for Medicare following receipt of Social Security disability benefits.

The Association asserts that the District's non-payment of the Grievant's insurance premiums was wrong because the "eligible for Medicare" language was intended to mean age 65. The evidence does not support the Association's argument. Prior to the 1995-97 labor agreement, the retirement language provided early retirees District-paid insurance premiums until age 65. At the Association's request, that language was removed during bargaining in order to address the anticipated increase in the age of non-disability Medicare eligibility and the desire of the Association to ensure that a retiree would not have a lapse in insurance benefits while waiting to become Medicare eligible. It is clear that the Association bargaining team fully understood the implications of removing age 65 from the Agreement for retirees whose Medicare eligibility would be greater than 65 years. It is equally clear that the parties did not foresee that the removal of age 65 would reduce the District-paid insurance benefit for retirees becoming eligible for Medicare prior to age 65.

The Association argues that in light of the fact that the parties did not anticipate that a teacher would retire and become eligible for Medicare prior to age 65 or older, the Arbitrator should "fill in the gaps" and provide the Grievant District-paid insurance until age 65. This is not a case where "gap filling" or attempting to give meaning to something that has been omitted from the parties' agreement is appropriate. The meaning of "until Medicare eligible" is clear; it is only the impact of this language on retirees that become eligible for Medicare due to disability that the parties did not contemplate. I agree with the District and Association that this is a fact scenario where bargaining is more appropriate.

The Association looks next to the 2001 Side Letter as bargaining support for the conclusion that the parties' intended to provide retirees with 15 years of District-paid insurance benefits. The 2001 Side Letter was bargained in response to the EEOC threatening age discrimination litigation due to the age specific limitations on retirement benefits contained within the collective bargaining agreement. Again, the parties' removed the 65-year maximum threshold which potentially expanded, and was intended by the Association to expand, the District's financial liability. There is no evidence to support the Association's assertion that the parties' intended to ensure a retiree 15 years of paid insurance benefits.

With regard to the Association's assertion that the language of the Grievant's Exit Contract is a written guarantee for 15 years of insurance benefits, the Contract does not extend such a guaranteed benefit. First, the Association is relying on language in the Memorandum that accompanied the Grievant's Exit Contract. The Memorandum is not the contract. The Exit Contract language clearly states that the Grievant is entitled to District-paid insurance benefits until she is eligible for Medicare, at which time, she has the option to purchase the carve-out plan. Moreover, the Association filed a grievance asserting that the language of Article XXI does not contain a 15-year ceiling for District paid early retirement. Thus, it was the Association's understanding that no minimum or maximum existed as a result of the change in contract language.

Although not grieved, the Association challenges the District's actions asserting that the "Medicare eligible" language has a disparate impact on persons with disabilities and thus, the District's implementation of the language constitutes unlawful discrimination against the Grievant and in violation of Article II of the parties' labor agreement. Even if this argument and contractual violation had been properly included in the grievance, it would have failed. The parties bargained language that recognized "Medicare eligibility" as the time at which the District's insurance premium obligation ends and the retirees' obligation begins. Grievance arbitration is not the place to alter the bargained for language of a labor agreement.

Finally, the Association requests that the Arbitrator, for purposes of equity given the Grievant's situation, order the District to pay the Grievant's carve-out premium until she reaches age 65. The issuance of a remedy presumes that there is a contract violation and that it is ordered to rectify the purpose for which the violated language was intended. There is no contract violation and the parties did not intend to bargain District-paid carve-out benefits to retirees who become eligible for Medicare via a disability determination. As such, the Association's request for an equity remedy is denied.

AWARD

The grievance dated February 25, 2004, shall be dismissed.

Dated at Rhinelander, Wisconsin, this 12th day of July, 2005.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator