BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN, INC.
FOR AND ON BEHALF OF ITS AFFILIATE LOCAL,
THE GREENDALE PROFESSIONAL POLICE ASSOCIATION

and

VILLAGE OF GREENDALE

Case 79
No. 66254
MA-13472

Appearances:

Patrick J. Coraggio, with **Benjamin M. Barth,** Labor Consultants, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin 53022, for the Labor Association of Wisconsin, Inc., for and on behalf of its affiliate local, the Greendale Professional Police Association, which is referred to below as the Association.

Nancy L. Pirkey, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, for the Village of Greendale, which is referred to below as the Employer or as the Village.

ARBITRATION AWARD

The Employer and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin as Arbitrator to resolve grievance number 2005-59, filed on behalf of "Greendale Professional Police Association, Local 309 of the Labor Association of Wisconsin, Inc." Hearing on the matter was conducted on November 30, 2006, in Greendale, Wisconsin. On December 14, 2006, Lisa Balkowski filed a transcript of the hearing with the Commission. The parties filed briefs and reply briefs by March 2, 2007.

ISSUES

The parties did not stipulate the issues for decision. The Association states the issues thus:

> Is the Village's application and interpretation of Article XVII – Insurance, Section 17.02(A), consistent with the 2005-07 collective bargaining agreement between the Village of Greendale and the Labor Association of Wisconsin, Inc.?
>
> If not, what is the appropriate application and remedy?

The Village states the issues thus:

> Did the Village comply with Section 17.02 and past practice when it calculated the percentage payment for retiree health insurance using the premium contributions made by the Village for active employees?
>
> If not, what is the appropriate remedy?
>
> Does the grievance procedure permit the remedies sought by the Association; specifically, the request for statutory interest, attorney and labor consulting fees payment of time spent by staff or witnesses of the Labor Association of Wisconsin and the posting of a notice in the local newspaper?

I find the Association's statement of the issues is that appropriate to the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

SECTION 2.01: The Association recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility and in the manner provided by law, and the powers and authority which the Employer has not specifically abridged, delegated or modified by other provisions of this Agreement are retained as the exclusive prerogatives of the Employer. . . .

SECTION 2.02: The exercise by the Employer of any of the foregoing powers, rights and/or authority shall not be reviewable by arbitrations except in case such are so exercised as to violate an express provision of this Agreement.

. . .

ARTICLE XVII – INSURANCE

SECTION 17.01 – HEALTH INSURANCE: The Employer shall provide hospitalization and surgical care insurance for employees covered by this Agreement under the Wisconsin Public Employers Group Health Insurance Plan (Wisconsin Group Plan), and thereafter coverage will remain as under the Wisconsin Group Plan, or under a substantially equivalent plan, and in the event of such change, the Employer will pay the full cost as previously provided. The Employer shall pay one hundred and five percent (105%) of the lowest cost qualified plan (meaning the lowest cost HMO or the lowest cost qualified plan if no HMOs are available) offered in the service area covering the Village as determined by the Wisconsin Group Plan and the employee shall pay the difference, if any, between the Employer contribution and the plan selected by the employee. Effective January 1, 2006, the Employer shall pay one hundred and two and one-half percent (102.5%) of the lowest cost qualified plan offered in the service area covering the Village and the employee shall pay the difference, if any, between the Employer contribution and the plan selected by the employee. Effective January 1, 2007, the Employer shall pay one hundred percent (100%) of the lowest cost qualified plan offered in the service area covering the Village and the employee shall pay the difference, if any, between the Employer contribution and the plan selected by the employee. A retired employee may continue to participate in the Employer's group health insurance program for active employees until the retired employee becomes eligible for Medicare, provided the insurance carrier agrees to permit the retired employee to continue in such group program and provided that the retired employee pays the full premium for such insurance, unless Section 17.02 applies. Such payment is to be made monthly on or before the 15th of each month. If applicable, this payment can be made from an employee's health insurance premium account pursuant to Section 10.07.

SECTION 17.02: The Employer agrees that employees who retire under the Wisconsin Retirement System as per guidelines set by the Wisconsin Retirement System, or older, during the life of this contract shall be continued for the balance of their lives as members of the group health insurance plan applicable to the collective bargaining unit under the following conditions:

A. The amount of payment made by the Employer will be based on the number of years creditable service with the Employer using the following formula:

With ten (10) years of service:	50% payment
With fifteen (15) years of service:	60% payment
With twenty (20) years of service:	70% payment
With twenty-five (25) years of service:	75% payment
Employees who retire under a disability Retirement under Chapter 40 of the Wisconsin State Statutes:	75% payment

. . .

F. The Employer will issue a check to an insurance company of the retiree's choice if the Employer has no policy or plan for which the retiree is eligible. . . .

ARTICLE XX – GRIEVANCE PROCEDURE

. . .

SECTION 20.03: Each party shall share equally in the cost of the Arbitrator. Each party, however, shall bear its own costs for witnesses and all other out-of-pocket expenses, including possible attorney's fees.

SECTION 20.04: . . . In making his decision, the Arbitrator shall neither add to, detract from nor modify the language of this Agreement . . . The Arbitrator shall expressly confine himself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination. . . .

BACKGROUND

Matthew Borkowski, the Association's President, and Ben Barth, a Labor Consultant for the Association, signed the grievance by January 1, 2006. The grievance form questions a letter from Village Manager Joseph Murray to "Retirees", which is dated December 12, 2005, and is headed "Re: 2006 Retiree Health Insurance Premium Calculations." The letter states:

. . .

Currently, the Village has three (3) primary calculations for retiree health insurance benefits depending on the retiree's retirement year and union contract or non-represented employee benefit language. These different "statuses" result in

different benefit calculations to determine the amount the Village pays towards their health insurance as follows:

Status 1 – "Capped" – Some retirees have their ***retiree health insurance benefit "capped" at the time of retirement.*** For these retirees the Village utilized the premium in effect the year they retired, multiplied that times 75% and established the health insurance benefit the Village will pay each year towards their retiree health insurance. The Village's payment – the health insurance benefit amount – remains constant and does not increase each year even though the health insurance premium amount does increase. This primarily applies to older non-represented employee retirees.

Most of the retirees now have benefit language that provides the "escalator clause" so that the Village must calculate their retiree health insurance benefit each year with the new premiums. In general, the Village must calculate the retiree health insurance each year so that it increases or "escalates" each year as the health insurance premiums also increase. Retirees in Status 1 above do not have the escalator clause and that is why they are "capped". The escalator clause benefit relates to Status 2 and Status 3 retirees below.

Status 2 – "Averaging" – When the Village joined the State Plan in 1999, the health insurance benefit for current employees and retirees was calculated utilizing an average of the HMO health insurance premiums each year. In essence, the Village calculated the average cost of qualified HMO health insurance premiums in Milwaukee County and then multiplied that by 75% to determine the MAXIMUM Village retiree health insurance benefit. Non-HMO (such as the Standard Plan) and non-qualifying plans are not included in the calculation. For some retirees their ***retiree health insurance benefit is 75% of the premium UP TO 76% times the average – whichever is less***. The retiree is required to pay at least 25% of the premium.

. . .

The Village does NOT pay the 75% x the Average amount . . . toward all the retirees' premiums. Each retiree's premium amount is calculated based on the health insurance plan they enroll in.

The calculations are computed each year based on the actual premiums so that the average "escalates", but the definition of the retiree health insurance benefit provided by the Village would remain the same – 75% of the premium UP TO 75% of the average – whichever is less.

This "Averaging" status applies to some of the retirees who retired between 1999-2001.

Status 3 – "105% LCP" - In 2002, the Village revised the health insurance benefit calculation method from "Averaging" to having it based on the Lowest Cost Plan ("LCP"). Annually, the State Plan identifies the LCP qualified plan available in Milwaukee County and the Village multiplies that by 105% to determine the MAXIMUM health insurance premium amount it pays for current employees. Non-HMO (such as the Standard Plan) and non-qualifying plans are not included in the calculation. The amount paid to the current employees (105% LCP) is then multiplied by 75% to determine the MAXIMUM Village retiree health insurance benefit. For some retirees their ***retiree health insurance benefit is 75% of the premium UP TO 75% times 105% LCP – whichever is less.*** The retiree is still required to pay at least 25% of the premium.

. . .

The Village does NOT pay the 75% x the 105% LCP amount . . . toward all the retirees' premiums. Each retiree's premium amount is calculated based on the health insurance plan they enroll in.

The calculations are computed each year based on the actual premiums so that the average "escalates", but the definition of the retiree health insurance benefit provided by the Village would remain the same – 75% of the premium UP TO 75% of 105% LCP – whichever is less.

The 105% LCP status applies to most Village retirees.

I should also note that yet another status – Status 4 – "102.5% LCP" will be added for those that retire in 2006. Changes in the retiree health benefits for those that retire in 2006 will have the same calculation methods as Status 3 above, however, the calculation method will utilize 102.5% of the LCP instead of 105% LCP.

The 102.5% LCP calculation will apply ONLY to those employees that retire in 2006. Those that retired prior to 2006 will continue to have their retiree health insurance calculation remain as noted above and as contained in the union contract or non-represented employee benefit resolution the year they retired.

. . .

The Association received a copy of this letter on December 12, 2005 from Pat O'Neill, a retired Village police officer, who once served as Association President.

The grievance form contends that the December 12, 2005 letter is frivolous in light of bargaining history and an arbitration award between the parties, VILLAGE OF GREENDALE, MA-10669 (Mawhinney, 1/00), and seeks the following remedy:

> The grievant respectfully requests the Village . . . cease and desist from violating the expressed and implied terms of the collective bargaining agreement. The grievant further requests the Village pay up to 75% towards any health insurance plan selected by current and future retirees based upon . . . *Section 17.02*. The grievant requests that the Village make all employees/retirees whole for any premiums they have been made to pay that is not consistent with . . . *Section 17.02,* plus the maximum statutory interests on the money retroactive to the day employees retired. The grievant is requesting that the Village pay the full cost of processing this grievance at the rate of $200.00 per hour for attorney fees, labor consulting fees and any time spent by the (Association's) staff or witnesses regarding this matter. Finally, the Grievant requests that the Village be ordered to post in a conspicuous place in the Village . . . a notice concerning the violations of the collective bargaining agreement and the corrective action required of the Village . . . The notice shall include, but not limited to, the local newspaper.
>
> In addition to the above remedy, if this grievance proceeds to arbitration, the Grievant requests that the Arbitrator award the above remedy, along with any other remedy deemed appropriate by the Arbitrator.

The parties met on February 2, 2006, to attempt to resolve the grievance. They were unable to resolve it, but agreed to hold it in abeyance so that both parties could review bargaining notes regarding health insurance upon retirement. That effort broke down by June of 2006 and the parties proved unable to resolve the matter short of arbitration.

The grievance has long roots, stretching through collective bargaining as well as Village administration of the benefit over a considerable period of time. Village payment toward retiree health insurance premiums began in the 1984-85 labor agreement. The Association filed a grievance questioning language contained in Sections 17.01 and 17.02 of the 1991-92 labor agreement. More specifically, the grievance questioned whether Village contribution under Section 17.02, Subsection A escalated over time or whether it was fixed at the level in effect at the employee's retirement. Subsection A then read thus:

> The Village will pay seventy-five percent (75%) of the specific dollar premiums listed in Section 17.01.

That grievance resulted in VILLAGE OF GREENDALE, MA-6882 (Greco, 4/92), which stated the following Award:

> 1. That there is a fixed cap as to how much of a retiree's health insurance premium the Village must pay which is based upon what the premiums are at the time of one's retirement and that the Village has properly complied with its contractual obligations by not increasing its share of such premium contributions.

The language of Section 17.02 remained unchanged through the 1994-95 labor agreement.

For the 1996-98 agreement, the parties agreed to change the language to that which now appears at Section 17.02 of the 2005-07 agreement. This is the language construed in the Mawhinney Award, which resolved the following issue:

> Is the Village's application and interpretation of Article XVII – Insurance, Section 17.02 . . . consistent with the 1996-1998 collective bargaining agreement between the Village of Greendale and the Labor Association of Wisconsin, Inc.? MA-10669 AT 1.

Mawhinney concluded:

> I find it is not. The Village has incorrectly relied on the old language and not taken into account the fact that the new language allows the insurance contribution for retirees to fluctuate or float up and down. It is no longer frozen at the time of retirement. That is what the change in the language means, that is what the parties agreed to in negotiations and that is how the parties are to interpret it. *Ibid.*, at 21.

Mawhinney issued her Award based on a stipulation to arbitrate the grievance after the expiration of the 1996-98 agreement and before the parties reached agreement on a successor.

During this same period of time, the parties reached an agreement to change the Village's health insurance to the Wisconsin Group Health Insurance Plan, which is referred to below as the State Plan. This agreement was reached prior to agreement on a successor to the 1996-98 labor agreement, and the parties reached an interim agreement to permit the Village to implement the insurance prior to execution of the successor. The interim agreement, executed on March 16, 1999, states:

. . .

> When the Wisconsin Group Plan becomes effective, the Village will pay the premium cost of the health insurance plan selected by the employee, but not to exceed an amount equal to the average of the single or family premium cost, whichever is applicable, of all the HMO plans offered in the service area covering the Village (excluding the highest and the lowest cost HMO plan and the standard plan). (Note – In the event there are only 4 or less HMO plans in the service area covering the Village, then the highest and the lowest cost HMO plans will be included in the computation of the average. In the event there are only 5 HMO plans in the service area covering the Village, then the average of the highest and the lowest cost plan will be added to the total of the remaining three (3) HMO plans and that sum will be divided by four (4) to obtain the above mentioned average.) . . .
>
> For purposes of determining the payment referred to in Section 17.02(A) and the payment to the insurance company referred to in Section 17.02(F), when the Wisconsin Group Plan is in effect, the Village will pay the applicable percentage of the actual premium cost for the plan the employee participates in or the other insurance plan under Section 17.02(F), but such Village payment shall not exceed the applicable percentage of the average premium cost as computed above. For example, in 1999, if the retiree participates in family coverage under Physicians Plus and the applicable percentage is 75%, the Village payment will be 75% of $547.16 or $410.37; if the retiree is covered by a family plan in another state whose premium cost if $450.00 and the applicable percentage is 75%, the Village payment will be 75% of $450.00 or $337.50; if the retiree is covered by a family plan in another state whose premium cost is $650.00 and the applicable percentage is 75%, the Village payment will be 75% of $547.16 or $410.37. (In the event the Village changes to a health insurance plan other than the Wisconsin Group Plan pursuant to Section 17.01, the payment referred to in Section 17.02(A) and the payment to the insurance company referred to in Section 17.02(F) will be the payment made by the Village under Section 17.01. . . .

The parties ultimately reached a voluntary agreement on a 1999-2001 labor agreement, and included the averaging method to determine premium payment. The averaging method was taken from the interim agreement and was included in that labor agreement as a Memorandum of Understanding, which is referred to below as the Memorandum. Those portions of the interim agreement cited above were included in the Memorandum, unaltered in any manner significant to this proceeding. The Village calculated the premium amount for the payment of the retiree insurance benefit under Section 17.02 by referring to the Memorandum.

Before agreement on a successor to the 1999-01 contract, the Village became aware that the averaging method employed to calculate its insurance premium payment exceeded the statutory maximum contribution for the State Plan. The parties allowed the Memorandum to expire, and amended Section 17.01 of the 2002-04 labor agreement to read thus:

> **SECTION 17.01 – HEALTH INSURANCE:** The Employer shall provide hospitalization and surgical care insurance for employees covered by this Agreement under the Wisconsin Public Employers Group Health Insurance Plan (Wisconsin Group Plan), and thereafter coverage will remain as under the Wisconsin Group Plan, or under a substantially equivalent plan, and in the event of such change, the Employer will pay the full cost as previously provided. The Employer shall pay one hundred and five percent (105%) of the lowest plan offered and the employee shall pay the difference, if any, between the Employer contribution and the plan selected by the employee. . . .

The parties did not alter the language of Section 17.02. During the bargaining for this agreement, the Village proposed to eliminate the escalator of Section 17.02, Subsection A, by adding the following clause after "formula" and before the statement of the sliding scale of percentage payments: "with specific dollar premiums listed in Section 17.01 in effect at the time of retirement." The Village twice offered the Association a one-time payment of $250 per employee to make this change and twice raised the offer to $500. The Association refused each.

In their bargaining for the 2005-07 contract, the parties changed the contribution levels noted in Section 17.01 as set forth above. They made no change to Section 17.02. The Village did attempt to change the language of Section 17.02, Subsection A. Between October of 2004 and January of 2005, the Village made three offers to the Association that used the same clause it unsuccessfully proposed to add in the prior round of bargaining. One offer included a proposed one-time payment of $250 per employee and the other two included a proposed one-time payment of 0.5% per employee. The Association refused each. Between May and June of 2005, the Village proposed amending Section 17.02, Subsection A by stating the "amount of payment made by the Employer" as a payment that "will be based on a percentage calculated from the Employer contribution for active employees". The Association refused each proposal. As June wore on, however, the parties came closer to agreement. During this round of bargaining, Murray referred to the proposed changes to Section 17.02, Subsection A as "housekeeping" changes. In an e-mail exchange on June 21, 2005, Barth noted:

> . . . why (would) we agree to your "housekeeping change in 17.02A that guarantees the Association a minimum of 50% to a maximum of 75% of the Standard plan with the ability to live anywhere for a minimum of 50% to a maximum of 75% of the lowest cost plan in Milwaukee County(?) I do not know how that proposal is considered "housekeeping." We will not agree to any change in 17.02A . . .

Murray replied:

> The housekeeping aspect is on the past and existing practice and interpretation. We've always based the retiree's percentage on the currant years LCP – NOT the Standard Plan.

After this exchange, the parties moved closer to a tentative agreement. Murray noted this in an e-mail to Barth and Borkowski dated June 27, 2005, which includes the following:

> As for our e-mail exchange from last week, the Village is willing to drop its proposal on revising Section 17.02 . . . because it was simply a housekeeping item to codify our existing practice. By dropping this proposal on this issue the Village is NOT agreeing to your interpretation of the contract language on retiree health insurance. The Village has been basing the retiree's "percentage" based on the 105% maximum annual contribution calculated for current employees. You may contact the union's former President, Pat O'Neil and recent retiree Lee Kelm to confirm our mutual understanding. . . .
>
> Also as a clarification, in the State Plan a retiree living in northern Wisconsin for example may enroll in a health insurance plan offered through the State Plan in the county in which they reside. The Village continues to pay their retiree health insurance benefit up to the maximum amount they would be entitled to if they lived in Milwaukee. The Village's payment in based on the LCQP in Milwaukee County, but they are not limited to enrolling in a Milwaukee Count plan.
>
> Also, the possible effect of your indicated interpretation that the Village would pay 75% of whatever plan the retiree is enrolled in has never been the case. If that were the interpretation a retiree enrolling in say the most expensive Standard Plan could receive a higher health insurance payment from the Village than the current employees. It is also theoretically possible that the retiree receiving 75% of the Standard Plan could exceed the 105% of the LCQP maximum benefit as provided by the State Plan.
>
> The Village was not trying to "sneak" something in the contract and is willing to forget the issue so that it does not complicate reaching a voluntary settlement.

The parties were ultimately able to agree to a 2005-07 contract. It did not include any change to Section 17.02.

The Village and the Association continued to bargain regarding a contract to cover a unit of Dispatchers represented by the Association. Barth and Murray continued to correspond via e-

mail to try to understand how the Village calculated the amount of payment toward the insurance premium of retired employees. In a November 7, 2005 e-mail to Barth, Murray detailed the Village's calculation thus:

> Here's how we'll calculate the retiree health insurance for 2006:
>
> 1. We ID the lowest cost plan (LCP). In 2006 it's United Healthcare SE at $528.50/Single & $1,317.80/Family;
> 2. We multiply the LCP by 105% (except for those that retire in 2006 who would have it multiplied by 102.5%) – which equals $554.93/Single & $1,383.69/Family;
> 3. That maximum payment is then multiplied by 75% - which equals $416.20/Single & $1,037.77/Family.
> 4. That equates to the MAXIMUM amount the Village will pay towards the retiree's health insurance – 75%x105%xLCP.
> 5. BUT, if a retiree enrolls in a health insurance plan out of the area that costs less than the LCP the Village will still only pay 75% of that premium – no greater than the 75% maximum payment in #3 above.
>
> I believe the "issue" this year such as with Pat O'Neil, is that CompcareBlue Aurora Family . . . is no longer the LCP as they have been since we moved to the State Plan in 1999. Since Family Health was always the LCP the 75% calculation equated to the Village always paying 75% of the premium. In 2006, Family Health's premium increased almost equal to Humana at $1,461.80/Family. The Village's maximum retiree payment (#3 above) is $1,037.77/Family so the Village's payment equates to only about 71% of the premium.
>
> The . . . Village has always been calculating the 75% retiree premium payment based on benefit amount it pays for the current employees. . . .

As noted above, Murray further addressed this in a letter to retirees dated December 12, 2005, which ultimately prompted the filing of the grievance.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Association's Brief

The Association contends that the language of Section 17.02 is clear and unambiguous. Arbitral and judicial precedent demand that such language must be given its plain effect,

whether or not the parties each understood the implications of the language. Here, the plain effect of Section 17.02, Subsection A "mandates the Village will pay a percentage of the insurance premium based upon the number of creditable years of service an employee has with the Village.

The 1994-95 labor agreement tied sections 17.01 and Section 17.02, Subsection a. With a Memorandum of Understanding executed in March of 2000, the parties tied these sections together for the purpose of Village movement to the State Plan. This is "the only example of Section 17.01 tied to Section 17.02(A) outside of the 1994-95 agreement." This Memorandum has expired and the Village remains in the State Plan, yet the Village continues to try to link these two sections. The Association has, however, consistently opposed every Village attempt to recreate this link during collective bargaining. Because the Memorandum afforded the Village no right to link the sections unless it left the State Plan, it is evident that the Village is "ignoring the present language of the contract and relying on old language".

Nor is there any "bona fide past practice" to support the Village's view. Even if the contract language was clear and unambiguous, there is no mutual understanding to found a binding past practice. Murray's December 5, 2001 letter to retirees attempted "an end run" to change the effect of Section 17.02 outside of collective bargaining. That letter was not, however, copied to the Association. He was, however, "professionally and ethically" required to do so. In any event the Village failed to change the language in bargaining and thus there is not a shred of evidence to support finding the existence of a binding practice. The Village's inconsistency regarding calculation of "the maximum contribution for retiree health insurance" underscores that "any claim to a past practice must be rejected by the Arbitrator."

Bargaining history underscores that "premium" is synonymous with "payment" in Article XVII. The parties changed the reference in Section 17.02, Subsection A from "premium" to "payment". However, there is no evidence the parties sought to link that subsection to Section 17.01. The State Plan permits the Village to contribute "any percentage towards retiree health insurance" and there is no evidence to establish the parties contractually linked the Village contributions to employee and retiree premium payments.

More significantly, bargaining history "strongly supports the Association's position." This grievance is the third regarding the terms of Section 17.02, Subsection A. In the first, Village of Greendale, MA-6882, (Greco, 4/92), the arbitrator "sided with the Village and agreed that Section 17.02(A) did not contain an escalator and the contribution was fixed at the time of retirement." However, the Association responded in the negotiations for a 1996-98 labor agreement, and succeeded in "deleting the reference to Section 17.01 and creating the sliding scale that is found in the current collective bargaining agreement". Examination of the language establishes that the Association made a trade off to obtain the change. The second is the Mawhinney award, which established that the Village "incorrectly relied on the old

language" in making its calculation of retiree insurance. This destroyed the nexus between Sections 17.01 and 17.02 that the Village seeks to create in this arbitration. It should not be permitted to create through arbitration a right it lost in negotiation.

The Association concludes by requesting "that the Arbitrator order the Employer to make the appropriate contributions of the applicable percentage of the actual premium cost for the plan the employee participates in and sustain the Association's grievance."

The Village's Brief

After an extensive review of the evidence, the Village contends that the Mawhinney decision does not govern this grievance, and that the Association "either misunderstands or misinterprets" it. The parties, by stipulation, limited her decision to the language of the 1996-98 labor agreement. This is significant, because it means that the parties "agreed that the Arbitrator would not address anything which occurred after the State Health Insurance Plan was implemented on May 1, 1999." The State Plan states a number of different plans and premiums, which poses an issue not decided by Mawhinney's review of Section 17.02. More specifically, Mawhinney addressed only whether the Village negotiated away a retiree health insurance benefit that was capped at the time of retirement and agreed to an "escalator" clause with a payment that increases from year to year." That she equated "premium" and "payment" was of no consequence at the time, since "the terms were interchangeable because the employees were not making any contributions to their health insurance plan".

Both the arbitration awards cited by the Association look to the language of the firefighters' agreement for guidance, and each "concluded that the same interpretation should apply to both contracts." Contrary to the Association's view, however, this demands dismissal of their grievance, since the "firefighters are receiving the same payment for retiree health insurance as police officer's receive – a 75% payment calculated on the contribution made for active employees." The firefighters did grieve the Village's interpretation of their agreement in the fall of 2005, but "declined to pursue their grievance to arbitration."

Beyond this, the Village has a "consistent past practice in interpreting Section 17.02, which the Association knows about, has accepted and failed to repudiate in the last round of contract negotiations." That the parties are in their third arbitration over the section belies the assertion that the language of Section 17.02 is clear and unambiguous. That the two cited arbitration awards turned on past practice and bargaining history also belies the assertion.

From 1999 through the present, the Village "has unequivocally followed a practice of calculating the payment for retiree health insurance to the contributions made for active employees." This reflects consistent practice since the implementation of the State Plan. From 1999 to 2001, the Village calculated the maximum contribution "by calculating 75% of the

'average' for the premium costs for all of the insurance plans offered that year." Once this is done, the Village looks to the individual retiree choice of plans. In 2001, the Village had to change this because the State would not permit its averaging method. The parties decided to let the Memorandum expire "and reverted back to the contract language." The initial calculation turned on "calculating the applicable percentage (50% to 75%) by 105% of the lowest cost qualified plan." The calculation then turned to the plan chosen by the individual retiree. This method has been consistent and includes two retirees who were Association officers.

The practice was also "clearly enunciated and acted upon" since Murray detailed the practice to the Association in June of 2005. That this did not provoke a grievance points to Association acquiescence. The collective bargaining proposals pointed to by the Association were in fact "housekeeping" items designed to clarify the phase-in of reduced contributions on health insurance. Murray clearly stated that the Village would continue its practice without regard to what happened at the bargaining table. That the practice has been consistent since Village implementation of the State Plan underscores that it should be given binding force. That the Association never took action to terminate the practice cannot be held against the Village, as is underscored by arbitral and Commission precedent.

The Village did try to bargain changes to the contribution of retiree health insurance premiums in the bargaining for a 2002-04 and a 2005-07 labor agreement. This is undisputed. However, "the purpose of those bargaining proposals and its impact on the instant dispute" is in question. The Village sought to remove the escalator clause awarded by the Mawhinney Award. However, Village failure to change the contract cannot be construed as Village agreement that the language, as supplemented by its consistent past practice, should be interpreted as the Village asserts. This cannot obscure that the Association has no persuasive evidence of bargaining history to support its own interpretation. Mawhinney's award did not address the impact of the change to the State Plan, but the language of the Memorandum does, and that language supports the Village's view that "payment for retiree health insurance" is linked to "the payment for active employees." The Memorandum decisively establishes this link and the sole ambiguity is whether its expiration supports a different view. The Association did not rebut Murray's testimony that the Memorandum expired because the Village learned that "the averaging formula used to calculate the maximum contribution for active employees exceeded the maximum contribution permitted under" the State Plan. This means the burden is on the Association to establish that the expiration of the Memorandum undid the link between the calculation of retiree premium payment and that of active employees. The Association's view of the grievance unpersuasively seeks to establish "a much more expensive and lucrative benefit than the parties originally bargained when they agreed to change carriers to the State Health Insurance Plan."

Section 20.03 unambiguously precludes any of the remedies sought in the grievance. This includes any fees, costs interest or notice posting. Those remedies are available in a statutory proceeding, but this is grievance arbitration, not prohibited practice litigation. Viewing

the record as a whole, the Village concludes that "the grievance (should) be dismissed with prejudice in its entirety."

The Association's Reply Brief

The Association prefaces its reply by noting it "has to bring out its fan to blow away the smoke and use its hammer to break the mirrors used by the Village in order for the Arbitrator to see the true facts clearly without distortion." The first distortion is the Village's ongoing attempt to link Section 17.02, Subsection A with Section 17.01. That attempt attempts to use language from the 1994-95 labor agreement and ignores a series of voluntary agreements that broke the asserted linkage. No Village attempt to recreate the linkage through collective bargaining has been successful, and it should not become successful through arbitration.

The next distortion concerns the Memorandum, which did link the two sections. That Memorandum, however, expired and would apply "only if the Village changed to a health insurance plan other than the State Plan."

The next distortion is the assertion of a clear past practice linking the contributions made for retirees to those made for active employees. The numerous miscalculations made by the Village over time defeat any assertion of consistency of practice. There is no evidence of mutuality to the practice in any event. It is another attempt to use smoke and mirrors in place of analysis to link the labor agreement covering police to that covering firefighters. The assertion that the parties bargained the linkage into the labor agreement in moving to the State Plan ignores that the parties "bargained the linkage of Section 17.01 and Section 17.02A out of the contract with the 1996-98 voluntary agreement." That Murray was not present for those negotiations belies the Village's assertion. This grievance makes it "the time once and for all for this arbitrator to tell Mr. Murray to take off his glasses with the word 'linkage' engraved on them, flush his eyes with Visine, accept reality and move forward."

It is also pure distortion to allege that the Association acquiesced to the Village's interpretation of the labor agreement. The Association grieved Village miscalculations as soon as it became aware of them. Nor will the evidence support any assertion that the Association ever failed to repudiate or to actively oppose any Village assertion of past practice. The Association concludes by requesting that "the Arbitrator . . . find the grievance . . . meritorious" and order "any other remedies deemed appropriate."

The Village's Reply Brief

The Village notes that the Association's "entire case is based on their argument that the term 'payment' in Section 17.02 is synonymous with the word 'premium'." There is, however, "no evidence to support this conclusion." Adoption of the State Plan makes this distinction

crucial, since the Village currently offers employees "their choice of six plans in Milwaukee County in which they can enroll." The Association asserts the parties bargained away the link between active employee and retiree contributions during the bargaining for a 1996-98 agreement and urges that Murray's absence from these negotiations undercuts the City's view. This ignores that no testifying witness was present for those negotiations. The sole evidence of the parties' intent flows from the Mawhinney award, but that decision "addressed the escalator clause and not the link between Section 17.02 and Section 17.01."

If, as the Association asserts, the parties clearly intended to "bargain language which requires the Village to pay seventy-five percent (75%) of the premium for whatever plan the retiree enrolls in" then it is unclear why they chose to use the work "payment" instead of "premium". The use of "payment" supports the Village's view that the parties meant something other than "premium" and thus "bargained away only the escalator clause, as confirmed by Arbitrator Mawhinney's decision." There is, in fact, no evidence to assert that the parties bargained away the longstanding link between payments made on behalf of active employees and retirees.

The Village acknowledges it made "an error in calculating the payment of retiree health insurance for four retirees over two years." The error is traceable to a spreadsheet formula, which made the maximum Village payment 75% of 105% of the lowest cost qualified plan without regard to the plan actually selected by a retiree. This resulted in an overpayment to those retirees in lower cost plans. The Village has not sought reimbursement for the mistake. In any event, if mistakes have interpretive significance regarding past practice, Association mistakes in its own calculations cannot be ignored.

The Association "either misunderstands or overstates the impact of the bargaining proposals that the Village made in the last two rounds of contract proposals." The existence of those proposals is not in dispute. Rather their significance is. The Village agrees that it tried unsuccessfully to bargain out or eliminate the escalator clause. It never tried to bargain in a link between "payment" in Section 17.02 and the active employee contributions of Section 17.01 because "that link already existed through bargaining history and past practice." The Association arguments seek to obscure that it cannot explain "when and how they bargained out the link between the payment specified in Section 17.02 and the contribution rates set forth in Section 17.01." The expiration of the Memorandum reflects nothing beyond agreement to revert to the labor agreement after it became impossible to continue the averaging method. The agreement carried with it unbroken practice linking the two sections the Association never successfully bargained apart.

Association arguments regarding Murray are "personal and shameful". The assertion that Murray was ethically obligated to copy the Association on notices sent to retirees ignores that the Association does not represent those retirees; that Murray simply could not remember doing so;

and that former Association executives were among those retirees. Assertions of "perjury" or of "devious . . . methods" substitute vitriol for analysis. The Village concludes that the "Arbitrator uphold the Village's interpretation . . . and dismiss the grievance with prejudice."

DISCUSSION

I have adopted the Association's view of the issues because it is broad enough to incorporate the points raised by the Employer. The Employer's view of the issue on the merits presumes the existence and relevance of past practice. This is not a fatal flaw, but the Association's statement does not pose the problem. Like the Employer's statement of the issue on the merits, the Association's prefaces its view of the merits. It does not mention past practice to underscore that the terms of Section 17.02, Subsection A are so clear that they must be enforced as written.

The terms are not, however, unambiguous. "75% payment", whether or not "payment" is equivalent to "premium", begs the question, 75% of what? Subsection A is given meaning by the reference in Section 17.02 that retirees are "members of the group health insurance plan applicable to the collective bargaining unit". Subsection A thus obligates the Village to make a percentage payment toward the premium for the group health plan. However, the question remains, to what is the percentage applied?

Because each party advances a plausible interpretation of the contract to resolve this issue, the language of Section 17.02 cannot be considered unambiguous. "Payment" under Section 17.02, Subsection A demands reference to the preceding paragraph of Section 17.02, which notes the group plan. This, in turn, demands examination of Section 17.01, which states the premium payment for the group plan. More than the equivalence or lack of equivalence between "premium" and "payment", the parties dispute the relationship of Section 17.01 to Section 17.02. Viewed on any level, the language at issue is ambiguous, and the two sections are inextricably tied together.

In my view, past practice and bargaining history are the most persuasive guides to resolve contractual ambiguity since each focuses on the intent of the bargaining parties, which is the source and goal of contract interpretation.

The evidence does not establish a binding past practice. The source of the binding force of past practice is the agreement manifested by the parties' conduct. As the Village points out, arbitral precedent often focuses on whether evidence establishes open conduct, clearly acted on over a considerable period of time. These indicia do not define agreement but point to a course of conduct from which agreement can reasonably be inferred. Here, those indicia raise more issues than they resolve. The Association does not represent retirees and the bulk of the course of the asserted practice concerns retirees. Murray's December 5, 2001 letter manifests this. It

offered retirees the option of giving up the averaging method for fixing premium payment in favor of the "105% LCP" method. It was mailed to retirees, but there is no persuasive evidence that the Village copied the Association. Beyond this, when the Association became involved, on and after June of 2005, the parties did not behave as if they shared an understanding regarding the administration of Section 17.02, Subsection A. The Association and the Village shared a series of e-mails on how the Village administered the benefit. That exchange did not bring about understanding, but a grievance. The parties agreed in February of 2006 to hold the grievance in abeyance for research on bargaining history by both parties. This manifests confusion on the point more than agreement. Beyond this, Village administration of the benefit was less than consistent. The "mistakes" discovered shortly before hearing do nothing to advance the persuasiveness of the assertion of a binding practice.

Against this background, it is unpersuasive to conclude that a binding past practice clarifies the relationship of Sections 17.01 and 17.02. The record contains considerable evidence of administrative practice and of bargaining history. That evidence is something less than conclusive. However, it affords a basis upon which to draw inferences regarding the range of outcomes the parties anticipated in the creation, modification and administration of Sections 17.01 and 17.02. These inferences, in light of the language of the disputed provisions, are the sole guides to resolving the grievance.

As preface to determining the relationship between these sections, it is necessary to highlight what, among the parties' arguments, cannot persuasively resolve the point. The arbitrations cited by the Association afford some insight into bargaining history but fall short of affording the determinative guidance the Association grants them. The Association's contention that the Greco award prompted the changes to the 1996-98 agreement is persuasive. No less persuasive is that the Mawhinney award established that the Village cannot claim that the payment demanded in Section 17.02, Subsection A is fixed to premium cost at the time of retirement. Granting this will not, however, support the Association's reading of that provision. The Mawhinney award interpreted language preceding the move to the State Plan. That move poses the fundamental interpretive issue here. Beyond this, the Village's view does not deny an escalator benefit, but reads it in a different way than the Association's. The "105% LCP"; "102.5% LCP"; and the "100% LCP" methods (generically referred to below as the "% LCP method") each affords an escalator, since each is pegged to a rising, or (at least theoretically) a falling premium cost. "Payment", under the Village's view, thus escalates with premium costs.

Nor can Section 17.02 be divorced from Section 17.01, whether viewed on their language or on their bargaining history. As noted above, "payment" under Section 17.02, Subsection A cannot be construed without a reference point. That reference point cannot be the general reference in the first paragraph of Section 17.02 to "the group health insurance plan applicable to the collective bargaining unit", since the reference point must be a number if the term "payment" is to have any meaning at all. Section 17.01 identifies the group health insurance plan as well as

the premium payment for it. Similarly, the reference in Section 17.02 to "collective bargaining unit" demands recourse to Section 17.01. Retirees are not part of the collective bargaining unit and this begs some connection to active employees. Although Subsection F of Section 17.02 is not in issue, it manifests the impossibility of divorcing Section 17.01 from Section 17.02. Without recourse to Section 17.01, the "check" referred to in Subsection F has no evident limitation and could be construed as a blank check.

These considerations pose the interpretive divide between the parties. They do not establish the reasonableness or unreasonableness of either interpretation. The ambiguity of the two sections does not invalidate the Association's assertion that the Village is obligated to pay the applicable percentage of Section 17.02 to whichever option under the State Plan a retiree selects.

As noted above, adopting the Association's view poses uncertainty regarding the administration of Subsection F. The difficulty with the Association's view is best posed by its noting that the State Plan permits the Village to pay any amount toward retiree insurance, without regard to premium limitations concerning active employees. This can be granted, but misses the issue posed here, which is not whether the Village can make a greater contribution to the insurance of a retiree than of an active employee. Rather, the issue is whether the parties bargained that result.

The evidence does not afford persuasive support for the Association's view that Section 17.02, Subsection A demands Village percentage payment toward any plan selected by a retiree. As the Village points out, there is no basis to conclude the parties directly bargained this result. More significantly, the evidence favors the view that the parties did not anticipate this result.

The parties' initial understanding of the implementation of the State Plan was specific. They agreed on an averaging formula, stating it in considerable detail. Significantly, their agreement excluded the Standard Plan from the averaging formula by which premium payment under Section 17.01 was set. The Interim Agreement supplied to the Association, including then-incumbent President O'Neill, included a cover letter from Murray dated March 18, 1999, which noted Board "appreciation to the Police Officers for taking this step to help address a large fiscal issue which impacts both the Village and all of the employees." This is the background to the Village's administration of the benefit, which has consistently set premium payment under the averaging formula or under any permutation of the "% LCP method" without including the Standard Plan. This administration does not constitute a binding practice, but does set the context for bargaining history.

More specifically, this undercuts the Association's reading of the bargaining history. There is no dispute that the parties devoted little, if any, discussion to the Memorandum's expiration. Rather, they allowed it to become inoperative once the averaging method was found inappropriate. The Association urges that the expiration significantly improved the retiree

insurance benefit, by having the sliding percentage payments of Section 17.02, Subsection A, divorced from the "% LCP method." It is not evident how this expansion could take place in the absence of meaningful discussion. The absence of such discussion is noteworthy given that the Interim Agreement was created to address a "large fiscal issue". It is difficult to conclude that the parties, without discussion and against the background of fiscal difficulty, agreed to a significant expansion of the retiree health insurance benefit against the insurance benefit afforded active employees. More to the point, the interpretation sought by the Association does not appear to be a result contemplated by the parties at the time they moved to the State Plan. In fact, it works contrary to the incentives for plan choice built into the implementation of the State Plan. The language of Section 17.01 did not just establish the State Plan, which included an inducement for employees to select lower cost plans delivering the State Plan's slate of benefits. It also set a disincentive for the Village to seek further premium sharing, by noting that the Village, if it chose to leave the State Plan or a substantially equivalent plan, "will pay the full cost as previously provided." The Association's view treats these incentives, crucial to the creation of Section 17.01, as irrelevant to Section 17.02. This result is not inappropriate, but highlights the difficulty of treating bargaining on a separate point in a predecessor agreement as determinative of the application of the State Plan to retirees. In the absence of some discussion of the point, it is difficult to understand how or why the parties exempted retirees from the insurance/fiscal problems they sought to address with active employees.

Beyond this, the Association view offers little insight into the behavior of the parties following the Memorandum's expiration. As noted above, former Association officers actively participated in the Village's administration of the benefit, without objection to the calculations the grievance challenges. This does not bind the Association, since those officers are no longer unit members. However, it is difficult to believe that those officers, during their preparation for retirement, somehow forgot a significant expansion of the retiree insurance benefit. The correspondence by which the parties honed the difference posed here affords little reason to believe the parties contemplated in bargaining the result sought here. The Association challenged the Village's reading of the contract, but there is no challenge that points to meaningful past discussion to create the benefit sought here. The research into bargaining history has not resulted in evidence that the parties considered the result sought here.

In sum, the Village's view that Sections 17.01 and 17.02 must be read together more persuasive than the Association's attempt to make them mutually exclusive.

It does not, however, follow from this that the Village asserts a persuasive reading of those two sections. As noted above, part of the persuasiveness of the Village's view is that its reading is consistent with the bargaining context surrounding the parties' adoption of the State Plan, as well as the language of Sections 17.01 and 17.02. Under this view, the "% LCP method" sets a maximum Village contribution, which may or may not be made to any employee, depending on individual employee plan choice. The payment percentage creates a financial

incentive for employees to choose lower cost plans. The Association's attempt to read the two sections as independent is less persuasive because it eliminates that incentive regarding retirees, in the absence of bargaining history to indicate the parties sought this result, and in the presence of evidence that the incentive was the purpose of the switch to the State Plan.

However, the Village's reading also pits the two sections against each other with no evident support. The Village asserts that "75% payment" in Subsection A of Section 17.02 operates both to set a maximum Village contribution and to assure that the Village makes no payment greater than 75% toward any particular plan chosen by an individual. The incentive for the Village to read the language that way is evident, but this incentive has nothing to do with the operation of Section 17.01 regarding the "% LCP method." Section 17.01 does not demand that the Village pay 100% of any individual premium. Rather, it sets a ceiling against which employee choice dictates actual premium payment. The actual percentage of Village payment may reach or fall below 100% depending on the plan chosen by each covered individual. The point is more easily shown by reference to the agreements that stated, in Section 17.01, an amount exceeding 100% of the LCP. Under those agreements, an active employee could receive an amount exceeding 100% of the lowest cost plan if the employee selected a plan that cost more than the lowest cost plan. Depending on the contract year, any plan which cost more than 5% or 2.5% above the LCP could generate a payment which cost the Village more than 100% of the LCP. The formula to generate the maximum Village contribution did not dictate any specific percentage payment to any particular plan. Rather, the dollar figure generated by the percentage set in Section 17.01 established an amount to be spent by individual employee choice.

The Village asserts, however, that the percentage payment set in Subsection A of Section 17.02 serves a function independent of Section 17.01. Thus, a 75% payment is not applied against the governing "% LCP" to generate a dollar figure to set the Village's maximum contribution. Rather, the subsection generates the dollar ceiling and also serves as the percentage to be applied to a specific insurance premium of certain plans selected by an individual retiree. The Village limits those plans to any that would generate more than 75% Village payment of any specific premium. The Village's view does not extend this to plans that generate less than 75% Village payment of any specific premium, such as the Standard Plan. This is not inherently inappropriate, but there is no evidence that this outcome was ever contemplated in bargaining by the parties. More significantly, the interpretation is not one ever applied by the parties to the operation of Section 17.01 for active employees. There, the governing percentage is used to set a dollar figure that creates a financial incentive for individual employee choice of less expensive plans. The Village's view actually undercuts those incentives by discouraging employee choice of the lowest cost qualified plan, for the risk of exceeding a 75% Village contribution is highest for that plan. This view urges that the parties created a separate, independent contribution formula in Section 17.02 than in Section 17.01. This is no more persuasive a reading of the governing language and bargaining history for the Village than for the Association.

It is more consistent with the evidence to conclude that the percentages listed in Section 17.02, Subsection A were meant to be applied to a specific number generated for active employees in Section 17.01. Under the current agreement, that would be 75% of 100% of the lowest cost qualified plan for an employee with the requisite years of service. This interpretation also fits better with the reference within Section 17.01 demanding full payment if the Village switches from the State Plan. Section 17.02 operates the same in either event, since the sliding percentage scale of Subsection A is simply applied against a different figure. This comports with the undisputed aspect of the Village's application of the benefit throughout its history.

In sum, the Village's use of the sliding percentage scale of Section 17.02, Subsection A is appropriate to the extent it applies the percentages listed there against the number yielded by application of the "% LCP method" set in Section 17.01. Thus, effective January 1, 2005, the Employer would apply, for a retiree with twenty-five years of service, 75% against the number (below referred to as the reference point) generated by multiplying the premium amount for the lowest cost qualified plan for an active employee times 105%. Effective January 1, 2006, the reference point would change to 102.5%, and effective January 1, 2007, the reference point would change to 100%. The dollar figure thus generated sets the maximum Village contribution toward a specific plan selected by an individual retiree. The Village violates Section 17.02, Subsection A, by using the sliding percentage scale against any premium for a specific plan selected by an individual retiree and offered under the State Plan. Rather, the applicable percentage under Section 17.02, Subsection A must be applied to the dollar figure generated by the governing "% LCP" set by Section 17.01 for active employees to establish the maximum dollar contribution to be made by the Village for retirees under Section 17.02.

The Award stated below incorporates the conclusions stated above to specify the Village's violation of the labor agreement. There is no evidence to establish that any employee is affected by the conclusion, in the sense of requiring make whole relief. The Award thus specifies the violation as the remedy appropriate to this record. The statement of this conclusion essentially addresses the remedial issues posed by the parties. Make whole relief calls into question the authority of an arbitrator to address non-employees. The parties' agreement that the Association does not represent retirees puts that issue beyond my reach. Section 20.04 underscores this. Section 20.03 addresses the issue of fees and costs in a manner inconsistent with the Association's remedial request. That request, in any event, presumes bad faith. Here, the conclusions reached above sustain, in significant part, Village arguments. This negates any possibility of the requested remedy of fees and costs on this record. The requested notice posting also overshoots the evidence. The grievance poses an interpretive dispute and my opinion on the appropriate interpretation addresses it. The requested notice posting assumes bad faith that I do not see in the evidence.

Before closing, it is appropriate to tie the conclusions stated above more closely to the parties' arguments. The conclusion stated above regarding remedy should not obscure that the

evidence manifests considerable depth of feeling on the issue of retiree insurance, which extends over many years. It is evident the parties have taken polarized positions. Thus, in the first award discussed by the parties, the arbitrator notes, "The Village is right on every single point" MA-6882 AT 3. In the second award, in spite of a change in contract language, the Village continued to assert it "consistently interpreted the contract language to fix the contribution at the time of retirement" MA-10669 AT 10. Depth of feeling and polarized positions can point to strong advocacy as well as to bad faith. Here, the evidence points to strong advocacy on an issue of importance to each party rather than to bad faith on an issue not reasonably in dispute.

Evidence of past practice is stronger than Association arguments acknowledge. Village use of the percentages of Subsection A of Section 17.02 to set both a floor and a ceiling for its contributions to certain plans selected by individual retirees has been in effect since its implementation of the State Plan. The grievance prompting the Mawhinney award started before the creation of the interim agreement, but the Village implemented the Mawhinney award under the State Plan. It paid Bergemann 75% of his plan rather than 75% of the then governing average of HMOs because his choice of plans had a premium below the amount yielded by the averaging method. This affords stronger support for the Village's position than the Association acknowledges. However, the evidence fails to demonstrate that the parties discussed this nuance. It is difficult to infer agreement on this point because of the subtlety of the difference. Village acknowledgement of "mistakes" in its implementation of its own view of Subsection A further undercuts the reasonableness of the inference of agreement. The difference in methods was sufficiently subtle to confuse the Village. Thus, while the Village persuasively argues that the implementation of the State Plan poses an issue first addressed by the parties in bargaining prior to the implementation of the Mawhinney award, it cannot persuasively argue that the bargaining of the interim agreement or its own implementation of the State Plan manifests mutual understanding that the percentages of Subsection A of Section 17.02 operate both as a floor and a ceiling for Village contributions, depending on which plan is at issue. Article XX highlights that the governing language must be primary in arbitration, and the language at issue here, if ambiguous, is not as pliable as the Village asserts.

The Village's "floor/ceiling" interpretation of Subsection A of Section 17.02 is consistent with the formula set in the interim agreement and Memorandum. This underscores the force of its arguments regarding past practice. The difficulty with this argument is that the Memorandum expired and was not incorporated into the 2002-04 labor agreement. It is undisputed that the parties did not specifically discuss the expiration. There is no persuasive evidence the Association understood how the Village applied Section 17.02 until the events prompting the grievance. This makes it unpersuasive to treat the language of successor agreements as if the Memorandum never expired. Section 20.04 focuses the arbitration process on contract language, and the language of Section 17.01 and 17.02 is not as expansive as the Village reads it. The declarative statement of a scale of percentages in Subsection A of Section 17.02 does not readily lend itself to applying those percentages to multiple reference points. To conclude it does makes it unclear why the percentage would not apply to any plan selected by a retiree.

Association arguments regarding bargaining history have considerable force and manifest strong feelings. The Association contends that it bargained the separation of Section 17.02 from Section 17.01 in the 1996-98 labor agreement, and has consistently opposed Village attempts to defeat the operation of the escalator embodied in that language change. Village proposals opposed by the Association do not, however, assist in resolving the grievance, since those proposals were intended to eliminate the escalator embodied in the 1996-98 changes and the Mawhinney award. There is no doubt on that point, but it does not reach the issue posed here, since the Village's view of Section 17.02, Subsection A does not eliminate the escalator effect. As noted above, it is impossible to completely divorce the language of Section 17.02 from that of Section 17.01. Against this background, the Association's interpretation of Section 17.02, Subsection A does less to defend gains won at the bargaining table than to extend them beyond their original limits. As I view the evidence, each party has tried to stretch the evidence of bargaining history and past practice to establish an interpretation of Sections 17.01 and 17.02 which they never reached in bargaining. Governing language and evidence upon which agreement can reasonably be inferred will not support either party's position in its entirety.

AWARD

The Village's application and interpretation of Article XVII – Insurance, Section 17.02(A), is consistent with the 2005-07 collective bargaining agreement between the Village of Greendale and the Labor Association of Wisconsin, Inc. to the extent the Village applies the sliding percentage scale of Section 17.02, Subsection A against the number yielded by application of the "% LCP method" set in Section 17.01 for active employees. The Village violates Section 17.02, Subsection A, by using the sliding percentage scale against any premium for a specific plan selected by an individual retiree. Village payment toward retiree health insurance premium costs is established by multiplying the dollar figure generated by the governing "% LCP method" in Section 17.01 for an active employee by the applicable percentage set by Section 17.02, Subsection A for a retiree.

As the remedy appropriate to this record, the Village shall administer Section 17.02, Subsection A, in a manner consistent with the terms of this Award.

Dated at Madison, Wisconsin, this 5th day of July, 2007.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
7158