

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHETEK SCHOOL DISTRICT

and

NORTHWEST UNITED EDUCATORS

Case 23

No. 65856

MA-13341

(Retirement Provision Grievance)

Appearances:

Pamela M. Macal, Attorney at Law, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin, 54702, appeared on behalf of the School District of Chetek.

Jesse L. Reshke, Executive Director, Northwest United Educators, 156 West John Street, Rice Lake, Wisconsin, 54868, appeared on behalf of Northwest United Educators.

ARBITRATION AWARD

The Chetek School District, herein the District, and Northwest United Educators, herein NUE or the Union, are parties to a collective bargaining agreement which was in effect at all relevant times and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of members of NUE, herein the Grievants. The Commission appointed Paul Gordon, Commissioner, to serve as the arbitrator. Hearing was held on the matter on August 8, 2006 at Chetek, Wisconsin, without transcription. A briefing schedule was set and extended, and the record was closed on October 4, 2006.

ISSUES

The parties did not stipulate to a statement of the issues. The District states the issues variously at the hearing and its written brief as:

Did the District violate Article XV of the collective bargaining agreement when it refused to sign the memorandum of understanding with WEA Insurance Trust to provide an exception to the current health insurance plan offered by the WEA Insurance Trust? If so, what is the remedy?

Did the District violate Article XV of the collective bargaining agreement when it refused to sign a memorandum of understanding with the WEA Insurance, to provide Medicare eligible retirees with prescription drug coverage, which would be an exception to the current WEA Insurance plan offered to the District's employees? Is so, what is the appropriate remedy?

The Union states the issues as:

Under Article XV of the collective bargaining agreement as part of the requirement to maintain health, dental, long term care and long term disability coverage, is the District required to maintain prescription drug coverage for Medicare eligible retirees? If so, what is the remedy?

The statement of the issue as framed by the Union is selected as that which best reflects the record.

RELEVANT CONTRACT PROVISIONS

Article V – MANAGEMENT RIGHTS AND FUNCTIONS

A. It is recognized that the Board has and will continue to retain the rights and responsibilities to operate and manage the school system and its programs, facilities, properties, and the right to direct employees in their duties.

. . .

Article XV – COMPENSATION

. . .

I. At retirement, the Board of Education will allow teachers with 15 years of service to the District to maintain their level of health, dental, long-term care and long-term disability coverages, either family or individual, with one of the following options:

1. Premiums at the current rate for three (3) years commencing with retirement.
2. Premiums at the exit rate for six (6) years.
3. Premiums at 75% of the exit rate for eight (8) years.

Changes to the plan design will be applied to both active and retired employees.

For employees not covered under the health insurance plan at retirement the District will contribute 50% of the health insurance exit rate each January for three (3) years paid over a three (3) year period into a District-selected, non-elective 403 (b) account up to the IRS allowable limits.

At age 65 insurance benefits become supplemental only. The parties agree that, unless there are extraordinary circumstances, the teacher shall apply for these early retirement benefits on or before April 15 of the calendar year in which the benefit is to begin. Said payments shall begin when the existing contract benefits expire.

. . .

Article XVIII – GRIEVANCE PROCEDURE

. . .

Step IV

. . .

3. . . . The arbitration panel shall have no power to advise on salary adjustments except as to the improper application thereof, nor add to, subtract from, modify or amend any terms of this Agreement. The arbitration panel shall have no power to substitute its discretion for that of the Board in any manner not specifically contracted away to the Board.

. . .

BACKGROUND AND FACTS

In 2005 and prior thereto the Chetek School District, pursuant to the collective bargaining agreements in effect at relevant times, provided health insurance benefits to retired bargaining unit members. This included prescription drug benefits. For those retirees who were age 65 or Medicare eligible, the health insurance benefits became supplemental to Medicare, and prescription drug coverage was provided as supplemental coverage with the District continuing to pay the premiums. Since approximately 1994 the District provided the health care insurance through WEA Trust.

In 2005 the Federal government made revisions to Medicare health plans, including adding Medicare Part D, which, for an additional premium, provides certain prescription drug coverage for those on Medicare Part A and Part B. The availability of Part D coverage was on or about November 15, 2005.

In March of 2005 WEA Trust contacted the District, among other Districts, to notify it that the Trust would be making two changes to its health plan. Beginning in July 2005 it would be including certain office visit co-payments for some of the plans it offered to Districts.

The Trust also notified Districts of a change in its prescription drug coverage provisions, known as an exclusion. Its March 30th letter reads in part:

Change Due to Medicare Prescription Drug Act

We have evaluated the Medicare drug plan thoroughly and concluded that, for Medicare-eligible retirees covered by a Trust health plan, the Medicare drug benefit is a good deal. The Trust simply cannot compete with a Medicare drug plan that receives a substantial subsidy from the federal government. Therefore, we have decided to drop prescription drug coverage from the WEA-MedPlus Plans of January 1, 2006.

Part of the Trust's determination that the Medicare drug benefit is a good deal, in comparison to the Trust plan, was based on the cost of the premium and who paid it. State-wide, most of the Trust's Medicare eligible enrollees paid their own premiums for prescription drug coverage. If a third party, such as a School District, paid the premium for a retiree then the Medicare Part D might not be as good an overall deal for the individual. Chetek School District is one of the relatively few Districts that had paid premiums for health insurance benefits that provided prescription drug coverage for Medicare eligible retirees.

The Trust's prescription drug coverage for active employees and retirees who were not yet 65 or Medicare eligible did not change.

After its March 30th notice the Trust became aware that some School Districts had clauses or provisions in their collective bargaining agreements which made them contractually bound to provide prescription drug coverage as part of the health insurance benefits provided to retirees, including those retirees age 65 or Medicare eligible. The Trust understood that Chetek was one of these Districts. There were approximately 19 District retirees who either would or would not be affected by the change on January 1, 2006, depending on how many months of benefits they chose upon retirement and when they will or have become age 65. Approximately 9 retirees would be affected at that particular snapshot in time. In October, 2005 the Trust contacted the School Districts such as Chetek as to District employees and their dependents who are eligible for Medicare as their primary health plan and have a WEA Trust health plan as their secondary coverage. The Trust notified the Districts that it was making an exception to the earlier drug coverage exclusion. It would continue to provide prescription drug coverage for the Medicare eligible. The letter stated in part:

Post-employment health insurance coverage

The second issue revolves around contractual obligations that require school districts to make premium payments for health insurance, including drug coverage, for non-active or retired employees. We have been asked to consider

allowing such individuals to continue the prescription drug plan through the District's Trust health plan. We are willing to work with school districts to offer this provided:

- You have retired employees for whom you are contractually obligated to provide a premium payment and you request that the Trust continue their drug coverage (that is, make an exception to the exclusion of drug coverage described above).
- You identify in writing to the Trust those who are eligible for the exception on January 1, 2006. For those individuals who are eligible in the future, you notify the Trust in writing 90 days in advance that an individual is eligible for this exception.
- You identify for the Trust the terms of your premium obligation and the description of the "group" to whom it applies.
- You notify those who are eligible for this exception and let them know for how long.
- You notify the Trust **and** those receiving continued prescription drug benefits 90 days in advance of when your premium obligation ends. We will not be able to accept retroactive terminations.
- All those receiving continued Trust prescription drug coverage must be on the school bill; we will not be able to make exceptions for those who are billed directly by the Trust.

This exception to the exclusion is, and remains, prospective only. Prescription drug coverage remains available to qualified retirees, but coverage cannot be retroactive.

The letter also contained a Memorandum of Understanding (MOU) for the Districts to sign and return to the Trust to effectuate the exception and to provide the prescription drug coverage for the non-active or retired employees. Among other things, the MOU contained a statement and condition that ". . . the District is contractually obligated to contribute to the health insurance premiums for certain retirees and non-active employees who are eligible for Medicare. . .". The MOU contained a provision whereby either party could terminate the MOU on 90 days prior written notice. The MOU is prospective only.

The District did not sign or return the MOU. The District did not make any other arrangements or provide any other prescription drug coverage – through WEA Trust or elsewhere - for retirees who were age 65 or Medicare eligible. Prescription drug coverage for Medicare eligible retirees was discontinued. As of January 1, 2006 the District took the position that it was not contractually obligated to contribute to such premiums. It took the position that its obligation under the collective bargaining agreement was, as to those retirees,

supplemental to Medicare and that Medicare made available Part D for prescription drug coverage. The exclusion reduces the amount of premiums paid by the District. The supplemental premium with drug coverage is about \$362 per retiree per month. The supplemental premium without drug coverage is about \$128 per retiree per month, the difference being approximately \$243 per month per retiree.

Previously the District and the Union had negotiated some changes in the language of the health insurance provisions in the collective bargaining agreements between the 2001-2003 contract and the 2003-2005 contract. In negotiating the changes the Parties did not discuss and were not aware of the Medicare Part D prescription Drug coverage which later became available through the Medicare program. The counterparts in the 03/05 provisions that were in the 01/03 agreement are as follows:

- H. At retirement the Board of Education will allow teachers with 15 years of service to the district to the following health, dental and long term care options:
1. Premiums at the current rate for three (3) years commencing with retirement.
 2. Premiums at the exit rate for six (6) years.
 3. Premiums at 75% of the exit rate for eight (8) years.

Employees may elect to delay options number 2 and 3. At age 65 insurance benefits become supplemental only. . . .

Prior to 2006 the WEA Trust had made changes in the health insurance plan designs offered to the District. The District health insurance plans had variously been a Corridor (phonetic) plan, a point of service plan, a preferred provider plan, and possibly others since 1994. A prescription drug coverage component has been included in the plans.

On January 13, 2006 the Union filed a class grievance regarding the change in the health plans for Medicare eligible prescription drug coverage, contending the District should have signed the MOU and continued the prescription drug coverage. The grievance was denied and this arbitration followed. Other facts appear as stated in the discussion.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues that Article XV(I) of the collective bargaining agreement requires that the District, at retirement, “maintain” for a teacher with fifteen years of service to the District the level of health, dental, long-term care and long-term disability coverages, which allows qualifying teachers to have District-provided health insurance, including prescription drugs. The Union argues that the Article XV(I) language is clear and unambiguous regarding coverage of prescription drug benefits. The language clearly states

that the District is required to “maintain” health coverage for teachers with 15 years of service for three, six or eight years, depending on the option chosen by the retiree. Until January 1, 2006 maintained coverage had always included District paid prescription drug benefits regardless of Medicare eligibility. It was the District’s failure to sign the MOU that stopped maintenance of the drug coverage.

The Union further argues that the two exceptions to coverage are clear and unambiguous. The exception stating “at age 65 benefits shall become supplemental only”, simply codified a past practice that the District paid for the WEA Trust Medicare supplement plan for Medicare eligible retirees. The language was bargained into the 2001-2003 agreement because retirees could delay taking the benefit so that Medicare Parts A and B would be primary and the District plan supplemental. The language always meant that the District would pay for prescription drug coverage. In addition, the Trust’s representative, Mike Zemplinski, explained his view that it is illegal for a health insurance provider to offer a supplement to Medicare Part D. Under the language of the agreement the District should have signed the MOU to continue prescription drug coverage under the WEA Trust supplemental plan.

The Union argues that the second exception is clear and unambiguous, which states “changes to plan design will be applied to both active and retired employees”. The language was intended to refer to changes in plan design such as higher prescription drug co-pays or changes from a front-end deductible plan to a Point-of-Service plan. When drug card co-pay changes were bargained the prescription drug care co-pay changes were applied to retirees and current employees alike. It was only the District’s failure to sign the MOU which gives possible latent or hidden ambiguity to the Article. Consistent application of the Article requires continued District-paid prescription drug coverage. The MOU accomplishes this.

The Union also argues that if Article XV(I) is ambiguous, the intent of NUE and the School District of Chetek when they bargained the CBA language at issue was to include District-paid prescription drug coverage for all retirees regardless of Medicare eligibility status. This intent was manifested by the District providing these benefits. Any possible ambiguities arise when the limited exceptions are applied to the new Medicare Part D benefit. The bargaining history and past practice provide strong evidence as to the parties’ intent. The supplemental only language was bargained to codify a past practice. Benefits could be delayed and the District would provide the WEA Trust supplemental plan, which provided secondary coverage to Medicare A and B and was the only coverage for prescription drug benefits. Clearly the intent of the supplemental only language was to refer to the WEA Trust supplemental plan which included prescription drug coverage. When the language was bargained, Medicare Part D did not exist and it is impossible that the District could have intended that Medicare Part D be the only coverage for prescription drugs. Part D was not brought up at the bargaining table. Further, the exception regarding changes to plan design was not intended to allow termination of prescription drug coverage for Medicare eligible employees. The reasoning was that retired members should not have better coverage than active employees.

The Union contends the District's argument that dropping prescription drug coverage for retirees is like adding a \$10 office co-pay is harsh, absurd and nonsensical. The Union states that the District argues, generally, that NUE bargained this contract with the knowledge that the WEA Insurance Trust could unilaterally change the insurance plan and therefore it had no requirement to continue prescription drug coverage for Medicare eligible retirees. The CBA does not create a duty to sign the MOU. NUE, on its part, requests the status quo prevail requiring continued coverage at the December 31, 2005 level. Medicare Part D is inferior coverage to WEA Trust coverage. It is absurd to conclude it is comparable to the WEA Trust implementation of a \$10 co-pay. And when WEA Trust added the co-pay there was no opportunity to select a plan without the additional expense. Here, the District had a very real opportunity to continue the status quo.

The Union requests as a remedy that the District be required to sign the MOU and retirees be made whole for increased interim expenses, without the requirement of making paybacks.

School District

In summary, the District argues that Article XV(I) does not create a contractual obligation which would require it to execute a Memorandum of Understanding with WEA Insurance to continue providing prescription drug coverage to its Medicare eligible retirees. Many of the District's retirees would prefer that the District not enter into such an agreement. The District argues the clear and unambiguous language of the collective bargaining agreement between the parties does not require the District to enter into agreements to provide benefits that are no longer being offered by the current health insurance plan. Article XV(I) makes it clear that retirees do not have a "vested" right to a particular insurance plan or design. It clearly states plan design changes will be applied to both active and retired employees. In March of 2005 the Trust was unilaterally implementing two changes which were not requested by the District: co-payments on office visits and removal of prescription drug coverage for Medicare eligible retirees. This is the WEA Trust plan currently available to the District's employees and, pursuant to the language of the Agreement, this is also the insurance plan available to retirees. The Agreement provided that retirees are only eligible for supplemental health insurance once they reach Medicare eligibility. Medicare now offers prescription Drug coverage under Part D, which was not available prior to January 1, 2006 through Medicare.

The District argues several basic principles of contract interpretation support the District's position that it is not required to enter into the Memorandum of Understanding with the WEA Insurance Trust. A determination of the parties' intent must be based upon a reading of the agreement as a whole, not on an isolated word or provision. Meaning should be given to each provision and denied to none. Meaning is inevitably dependent on context. Certain changes were negotiated between the 2001-2003 agreement and the 2003-2005 agreement. The

District contends the Union attempts to argue that the phrase “maintain their level” in Article XV(I) requires the District to “maintain” a certain level of health insurance coverage for retirees. The phrase “maintain their level” was negotiated to ensure retirees would not have less insurance than when they were employed, which language conflicts with the language in the two agreements. It states “[a]t age 65 insurance benefits become supplemental only”. That meant insurance benefits offered by the District were supplemental to Medicare coverage. While it is true that Medicare Part D did not exist at the time the parties were bargaining, it does not negate the fact that the parties negotiated a benefit for retirees with the full knowledge that, at Medicare eligibility, a retiree’s insurance coverage from the District would be supplemental to Medicare’s offerings.

The District also contends that the Union’s testimony conflicts with past practice between the parties. The District only pays for all or a portion of the WEA supplemental insurance premium, depending upon the retiree’s exit rate. Thus, Medicare-eligible retirees have never been treated exactly like current employees. If the District had to treat Medicare-eligible retirees exactly like current employees, those retirees would not have to apply for Medicare Parts A & B. The entire benefit would be covered or the District would have to reimburse retirees for Parts A & B coverage, which it does not do. “Maintain” does not guarantee a particular level of coverage, it guarantees retirees the ability to continue family or individual health, dental, long term care and/or long term disability once they have retired. During negotiations teachers were concerned the District could unilaterally move retirees from family coverage to single coverage. The modification to Article XV(I) clearly prohibits this reduction from family to single coverage. Article XV(I) requires changes to the 2006 WEA Insurance plan be applied to both active and retired employees. Once an active employee retires and becomes Medicare eligible, they will be required to obtain Medicare Parts A, B and D. According to the terms of the 2006 WEA Insurance plan, active employees will not be eligible for prescription drug coverage once they become eligible for Medicare.

The District points out that this is not a District-initiated plan design change. Over the years WEA Insurance has made many unilateral modifications to its plan design, which the Union never grieved. Here, the Union only grieved one of the two unilateral changes made by WEA Insurance. The agreement does not give the Union the right to decide which benefits vest when an employee retires. If the Union does not like the benefits offered by WEA Insurance, it can attempt to negotiate a new insurance plan with the District. To read “maintain” in isolation, the way the Union does, obliterates provisions requiring plan design changes to be applied to both active and retired employees and the requirement that at age 65 insurance benefits become supplemental only. Intent must be based upon a reading of the agreement as a whole, not on an isolated word or provision.

The District argues the collective bargaining agreement between the parties prohibits the arbitrator from adding to or modifying the terms of the agreement. The Union is essentially asking the arbitrator to read into the agreement “. . . as if they were still employed

with the District”. This language is not part of the agreement and the arbitrator cannot modify or add additional language to satisfy Union desires. Article XVIII limits the role of the arbitrator to interpretation of the express language of the agreement. The agreement specifically gives the District the ability to apply plan design changes to retirees, so retirees have no legitimate expectation that their health insurance coverage will remain unchanged.

The District also argues that if it has violated Article XV of the collective bargaining agreement it would be obligated to provide retirees, who retired prior to January 1, 2006, with prescription drug coverage by signing the MOU. The District would not be required to provide prescription drug coverage to retirees who retired after January 1, 2006, after the provisions of the 2006 WEA Insurance Plan took effect.

Union Reply

In summary, the Union replies that the District’s arguments are an attempt to pass the blame for not maintaining the status quo, which the District could have done by signing the MOU. The supplemental only at Medicare eligibility is not as broad as the District’s reading. And, to give the language meaning supplemental coverage needs to be available. The law does not allow Medicare Part D supplemental coverage.

The Union contends that it has not argued, as the District asserts, that retirees have a vested right to a particular plan or plan design. NUE’s argument is that the District does not have a right to unilaterally change the insurance plan. The contract language assumed insurance plan design changes would be collectively bargained, as testified to by Union witnesses. The District’s argument that it can make a unilateral change is nonsensical. Further, dropping the drug coverage for Medicare eligible retirees is not comparable to adding a \$10 co-pay. Neither NUE nor the District had an option to maintain that part of the plan. The District had the exclusive option to maintain the drug coverage for Medicare eligible retirees. The District is trying to pass the blame for its decisions, and save money by violating the collective bargaining agreement.

The Union argues that the case strikes at the heart of present day collective bargaining in northwest Wisconsin. Finances are tight for Districts. The District was trying to save money by not signing the MOU and was happy to decrease health insurance coverage to do so. Because of the integrity of the collective bargaining process the District cannot be allowed to prevail in this grievance. Present retirees had their coverage substantially affected, and future retirees will have their coverage substantially affected. If the District desires to make this type of change it needs to do so through collective bargaining, the same manner in which NUE acquired the benefit.

District Reply

In summary, the District replies that the Union's claim that it is illegal for a health insurance provider to offer a supplement to Medicare Part D is misleading. A health insurance plan that covers retirees who are eligible for Medicare Part A and B is also free to offer prescription drug coverage to retirees.¹ A supplement from the Federal government to offset the cost of continuing prescription drug coverage to retirees is available, but not to WEA Insurance Trust due to the way the Trust plan is designed.

The District argues that Article XV(I) does not clearly state the District is responsible for providing prescription drug benefits to retirees. The phrase "prescription drug coverage" does not exist within the collective bargaining agreement. The District is obligated to provide certain types of coverage and allow the retiree to "maintain" the level of coverage, whether single or family, the retiree had at the time of retirement. The District is only required to pay for "supplemental" insurance once a retiree reaches age 65. This language clarified that once a retiree became Medicare eligible, the District was only responsible for the WEA supplemental Insurance Plan. The current supplemental insurance plan offered by WEA does not include prescription drug coverage for Medicare eligible retirees.

The District also argues that by signing the MOU a school district is affirming that it has a contractual obligation to provide prescription drug coverage to Medicare eligible retirees. The MOU is an exception to the current 2006 WEA Insurance Plan, which does not provide prescription drug coverage to retirees. The collective bargaining agreement states that plan design changes will be applied to retirees. Entering into the MOU prevents plan design changes from being applied to the District retirees, contrary to the actual language in the collective bargaining agreement. The District is not one that has a specific contractual obligation to provide "prescription drug coverage". If the Union wants prescription drug coverage they must bargain for it.

In addition, the District argues the collective bargaining agreement states that insurance after age 65 is supplemental only. The MOU pays for prescription drug coverage outright, and is not supplemental insurance and it runs counter to the terms of the agreement. The District should not be required to provide additional benefits to make up for the shortfalls of the program chosen by the Union. The MOU is an exception to the plan, not supplemental to Medicare Part D. It is a stand alone insurance plan. It can be eliminated by WEA at any time and the District would be stuck with a plan that no longer provides the coverage. The District wonders where coverage would then come from. Reimbursement of expenses was not intended and would be absurd.

¹ The District's reply brief references a website and other insurance providers which were not made part of the evidentiary record. Accordingly, those arguments and references will not be considered.

The District argues that Union witness Morgan would be a high utilizer of the benefit who would not benefit from the plan design change. She has a lot of incentive to testify that the “intent” of the parties was to cover prescription drug coverage, even if this “intent” runs counter to the clear language on the agreement and the testimony of the District’s witnesses. The Union is asking the District and District retirees who pay part of their Medicare supplement to subsidize Morgan’s health insurance costs. Not everyone benefits when a change is made. For some the reduction in cost is welcome. The District faces double digit health insurance premium increases year after year, but does not file grievances. Retirees have no vested interest in a particular plan or a particular set of benefits. Plan design changes will be applied to retirees. The current WEA Plan offer to District employees is the 2006 Plan which does not provide prescription drug coverage for Medicare eligible employees. The parties are bound by the agreement they negotiate.

The District also argues that if a remedy is ordered, then the District is under no obligation to provide prescription drug coverage in any form when the prescription drug benefit is evaporated from the WEA Supplemental Insurance Plan. And, the District would like any obligation to enter into the MOU to apply only to teachers who retired prior to January 1, 2006 with no continuing obligation to provide the additional exception to teachers who, prior to retirement, were covered by the 2006 WEA Insurance Plan which does not provide prescription drug coverage for Medicare eligible retirees.

The Union further argues that the two exceptions to coverage are clear and unambiguous. The exception stating “at age 65 benefits shall become supplemental only”, simply codified a past practice that the District paid for the WEA Trust Medicare supplement plan for Medicare eligible retirees. The language was bargained into the 2001-2003 agreement because retirees could delay taking the benefit so that Medicare Parts A and B would be primary and the District plan supplemental. The language always meant that the District would pay for prescription drug coverage. In addition, the Trust’s representative, Mike Zemplinski, explained his view that it is illegal for a health insurance provider to offer a supplement to Medicare Part D. Under the language of the agreement the District should have signed the MOU to continue prescription drug coverage under the WEA Trust supplemental plan.

The Union argues that the second exception is clear and unambiguous, which states “changes to plan design will be applied to both active and retired employees”. The language was intended to refer to changes in plan design such as higher prescription drug co-pays or changes from a front-end deductible plan to a Point-of-Service plan. When drug card co-pay changes were bargained the prescription drug care co-pay changes were applied to retirees and current employees alike. It was only the District’s failure to sign the MOU which gives possible latent or hidden ambiguity to the Article. Consistent application of the Article requires continued District-paid prescription drug coverage. The MOU accomplishes this.

The Union also argues that if Article XV(I) is ambiguous, the intent of NUE and the School District of Chetek when they bargained the CBA language at issue was to include District-paid prescription drug coverage for all retirees regardless of Medicare eligibility status. This intent was manifested by the District providing these benefits. Any possible ambiguities arise when the limited exceptions are applied to the new Medicare Part D benefit. The bargaining history and past practice provide strong evidence as to the parties' intent. The supplemental only language was bargained to codify a past practice. Benefits could be delayed and the District would provide the WEA Trust supplemental plan, which provided secondary coverage to Medicare A and B and was the only coverage for prescription drug benefits. Clearly the intent of the supplemental only language was to refer to the WEA Trust supplemental plan which included prescription drug coverage. When the language was bargained, Medicare Part D did not exist and it is impossible that the District could have intended that Medicare Part D be the only coverage for prescription drugs. Part D was not brought up at the bargaining table. Further, the exception regarding changes to plan design was not intended to allow termination of prescription drug coverage for Medicare eligible employees. The reasoning was that retired members should not have better coverage than active employees.

DISCUSSION

The issue concerns whether the District is obligated under the 2003-2005 collective bargaining agreement to continue to provide a health insurance coverage benefit which covers prescription drugs for certain Medicare eligible retirees.² A determination of the issue involves what benefits are required to be provided under the language of the collective bargaining agreement. The Union contends such coverage must be maintained under Article XV. The District contends it is not contractually obligated under Article XV to execute the MOU to continue providing the prescription drug coverage.

There were some changes negotiated between the 2001-2003 and the 2003-2005 agreements. However, both agreements contain the same phrase:

At age 65 insurance benefits become supplemental only.

The prescription drug benefit has been part of the health insurance plan provided to the District by the WEA Trust, and for those retirees 65 and over this was done as a supplemental provision in the WEA Trust plan. Prior to January 1, 2006 there was no Medicare Part D to provide prescription drug coverage through the general Medicare program. Prescription drug coverage was provided as the supplemental coverage referred to in the above contractual phrase as a carve-out to the health plan, which contained a prescription drug benefit, covering

² Provided the number of months of benefits selected extend beyond any particular retiree's Medicare eligibility, typically at age 65.

current employees and retirees not yet age 65. The retiree paid the Medicare premium for Part A and Part B. Pursuant to the agreement, the District paid the premiums for this supplemental insurance which, in turn, provided the prescription drug benefit for those 65 and over.

Since about 1994 the WEA Trust has been the insurance company which provided health insurance, including the supplemental insurance, to the District. Being a supplemental plan, it covered prescription drugs and other matters not covered by Medicare Part A and Medicare Part B, which would otherwise be covered by the health insurance plan available to current employees and retirees who were not yet Medicare eligible. WEA Trust has made unilateral changes to coverage plans in the past. In March of 2005 WEA Trust determined it would no longer offer prescription drug coverage as part of the carve out plan and such coverage would become an exclusion to the plan. WEA Trust then, after realizing that there were some school districts that were contractually bound to provide that benefit, determined to make an exception to the exclusion for those districts with such contractual liability. In effect, WEA Trust would continue to provide this coverage. The instrument WEA Trust chose to use to effectuate this is the MOU involved in this case. Thus, at all times, a prescription drug benefit was available through the WEA Trust health plan available to the District to meet its obligations under the collective bargaining agreement.

The question becomes whether the District was so obligated to provide a supplemental insurance plan that covered prescription drugs once Medicare Part D was introduced by the Federal government.

Until December 31, 2005 those obligations included providing coverage for prescription drugs to Medicare eligible retirees through a supplemental plan which was available from WEA Trust. Even though Medicare Part D is now in existence, prescription drug coverage is still available through a supplemental plan from WEA Trust. The format of the instrument providing that coverage has changed by the use of an additional MOU, but the available benefit has not. The District has had and still has the ability to obtain this supplemental coverage that provides the benefit. The agreement says the insurance benefits become supplemental. That is what the District is obligated to provide. The agreement does not say the insurance is eliminated if other coverage, such as Medicare Part D or anything else, is or becomes available. This language was negotiated into the collective bargaining agreement before the development of Medicare Part D. It is the intent and understanding of the parties at the time the language was negotiated and signed which controls. There is nothing in the record which suggests that this language, even though it uses the word "supplemental", was intended to transfer premium payment for a prescription drug benefit from the District to the retiree. Because there was no Part D program at the time, the parties could not have intended that by use of the word supplemental. At the time the agreement was entered into, supplemental could only mean supplemental to Medicare Part A and Part B.

Both parties argue fundamental contract interpretation principles in addressing the issue. Both argue that all parts of the agreement must be given meaning. None can be left meaningless. The Union argues that in order to give any meaning to the "supplemental only"

language, supplemental coverage needs to be available. That supplemental coverage has provided and still provides a prescription drug benefit - a major part of the benefit. The record is clear that prescription drugs were covered. The record does not specifically demonstrate that supplemental benefits included anything else, such as covering deductibles, co-pays, or other things. But those are things typically covered by a supplemental policy. The premium for the supplemental policy without drug coverage was reduced from \$362 to \$128. It covers something for this premium, even though the exact benefits are not disclosed in the record. But, given the loss of coverage of prescription drugs and a reduction in approximately two-thirds the dollar value of the premium, it is clear that the coverage provided is significantly less and is not as meaningful. With that benefit not provided under this language there is significantly less value in the agreement than it had before the Medicare Part D change. So even though the phrase is not meaningless, there is nothing in the record to suggest that the parties intended the values of the benefit to the retirees would, or could, be reduced in such a large fashion without some expression or recognition by both parties that that was their mutual understanding. The District has not argued that it understood or intended that the value of the benefit to retirees would be reduced by the elimination of prescription drug coverage. Neither did the District present evidence that it understood the phrase to somehow automatically reduce its obligations merely by continuing the use of the phrase.

The very practical difference in providing the supplemental benefit is who pays the premium for prescription drug coverage for Medicare eligible retirees. Under the District's view, the retiree would pay as a premium for Part D coverage. Under the Union's view the District would pay as an obligation to provide the supplemental benefit which had previously provided a prescription drug benefit. It is true that when the changes between the collective bargaining agreements were made the parties were not aware of the Part D provision. At that point the District had been paying the premium for the coverage. There is no evidence and no reason to think that the parties agreed that the District would no longer have an obligation to provide the benefit as a supplement with the introduction of Part D. Part D did not exist. There is no evidence or reason to believe the Union agreed that its retirees would pay a premium they had not paid before. Thus, the language as drafted, as applied previously, and as negotiated, shows an intent that the phrase, [at] age 65 insurance benefits become supplemental only, means the District would continue to provide the benefits previously provided as supplemental. That benefit is prescription drug coverage.

There is nothing in the language of the agreement which eliminates this obligation of the District on January 1, 2006. That date does not appear in the agreement. There is no reference to Medicare Part D in the agreement. There is no language in the agreement which provides an ending date or condition to the coverage other than the options for duration a retiree can elect.

The fact that Part D has been available since November 15, 2005 does not change the language of the collective bargaining agreement or the obligations of the parties under it. Part D does, however, present an eligible retiree with a choice of whether to be covered in Part D at their own expense or seek coverage under the WEA Trust plan through the District.

The collective bargaining agreement requires the District to “allow” retirees to maintain their insurance. The preceding agreement also would “allow” coverage for retirees. But there is nothing which requires a retiree to take the insurance if they do not want to.

Both parties have argued the use of the word maintain their benefit. The record demonstrates that the word “maintain” was added to the sentence at the same time the phrase “either family or individual” was added to the same sentence. The Union bargaining team members understood at the time that was to allow retirees to keep family coverage if they had had it, rather than being limited to single coverage. This seems most reasonable. It does not, however, go to the issue of what benefits are actually provided under the coverage be it single or family coverage. Thus, the arguments do not help either party.

The parties also added the language in the 2003-2005 agreement that changes to the plan design will be applied to both active and retired employees. This requires that retirees be allowed the same plan as active employees, whatever those plans might be. However, there has always been a very real difference between the plans offered to those retirees who became age 65 and thus Medicare eligible. Those retirees did have a different plan than everyone else, active employee or retired before age 65, because their plan was supplemental only. That is how the parties understood that group of retirees would be covered. Clearly some difference in plans or coverage was anticipated for the age 65 group. What has remained constant is the provision of prescription drug coverage for all current and retired employees. Contrary to the argument of the District that the 2006 WEA Insurance Plan offered to current District-wide employees does not provide prescription drug coverage to Medicare-eligible retirees, the exception to the exclusion to the WEA-MedPlus Plan, made available through the MOU, has actually retained the same prescription drug coverage which is otherwise available to employees. As to the prescription drug benefit the plan design did not change. All current and retired employees are provided a prescription drug benefit under the health insurance plans.

The District raises a concern about the ability of the MOU to be cancelled with 90 days notice by either it or WEA Trust. That might, in the future, present an impossibility issue to the District. That has not happened yet, and it would be speculative to assume it will. Whether that would relieve the District of any obligation, or require it to seek alternate coverage from WEA Trust of some other carrier, need not be decided in determining current obligations.

Signing the MOU was and is a way for the District to provide the benefit it obligated itself to in the collective bargaining agreement. The agreement does not refer to the MOU, obviously. It is not the failure to sign the MOU which violates the agreement. It is the failure to provide the contracted benefit which violates the agreement. An obvious way to provide that benefit is the MOU. Neither party has suggested an alternative. Providing the coverage through the use of the MOU would be a way for the District to comply with the collective bargaining agreement.

The scope of the remedy is at issue. The District argues that if a remedy is awarded it should not extend past January 1, 2006. The Union argues that there should be no repayment to the District for any advantage any particular retiree might have experienced due to the changes.

As indicated above, it is the agreement as the parties negotiated it that is at issue. That agreement does not contain an ending date for obligations with the introduction of Medicare Part D. That agreement is prospective and there is nothing that eliminates the obligations under it on January 1, 2006, the date the original exclusion was effective but for the availability of the exception. There is no reason to limit the agreement's provisions to a date not contemplated by the parties.

As to the Unions request, it cites a Wisconsin unfair labor practice complaint case for the availability, in some instances, of a bargaining unit member being able to keep a benefit they would not have had if there had not been an unfair labor practice in violation of Wisconsin Statutes under MERA. That is not the case here. This case is a grievance arbitration and not an unfair labor practice complaint. In the statutory violation area there is some interest in discouraging a violating party from repeating the violation, and the remedy of non-repayment serves as something of a punitive measure. Those considerations are not present here. The polestar should be to place the parties in the position they would have been in if there were no contract violation. While some retirees may benefit from a remedy requiring coverage by the District, it appears there may be retirees who would not. A remedy here should not force a retiree to be covered by the District if they do not want to be and are satisfied to pay their own Medicare Part D premium. Such a scenario is alluded to above. For those who would find it advantageous to be covered by the District, they should have that available to them and they should be made whole. They should be no better or no worse off than they would have been without the dispute. The same should apply to repayment. Any retiree in that circumstance should be no better or worse off than they would have been without the dispute. There is very little evidence of the effect on individual retirees due to the benefit changes. Thus, the remedy is to make whole by instituting the coverage and making whole the bargaining unit members which is to include repayment from those whose calculations may so indicate. Admittedly, this may lead to some further questions of the parties in applying this, and jurisdiction will be retained for that purpose.

Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is sustained. As a remedy, the District shall provide the prescription drug coverage for retirees age 65 and over in a manner available such as through the Memorandum Of Understanding. Retirees will be put in the same position they would have

been in had there been no violation. This is a make whole remedy with payback provisions. The arbitrator will retain jurisdiction for 60 days to make further determinations of this portion of the remedy if the parties are not able to resolve the make whole matter themselves.

Dated at Madison, Wisconsin this 10th day of April, 2007.

Paul Gordon /s/

Paul Gordon, Arbitrator