

BEFORE THE ARBITRATOR

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**VILLAGE OF KEWASKUM**

and

**THE LABOR ASSOCIATION OF WISCONSIN, INC.  
For and on behalf of  
THE KEWASKUM POLICE ASSOCIATION, LOCAL 314**

Case 11  
No. 66892  
MA-13673

(Retiree Health Insurance Premium Grievance)

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**Appearances:**

**Joel S. Aziere**, Attorney at Law, Davis & Kuelthau, S.C., 300 N. Corporate Drive, Suite 150, Brookfield, Wisconsin, 53054, appeared on behalf of the Village of Kewaskum.

**Benjamin M. Barth**, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin, 53022, appeared on behalf of the Labor Association of Wisconsin, Inc. and the Kewaskum Police Association, Local 314.

**ARBITRATION AWARD**

The Village of Kewaskum and the Labor Association of Wisconsin, Inc., for and on behalf of the Kewaskum Police Association, Local 314 are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by Local 314 President, Troy Ellis on behalf of Local 314 as to the payment of health insurance premiums for retired Association members. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held in the matter on November 8, 2007 in Kewaskum, Wisconsin. A transcript was prepared and made available to the parties. The parties filed written briefs and arguments and the record was closed on February 11, 2008.

**ISSUES**

At the hearing the parties stipulated to a statement of the issues as:

Whether the Village's interpretation and application of Section 19.07 violates the terms of the collective bargaining agreement?

If so, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE III – GRIEVANCE PROCEDURE**

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**Section 3.04:** The arbitrator shall have the authority to interpret this Agreement in arriving at a determination of any issue presented which is proper for final and binding arbitration, but the arbitrator shall have no authority to add to, subtract from or modify any of the provisions of this Agreement. The arbitrator shall not have authority to grant wage increases or wage decreases. The arbitrator shall expressly confine himself or herself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue not so submitted to the arbitrator nor shall the arbitrator submit observations or declarations of opinion which are not essential in reaching the determination.

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**ARTICLE X – SICK LEAVE**

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**Section 10.07:** Retirement health insurance bank is designed to work as follows: A full-time Officer must work one (1) full calendar year as a full-time employee to be eligible for participation in the retirement health insurance bank. After he/she has completed one (1) full year, the number of sick days which he/she had used during that calendar year will be the determining factor in calculating the number of retirement health insurance days he/she has accrued. This computation will take place on or immediately after January 1<sup>st</sup> of every year and the Officer will then be notified of the number of days he or she currently has in his/her retirement health insurance bank. Each employee shall be allowed to accrue up to one hundred twenty (120) retirement health insurance bank days. When an employee retires, including disability retirement, the days contained in the employee's retirement health insurance bank on the date of retirement will be converted into a dollar equivalent based on the rate of pay in effect on the date of retirement. The Employer will retain the money accumulated in the retirement health insurance bank and utilize it to pay health insurance premiums for the retired employee. At the employee's option, the Village will make premium contributions to a health insurance carrier other than the group health insurance plan. If the employee elects this option, the employee must submit an invoice to the Village and the Village will pay the insurance carrier directly from the employee's accrued retirement health insurance bank. If the employee opts not to enroll in the Village's health insurance plan at the time of retirement, he/she may not enroll in the plan at a later date. After the employee has used all of his/her accrued retirement health insurance bank, he/she shall be allowed to remain in the health insurance program, provided that the employee pay the full premium to the Village on a monthly basis. The following schedule will apply:

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## ARTICLE XIX – GROUP HEALTH INSURANCE

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**Section 19.04:** The Village will pay ninety-two and one-half percent (92.5%) of the premium cost of the single or family plan for full-time Officers and the Officer will pay the balance of the premium through payroll deduction.

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**Section 19.07 – Retired Employees:** A retired employee may continue to participate in the Village's group health insurance plan for active employees, and shall be subject to all changes in the carrier, administration, benefit levels, and other terms as those that are negotiated for active employees. The Village and retired employees shall pay premiums as set forth in Section 19.04. Retired employees may remain in the group health insurance plan until they become eligible for Medicare or insurance coverage from another source.

### BACKGROUND AND FACTS

The Village of Kewaskum operates a Police Department. The Association is the exclusive bargaining agent for all regular full-time and regular part-time police officers with the power of arrest employed by the Village of Kewaskum, excluding the Chief of Police and supervisory, managerial and confidential employees. Officer Troy Ellis has been the President of Local 314 for the last approximately 12 years and has been on the bargaining committee for that long. He filed the grievance herein on behalf of the membership of Local 314. There are approximately seven members in Local 314.

Since at least the 2001–2003 collective bargaining agreement there has been a provision for a retirement health insurance bank in the basic form and substance as contained in Section 10.07 and which remained in all subsequent agreements. Basically, it converts unused sick leave into a retiree health insurance bank for each particular employee. The Village also has an AFSCME collective bargaining agreement for a different collective bargaining unit of employees which contains a similar retirement health insurance bank, as well as a similar arrangement for the Village's non-represented employees.

In negotiations that produced the 2004–2006 collective bargaining agreement between the parties the Village, through Attorney Nancy Pirky, proposed adding language which during that bargain eventually became Section 19.07, and which remains in the 2007-2009 agreement. The Village wanted to make Local 314's contract consistent with the AFSCME contract which at that time contained an additional provision. The Village wanted retirees' health insurance to move with the active employees' plan benefits so that retirees' plan benefits would not vest and remain the same upon retirement. Rather, retiree health insurance benefits would change as the benefits changed for actives. The Village did not state during negotiations that it would pay any portion of retiree health insurance premiums. Pirky believed at the time that the

language provides upon retirement the Village would use the sick leave bank to pay the 92.5

percent for the retiree just the way it had been paying that same percentage for actives. The remaining 7.5 percent would come from the retiree. She understood this to be the same as was being done with the AFSCME employees, and said so at the negotiations. The contract language in the AFSCME agreement is not identical to the Local 314 language. The Village proposed that the 92.5 percent of the premium would be paid from the sick leave bank. Ellis, who was on the negotiations team for Local 314, did not believe at the time that what was being proposed was the Village actually paying the 92.5 percent of the retirement health insurance premium because at the time nobody in his bargaining unit had retired. At the time he didn't look at it because it didn't apply to anybody. The parties' discussions focused, instead, on the premium deductibles, co-pays and pharmacy co-pay changes proposed by the Village. The parties did not discuss that the Village was going to fund the 92.5 percent of retiree health insurance in exchange for Local 314 agreeing to the health insurance premiums proposed. There was no discussion of any *quid pro quo* with regard to Section 19.07. The Association proposed a change in Section 10.07, which added language regarding the retiree's ability to have the sick leave bank money paid to a different insurance plan. The Association was concerned about premium payments for members who may retire, move out of the area or have other insurance plans available other than the Village plan. The Village eventually accepted the proposal after crafting the language concerning the Village paying the other carrier from an invoice. The language added to Section 10.07 is:

At the employee's option, the Village will make premium contributions to a health insurance carrier other than the group health insurance plan. If the employee elects this option, the employee must submit an invoice to the Village and the Village will pay the insurance carrier directly from the employee's accrued retirement health insurance bank. If the employee opts not to enroll in the Village's health insurance plan at the time of retirement, he/she may not enroll in the plan at a later date.

This language remained in subsequent collective bargaining agreements.

In early 2007 when one of the Local 314 members was looking into retirement a question arose on payment of health insurance premiums. The Association and the Village conferred on the matter. The Association position was that a retired member is only responsible for seven and one-half percent of the premium, which is to be paid from the retirement health insurance bank, with the Village paying the rest from sources other than the retirement health insurance bank account. The Village position was that the retired employee pays the seven and one-half percent, through payments to the Village, and the Village pays the balance of the premium from the particular retired employee's retirement health insurance bank account. Once the total amount in the retired employee's retirement health insurance bank account was expended the retired employee would be responsible for paying the total premium to the Village for coverage. The parties were not able to reach an agreement on the import of the language in their collective bargaining agreement, and the instant grievance was filed to resolve the issue. That led to this arbitration.

Several examples<sup>1</sup> approximate what the relative financial implications are for the Village and two retirees in two situations, assuming increases in premium costs and certain Medicare eligibility dates which admit of some variability. Both assume an initial monthly total insurance premium of \$1043.19. One member of Local 314, Officer Buddenhagen, retired in July, 2007 while the grievance and arbitration was pending. He will assumedly reach Medicare eligibility on or about June 30, 2015. As of June 30, 2007 he had the value of \$23,990.00 in the retirement health insurance bank. If 100 percent of the health insurance premiums were to come from his sick leave bank it would run out in just under two years. If the Village were to pay 7.5 percent of health insurance premiums from the sick leave bank with the Village otherwise assuming the rest, it would have a balance of \$13,739.25 at Medicare eligibility.<sup>2</sup> The total cost of the insurance, assuming a 6% increase each year, would then be approximately \$143,851.00 until June 30, 2015 (assumed Medicare eligibility). As of the date of the hearing, another member, Thomas Bauer, anticipated retirement as of February 1, 2008. He will assumedly reach Medicare eligibility on or about February 1, 2018. As of February 1, 2008, his approximate balance in the retiree health insurance bank would be \$24,969.00. If 100 percent of the health insurance premiums were to come from his sick leave bank it would run out in just under two years. If the Village were to pay 7.5 percent of health insurance premiums from the sick leave bank, with the Village otherwise assuming the rest, it would have a balance of \$10,913.16 at assumed Medicare eligibility.<sup>3</sup> The total cost of the insurance, assuming a 6% increase each year, would then be approximately \$187,419.21. For both retiree examples there is nothing in the record to indicate that the above assumptions, percentages, monthly amounts, balances, plan coverage, participation of retirees, or anything else will actually occur in the future.

When Buddenhagen retired the Village began paying 92.5 percent of his monthly health insurance premium from the retiree health insurance bank, the balance came out of pocket from Buddenhagen, who paid 7.5 percent of the premium to the Village. This is different than how the Village was administering the AFSCME and non-represented retirees who remained insured. For those retirees, the Village paid 100 percent of the health insurance premiums from the respective retirees' health insurance banks. These others did not make a separate out of pocket payment to the Village for any percent of the premiums. In preparation for the grievance arbitration hearing in the instant case, the Village discovered this difference. The Village wrote to the Association's Representative explaining that the Village had wanted to calculate and pay the police retiree benefits the same as it did for the other retired employees, and had been in error in calculating the retiree health insurance benefits for Officer Buddenhagen. The Village indicated its position that it should be paying 100 percent of Buddenhagens's health insurance premiums from his retiree health insurance bank, and would be refunding him the amount he paid for the 7.5 percent of the premiums since he retired. The

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<sup>1</sup> Based upon calculations supplied by and performed by the Village.

<sup>2</sup> The projections in both scenarios assumes a premium increase of 6% per year for the total cost of the premium based on historical data, with a beginning total monthly premium of \$1043.19 as of June, 2007.

<sup>3</sup> Same assumptions as above.

letter, dated November 6, 2007, reiterated the Villages' arbitral position in this case as well. As to how it had been administering Buddenhagen's premiums, it stated in pertinent part:

At the time we bargained the 2004-2006 language, we believed the past practice was that the Village paid 92.5% of the premium cost for retiree health insurance from the retiree health insurance bank as set forth in Section 10.07. In preparing for the arbitration hearing, we have learned that the past practice on this issue is for the Village to pay 100% of the premium cost for employees who retire under the AFSCME contract or as a non-represented employee, out of the retiree health insurance bank. There have been no officers who retired under the language of Section 10.07 to confirm the Village's interpretation of Section 10.07. Because our intent in bargaining the disputed language of Section 19.04 of the police contract was to be consistent with the AFSCME contract, we have determined that we made an error in calculating the retiree health insurance benefits for Officer Buddenhagen. To be consistent with the past practice, we should be paying 100% of Officer Buddenhagen's health insurance premiums from his retiree health insurance bank as set forth in Section 10.07 of the collective bargaining agreement. We will be notifying Officer Buddenhagen of this fact and making arrangements to refund the amount he has paid for the 7.5% of his health insurance premium since his retirement.

At the time of negotiating the 2004-2006 agreement with Local 314, Pirkey had been under the misunderstanding that the Village was only paying 92.5 percent of the premiums from the AFSCME and non-represented retiree health insurance banks, rather than 100 percent from the banks.

The grievance is signed March 1, 2007, alleging a date of grievance of February 21, 2007. It contends that on February 21, 2007 the Village informed the Association that the Village will not pay 92.5% of the premium for a retired employee's health insurance. The grievance referenced Sections 19.04 and 19.07 specifically, and generally Articles II and XIX as well as any other Article, Section, work rule or past practice that may be applicable. The grievance alleged, in essence, that the Village is required to pay the 92.5% of the premiums as required by the language in the agreement, as was the intent of the parties, and that the Village had exercised its management rights in an unreasonable manner.

Further facts appear as are in the discussion.

### **POSITIONS OF THE PARTIES**

#### **The Association**

In summary, the Association argues that the language found in the agreement is clear and unambiguous. Where the contract language is clear and unambiguous, the arbitrator should give no other meaning other than that expressed, citing arbitral authorities. The Association believes that using the plain meaning of the language found within the four corners

of the collective bargaining agreement is sufficiently clear in explaining the contribution the Village must make towards health insurance after an employee retires. The language in Section 19.07 mandates the Village shall pay the premiums as set forth in Section 19.04. Section 19.04 requires the Village to pay ninety-two and one-half percent of the premium cost for the single or family plan. The parties have agreed to this provision in the collective bargaining agreement and it must be followed. If not, the Village must be held accountable.

The Association argues, whoops I made a mistake – so says the Village. The language has been in place since the 2004-2006 contract. In those negotiations the Village proposed changes, one being adding new section 19.07. The parties entered into a voluntary settlement of the agreement which included new Section 19.07. Association President Ellis testified that his understanding of the Village's proposal was for the Village to pay ninety-two and one-half percent of the insurance premiums for retired employees and that the retired employees would pay the remaining seven and one-half percent, the same as active employees, referencing testimony. Ironically, the Village takes the position that an error was made in drafting the current language in Section 19.07. It is mind-boggling. For over a decade health insurance and employee/retiree contributions for health insurance have been a major issue at the bargaining table. To believe that a veteran labor attorney, from one of the largest labor law firms in the state of Wisconsin made a "mistake" in this issue is incredulous. The employer created, drafted and proposed Section 19.07, brought it to the bargaining table stressing its importance to the Association in order to achieve a voluntary settlement. This is the very essence of collective bargaining. The employer did not make a mistake in drafting Section 19.07 but, is making a mistake by trying to modify the clear and unambiguous language in Section 19.07 through grievance arbitration rather than collective bargaining. The language has not changed since the 2004-2006 contract. The Village should have addressed the "mistake" during negotiations for the current agreement. The Village is in the wrong forum.

The Association also argues that desperate, the Village now tries an end run and wants to tie 19.07 to 10.07. The Village argued that the meaning of Section 19.07 must be read in conjunction with Section 10.07, reading both together with the intent for retired employees to pay 100% of the health insurance premiums out of their health insurance bank. The Association would agree to the fact that Section 10.07 was created to pay health insurance premiums for retired employees. When the Parties agreed to add Section 19.07 to the contract, the meaning of Section 10.07 did not change. Prior to Section 19.07, it was the Association's position that retired employees used their health insurance bank to pay health insurance premiums. When the parties added Section 19.07 that requires the Village to pay 92.5% and retired employees pay the remaining 7.5%, the position of the Association never changed. As testified to during the hearing by Association president Ellis, it is the Association's position that retired employees may use their health insurance bank to pay the remaining 7.5% of the health insurance premium, referencing testimony. The language within the four corners of the contract greatly supports the Association's position. To agree with the Village position would require the arbitrator to ignore the plain language of Section 19.07 that mandates the Village and retired employees to pay premiums as set forth in Section 19.04.



The Association further argues that the grievance procedure guidelines for an arbitration decision favors the Association's position. Section 3.04 establishes the guidelines in which the arbitrator shall base his decision, emphasizing the arbitrator shall have no authority to add to, subtract from, or modify any provisions of this agreement. For the arbitrator to agree with the Village, he would have to subtract or modify the very same contractual language that the Village proposed during the 2004-2006 negotiations. This would not be consistent with the grievance procedure language. The Village, if unhappy with the language, should go through collective bargaining to achieve a change and not by grievance arbitration.

The Association argues there is no *bona fide* past practice. It has been well established that in order for a past practice to be valid, certain conditions must be met. Two common elements clearly lacking are mutual understanding and mutual agreement. Clearly there is no mutual understanding or mutual agreement in the instant case. During the grievance process the Village maintained that the past practice was the Village paid 92.5% from the retired employee's retiree health insurance bank. However, two days prior to the arbitration hearing the Village sent a letter advising the Village realized that the actual practice was for the Village to deduct 100% of the insurance premium cost for retired employees from the retired employee's retiree health insurance bank. To claim there is a "bona fide past practice" when the Village changed its own application of Section 10.07 a couple of days before this hearing illustrates that their concept of a past practice is inconsistent with arbitral law. Further, only two employees of the Village have retired, neither one being a member of the Police Association. One was an AFSCME member, the other non-represented. The language in the AFSCME contract and the non-represented program is silent as to retiree health insurance or different, citing the AFSCME contract Section 14.05. The Police contract is the only document that mandates the Village will pay 92.5% of the premiums for retired employees, citing testimony. Any argument alleging a past practice would lack mutual understanding, mutual agreement and taking place over a long period of time. There cannot be a past practice when there has been no employee from the Police Association who retired under the specific terms and conditions of the Police contract. The Village is incorrect to compare the AFSCME contract and Non-rep program to the Police language, which is the only contract that contains the requirement that the Village pay the same percentage towards the insurance premiums for retirees as it does for active employees.

The Association requests that the arbitrator order the Employer to make the appropriate health insurance contributions to the retirees as set forth in Section 19.04 and Section 19.07 of the collective bargaining agreement and sustain the Association's grievance.

### **The Village**

In summary, the Village argues that when adopting Section 19.07 of the collective bargaining agreement, the parties did not intend for the Village to pay retiree health insurance premiums from any source other than the retirement health insurance bank. The parties' intent is the goal and source of contract interpretation, citing arbitral authority. The evidence shows

that when the Village and the Union agreed to include Section 17.09 in the collective bargaining agreement, neither party intended for the Village to pay its portion from any source other than the retirement health insurance bank. The Village intent was clearly communicated, the Union raised no objections, and the proposed language was agreed to without modification. To suggest that the intent of Section 19.07 was for the Village to take on the obligation of paying premiums from any source other than the retirement health insurance bank leads to absurd and unreasonable results. The Village would have received nothing in return for a huge benefit to the Union. Retirees would have significantly better health insurance benefits than the active employees. Other provisions of the collective bargaining agreement, such as in Section 10.07, would become obsolete.

The Village argues that bargaining history demonstrates that the Village clearly communicated its intent during the negotiations, the Union asked no questions, raised no objections, and the Village's proposed language was adopted by the parties without modification. The Village intent was to make all police officer retirees subject to the same health insurance premium payment schedule as the active police officers, and to create uniformity among retirees from all departments. All others outside the police department have retirement insurance banks which operate similar to that in Section 10.07. They have had the Village portion of their health insurance premiums paid from the retiree's health insurance bank. Proposing Section 19.07 was the Village intent to pay its portion of the police retirees' premiums from the police retirees' retirement health insurance bank as well. The Village communicated this to the Union during negotiations for the 2004-2006 contract. Nancy Pirky stated the intent to make the police department retirees subject to the same plan and benefit as actives, and align the payment scheme with that of other Village retirees. The Union had no evidence to contest this, and the Union President stated Pirky "may have" informed the Union negotiators of that intent. He also admitted that the Village never stated during negotiations that it would pay any portion of the retiree health insurance premiums from a source other than the retirement health insurance bank. To accept the Union's claim would be outrageous considering the Village received nothing from the Union at the bargaining table for such an enormous financial obligation. The Union did not even consider the provision to have the intent the Union now claims, citing testimony. And, the Union acquiesced to the Village intent when the Union failed to object to, or even question, the language of the proposed provision or the Village's expressed interpretation, citing arbitral authority.

The Village also argues that the absurd and unreasonable results of interpreting Section 19.07 as the Union advocates demonstrates that the parties could not have intended such an interpretation. Citing arbitral authority, the Village contends an absurd and unreasonable result would occur if one accepted the Union interpretation of Section 19.07. This would render Section 10.07 obsolete, provide better health insurance benefits than active employees, and cause significant economic harm to the Village. If Section 19.07 were interpreted as the Union suggests, and the Village was required to pay 92.5% of the retirees' health insurance premiums from a source other than the retirement health insurance bank, retirees using the bank to pay their 7.5% contribution would have huge balances left when they become eligible for Medicare. This result would directly contradict Section 10.07 which states

in part that “After the employee has used all of his/her accrued retirement health insurance bank, he/she shall be allowed to remain in the health insurance program, provided that the employee pay the full premium to the village on a monthly basis.” This language would become obsolete because at a 7.5% draw there would be more than enough money in a retiree’s bank until Medicare eligibility to ensure the employee never uses his or her accrued retirement health insurance bank. Ellis essentially admitted this, citing testimony. Ellis also agreed with the Buddenhagen and Bauer charts as presented by the Village. Common sense has to prevail. Why would a retiree walk away from the kind of money the 7.5% draw charts have at Medicare eligibility? They’d be walking away from thousands of dollars. The Union’s Medicare supplemental insurance position does not have merit because retirees were ineligible to continue using the Village plan or the retirement health insurance bank once they reach Medicare eligibility. Ellis admitted a Medicare supplement was not the intent of the parties at the time the new language was added to Section 10.07, citing testimony. These funds are out of the system at Medicare eligibility and could no longer be used. Section 10.07 and Section 19.07 must be read in conjunction. To read Section 10.07 the way the Union advocates ignores the purpose and plain language of Section 10.07.

The Village contends that the Union’s interpretation of Section 19.07 would create the inexplicable inequity of retirees receiving a greater health insurance benefit than active employees. Retirees would pay nothing out of pocket for coverage, possibly for their lifetime, while actives would pay 7.5% out of pocket for health insurance. At this rate, the bank for each retiree would likely remain funded for years, if not for the entire life of the retiree. Using the bank for Medicare supplemental insurance is also better coverage than actives. To provide better benefits to retirees than actives would be extraordinarily unusual, the Village would never agree to it, and it is not credible to suggest the Union would negotiate better retiree terms than for current dues paying members.

The Village further argues that the Union’s interpretation of Section 19.07 would place a significant economic burden on the Village. It would cost the Village up to \$150,000.00 per retiree, an astronomical cost it could not absorb. There is no way the Village would agree to, let alone itself propose, such terms.

The Village argues it is illogical to believe that the Village would have ever offered such a huge benefit to the Union without receiving anything in return. By the Union’s own admission the Village received absolutely nothing in return for its magnanimously gracious gift to the Union. The Union did nothing, asked no questions, and expressed no gratitude because the Union never believed the Village was proposing it pay from any source other than the bank. The Village never proposed a *quid pro quo*. The Union admitted it received wage increases each year. It cites no take-aways or reductions in benefits. It is infeasible to believe that the Village would make the offer claimed by the Union.

Additionally, the Village contends that the fact that the Village erred in the initial handling of Officer Buddenhagen’s retiree health insurance does not adversely affect the Village position in this case. During preparation for the hearing it was discovered that an error

had been made in drafting Section 19.07. The Village retirees outside the police department paid nothing out of pocket. Rather, 100% of the premium was paid out of the bank for the retiree, until the money was exhausted, at which time the retiree was free to continue if he/she paid the entire premium. Once the Village realized this it notified the Union and Officer Buddenhagen of the error, advising Buddenhagen it would reimburse him from his retirement health insurance bank for the out of pocket he had paid, and that 100% of future premiums would be paid from the bank until exhausted. The Village regrets the error. It has no bearing on the core case. The dispute is the question of whether the Village agreed to pay any portion of the premium from any source other than the bank. The Village pays no portion of the retirement health insurance premium for other Village employees outside the police department. This supports Pirky's testimony of the Village intent. The fact that an error was made is irrelevant.

The Village also contends that the Union's argument regarding the clear and unambiguous language of the collective bargaining agreement does not address the issue in dispute. The Union offers no evidence to disprove that the Village made a valid mistake when drafting Section 19.07, and, in any event, the mistake is irrelevant to the issue in dispute. At the time the parties agreed to Section 19.07, the Union did not believe the Village was agreeing to pay any portion of the retiree health insurance premiums from any source other than the retirement health insurance bank. The Village intends to pay 100% of police department retirees' health insurance premiums from the retirement health insurance bank to honor the original intent of Section 19.07. The Village has never suggested the existence of a past practice between the Village and the Union.

The Village requests that the grievance be dismissed.

### DISCUSSION

Pursuant to Section 10.07 of the collective bargaining agreement, active Association Members can have unused sick leave days converted into a dollar amount at retirement and have that amount placed into a retirement health insurance bank (the Village retaining the funds) with those funds being used to pay health insurance premiums for the retiree. The parties disagree on the interpretation and application of Section 19.07 of the collective bargaining agreement and its intent. The Section states:

**Section 19.07 – Retired Employees:** A retired employee may continue to participate in the Village's group health insurance plan for active employees, and shall be subject to all changes in the carrier, administration, benefit levels, and other terms as those that are negotiated for active employees. The Village and retired employees shall pay premiums as set forth in Section 19.04. Retired employees may remain in the group health insurance plan until they become eligible for Medicare or insurance coverage from another source.

The Association takes the position that the language is clear and unambiguous; by reference to Section 19.04, the Village is obligated to fund 92.5 percent of a retiree's health insurance premium from Village funds other than the retirement health insurance bank, with the retiree's

retirement health insurance bank being the source of the retiree's 7.5 percent of the premium cost. Section 19.04 states:

**Section 19.04:** The Village will pay ninety-two and one-half percent (92.5%) of the premium cost of the single or family plan for full-time Officers and the Officer will pay the balance of the premium through payroll deduction.

The Village takes the position that the 92.5 percent share of premium cost is to be paid from the retiree's retirement health insurance bank, that it has no obligation to pay premiums from any source of funds other than the retiree's retirement health insurance bank, and that obligation ends when the funds in the retiree's bank are depleted. Section 10.07 states in pertinent part:

**Section 10.07:** Retirement health insurance bank is designed to work as follows: A full-time Officer must work one (1) full calendar year as a full-time employee to be eligible for participation in the retirement health insurance bank. After he/she has completed one (1) full year, the number of sick days which he/she had used during that calendar year will be the determining factor in calculating the number of retirement health insurance days he/she has accrued. This computation will take place on or immediately after January 1<sup>st</sup> of every year and the Officer will then be notified of the number of days he or she currently has in his/her retirement health insurance bank. Each employee shall be allowed to accrue up to one hundred twenty (120) retirement health insurance bank days. When an employee retires, including disability retirement, the days contained in the employee's retirement health insurance bank on the date of retirement will be converted into a dollar equivalent based on the rate of pay in effect on the date of retirement. The Employer will retain the money accumulated in the retirement health insurance bank and utilize it to pay health insurance premiums for the retired employee. At the employee's option, the Village will make premium contributions to a health insurance carrier other than the group health insurance plan. If the employee elects this option, the employee must submit an invoice to the Village and the Village will pay the insurance carrier directly from the employee's accrued retirement health insurance bank. If the employee opts not to enroll in the Village's health insurance plan at the time of retirement, he/she may not enroll in the plan at a later date. After the employee has used all of his/her accrued retirement health insurance bank, he/she shall be allowed to remain in the health insurance program, provided that the employee pay the full premium to the Village on a monthly basis. The following schedule will apply:

Prior to the instant grievance being filed no Association Member had retired and sought retiree health insurance premium payments pursuant to the collective bargaining agreement.

Both parties present a plausible reading of parts of the agreement that favors their respective positions. Reading sections 19.07 and 19.04 together, as the Association does, payment by the Village of premium costs above 7.5% is plausible, especially in the absence of any reference to the source of funds. On the other hand, Section 10.07 does refer to using the bank to pay insurance premiums, and this supports the Village position. Thus, when reading all three Sections together there is an ambiguity.

When faced with an ambiguity the intent of the parties along with the language of the agreement is critical. The best evidence of the intent of the parties as to the meaning of the provisions is in the language itself used in the collective bargaining agreement. In interpreting collective bargaining agreement language, the provisions must be read together giving meaning to all and rendering none of them meaningless. Bargaining history is also an aide in ascertaining the intent of a provision, particularly where there is ambiguity in the contract language.

Section 10.07 states that the Employer will retain the money accumulated in the retirement health insurance bank and utilize it to pay health insurance premiums for the retired employee. This is clear language that the source of funds to pay the premiums is the bank. The balance of the Section also makes it clear that there is a limited amount of days or funds that can be accumulated in the bank. This is a specific section that deals with retiree bank funding and the use of the bank to pay premiums without differentiating between employer and employee. Generally a specific provision controls over a more general provision. This supports the Village position.

While Section 19.07 does specifically refer to premiums being paid as set forth in Section 19.04, it does not specify whether the employee contribution is to come from the bank or not. The Association argues that the language is clear and unambiguous and that the plain meaning of the language in the collective bargaining agreement explains the contribution the Village must make towards health insurance after an employee retires. Section 19.07 mandates the Village shall pay the premiums as set forth in Section 19.04. Section 19.04 requires the Village to pay 92.5 percent of the premium cost. The Association argues the clear meaning of the contract must be enforced even though the results may be harsh or contrary to the original expectations of one of the parties.

An examination of Section 19.04 shows that it cannot be applied to a retiree as literally written. The Section provides that the Officer pays the balance of the premium through payroll deductions. A retired Officer is no longer on the payroll and cannot make a payment through payroll deductions. Section 19.04 does not mention retired Officers. It only referenced full time Officers. If the retiree were to make a premium payment of 7.5 percent to the Village from out of pocket, that would be consistent with actives' payroll deduction. The same would hold if the 7.5 percent came from the bank. And that part of Section 19.07, when applied to Section 19.04, would not be rendered meaningless.

There is also the matter of how other parts of Section 10.07 refer to the bank balances being used up, particularly the phrase:

After the employee has used all of his/her accrued retirement health insurance bank, he/she shall be allowed to remain in the health insurance program, provided that the employee pay the full premium to the Village on a monthly basis.

This language anticipates that a retired Officer might have to pay the full premium. If the Village were required to pay 92.5 percent of the premium from funds or sources other than the bank, then the retiree would not have to pay the full premium. But, the language does require full payment by the retiree. This eliminates a requirement that the Village pay any part of the premium once all the funds in the accrued retirement health insurance bank are used. This is a clear statement that the source of all premium costs is the retirement health insurance bank, not just the 7.5 percent.

Additionally, as the Village argues, the Association's position would render the above referenced sentence meaningless. If the Village were required to pay 92.5 percent of the premium even after the bank was used up, then the retiree would not have to pay the full premium. Arbitral interpretations of contracts cannot render parts of it meaningless. The provision would still have meaning under the Village position because the Village would have no obligation to pay anything after the bank was used up because the retiree would have to pay the full premium.

A similar result follows from the language in Section 10.07 which states:

At the employee's option, the Village will make premium contributions to a health insurance carrier other than the group health insurance plan. If the employee elects this option, the employee must submit an invoice to the Village and the Village will pay the insurance carrier directly from the employee's accrued retirement health insurance bank.

This is a specific reference to the bank being the source of funds that the Village is to use to pay premiums.

Any ambiguity created by the tension between combined Sections 19.07 and 19.04, and Section 10.07, is resolved by reading the above three Sections together, giving meaning to all and rendering none meaningless when the bank alone is considered the source of the 92.5 percent of the premiums. This result is also supported by bargaining history. It does not add to, subtract from or modify anything in the agreement's language

There is an issue as to what the Association negotiators understood Section 19.07 meant when it was proposed by the Village in the 2004-2006 bargaining. At the hearing the Association president testified in direct examination that his understanding of the proposed

language was that the Village would pay 92 and one-half percent and the member would pay 7 and one-half percent based on the language in 19.07. However, on cross examination the President testified that at the time Section 19.07 was proposed, he did not realize that. He also testified that at the time he “never looked at it, didn’t apply to anybody.” He also testified to the effect that he never considered what was being proposed. And that at the time he never believed that what was being proposed was the Village actually paying 92.5 percent of the retiree health insurance premiums, “because nobody had retired.” The undersigned credits his statements and understandings as expressed in cross examination because it shows his reasoning at the time. His cross examination answers are also consistent with the testimony of Village negotiator Pirky, that she said during negotiations that the source of the 92.5 percent would be the bank. And this is consistent with the Village motivation in proposing the Section to make the operations of the Village consistent across the AFSCME and non-represented’s retiree health insurance banks, as well as keeping to a single insurance plan for actives and retirees.

The undersigned is persuaded that at the time Section 19.07 was proposed, the Association did not have an understanding that retiree health insurance premiums in any percentage or amount would be paid by the Village from any source other than the bank. Without such an understanding, it could not have been the Association’s intent by agreeing to Section 19.07 that the Village would pay 92.5 percent of such premiums from any source other than the bank. And there is no evidence to suggest the Village had an intent to pay from a source other than the bank. All evidence of the Village intent is that it did not intend to pay from any source other than the bank. Thus, bargaining history shows the language was not understood or intended by either party to fund premium payments the way the Association now argues. Rather, the Village expressed its intent behind Section 19.07, the Association did not question or object to that, and accepted it. This bargaining history strongly supports the Village position that the intent of the parties in adopting Section 19.07 was that the bank would be the source of the 92.5 percent of the retiree premium cost.

It also seems extremely unlikely that the Village would propose such a potentially large benefit to the Association, under the Association position, without negotiating something specific in return or in regard to it. Nothing in the record indicates that either party had that understanding when the language was agreed to. The language of all three Sections read together along with the bargaining history persuades the undersigned that the source of the funds by which the Village is required to pay retiree health insurance premiums is from the retiree health insurance bank and not from another source.

An additional aid in determining the intent of parties to a collective bargaining agreement is any relevant past practice. Both parties have made past practice arguments here to the effect that there is no past practice that supports the other party’s position. Both are correct. The record establishes no past practice between the Village and the Association as to how retiree health insurance premiums are paid or the source of the payments. Any past practice between the Village and the AFSCME bargaining unit cannot and does not bind the Association. The Village practice as to the non-represented employee retirees cannot bind the Association. And, there having been no former Association retirees, there is no fact situation



for any past practice to have been established between these parties. While the fact that the Village may have had a practice in how it used or paid premiums for AFSCME or non-represented retirees might help understand its intent when proposing Section 19.07 during negotiations, it is not binding here. The Village does not argue otherwise. There is no past practice that aids interpretation here.

There is the matter of Pirky's misunderstanding of how the retirees paid the 7.5 percent and how Officer Buddenhagen's out of pocket payments were made. This is the matter discussed in the November 6<sup>th</sup> letter. Whether argued as a past practice, a mistake, a drafting error, or something else, once Buddenhagen retired he began paying the 7.5 percent of the premium cost to the Village out of pocket. That matter does not have any impact on the instant grievance. The grievance which is the subject of this arbitration was filed months before Buddenhagen retired in July of 2007. The grievance submitted alleges a grievance date of February 1, 2007. Whether the retiree contributions toward premium cost as set out in Section 19.07 and Section 19.04 come from the retiree health insurance bank along with the Village payment, are out of pocket, or who makes that decision, are matters that exceed the precise issue submitted for arbitration. Section 3.04 of the collective bargaining agreement prohibits an arbitrator from determining any other issue than that submitted for arbitration. The issue submitted requires a determination if the Village has an obligation to pay retiree health insurance premiums from any source or funds other than the retiree health insurance bank. Whether the retiree makes an ongoing contribution or has the contribution come from the bank is a different issue. And given the dispute between the parties that prompted the filing of the grievance in the first place, how the Village and Buddenhagen administered the 7.5 percent of the cost cannot be said to have created any past practice binding on the Association or the Village. The Association did not express any consent to what the retiree and the Village did after the original grievance was filed.

As to the grievance filed in this case, the Village's application and interpretation of Section 19.07 does not violate the terms and conditions of the collective bargaining agreement. Accordingly, based on the evidence and arguments presented in this case I issue the following

### AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 7<sup>th</sup> day of May, 2008.

Paul Gordon /s/

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Paul Gordon, Arbitrator

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