BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WEYAUWEGA-FREMONT EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

WEYAUWEGA-FREMONT SCHOOL DISTRICT

Case 29
No. 64055
MA-12793

(Health Insurance Grievance)

Appearances:

Mr. Tim Smith, UniServ Director, Central Wisconsin UniServ Council, P.O. Box 158, Mosinee, Wisconsin, appearing on behalf of the Weyauwega-Fremont Educational Support Personnel Association.

Mr. Tony J. Renning, Davis & Kuelthau, S.C. 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin, appearing on behalf of Weyauwega-Fremont School District.

ARBITRATION AWARD

Weyauwega-Fremont Educational Support Personnel Association, hereinafter "Association," and Weyauwega-Fremont School District, hereinafter "District," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators to the parties in order to select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on February 22, 2005, in Weyauwega, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received May 17, 2005, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties did not raise any procedural issues and stipulated to the following substantive issues:

Did the District violate Article XVIII of the 2003-2005 collective bargaining agreement by exercising the rights afforded to it in the collective bargaining agreement by selecting the insurance carrier and insurance plan for the 2004-2005 school year? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II – MANAGEMENT RIGHTS

The operation of the school system and the determination and direction of the work force, including the right to plan, direct, and control school activities; to assign work loads and the work to be performed; to hire, promote, transfer, schedule and assign employees; to maintain the effectiveness of the school system in accordance with school board policy; to create, revise, and eliminate positions; to establish and require observance of reasonable rules and regulations; and to discipline, reprimand, suspend, and discharge and lay off bargaining unit members are the functions and rights of the Board, and shall be limited by the terms of this Agreement and Wisconsin Statutes.

The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth, the Board retaining all functions not otherwise specifically limited by this Agreement.

Nothing in this clause is to be interpreted as limiting the negotiability of any items regarding wages, hours, and conditions of employment in subsequent negotiations.

ARTICLE XVIII – INSURANCE PROVISIONS

A. The Board reserves the right to select the insurance carrier and insurance plans offered for each type of coverage. The employees agree to coordinate insurance benefits to avoid duplicate coverage.

B. Health Insurance

The District shall institute the WEA Insurance Plan for the 2001-2002 school year. The District shall pay 86% per month for the family health premium and 75% per month for the single health premium for those full-time employees who wish to be insured. The same percentage will be used for the 2002-2003 rates. For the purposes of this provision, full time shall be determined according to 1440 hours annually. Eligible employees who work less than 1440 hours annually shall receive pro-rated payment for insurance.

. . .

BACKGROUND AND FACTS

This grievance was filed by the Association on behalf of its membership.

During bargaining for the 2001-2003 collective bargaining agreement, both the Association and the District made proposals to change the amount employees' contribute to health insurance premiums. The parties reached tentative agreements to on multiple issues, including wage adjustments, but went to interest arbitration on the issue of health insurance. The District sought language which would have capped the District's contribution to the employees' health insurance premium and proposed the creation of section 125 plan. The Association submitted a status quo final offer along with the tentative agreements. The arbitrator issued his decision on July 18, 2003, and selected the Union's offer.

The parties were more successful in negotiating the 2003-2005 successor agreement and reached tentative agreement on all issues by December 5, 2003. Although both sides' initial proposals sought changes to the percentage that the District and the employee contributed to the health insurance premium, there were no changes to the health insurance language. During negotiations, the District was aware that it was possible the health insurance plan would change due to the work of an ad-hoc insurance committee. The Association had representatives on the ad-hoc committee. The District did not inform the bargaining unit that it was possible the insurance plan would change.

Following ratification and implementation of the 2003-2005 labor agreement, the District reached an agreement with the teacher bargaining unit. The teacher unit agreed to the health insurance plan redesign with increased out-of-pocket costs. The District implemented an insurance plan for the Association membership that matched the teacher bargaining unit plan for the 2004-2005 school-year. The District pays 95 percent of the teachers' health insurance premiums while it pays 86 percent of the family and 75 percent of the single premium for support staff.

The WEA Trust Field Representative sent a letter to the Association membership during August 2004 informing them of the following changes, effective September 1, 2004:

	Pre-9/1/04 Benefit	Post 9/1/04 Benefit
All services except listed below	Deductible $100/$300 0 % Co-pay	Deductible$250/$500 10% Co-pay
Prescription Drug	$0	Three Tier Drug Card $5/$10/$25
Emergency Room		Deductible $250/$500 10% Co-pay
Mental Health	0% of first $2000, then 50%	same
Transitional	10% first $3000, then 50%	same
Inpatient	0% first $7000, then 0%	0% first $7000, then 10%

The Association filed the following grievance on August 15, 2004:

. . .

Statement of grievance (briefly, what happened): On August 6, 2004 during a conversation with Dr. Harlan, he informed me that the support staff insurance will be the same as the teacher's insurance beginning September 1, 2004. After considerable discussion with Dr. Harland I informed him that when we settled our contract for the 2003-2005 school years on November 17, 2003 and ratified by the Weyauwega-Fremont School Board and WFESPA on December 15, 2003 that the negotiation team understood from the Weyauwega-Fremont School Board that there would be no change in insurance. The only discussion regarding insurance during negotiations was WFESPA requesting that the Weyauwega-Fremont School Board increase the percentage that they pay towards health and dental be 95% like the teachers contract which the school board denied. Mrs. Gonwa stated "OK, we will keep the insurance".

Article or section of contract that was violated, if any (what did management do wrong):
Page 18, Article XVIII – No where does it state in the 2003-2005 contract that we have to follow what the teachers have negotiated with

the school bard in regards to insurance. The District pays 95% towards the teacher's health but only 86% of the support staff that work full-time. The only full time employees in the support staff are three (3) secretaries and the janitorial staff. The remainder that take insurance have the portion that the district pays prorated according to the number of hours the employee works which puts the burden of insurance cost on the employee. The teacher's are not able to bargain insurance for the support staff nor are we able to bargain insurance for the teachers. The teachers have almost 100% of their employees taking the insurance benefit but a small portion of the support staff take insurance as the burden of the premium is on the employee. The support staff already pays more toward the costs of health insurance premiums than employees do in comparable school districts both in terms of percentage and dollars. The District is trying to take the lowest ranking district in a comparability pool and make them even lower and increase the distance between them and the next lowest comparable. The District has the burden to show why it is necessary to change the health insurance benefits in regards to the support staff, as it would be considerable more out-of-pocket expense for the employee. According to a memo I received from Marsha Yulga dated June 25, 2004 WEA Insurance rates effective as of September 1, 2004 for health increased .09% family and .08% single and the dental increase of 1.8% for family and single. This increase is considerably lower than it has been in recent years.

The request for settlement (corrective action desired); The WESPA requests that the Board does not change the health insurance and the health insurance benefits remain intact with 100/300-deductible and $0/5 drug card. If the District goes ahead with the change in the health insurance and a settlement is reached after September 1, 2004 in favor of the WESPA the District should take the responsibility of compensating the employee for any additional expense which occurs up and above what the insurance plan is now.

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

POSITIONS OF THE PARTIES

The Association Brief

The Association challenges the District's unilateral decision to change the health insurance plan on the basis that it violates the standards of fairness. There is no question that

health insurance is a burden on the District, but it is much more of a burden on the low paid support staff employees. As Arbitrator Engmann stated in his 2001-2003 arbitration award:

> Every school district in the state of Wisconsin is experiencing increasing health insurance costs. Every school district in the state has the same revenue controls. But the numbers above raise the question of how every other school district in both sets of comparables is able to live with these revenue controls and the vast majority of them contribute ninety-one point fifth-four percent (91.54%) or even ninety-five (95%) and more to their employees' health insurance premiums, while this District contributes seventy-five percent (75%) or eighty-six percent (86%) and wants relief from that commitment.

ASSOCIATION BRIEF P. 4 CITING WEYAUWEGA-FREMONT SCHOOL DISTRICT, DEC. NO. 30449-A (ENGMANN, 7/03). The imposed health insurance change impacted the support staff employees at a significantly higher degree than the teachers due to their lower wages. The District should have informed the Union that it intended to change the health insurance. In failing to inform the Union, it distorted and misused the covenant of good faith and fair dealing.

The tentative agreement that was ratified by the Union on December 15, 2003, did not contain any changes to health insurance. The District made the changes without the approval of the Union. In doing so, the District imposed economic changes on the Union without addressing a mandatory subject of bargaining.

The District Initial Brief

The District maintains that the clear and unambiguous language of the labor agreement allows it to select the health plan and provider. Additionally, there is no language in the labor agreement that expressly restricts or prohibits the District from selecting a new plan mid-term.

The Association was aware of the impending change to the health insurance plan. The changes were discussed by the health insurance committee that included Association representatives. The Association did not propose any restrictions or prohibitions on the District's right to select the health insurance carrier and plan during bargaining thus, they have no right to challenge the District's actions.

The District never represented to the Association that the health insurance carrier and plan would remain status quo. In fact, there was no discussion concerning the health insurance carrier or the plan during bargaining and this precludes any assertion by the Association that the District was estopped from making changes to the plan. As far as the Association's

witnesses testimony, they did not have a clear recollection as to what was discussed or agreed upon thus there is no clear bargaining history for the Arbitrator to consider.

The District maintained the same WEA Health Insurance Plan for 2003-2004 as was in place for 2002-2003. After the District reached settlement with the Association, it completed its negotiations with the teachers bargaining unit and made changes to the District's health insurance plan The District has historically offered one health insurance plan to all eligible employees and instituted the plan changes effective September 1, 2004.

The District offered and the Association accepted a *quid pro quo* in exchange for changes made to the health insurance plan. This offer was an additional 10 cents per hour.

In this instance, past practice and bargaining history are not relevant since the contract is clear and unambiguous. Even if considered, neither support the Association's position. As to any claim by the Association that the District has not made insurance changes mid-term, the mere fact that the District failed to exercise its rights is not a surrender of its rights.

Finally, the Association is attempting to obtain in arbitration what it could not obtain at the bargaining table. If the Arbitrator were to find in favor of the Association, she would be placing a restriction or prohibition on the District's right to select a health insurance carrier or plan.

The Association in Reply

The Association maintains that the District's interpretation of the labor agreement leads to an overly harsh and absurd result and is inconsistent with its prior actions. If the District's position is correct, then the District can unilaterally change the deductible to whatever amount it desires, regardless of its absurdity. And if the District has the right to make absurd unilateral changes, why didn't it do so in 2003 when the parties went to arbitration on health insurance language?

The District's assertion that everyone knew that the District was seeking new insurance for the second year is a fabrication. The District created an Insurance Committee, chaired by the Board of Education president, and disbanded the committee as soon as the Association would not agree to separate from WEA Trust. The Committee never communicated to the Association that the second year of health insurance was "open" because if had been communicated, the Association would not have reached a voluntary agreement. Additionally, the Board President's testified that the parties agreed to "no change to existing [health insurance] language." It is unreasonable for the District to believe that the bargaining history supports the conclusion that there was mutual agreement to change the level of benefits after the District assured the membership that there would be "no change."

The Association is not attempting to obtain through arbitration what it could not at the bargaining table. Rather, it is seeking to maintain exactly what it believed it had bargained at the table. The level of insurance coverage was never discussed at the bargaining table. The appropriate insurance cap was the extent to any discussion on health insurance. The District had no proposal on health insurance and communicated it was happy with the language until after the agreement was settled.

The Association requests that the grievance be granted and that the Arbitrator award reimbursement of the increased deductible, the additional out-of-pocket co-pays, and prescription drugs, with interest.

The District in Reply

The District challenges two arguments of the Union; first the assertion that the changes to the health insurance plan was "not fair" and second, that the District has imposed economic changes without addressing them at the bargaining table.

As to the fairness concerns, notions of fairness are not relevant to the instant case. This case deals with clear and unambiguous contract language that must be applied. This language grants the District the right to select the health insurance carrier and health insurance plan. This was discussed at the bargaining table and the labor agreement does not restrict the District's exercise of this right.

As to the Union's argument that the 2003-2004 insurance plan was incorporated into the 2004-2005 agreement, it is inapplicable. The District has the explicit right to select the carrier and the plan. Moreover, if such an argument had any merit, it would apply solely to the 2003-2004 year since the contract does not specifically address the 2004-2005 year. The principle of *expression unius est exclusion alterius* applies and the District was not bound for the 2004-2005 year.

The Union does not like the insurance plan selected by the District, but the clear language of the labor agreement supports the District's position and the grievance should be denied.

DISCUSSION

This case questions whether the District was acting within it's contractual authority when it increased employee out of pocket costs for deductibles, co-insurance and prescription drugs. The District maintains that the health insurance language, coupled with management rights, support the District's action while the Association disagrees.

In a contract interpretation case, the arbitrator first looks to the language of the parties' agreement. If that language is clear and unambiguous and there is but one meaning conveyed, then there is no need to resort to extrinsic evidence. But if the language presents more than one plausible interpretation; extrinsic evidence, including bargaining history, past practice and course of dealing are utilized to ascertain the parties' intended meaning.

The language at issue is found in Article 18 – Miscellaneous Provisions. Section A is inclusive to all insurance plans and provides the District with the right to select the insurance carrier and insurance plan. This language is controlling and supports the District position, provided it is not limited by other express provisions of the labor agreement.

Section B of the same article addresses health insurance and reads as follows:

> The District shall institute the WEA Insurance Plan for the 2001-2002 school year. The District shall pay 86% per month for the family health premium and 75% per month for the single health premium for those full-time employees who wish to be insured. The same percentage will be used for the 2002-2003 rates. For the purposes of this provision, full time shall be determined according to 1440 hours annually. Eligible employees who work less than 1440 hours annually shall receive pro-rated payment for insurance.

The first sentence of Section B, it states that the District will offer "the WEA Insurance Plan" and the date of institution as the 2001-2002 school-year. By specifically referencing WEA, the parties have negotiated the District health insurance carrier. The language further states that it is "the" WEA Insurance "Plan" that is to be implemented. Addressing first the parties choice of "the" rather than "a" as the modifier, it is instructive in as much as it would appear that it was not any WEA plan that the parties were referring to, but rather were referring to a known and specific plan. Moving next to "Insurance Plan", this is the same language utilized in Section A wherein the District finds its authority. If I accept the District definition of "insurance plan" in Section A, meaning the benefit plan of all insurance benefits and obligations, then that same definition would apply to Section B. As such, "the WEA Insurance Plan" in Section B of the parties' agreement is a label for the insurance plan with specific benefits and obligations that was implemented for the 2001-2002 school year.

Specific provisions of a labor agreement restrict the meaning of general provisions, provided extrinsic evidence does not indicate otherwise. ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 6TH EDITION, P. 469-470 (2003). The language of Section A is general and provides the District with the authority to determine the insurance carrier and plan, but the language of Section B is specific and designates the insurance carrier and plan. Thus, Section B limits the Districts rights as contained in Section A in as much as it specifies that the District will offer "the WEA Insurance Plan" and secondly, the date of institution is the 2001-2002 school year. As such, the District's position that Section A provided it the authority to

unilaterally institute health insurance changes is in error unless the extrinsic evidence indicates otherwise.

Looking first to bargaining history, the District offered testimony that the parties agreed during the 2003-2005 negotiations that the second year of insurance was to be "left open" to allow for changes consistent with the insurance committee investigations. The District bases this argument on the fact that the second year of the agreement, 2004-2005 was not identified in the language. If this was supported in the record, it would be persuasive evidence that in the context of bargaining the 2003-2005 contract, the Association acquiesced to the District's asserted right to change insurance plans and carriers, but the evidence does not support this conclusion. First, the parties made no changes to the health insurance language; not even updating reference to the 2001-2002 school-year to the 2003-2004 school-year. Second, the District's argument fails to recognize that the parties reference a single year for the 1999-2001 and 2001-2003 agreements and made no changes during the second year. I am therefore unable to conclude that the reference to 2001-2002 was intended to mean that the issue of health insurance was "open" and that the District was granted the authority to make changes during the term of the agreement.

The Association asserts that the District assured them during the 2003-2005 bargain that there would be no changes to the health insurance. In response, the District points out that the witnesses that testified to what occurred during the 2003-2005 bargain offered both speculative and self-serving testimony and the Arbitrator should not rely on the testimony. I disagree with the District's characterization of the evidence. Association witness Lynn Koehler testified that District negotiator, Christie Gonwa, stated during bargaining that the health insurance would not change. Koehler had contemporaneous notes that supported this testimony. Gonwa confirmed that she made the statement as Koehler testified, but that its meaning was different than that which Koehler understood. That may be the case, but Gonwa's testimony gives credence to Koehler's veracity.

The evidence establishes that the District knew it was probable that the health insurance plan would change and failed to inform the Association. This is so because the District characterized the additional ten cents in its economic offer as a quid pro quo for the health insurance changes.[1] However, revealing this bargaining history is, it is not helpful in ascertaining what the parties intended when the language was bargained.

The Union cites past practice and specifically, Arbitrator Engemann's decision in 2003, as evidence that the parties' have a history of bargaining changes to the health insurance benefit. The Union's argument is misplaced. Arbitrator Engemann was presented with a final offer from the District seeking to change the percentage amount that the District and each employee would contribute to the employee's health insurance monthly premium.

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[1] There is no evidence to indicate that the District ever informed the Association that the ten cents that was added to wages was a quid pro quo for health insurance changes. Given that there was no voluntary exchange, it is inaccurate to characterize the ten cents as a quid pro quo for health insurance.

Article XVIII, Section D states that the District's contribution to the monthly premium is either 86 percent per month for family or 75 percent per month for single. The District desired a change in this language and after the Union was unwilling to voluntarily make the change, the District was forced to take its chances at arbitration in order to achieve its desired change. The present scenario is not the same in that the changes the District made to the deductible, co-pays and drug card are not specifically identified benefits in the labor agreement. Had the labor agreement stated that the deductibles in the WEA 2001 plan were $100 for single and $300 for family, then it would be similar to the desired percentage changes in the 2003 bargain. Since the changes made to the health insurance plan are not specifically spelled out in the labor agreement, it is not a comparable situation and the Union's past practice argument is not persuasive.

Moving to the manner in which the parties have dealt with the issue over time, I find the Association's position more persuasive. The District maintains that it has the authority to make unilateral changes to the plan design, but the evidence indicates that the District did not always believe this to be its right. The District argued in the 2003 interest arbitration case before Arbitrator Engemann that it needed to increase the employee's portion of the health insurance premium because "then employees are more likely to be receptive to redesigning the existing health insurance plan if they have some limited stake in sharing the cost increase." Exhibit 6, p. 6. The District in 2002 appears to have believed that it was necessary for employees to agree to plan redesign rather than unilaterally impose plan design changes.

In conclusion, the specific language of Article XVIII, Section B overrides the general authority granted to the District in Section A. The parties' bargaining history augments the specific language of the agreement. There is no binding past practice in this matter and the parties' manner of dealing supports the Association's position. As such, I conclude that the District violated the parties' collective bargaining agreement when it unilaterally imposed additional out-of-pocket health insurance costs on the Association membership.

AWARD

1. Yes, the District violated Article XVIII of the 2003-2005 collective bargaining agreement by selecting the insurance carrier and insurance plan for the 2004-2005 school year.

2. The appropriate remedy is to reinstate the status quo ante and to reimburse all employees for co-pay, prescription and deductible costs incurred in excess of the 2003-2004 WEA Insurance Plan benefits consistent with this Award.

Dated at Rhinelander, Wisconsin, this 8th day of November, 2005.

Lauri A. Millot /s/

Lauri. A. Millot, Arbitrator

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