BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEILLSVILLLE EDUCATIONAL SUPPORT PROFESSIONALS' ASSOCIATION

and

SCHOOL DISTRICT OF NEILLSVILLE

Case 145
No. 65965
MA-13384

(Jan Shilts Grievance)

Appearances:

Ms. Megan E. Werner, UniServ Director, Central Wisconsin UniServ Council, 370 Orbiting Drive, P.O. Box 158, Mosinee, Wisconsin 54455-0158, on behalf of the Union.

Lathrop & Clark, LLP, **by Attorney Shana R. Lewis,** 740 Regent Street Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, on behalf of the District.

ARBITRATION AWARD

At all times pertinent hereto, the Iowa-Grant Education Association of Professional Staff and Support Personnel (herein the Union) and the Iowa-Grant School District (herein the District) were parties to a collective bargaining agreement covering the period from July 1, 2004 through June 30, 2006. On June 9, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a dispute concerning the District's reduction of its contribution to health insurance benefits to bargaining unit member Jan Shilts. The Undersigned was selected from a panel of WERC staff members to hear the dispute and a hearing was conducted on October 5, 2006. The proceedings were transcribed. The parties filed their initial briefs by November 29, 2006 and their reply briefs by December 26, 2006, whereupon the record was closed.

ISSUES

The parties stipulated to a statement of the issues, as follows:

1. Did the Union's failure to request arbitration within ten days of notifying the District of its intent to arbitrate bar the Union from arbitrating the grievance?

2. If not, did the District violate Article 29 of the 2004-2006 master agreement when it determined the amount it would pay toward Jan Shilt's health insurance and dental premiums based upon her new scheduled work hours after her hours were reduced effective February 2, 2006?

3. If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE IV. GRIEVANCE PROCEDURE

1) The purpose of this procedure is to provide an orderly method for resolving grievances arising during the term of this agreement. A determined effort shall be made to settle any such grievances through he use of the grievance procedure.

2) Definitions:

A grievance shall be defined as a dispute regarding the interpretation, meaning or application of a specific provision(s) of this Agreement arising during the term of the agreement.

The term "days" when used in the grievance procedure, shall mean calendar days, excluding Saturdays, Sundays, and those paid holidays provided for twelve month employees.

3) The following steps shall be followed in handling grievances:

Step 1 – The aggrieved employee shall take up his grievance with his supervisor or District Administrator within 22 days after the aggrieved action occurs: The Association's designated representative may be present if desired by the employee.

Step 2 – If the grievance is not satisfactorily settled in Step 1 within five (5) days, the same shall be reduced to writing and shall be discussed at a meeting between the grievant, Association representative, and the District Administrator within five (5) days after the expiration of time under Step 1. The written grievance shall clearly state the nature of the dispute, the specific

provision(s) of the Agreement allegedly violated, and any relief sought.

Step 3 – If the grievance is not satisfactorily settled in Step 2 within five (5) days of the meeting with the District Administrator, then the grievance may be heard by the Board at a meeting to be held within twenty (20) days of the expiration of the time under Step 2.

4) In the event the grievance is not settled in Step 3, then either party may require the grievance to be submitted to arbitration by serving on the other party a written notice of request for arbitration within ten (10) days after the expiration of the twenty (20) day period in Step 3.

5) The parties agree to follow the foregoing steps in the processing of a grievance. If the party concerned fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not processed at any step within the prescribed time limits shall be considered dropped. Time limit [sic] may be extended under circumstances agreeable to both parties.

6) Within ten (10) days of notice of request for arbitration, grieving party may request the Wisconsin Employment Relations Commission (WERC) to submit a panel of five (5) WERC arbitrators from which the parties shall alternately strike names until one (1) name remains. This person shall serve as arbitrator, if available. If not, a new panel may be requested from WERC. The order of striking shall be determined by flipping a coin with the winner of the flip to have the choice of striking first or second.

7) The Arbitrator shall schedule a hearing on the grievance as soon as possible and, after hearing, and considering such evidence as the parties desire to present, shall render a written decision as soon as practicable. His/her decision shall be binding on both parties.

8) Each party shall bear the expense of presenting its own case, its witnesses and representatives. The expenses of the arbitrator shall be borne by the non-prevailing party.

9) Grievances involving the same act or issue may be consolidated when agreed upon by both parties in one arbitration proceeding, provided the grievances have been processed through the grievance procedure by the time the parties meet to select the arbitrator.

10) It is understood and agreed that the function of the arbitrator shall be to interpret and apply the specific terms of this Agreement. The arbitrator shall have no power to advise on salary adjustments, except as to the improper application thereof, nor to add to, subtract from, modify or amend any terms of this Agreement.

ARTICLE XXIX. HEALTH, MEDICAL, DENTAL AND DISABILITY INSURANCE

1) All members of the bargaining unit who work at least seven hundred twenty (720) hours per year shall be eligible for group health insurance coverage. For those eligible employees, the District shall pay health insurance premiums as follows:

(a) The Board of Education shall pay ninety (90%) percent of the employee's health insurance premium for a family or single health insurance policy on a twelve (12) month basis for all support staff employees who work at least two thousand eighty (2080) hours per year in a position or combination of positions. Members of the bargaining unit who took health insurance prior to July 1, 1999, and who worked a minimum of seven and one-half (7-1/2) hours per day in a position or combination of positions that required the performance of duty of a minimum of one hundred eighty (180) days per year at that time, shall be grandfathered in; thus, the Board shall pay ninety (90%) percent of such employee's health insurance premium for a family or single health insurance policy on a twelve month basis. Any employee subject to layoff, breaking employment, or having their hours reduced, will have their insurance coverage determined based upon their new scheduled work hours.

(b) The Board of Education shall pay seventy-five (75%) percent of the employee's health insurance premium for a family or single health insurance policy on a twelve (12) month basis for all support staff employees who work at least one thousand three hundred fifty (1350) hours per year in a position or combination of positions. Regular bus drivers who took health insurance prior to July 1, 1999, and who worked a minimum of seven hundred twenty (720) hours per year at that time, shall be grandfathered in; thus, the Board shall pay seventy-five (75%) percent of such driver's health insurance premiums for a family or single health insurance policy on a twelve month basis. Any employee subject to layoff, breaking employment, or having their hours reduced, will have their insurance coverage determined based upon their new scheduled work hours.

(c) The Board of Education shall pay fifty (50%) percent of the employee's health insurance premium for a family or single health insurance policy on a twelve (12) month basis for all support staff employees who work at least seven hundred twenty (720) hours per year in a position or combination of positions. Any employee subject to layoff, breaking employment, or having their hours reduced, will have their insurance coverage determined based upon their new scheduled work hours.

2) All members of the bargaining unit who work at least seven hundred twenty (720) hours per year shall be eligible for group dental insurance coverage. For those eligible employees, the District shall pay dental insurance premiums as follows:

(a) The Board of Education shall pay ninety-five (95%) percent of the employee's dental insurance premium for a family or single dental insurance policy on a twelve (12) month basis for all support staff employees who work at least two thousand eighty (2080) hours per year in a position or combination of positions. Members of the bargaining unit who took dental insurance prior to July 1, 1999, and who worked a minimum of seven and one-half (7-1/2) hours per day in a position or combination of positions that required the performance of duty of a minimum of one hundred eighty (180) days per year at that time, shall be grandfathered in; thus, the Board shall pay ninety-five (95%) percent of such employee's dental insurance premium for a family or single health insurance policy on a twelve month basis. Any employee subject to layoff, breaking employment, or having their hours reduced, will have their insurance coverage determined based upon their new scheduled work hours.

(b) The Board of Education shall pay seventy-five (75%) percent of the employee's dental insurance premium for a family or single dental insurance policy on a twelve (12) month basis for all support staff employees who work at least one thousand three hundred fifty (1350) hours per year in a position or combination of positions. Members of the bargaining unit who took dental insurance prior to July 1, 1999, and who worked a minimum of seven hundred twenty (720) hours per year in a position or combination of positions at that time, shall be grandfathered in; thus, the Board shall pay seventy-five (75%) percent of such employee's dental insurance premium for a family or single health insurance policy on a twelve month basis. Any employee subject to layoff, breaking employment, or having their hours

reduced, will have their insurance coverage determined based upon their new scheduled work hours.

(c) The Board of Education shall pay fifty (50%) percent of the employee's dental insurance premium for a family or single dental insurance policy on a twelve (12) month basis for all support staff employees who work at least seven hundred twenty (720) hours per year in a position or combination of positions. Any employee subject to layoff, breaking employment, or having their hours reduced, will have their insurance coverage determined based upon their new scheduled work hours.

BACKGROUND

The Grievant, Jan Shilts, has been a bus driver in the Neillsville School District since 1989. Prior to February 2, 2006, she was working 1080 hours per year, which entitled her to a 75% contribution to her health and dental insurance premiums from the District. At that time her hours were reduced to 720 per year, which resulted in a reduction in the District's contribution to health and dental insurance premiums to 50%. Ms. Shilts discovered this fact when she received her paycheck on March 30, 2006.

On April 3, 2006, The Grievant and Union filed a grievance against the District, alleging that the District's reduction of its insurance premium contribution was a violation of the 2004-2006 collective bargaining agreement. On April 6 the District Administrator, John Gaier, denied the grievance, which was promptly appealed to the Board of Education. The Board met on April 10 and voted to deny the grievance at that time. At that time the Board also made an offer of settlement, essentially offering to maintain its contribution to the Grievant's insurance benefits at the 75% level for the balance of the contract, whereupon they would be reduced. On April 17, the Union notified the District, pursuant to Article IV, Section 4 of the contract, that it was requesting arbitration. At the same time, the Union made a counter-offer to the District's previous settlement offer. Thereafter, the parties continue to meet discuss settlement, but the Union did not request arbitration from the Wisconsin Employment Relations Commission, nor did the parties discuss waiving the contractual timelines for doing so. On May 16, Gaier sent the Union a letter inquiring about the status of the grievance and attaching another copy of the Memorandum of Agreement. On June 6, Gaier asked the Grievant and her Union Representative if they had filed for arbitration, to which they replied they thought so, but would check it out. The Union discovered that no such request had been filed and thereupon filed one on June 7. On June 14, Gaier sent a memorandum to the Union Grievance Chair, Dean Hinklemann attaching an amended settlement offer, but also advising Hinkelmann that the District believed that it would prevail in arbitration, both on the merits and also on the issue of timeliness. The parties continued to negotiate and exchange offers thereafter, but never resolved the grievance, which resulted in this arbitration. Additional facts will be referenced, as necessary, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Union

Arbitrability

The Union asserts that its failure to request arbitration within ten days of notifying the District of its intent to do so it should not bar it from arbitrating the grievance. It maintains that requesting arbitration is not an official step in the grievance procedure and, therefore, the time limit for doing so should not be applied as strictly as those for the steps in the actual grievance procedure. The contract describes a three-step grievance procedure with specific timelines for advancing the grievance to the next step and indicates that if the timelines are not followed the grievance is deemed dropped. Thereafter, the contract discusses moving to arbitration. If the timeline language was intended to apply to requesting arbitration, it would have followed that section. The section setting forth a timeline for requesting arbitration should, therefore, be observed less strictly, especially where the parties are engaging in ongoing negotiations to resolve the grievance. In fact, the ongoing negotiations between the parties should be deemed an implied waiver of the timelines for requesting arbitration. It would be inequitable for the District to be able to lull the Union into a sense of complacency by negotiating only to then attempt to employ procedural defenses. Further, there is no conclusive evidence that the parties have ever strictly enforced the time lines.

The Merits

The Union contends that the District violated the contract when it reduced its contribution toward the Grievant's insurance premiums based on her reduced work hours. The grandfather clauses in Article XXIX, Secs. 1(b) and 2(b), require that the District contribute 75% toward health insurance and 95% toward dental insurance. The District interprets the language to require it to pay only 50% of the premiums because the Grievant's hours were reduced to 720 hours per year, although other bus drivers working only 720 hours per year receive the higher levels of contribution due to the grandfather clauses. This creates an unreasonable result. Also, contrary to the Administrator's interpretation of the meaning of the operative language, there was no meeting of the minds between the parties that any reduction in hours would lead to a reduction in benefits, so Mr. Gaier's interpretation should not control.

The District

Arbitrability

The District asserts that the grievance must be dismissed for failure to meet the contractual timelines. Article IV, Section 6, of the contract requires that a request for arbitration be filed within ten days of given notice of intent to proceed to arbitration and the Union did not meet this deadline. Notice of intent to arbitrate was given on April 17, 2006, making the deadline for filing the request May 1. The request was not filed until June 7 and

then only after an inquiry was made by the District. The contract specifies that "…grievances not processed at any step within the prescribed time limits shall be considered dropped," therefore the Union was aware of the consequences of not filing the request in a timely fashion. Arbitral precedent supports strictly enforcing timelines and dismissal of grievances where they are not followed, which should apply here. (citations omitted)

The District has always taken contractual timelines seriously and there is no evidence to the contrary. Further, there is no merit to the suggestion that settlement negotiations should work to extend or waive the timelines. No District official ever suggested that the District agreed to extend or waive the timelines due to ongoing negotiations. The Administrator specifically told the Grievant he believed the timeline had been missed and the District raised the timeliness issue with the Union in writing on June 14 and 16, so there is no legitimate argument that the union was misled on this point. Further, the contract specifically states that timelines may be extended "…under circumstances agreeable to both parties," which implies mutual agreement, but the re was no such agreement here. The District attempted to settle the matter amicably by negotiating and should not be penalized by having its good will considered a waiver of its procedural defenses.

The Merits

The contract is clear, where an employee's hours are reduced to 720 hours per year the District's obligation is to pay 50% of health insurance premiums, not 75%. This language applies to any employee who has his or her hours reduced, even bus drivers covered by the grandfather clause. The language is clear and unambiguous and should be applied as written. In February 2006, the Grievant's hours were reduced from 1080 hours per year to 720, therefore she is only entitled to a 50% premium contribution. In order to achieve the Union's desired result, the Arbitrator would have to ignore the language referring to reductions of hours, or exempt bus drivers from it, which he cannot do. By contract, the arbitrator cannot add to, subtract from, or amend, the contract and is required to apply it as written. Further, past practice and bargaining history, as set forth in the record, support the District's position as to how this language has been and should be applied.

The Union in Reply

Arbitrability

The District, by its actions, waived the timelines for requesting arbitration. By the fact that negotiations continued without interruption, the Union reasonably concluded that an extension or waiver of the timeline was agreeable to the District. The cases where such extensions have not been given involve much longer lapses and periods where negotiations were not ongoing. The District argues it would be prejudiced if its goodwill in continuing to negotiate after the timelines lapsed is considered a waiver, but so, too, the Union would be prejudiced if the District were permitted to lull it into complacency by continuing to negotiate only to then use procedural defenses to avoid arbitration. Both parties negotiated in good faith

and it would be unfair to now use that willingness to negotiate as a weapon against the Grievant. It should also be noted that, contrary to the District's assertion, the evidence is not clear that the parties have strictly adhered to timelines in the past.

The Merits

The provisions of Article XXIX dealing with insurance contributions are inconsistent with one another and cannot be reconciled. As such, they are ambiguous and require interpretation. The Grievant works 720 hours per year and worked for the District in 1999, thus the grandfather clause applies to her and should entitle her to a 75% insurance premium contribution. This, however, is inconsistent with the last sentence, which entitles her to only 50% if her hours are reduced. The District's interpretation is that she is only entitled to the 50% contribution, even though other drivers, who also work 720 hours per year, receive 75% because they are grandfathered and their hours have never been reduced. This is inherently absurd and contract interpretation principles seek to avoid absurd and nonsensical results. Also, contrary to the District's assertion, the bargaining history does not support a finding that there was a meeting of the minds as to the correct interpretation of the language of Article XXIX.

The District in Reply

Arbitrability

The Union did not provide evidence of any extenuating circumstances, nor legal support for its position, to justify its failure to file an arbitration request in a timely fashion. Therefore, the grievance should be dismissed. The Union asserts that the ongoing discussions between the parties constitute such extenuating circumstances, but there is no legal basis for this claim. Further, there is no legal rationale for its contention that ongoing settlement discussions constitute a *de facto* waiver of contractual timelines. The union appears to suggest that the District tricked it into missing the deadline by lulling it into a false sense of security and then using its procedural defenses as a sword, but there is no evidence of this. Further the Union attempts, without any legal support, to impose a duty on the District to announce its intention to end settlement discussions and enforce the timelines if it intended to do so. In fact, it was the Union's obligation to follow the timelines despite ongoing discussions Finally, despite the Union's protestations to the contrary, this is simply a case where the Union sat on its rights and did not act in a timely fashion and it should not be rewarded for doing so.

The Merits

It is the Union's burden to show that the District violated the contract and it has failed to do so. The Union argues that the District's interpretation of Article XXIX leads to an absurd result because it creates different levels of contribution, but this is the method the parties negotiated. The contract is clear that any employee subject to layoff, breaking of employment, or reduction of hours will have their benefits recalculated accordingly. That is what happened

with the Grievant – her hours were reduced and her benefits were adjusted to reflect the reduction. This was previously done when Dale Erickson was laid off and recalled without objection from the Union. The Union argues that the language calling for an adjustment if there is any reduction in hours is unreasonable, but that is the language the Union negotiated and it must live with it.

The argument that there was no meeting of minds on the meaning of the language is specious. The Union suggests that its interpretation of the language during negotiations may have differed from the District's, but it offers no evidence of the fact. It is the Union's burden to prove its case and it has failed to do so. To the contrary, the record establishes that the language is a codification of a previous policy and that all parties understood that a reduction of hours would result in a recalculation of benefits. Also, the Union's argument fails to consider all the relevant language from Article XXIX, which ties the grandfather clause to the number of hours worked in 1999, not 2006. It is the reduction of hours at that time that triggered the recalculation of benefits, therefore, the grievance should be dismissed.

DISCUSSION

The first question presented is whether the grievance is arbitrable. The District contends that it is not because the contract requires the request for arbitration to be filed within 10 days of giving notice of intent to arbitrate, exclusive of weekends and holidays. Here, the Union gave notice of intent to arbitrate on April 17, 2006. The actual request for arbitration was not sent to the WERC until June 7, 2006, or 36 days later under the contractual formula. The District contends that the request was, therefore, untimely and the grievance should be dismissed. The Union contends that, for a number of reasons, the contractual timelines should not be strictly enforced and that the grievance should not be dismissed on that basis. For the reasons set forth below, I find the District's position to be more persuasive and hold that the grievance must be dismissed on the basis of untimeliness.

To begin with, the pertinent contract language indicates that time is of the essence as to advancing grievances through the contractual process. Article IV, Section 5, of the contract states:

> The parties agree to follow the foregoing steps in the processing of a grievance. If the party concerned fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not processed at any step within the prescribed time limits shall be considered dropped. Time limit [sic] may be extended under circumstances agreeable to both parties.

Section 6 then states that the grieving party may request a panel of arbitrators from the WERC within 10 days of giving notice of intent to arbitrate to the other party, as provided in Section 4. The Union argues persuasively that the forfeiture language in Section 5 only refers to the contractual steps referred to previously, and not the 10 day deadline set forth in Section 6.

Nevertheless, Section 6 does establish a deadline for requesting arbitration that would be rendered superfluous under the Union's interpretation. If I am to assume that the 10 day requirement in Section 6 was intended by the parties to have meaning, which I do, then I must conclude that the parties also intended there to be a consequence for failure to observe it.

The Union also argues that a waiver of the timelines was implied in the District's willingness to continue negotiations even after the deadline had passed. I do not agree. Again, Section 4 states that timelines may be extended under circumstances agreeable to the parties. There is no evidence in this record of such agreement by the District. Union Grievance Chair Dean Hinklemann testified that the District representatives never told him they agreed to an extension of the timelines despite the fact that they continued discussing the grievance. (Tr. 59, 8-14) Further, Hinklemann stated that after sending the notice of intent to the District he believed the request had been filed with the WERC, but that when he inquired about it with the Union Representative, Mary Virginia Quarles, she told him it did not need to be filed as long as negotiations were ongoing. She did not tell Hinklemann that she had an understanding to that effect with the District and Ms. Quarles did not testify at the hearing. It appears, therefore, that the local Union members might have assumed that an extension was in effect based on what Ms. Quarles told Mr. Hinklemann, but this was not based on any such representation by the District and the District cannot be held responsible for representations made by the Union Representative as to the effect of ongoing negotiations on contractual filing requirements.

The Union further maintains that the equities and public policy support its position. It states that the District should not be able to induce it to compromise its rights by continuing settlement discussions, only to turn around later and employ procedural defenses. Such practice is contended to be unfair and would have the effect of inhibiting attempts to negotiate settlements of grievances in the future, which should be discouraged. First, there is no evidence that the District's behavior was in any way intended to induce the Union or Grievant to miss a deadline thereby providing the District a procedural defense. Also, even though the parties continued talking, there was nothing to prevent the Union from filing its request for an arbitration panel within the timelines required by the contract. It is frequently the case that parties will continue negotiating while simultaneously preparing for arbitration and will ultimately settle just before, or even during, the hearing. If avoiding the cost of the filing fee was the concern, although the record does not indicate this, there was also nothing preventing the Union from specifically asking the District for an extension of the timelines while discussions continued. That way either the District would have agreed or, if not, the Union could then have filed, if necessary. In any event, there is no evidence of sharp practice by the District, nor is there a logical explanation why the Union could not and should not have acted to preserve its rights while negotiations went forward.

The Union also appears to suggest that the District had an affirmative duty to end settlement discussions if it wanted to proceed to arbitration, which it failed to do, thereby losing its right to raise a timeliness defense. I find this argument has no merit. Absent extenuating circumstances which do not appear here, it is the Union's obligation to adhere to

the contract to preserve its procedural rights regardless of whether the parties are still exploring settlement possibilities. I further find no merit in the argument that absent clear evidence that the parties have strictly enforced timelines in the past it may be assumed that they have not done so. Lax enforcement of timelines is an affirmative defense to the District's procedural argument. As such, it is the Union's burden to produce evidence supporting it. It has not done so.

Because I find the grievance to not be arbitrable, I do not reach the merits of the case. For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The Union's failure to request arbitration within ten days of notifying the District of its intent to arbitrate violated the provisions of Article IV, Section 6 of the contract and bar the Union from arbitrating the grievance. The grievance is dismissed.

Dated at Fond du Lac, Wisconsin, this 6th day of September, 2007.

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

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