

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CRIVITZ EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF CRIVITZ

Case 28
No. 67245
MA-13815

Appearances:

Attorney Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, Madison, Wisconsin 53708 and **Ms. Kim Plaunt**, UniServ Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303, on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney James M. Kalny**, 318 South Washington Street, Green Bay, Wisconsin 54301, on behalf of the District.

ARBITRATION AWARD

At all times pertinent hereto, the Crivitz Education Association (herein the Association) and the Crivitz School District (herein the District) were parties to a collective bargaining agreement dated May 24, 2006 and covering the period from July 1, 2005 through June 30, 2007. On August 28, 2007, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a dispute concerning an allegation that the District had unilaterally altered the prescription drug benefits for retired bargaining unit members contrary to the collective bargaining agreement. The undersigned was jointly requested to hear the dispute and a hearing was conducted on November 20, 2007. The proceedings were transcribed. The parties filed their initial briefs by February 28, 2008 and reply briefs on March 10, 2008, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues. The Association frames the issues, as follows:

Did the District violate the collective bargaining agreement when it refused to provide prescription drug coverage to Judy Gehm when she retired and became Medicare eligible?

If so, what is the appropriate remedy?

The District frames the issues, as follows:

Is the grievance procedurally or equitably barred?

Did the District violate the collective bargaining agreement when it refused to sign the Memorandum of Understanding with the WEA Trust to provide an exception to the exclusion of prescription drug coverage for Medicare-eligible retirees?

Can the arbitrator award the remedy sought by the Association?

The Arbitrator frames the issues as follows:

Is the grievance procedurally or equitably barred?

Did the District violate the collective bargaining agreement when it failed to sign the Memorandum of Understanding with the WEA Trust or otherwise provide supplemental prescription drug coverage for Medicare-eligible retirees?

PERTINENT CONTRACT LANGUAGE

ARTICLE VI – GRIEVANCE PROCEDURE

- A. Purpose: The purpose of this procedure is to provide an orderly method for resolving differences arising out of this agreement and to secure at the lowest possible administrative level equitable solutions to problems, which may from time to time arise affecting the relations between the Crivitz Education Association and the School District. An effort shall be made to settle any such differences through the use of the grievance procedure.
- B. Definition of a Grievance: A grievance is defined as a dispute concerning wages, hours or conditions of employment.
- C. Grievances shall be processed in accordance with the following procedure:

Step 1.

- A. An earnest effort shall first be made to settle the matter informally with the immediate supervisor.
- B. If the matter is not resolved the grievance shall be presented in writing to the immediate supervisor within fifteen (15) days after the event upon which the grievance is based first occurred. The written grievance shall include the facts upon which the grievance is based, the issues involved, those provisions of the agreement alleged to have been violated and the remedy sought. The immediate supervisor shall determine whether the grievance lies within his/her jurisdiction. If the grievance does not lie within his/her jurisdiction, he/she shall notify the grievant within five (5) working days. If the grievance lies within the jurisdiction of the immediate supervisor, he/she shall give his/her written answer to the grievant within a total of fifteen (15) working days from the time that the grievance was presented to him/her in writing.

Step 2. If not settled in Step 1, the grievance may immediately, but within ten (10) working days, be appealed in writing to the Superintendent of Schools. The Superintendent shall give a written answer not later than ten (10) working days after receipt of the appeal.

Step 3. If not settled in Step 2, the grievance may immediately, but within ten (10) working days, be appealed to the Board of Education. The Board shall give a written answer within ten (10) working days after the next regularly scheduled board meeting.

Step 4.

- A. If a grievance is not satisfactorily resolved at Step 3 or if no answer has been received from the Board, the Association may submit the grievance to arbitration within 60 working days.
- B. Immediately, but within ten (10) working days, after the written notice of submission to arbitration, the Board and the Association will agree upon a mutually acceptable arbitrator and will obtain a commitment from said arbitrator, to serve. If the parties are unable to agree upon an arbitrator or to obtain a commitment within the specified time period, both parties shall jointly file a written request with the Wisconsin Employment Relations Commission to obtain a list of five names for their consideration. A representative of the employer and employee shall determine by lot the order of elimination and thereafter each shall, in that order, alternately strike a name from the list, and the fifth and remaining name shall act as arbitrator.

- C. The arbitrator so selected will confer with the representatives of the Board and the Association and hold hearings promptly and issue his/her decision on a timely basis. The arbitrator shall have no authority to add to, subtract from, delete or modify this agreement and is limited to deciding a case based under the terms of this agreement. The decision of the arbitrator will be final and binding on both parties.

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D. **GENERAL PROCEDURES**

1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified by, however, may be extended by written, mutual agreement.

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6. Grievances not processed according to the prescribed time limits stated shall be deemed resolved on the basis of the last answer from the administration or school board. Grievances not processed according to the prescribed time limits stated above shall be deemed waived. If the administration or school board fails to give its answer within the prescribed time limits, the grievant may immediately appeal to the next step.

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ARTICLE X – GENERAL CONDITIONS OF EMPLOYMENT

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- H. Retirement Incentives – Teachers employed by the District during the 94-95 school term will be eligible for one of two retirement incentives (A or B). Teachers hired effective with the 95-96 school term and thereafter will be eligible only for incentive B. Teachers must state their option choice at the time of notification on or before March 1 the year preceding their retirement.

1. Options

- (A) Unused sick leave

- (1) Any teacher may qualify for this program by completing ten years of service as a teacher with the District and by achieving that age required for retirement under the Wisconsin State Retirement System, whether that age is designated for “retirement” or regular retirement. For purposes of this retirement incentive and for this incentive only, teachers shall be entitled to payment for unused sick days up to 240 days at a rate of \$75.00 per day (retirement incentive).

- (2) Election Option In Lieu Of Health Insurance

Former employees (and surviving dependents) entitled to extended group health insurance coverage may elect to receive, in lieu of such coverage, monthly cash payments for the same period of time that the insurance coverage (single or family, regular or Medicare coordinated) would have been extended. Insurance coverage and the cash alternative are based only on the employee’s eligible insurance status (i.e., a single Medicare eligible employee cannot choose Family cash).

This election shall be made in writing prior to September 1 and then annually each year prior to the cafeteria plan’s definition of the beginning date for a new year. Absent a mid-year (January through December) cafeteria IRC §125 exception [such as an employee getting married, loss of spouse coverage, etc.], a mid-year change from their eligible status is not permitted. Each monthly payment equals the monthly amount paid by the District to the health insurance provider when the employee applied for retirement (subject to applicable payroll taxes). If a cash payment election is made for one year, then cash payments will have to be elected for later years, unless group health plan coverage is available for those later years {or unless the employee or surviving dependents elects to use some or all of the monies available to offset eligible expenses under the District’s flexible spending account}.

To avoid adverse income tax consequences to employees who elect the insurance coverage, both the extended coverage and the cash shall be available only under the District’s §125 cafeteria plan, consistent with IRS rules

governing §125 plans. Prior to any employee being eligible to elect this option, the District shall, if necessary, create or amends its §125 plan to provide coverage to such former employees.

(B) Experience Based Retirement Incentive

- (1) Teachers shall be credited one year of retirement health insurance Benefits (family or single) valued at the rate in effect at the time of their notification to the district for each two (2) years of service beyond 15 years for a total benefit not to exceed 7 years. Upon eligibility for Medicare, if any benefit remains, the district shall assume the supplemental Medicare cost not to exceed the stated monthly amount.

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BACKGROUND

The collective bargaining agreement between the Crivitz Education Association (the Association) and the School District of Crivitz (the District) has for many years provided an early retirement incentive for members of the bargaining unit. Since at least 1995, one component of that incentive for teachers with at least 15 years tenure in the District has been up to 7 years of post-retirement health insurance premium contributions at the premium rate in effect at the time of retirement, known as the Experience Based Retirement Incentive. In the event of premium increases during the post-retirement period, the difference in cost is the responsibility of the retiree, but the benefits are the same as those also supplied to teachers in the bargaining unit. The contract language further provides that if a retiree reaches the age of Medicare eligibility without having exhausted the insurance benefit, any remaining balance in the premium contribution that had not been paid out would be applied to "...the supplemental Medicare cost not to exceed the stated monthly amount." Prior to 2006, this language was interpreted and applied so as to provide supplementary health insurance benefits to Medicare eligible retirees who had remaining premium balances sufficient to cover the gap between the benefits provided by Medicare and the District's health plan. This included, among other things, a three-tier drug card to offset the cost of prescription medications not covered by Medicare. Under the drug card, the co-pays for prescription medications were \$0 for generic medications, \$5 for formulary medications and \$20 for non-formulary medications.

At all times pertinent to the events herein, the District contracted for health insurance with the WEA Trust (the Trust), although the contract does not require that the Trust be the carrier, so long as the selected carrier is mutually agreeable to the parties. The Medicare supplement benefits were also provided by the Trust. In 2005, Congress passed legislation creating a new prescription drug program for persons eligible for Medicare, entitled Medicare

Part D, to go into effect on January 1, 2006. After enactment of the legislation, the Trust conducted a cost study of Medicare Part D and concluded that for most of its eligible insureds Medicare Part D would be preferable in cost and coverage to the prescription drug benefit provided by the Trust. One of the negative features of Medicare part D, however, was the so-called "donut hole," which was a gap in prescription medication coverage for annual costs exceeding \$2250.00, but less than \$5100.00, for which the retiree would be wholly responsible. The Trust determined to eliminate the prescription drug benefit for its Medicare eligible insureds as of January 1, 2006. The Trust also offered a series of seminars throughout Wisconsin in 2005 explaining Medicare Part D and its decision to eliminate retiree prescription coverage in light thereof. One such seminar was attended by the District's Superintendent, Charles Poches, and Business Manager, Linda Tarmann. Poches recalled that shortly thereafter he had a conversation with the Association President, Bob Hoyer and shared with him the information about the Trust's plan to eliminate the retiree prescription benefit. Hoyer did not recall any such conversation.

Subsequently, it came to light that a number of districts, including Crivitz, had contracts arguably requiring them to provide prescription drug benefits to their Medicare eligible retired employees. As a result, the Trust, via a Memorandum of Understanding, offered those districts the option of an exemption from the prescription drug exclusion for any eligible employees. Persons covered under plans eligible for the exemption would thus avoid expenses resulting from the "donut hole." Copies of the Memorandum of Understanding were sent out to the districts in October 2005, with instructions to sign and return them by December to avoid a lapse in coverage when Medicare Part D went into effect. A copy of the Memorandum was sent to Poches. Poches did not read the document in detail, nor did he discuss it with the Association, but forwarded it to the District's attorney for review. The District's attorney gave the opinion that the Memorandum had potential to expose the District to greater liability, and provide retirees with a greater benefit than provided under the contract, and advised Poches to not sign it, whereupon it was discarded without further action. Poches said nothing about the memorandum or the District's intentions regarding it to the Association. At the time of the events herein, the Trust supplemental insurance, with the prescription coverage, would have cost \$437.74 per month for a single policy and \$875.48 per month for a family policy. Without the prescription coverage, a single supplement cost \$154.86 per month and family coverage cost \$309.72. Further, because Medicare Part D was not considered by the District to be a supplement, the cost would be borne by the retiree rather than the District. By comparison, at the same time, the cost of insurance coverage for bargaining unit members was \$822.28 per month for a single plan and \$1867.80 for a family plan.

Sometime in the approximately March 2006, the issue of the MOU arose again. Poches recalled that Hoyer approached him about the matter because retirees were having problems with their prescription coverage and that Poches at that time did not recall having gotten the MOU earlier, so he contacted the Trust for another copy. Again, Hoyer did not recall any such conversation. The copy was obtained approximately two months later and once again Poches sought advice of counsel about the matter and was advised to not sign the MOU. Poches supposedly shared this information with the Association, but the matter was not pursued further at that point by either party.

In February 2007, one of the District teachers who qualified for the Experience Based Retirement Incentive, Judy Gehm, along with her husband, who was the high school principal, met with Poches to discuss retirement. Ms. Gehm is a cancer survivor who must take costly prescription medications for maintenance of her health. At the time, she was 69 years old and immediately eligible for Medicare benefits. In early March, she met with Poches again and at that time, Poches explained the ramifications of the District's decision to not sign the MOU and the potential prescription costs to the retiree under Medicare Part D. Until that time Ms. Gehm had been under the impression that her retirement health benefits would be the same as those she received while employed and she didn't completely grasp the implications of the information Poches gave her. On March 6 she informed Poches in writing of her intention to retire at the end of the school year. . Subsequently, she and her husband discovered that the cost of Medicare Part D was not paid by the District, nor did it cover her prescription costs as completely as the Trust plan. She asked Association President Hoyer about it and he, in turn, sent an email to UniServ Director Kim Plaunt on March 29 asking whether the cost of Medicare Part D was a "supplement" and should, therefore, rightfully be paid from a retiree's remaining health insurance premium benefit. Investigation by Plaunt discovered that the District had not signed the MOU accepting the extended Trust prescription benefit and that the District did not feel Medicare Part D was a supplement as that term was used in the contract and so would not cover the cost. On April 23, 2007, the Association filed a grievance alleging that by refusing to sign the MOU the District had unilaterally altered the retirees' contractual insurance benefit. It requested as relief that the District sign the WEA Trust MOU. The District denied the grievance on both substantive and procedural grounds and the matter moved forward to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Association

Arbitrability

The Association argues that the grievance is arbitrable. It asserts that the grievance was timely and that where doubts as to timeliness exist they should be resolved against forfeiture. The question is whether the Association knew before April 2007 that the District had not signed the MOU with the WEA Trust. The record establishes that the Association did not have such knowledge and acted promptly once it became aware of the situation.

It is the District's burden to show that the grievance was untimely. The District relies on the testimony of Charles Poches regarding when the Association was notified that the prescription coverage would be dropped. Mr. Poches' testimony claimed to have have shared this information with the Union in 2005, but only Mr. Poches recalled the conversation and his recounting was ambiguous about what exactly he supposedly told Mr. Hoyer. Based on only this evidence, the District's timeliness should fail.

The event that precipitated the grievance was Ms. Gehm's anticipated retirement and conversations with Mr. Poches in early 2007. In April, Poches first informed the Association leadership that there was no prescription coverage for Medicare eligible retirees, at which point the grievance was filed within 15 days, as provided by contract. The grievance was filed in anticipation of the District's denial of Ms. Gehm's benefits upon retirement, which it was entitled to do. See: SCHOOL DISTRICT OF LANCASTER, Case 19, No. 66415, MA-13521 (Michelstetter, 7/11/07). Prior to April 2007, the Association was unaware of the District's intention to deny benefits to Medicare eligible retirees, so there was no "event" upon which to base a grievance. The District suggests that Union Representative Jim Blank was aware of the District's actions, but the record does not support this. There is no evidence that Blank knew that the MOU applied to the Crivitz district or that the District had not signed it.

Merits of the Grievance

The District violated Article X(B)(1) by not providing MS. Gehm with the WEA Trust supplemental Medicare plan. Under the contract, she was entitled to eight years of insurance benefits after retirement, including prescription coverage. The District failed to provide that coverage without legitimate excuse. Under the MOU, the Trust offers a "wrap around" plan that supplements Medicare A and B and provides prescription coverage, but the District refused to enroll in the plan.

Historically, the contract language has been interpreted to provide the same prescription drug benefits to retirees, whether or not they are Medicare eligible, as to regular employees. Prior to the enactment of Medicare Plan D, the District provided prescription coverage to all Medicare eligible retirees who still had unexpended premium benefits. The District asserts that the enactment of Medicare Plan D relieved it of its contractual obligation to its retirees, which is absurd. Medicare D is not a freestanding plan for which supplemental coverage does not exist and Medicare eligible retirees are not required to purchase a Medicare D plan. An employee who is covered under an employer provided prescription plan is under no obligation to drop it in favor of Medicare D.

The contract language must be interpreted so as to honor the parties' intent in adopting it, which was to provide the same coverage to retirees as to active employees. At that time there was no Medicare D and the language clearly intended to provide a supplement to bridge the gap between coverage provided by Medicare A and B and the District's plan for its active employees. The prescription coverage under Medicare D is inferior to the Trust plan and Ms. Gehm is entitled to the benefits provided under the contract. She is entitled to the benefits available under the Trust supplemental plan.

This case is very similar to that decided in CHETEK SCHOOL DISTRICT, Case 23, NO. 65856, MA-13341 (Gordon, 4/10/07). There, the arbitrator held that the contract obligated the District to provide the supplemental coverage regardless of the availability of Medicare D and rejected the notion that because Medicare D is now available the cost for providing prescription coverage should be shifted from the employer to the retiree. The Association's

interpretation of the contract language is buttressed by the bargaining history, provided by Pat Lane, the Association Chief Negotiator when the language was added. She testified that it was always the intent to provide the retirees the same benefits as active employees and the Medicare supplement was intended to do that. This intent was not superseded by Medicare D. The appropriate remedy for the District's violation is to require it to sign the MOU and acquire the Trust supplemental coverage and the Association requests that he do so.

The District

Arbitrability

The District asserts that the issue as presented by the Association is not the controversy raised by the grievance, that the issue of Judy Gehm's claims against the District were never raised prior to the arbitration and that the District never agreed to arbitrate them. This is an attempt to amend the grievance and violates Article VI, Sec. C, Step 1B. The Association grieved the District's failure to sign the MOU, not any violation of Ms. Gehm's contract rights and the District was not put on notice as to any such claim. Ms. Gehm had not been injured, nor was she a retiree, when the grievance was filed. Thus, at the time the grievance was filed, Ms. Gehm did not have standing as a grievant, because she had not yet been injured. Were she a retiree at the time, her claim would be unenforceable because retirees are not municipal employees and, therefore, may not employ the grievance procedure. Further, grievances are restricted to issues concerning wages, hours and conditions of employment. Retirees' benefits fit into none of these categories. Thus, the issue, as framed by the Association, is not arbitrable.

The grievance was also untimely. The contract is clear that time is of the essence as to processing of grievances and that timelines may only be extended by mutual written agreement of the parties. There was no such agreement here. According to Mr. Poches, he told Hoyer prior to negotiations for the 2005-07 contract that the Trust would no longer cover prescriptions. The contract was signed in May 2006. UniServ Director Blank was aware of the MOU as early as fall 2005, thus he must also have known the Trust was ceasing prescription coverage as of January 1, 2006. He did not think any of his units had contract language qualifying them for the MOU, so he did not pass on the information.

The Trust did, in fact, eliminate prescription coverage on January 1, 2006. At that time, that knowledge was shared by the bargaining representative and chief negotiator. That knowledge should be imputed to the members of the bargaining unit, as well. Thus, according to the contract timelines, the Association should have filed its grievance within 15 days of January 1, 2006. Poches again discussed the plan changes due to Medicare D with Hoyer in March and June of 2006. Given the media coverage of Medicare D, it is inconceivable that the Association did not know that it would present problems with prescription coverage for retirees. Also, Poches recalled that in the March conversation Hoyer specifically asked why the District did not sign the MOU and said some retirees were affected by the change. Poches then obtained a second copy of the MOU and sought a legal opinion about its implications. He

would not have done this without the prompting by Hoyer. Hoyer's memory of these conversations was sketchy, at best, but he admitted talking to Poches about the MOU at some point. Hoyer was aware the Trust was dropping prescription coverage in 2005 and knew by March 2006 that the District had not signed the MOU. The contractual timelines are clear and were not followed.

The Association's claim is also barred by the doctrine of estoppel. The Association was aware that prescription coverage under the Trust plan was being eliminated, but did not raise the issue or otherwise take action. The District, in reliance on the Association's apparent acquiescence, did not attempt to stop the Trust from eliminating coverage or find an alternative. The Association also made no attempt to bargain over the impact of Medicare D in the 2005-07 contract negotiations. The matter is properly one for bargaining, not arbitration, and the District's position in bargaining would have been stronger. It would, therefore, be inequitable to allow the Association to avoid bargaining at press its claims in arbitration.

Merits of the Grievance

The MOU is a new, separate contract that imposes new responsibilities on the District that go beyond the original intent of the parties. Denise Gaumer Hutchinson testified that the MOU was a separate "carve out" for prescription coverage, rather than a supplement to Medicare. The MOU is a replacement to Medicare D, not a supplement. The contract language, drafted by the Association, only requires the District to provide supplementary coverage. Further, the MOU would amend the collective bargaining agreement, therefore the Arbitrator cannot order the District to sign the MOU, thereby amending the contract.

The MOU would require the District to certify to the trust that adverse selection would not occur under the exemption, which was not a previous obligation of the District and would be a burden on the District. There is also added risk, in that the parties may terminate the MOU on 90 days notice, unlike the underlying insurance contract, which goes from year to year. If the Trust opted to withdraw, the District would have 90 days to find new coverage or self-insure, which again would be a new obligation on the District that the Association did not bargain for. It would also be more expensive. The evidence shows that the MOU coverage would cost the District \$235 per month per insured, which is more than the out of pocket expenses of the retirees under Medicare D. Again, an additional financial burden on the District that was not bargained for.

Further, if the District signed the MOU it might commit a prohibited practice, because it would unilaterally change the labor contract with respect to a mandatory subject of bargaining. The District has a contractual obligation to provide coverage under the Trust plan. The Trust changed the plan when Medicare D went into effect and the parties are bound by that change. If the District signed the MOU it would be changing the express intent of the contract, which exceeds its legal authority. Also, as previously noted, the Arbitrator cannot order a remedy that alters the terms of the contract.

The Arbitrator also has no authority to determine the means by which the District performs its obligations under the contract. The District's rights to administer the contract are broadly defined under ARTICLE IV – MANAGEMENT RIGHTS. The relief sought by the Association would encroach on management's discretion. If it is found that the District has an obligation to cover prescription costs for Medicare eligible retirees, there are numerous ways that could be accomplished beyond signing the MOU. The choice of how to meet that obligation clearly belongs to the District.

At the time the language was bargained Medicare D did not exist and could not have been contemplated by the parties. When Medicare D came into being, the Association was aware of it, and was aware of the Trust's intent to change its coverage due to Medicare D, but did not raise the issue in bargaining, where the resolution of this issue properly belongs. Further it did not file a grievance in a timely manner, so its claim should be barred.

The Association in Reply

Arbitrability

The District is wrong in asserting that Ms. Gehm's damages are not covered by the grievance. Her loss was a natural and foreseeable result of the District's failure to sign the MOU and it was her pending retirement which brought this matter to light. Poches denied the Association's request to provide prescription coverage to Ms. Gehm, as called for by the contract, which had the foreseeable result of financial harm to her. Arbitrators commonly fashion remedies for contract violations that make whole any employees who have suffered pecuniary losses due to the breach. The District's argument that Ms. Gehm cannot recover her losses because she was not mentioned in the grievance is specious. Further, there is no contract bar to filing a grievance for an anticipatory breach of contract. Poches' informing the Association of his refusal to provide Ms. Gehm with prescription benefits upon her retirement was an anticipatory breach which the Association was entitled to grieve. Neither is there any merit to the District's argument that retirees' claims for breaches of contract are not arbitrable. No authority supports such a position.

Hoyer's testimony regarding his meetings with Poches and knowledge of the MOU was credible. Hoyer did not recall any conversation with Poches about denial of prescription benefits to retirees. He did not embellish or overstate his testimony to support the Association's case. The District asserts that Poches and Hoyer spoke on three separate occasions about Medicare D and/or the MOU. In the first, in March 2005, Poches told Hoyer that a change would come down regarding Medicare D, but there was no discussion of the MOU because it did not exist at the time. Poches did not inform the Association after he received the MOU. Poches also claimed that Hoyer approached him in March 2006 to ask why the District had not signed the MOU. Poches did not respond until June. Yet there is no evidence that Hoyer spoke to UniServ Representative Blank about the issue, which he surely would have done, because it is undisputed that Blank did not know the District had not signed it. It is further improbable that Hoyer would have waited three months to get a response from

Poches on an issue of such importance. Further, Poches' email to Denise Gaumer-Hutchinson on May 30, 2006, requesting a copy of the MOU did not mention supposed "pressure from the Association" to sign the MOU, which would only have been from his conversation with Hoyer in March. It is unlikely that Poches would wait until the end of May, nearly ten weeks later, to request a copy of the MOU. More likely is that he was responding to an issue with the trust or some retirees who had been notified about Medicare D, than that he was responding to pressure from Hoyer. Further, Poches' testimony that he asked for a legal opinion after receiving the MOU in June due to "pressure" from Hoyer is odd since he had not supposedly spoken to Hoyer about the MOU since March. Also, the fact that he could not recall details of the March conversation calls his credibility into question. Poches could also not remember details of the conversation he supposedly had with Hoyer in June 2006 telling him that counsel had advised against signing the MOU. Hoyer did not recall such a conversation and District counsel did not challenge his testimony on cross-examination. The District's argument also does not account for Hoyer's email to Kim Plaunt on March 29, 2007, which makes it clear he was unaware of the Medicare D issue prior to that time. To accept the District's reasoning would require a finding that the March 29 email was a fabrication designed to mislead as to Hoyer's true awareness of the situation. Such an idea is absurd.

The District's estoppel argument is also in error. The District failed to prove that the Association was aware of the Medicare D issue when bargaining the 2005-07 contract, a necessary element of its argument. Further, the argument assumes that the Association knew of the issue, but deliberately didn't bring it up, which is not reasonable. On the other hand, the Board was aware of the issue at the time and did not raise it in bargaining, even though it took significant risks in not doing so. Thus, the District's estoppel defense is disingenuous, at best.

The MOU does not amend the contract. District's often have to enter into agreements with third party vendors in order to fulfill their obligations under collective bargaining agreements. Simply because the MOU is not mentioned in the contract does not mean that signing the MOU would somehow alter the contract or the District's obligations. Further, there is no evidence in the record supporting the District's argument with respect to adverse selection. It claims that there would be additional burdens placed upon it by signing the MOU, but produces no facts to support those claims. The Arbitrator can address this issue in fashioning a remedy. Also, the District's reliance on CITY OF PESHTIGO, A/P M-04-255 (Vernon, 2005), is misplaced. In PESHTIGO, the policy provided for possible reductions in benefits and the District's obligation was to pay premiums. When the insurer reduced benefits, but the District continued to pay premiums, no violation was found. Here, there is no provision for reduction in benefits and the contract provides for changing insurers by mutual agreement. Thus, PESHTIGO is distinguishable on its facts. Finally, bargaining history supports the Association. Pat Lane's testimony establishes that the parties' intent in drafting the retirement insurance provision was to insure that retirees would enjoy the same prescription benefits as active employees. Whether the retirees must pay their own Medicare B or Medicare D premiums is irrelevant. The District's obligation is to provide supplemental coverage to bring the benefits into line with the active employees.

The District in Reply

The District reasserts its position that the grievance is untimely and that the Association's claims are otherwise barred for equitable reasons. It notes that the underlying landscape is one wherein there was a significant and much publicized change in the law that directly impacted the health insurance plan for retirees. This is not a case of an obscure act of which the Association was unaware until much after the fact. The District announced its intentions more than two years prior to the filing of the grievance and on two occasions there were conversations between Poches and Hoyer regarding the implications of the change. The Association tries to avoid the timeliness problem by claiming that it was Ms. Gehm's retirement in 2007 that led to the filing of the grievance, but the facts show otherwise. The precipitating event was the District's decision to not sign the MOU, which occurred in June 2006, but the grievance wasn't filed until April 2007. The contract calls for grievances to be filed within fifteen days. This is not a case where equities lie in favor of liberal filing rules to insure justice over forfeiture. To a large degree, the determination of what Association knew involves a comparison of the credibility of Poches and Hoyer. The District asserts that Poches was more credible, that Hoyer's demeanor was evasive, that his March 2007 email to Plaintiff was self-serving and that he had a good motive to "forget" that he had spoken to Poches about the MOU.

The District had reason to rely on the assumption that the Association was aware of the District's decision to not sign the MOU during negotiations over the 2005-07 contract. The UniServ Director had notice that the Trust was discontinuing prescription coverage and should have known that the Association would be impacted. Further, Poches gave this information to Hoyer in March 2005. The Association for whatever reason did not follow up and the District elected to accept the change in coverage by the Trust. That the UniServ Director did not think the change affected any of his locals is irrelevant. The change did affect this unit and the knowledge of the UniServ Director should be imputed to it. Further, the close relationship between WEAC and the Trust permits an inference that there was communication about the Trusts plan to phase out prescription coverage. Obviously the Trust knew that the District had an obligation to provide prescription coverage to retirees otherwise it would not have sent the MOU to Poches. It may be assumed that if the Trust had this information so did the UniServ. Further, Hoyer contacted Poches in March 2006 to ask why the MOU had not been signed. Poches obtained a copy of the MOU, sought legal advice and informed Hoyer in June that the District would not sign. At that point, the Association had knowledge of the basis for this grievance. There is overwhelming evidence that the Association knew of the circumstances undergirding this grievance long in advance of its filing. It was not the District's obligation to raise the subject in bargaining, nor is it reasonable to expect the District to bear the burden of the Association's lack of initiative. The Association should not be permitted to benefit from the negligence of its officers.

The Association should also not be allowed to amend its grievance. This case was never about Judy Gehm's benefits. The grievance does not mention Ms. Gehm or her claims. What began as a grievance about the District's failure to sign the MOU, changed to pursue

Ms. Gehm's retirees' benefits, which is improper. Ms. Gehm was not a retiree at the time the grievance was filed and, further, grievances arbitration should be restricted to the issues that are identified in the written grievance.

The District should not be required to sign the MOU. This case is distinguishable from CHETEK SCHOOL DISTRICT, Case 23, No. 65856, MA-13341 (Gordon, 4/10/07) The district here made different arguments and specifically raised the limited ability of an arbitrator to amend a contract. In CHETEK, there were also few equitable arguments about the harm an adverse ruling would do the District. The MOU is a new agreement which alters the District's obligations under the contract. That fact and its implications were not thoroughly discussed in CHETEK. The arbitrator cannot order the District to sign the MOU and thereby alter the underlying contract. Thus, the arbitrator cannot grant the relief the Association seeks, which is to have the District sign the MOU, because that would alter the contract. The arbitrator cannot change the contract. Ordering the District to provide a specific coverage would do just that. What the parties contemplated in 1992 and what they expect in this day are two separate things. This is a matter best left for the parties to resolve in negotiations.

DISCUSSION

Arbitrability

The threshold issue in this matter is whether the grievance is procedurally barred, thus I take that matter up in the first instance. In essence, the District's argument on this point is two-fold. First, it contends that the grievance was untimely. In the alternative, it argues that the grievance should be barred on a theory of equitable estoppel.

The timeliness issue is complex. The grievance in this matter was filed on April 23, 2007. The Association characterized the precipitating event, as follows:

"The District, refusing to sign the WEA-Trust memorandum of understanding, granting drug coverage to those retirees who are Medicare eligible acted unilaterally to change benefits for retirees. The District has no authority to change the status quo of the collective bargaining agreement signed and ratified by the Association."

In its proposed framing of the issues, however, the Association characterizes the substance of the grievance, as follows:

"Did the District violate the collective bargaining agreement when it refused to provide prescription drug coverage to Judy Gehm when she retired and became Medicare eligible?"

The distinction is significant in framing the discussion of whether the grievance was or was not timely. The District first received a copy of the MOU from the WEA Trust in October 2005. It

obtained a second copy in May 2006 and, after receiving a legal opinion on its implications, determined not to sign it in late June 2006, approximately ten months prior to the filing of the grievance. On the other hand, Ms. Gehm announced her pending retirement in March 2007 and was informed by District Administrator Charles Poches at that time that the WEA Trust health plan no longer covered prescription medications for Medicare eligible retirees, but that she would have to enroll in Medicare Part D and would be responsible for her own premiums for that coverage. Association President Robert Hoyer inquired about this to UniServ Director Kim Plaunt, who investigated and found that the District had not signed the MOU. The grievance followed.

The contract language on the processing of grievances is explicit:

- C. Grievances shall be processed in accordance with the following procedure:

Step 1.

- A. An earnest effort shall first be made to settle the matter informally with the immediate supervisor.
- B. If the matter is not resolved the grievance shall be presented in writing to the immediate supervisor within fifteen (15) days after the event upon which the grievance is based first occurred. The written grievance shall include the facts upon which the grievance is based, the issues involved, those provisions of the agreement alleged to have been violated and the remedy sought...

D. GENERAL PROCEDURES

- 1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified by, however, may be extended by written, mutual agreement.

. . .

- 6. Grievances not processed according to the prescribed time limits stated shall be deemed resolved on the basis of the last answer from the administration or school board. Grievances not processed according to the prescribed time limits stated above shall be deemed waived.

The parties disagree as to what was “the event upon which the grievance is based.” The District asserts that the precipitating event was its refusal to sign the WEA Trust MOU in June 2006. The Union asserts that the precipitating event was its discovery that the MOU had not been signed in April 2007. Clearly, which proves to be correct has a significant impact on the timeliness of the grievance.

I have framed the issues as I have because, in my view, they more accurately reflect the sense of the grievance. For purposes of triggering the timelines in the contract, however, the operative date is not when the District failed to sign the MOU, but when the Union first knew of it. The Association cannot be required to file a grievance over an event of which it is unaware. In that regard, much of the District’s argument seeking to impute knowledge to the Association centers on what the Association knew about Medicare Plan D or the existence of the MOU, in general. There is no question that Hoyer was aware of Medicare Plan D when it was introduced in 2006. Further, it is stipulated that the UniServ Director at the time, James Blank, was aware of the fact that the Trust was circulating the MOU, but did not think it applied to any of his bargaining units, so did not look into it. For the purposes of this grievance, however, what is relevant is not when the Association found out about Medicare Plan D, or even when it learned that the Trust had developed the MOU, but when it learned that the District had not signed the MOU and was not providing other supplemental coverage.

There is conflicting testimony between Poches and Hoyer as to when the Association learned that the District had not signed the MOU. Poches testified that Hoyer approached him about it sometime in March or April 2006 and asked why the District had not signed the MOU because some retirees were having problems with their prescription coverage. This prompted Poches to contact the Trust to obtain a copy of the MOU, which he received in early June. He then consulted counsel, who advised him to not sign the MOU, which he informed Hoyer in late June. From the District’s perspective, therefore, the Association knew it had not signed the MOU no later than June 2006. Hoyer, for his part, remembered no such conversation. He stated that he first learned of the problem in March 2007 when Gehm told him the District would not cover her Medicare D premiums, prompting him to send an email to UniServ Director Kim Plaunt about it. Plaunt made inquiries and in April she and Hoyer met with Poches to discuss Gehm’s situation. According to Hoyer, it was in that April meeting that he first learned that the District had not signed the MOU.

The prevailing rule in arbitration is that where there has been a clear violation of contractual timelines and where the contract provides for forfeiture in such cases, the grievance should be dismissed. However, because forfeiture denies a party the ability to have a case judged on the merits, where there are doubts or ambiguities surrounding the timeliness issue, forfeiture is to be avoided. Here, I am not convinced that the Association was aware of the fact that the District had not signed the MOU prior to April 2007. It does not make sense to me that Hoyer would approach Poches in March 2006 about the MOU because some retirees were having problems with their prescription coverage, but then would not follow up with Poches about that until Poches approached him three months later to say the District would not sign. Also, if Hoyer was pressing Poches about retirees with prescription problems, it does not seem

likely to me that when Poches told Hoyer the District would not sign the MOU Hoyer would drop the matter without protest and not raise it again until Gehm's retirement ten months later. As Poches himself conceded, his experience working with Hoyer was that Hoyer "was not shy" about addressing contract issues. It seems unlikely to me, therefore, that he would let a matter of such importance to his members just drop without further inquiry. Certainly, when the issue with Ms. Gehm arose, Hoyer immediately pursued it with both the UniServ Director and the Administrator. In short, I am not persuaded on this record that the Association was aware that the District had not signed the MOU or provided for alternative prescription coverage prior to April 2007, when Hoyer and Plaunt met with Poches over Gehm's retirement. As such, I am not prepared to dismiss the grievance on that basis.

I also do not find merit in the District's equitable estoppel argument. The rationale is based on a theory of reasonable reliance on the action or inaction of another to one's detriment. Here, the District asserts that since the Association was aware of Medicare Plan D and did not raise the issue in negotiations over a successor contract, which took place in 2005-06, the District reasonably relied on this behavior as evidence that the Association acquiesced in the transition to Medicare Part D and did not object to the District's refusal to sign the MOU. The result is that the District was placed in a more vulnerable and financially disadvantageous position when, in 2007, the Association decided to grieve its inaction. Both parties have responsibility to bring forth issues in bargaining and the District cannot legitimately claim that it was the Association's obligation to raise the prescription benefit issue. When the parties were negotiating, Poches knew that the Trust was eliminating the prescription benefit for Medicare eligible retirees. He also knew that the contract language regarding that benefit for retirees was arguably required the District to provide such coverage. Further, while he may have assumed at the time that the Association was aware of the ramifications of Medicare Part D, he had no direct evidence of this and thus no reasonable basis for reliance on the Association's behavior. Also, Poches did not have completely clean hands in the matter. He testified that he didn't raise the prescription issue in bargaining because "I didn't think it was my responsibility." It is clear that at the time Poches saw Medicare D as potentially causing problems for the retirees, but not the District, and if the Association wasn't going to raise the issue in bargaining he was prepared to let sleeping dogs lie because he saw no risk in it for the District. He apparently underestimated the risk to the District if it did not act to hedge against its potential liability to its retirees or chose to ignore it. Under the circumstances, it seems unreasonable to allow the District on the one hand to withhold information regarding the MOU from the Association when it seemed advantageous to do so, but then to allow it to avoid a grievance by arguing that the Association breached a duty to raise the issue in bargaining. In short, therefore, I do not agree that equitable estoppel should apply here to deny the Association an opportunity to have its grievance heard on the merits. I find the grievance arbitrable.

Merits of the Grievance

The District argues on a number of grounds that it cannot be required to sign the MOU. Principally, it asserts that the MOU is a separate contract from the insurance agreement it has

with the Trust and would have the effect of amending the collective bargaining agreement. This would potentially expose the District to a prohibited practice complaint for unilaterally changing the terms of the contract. It would also potentially provide greater benefits to the Association members than they are entitled to under the contract, while at the same time creating additional costs and administrative burdens for the District. The Association, on the other hand, believes that this matter is on point with CHETEK SCHOOL DISTRICT, SUPRA, and that ordering the District to sign the MOU would be a reasonable remedy to impose.

Under the contract, retired teachers who qualify for the experience based retirement incentive set forth in Article X, Section H.1.(B) are entitled to remain in the District's health plan and to receive seven years of premium contributions at the premium rate in effect at the time of retirement. Retirees who reach Medicare eligibility with premium benefits remaining are entitled to have the remaining balance applied to the cost of Medicare supplemental insurance. This language was added prior to the advent of Medicare Part D and, according to Pat Lane, who was the Association's chief negotiator at the time, was specifically intended to address the issue of prescription drugs, to make sure retirees had the same prescription benefit as the active employees. At that time, the prescription benefit was offered as part of the Trust's comprehensive health insurance plan with the District. That changed when Medicare Part D was implemented in 2006. The District reasoned that it was not liable for the premiums because Medicare Part D was not a "supplement" and that Medicare Part D would now be the prescription drug plan for eligible retirees. For the reasons set forth above, it also reasoned that it had no obligation to sign the MOU with the Trust creating an exception to allow qualifying Districts to continue providing the Trust's prescription drug coverage to Medicare eligible retirees. So, at one and the same time the District eliminated its obligation to provide prescription benefits and shifted the cost of obtaining Medicare Plan D to the retirees – a potential windfall for the District.

In my view, the pertinent language in Article X, H1(B) is ambiguous. It states, "Upon eligibility for Medicare, if any benefit remains, the district shall assume the supplemental Medicare cost not to exceed the stated monthly amount." Past practice and bargaining history establish, however, the intent of the parties, which was to provide the same health coverage to retirees that was provided to active employees as long as the retirees had remaining premium benefits. The benefit was provided through the existing Trust plan. The District argues that Medicare Part D had the effect of altering its obligation by eliminating the need for a prescription drug supplement and, since Medicare Part D was not a supplement itself, its cost would be fully borne by the retiree, rather than being offset by any remainder in a retiree's insurance premium benefit.

Clearly, Medicare Part D, even apart from its cost, is for many retirees inferior to the prescription coverage provided with the District's health plan through the Trust. This is largely due to the so-called "donut hole," which requires the retiree to cover 100% of annual prescription costs between \$2,250.00 and \$5,100.00. Thus, under the contract language, as it has been interpreted and applied by the parties over the years, the District is obligated to provide supplementary coverage either to make up the difference between Medicare Part D and

the Trust plan, or to replace Medicare Part D altogether and provide a separate benefit to eligible retirees consistent with the prescription benefit provided to the active employees. Setting aside the District's administrative concerns, that was the intent and effect of the MOU that the Trust sent out to qualifying districts. Had the District signed it, Medicare eligible retirees would have continued to be covered by the Trust plan as in the past. That is not to say, however, that signing the MOU is the only available option. It is possible that the District might find another insurance company to underwrite the prescription benefits for eligible retirees at less cost or with fewer administrative headaches. Article XI A. specifies that the District plan will be obtained through the Trust "or other mutually agreeable carrier." Thus, such a step would require Association approval, but that does not seem an insurmountable obstacle if the benefits are equivalent. The District might also decide to self-insure the prescription benefits of its eligible retirees. One assumes that the number of eligible retirees with remaining premium benefits whose annual prescription costs exceed \$2,250.00 is small. The risk of such a decision would be further mitigated by the fact that the benefit is capped at the amount of remaining premium benefits in a retiree's account.

CHETEK SCHOOL DISTRICT, cited by the Association, is a case that arose under nearly identical circumstances. The district had contract language with its teachers' association requiring it to provide prescription benefits to its Medicare eligible retirees, which it obtained from the Trust. When Medicare Part D came into being, the trust offered the same MOU as that in issue here to the district, which declined to sign it, resulting in a grievance. Arbitrator Gordon noted that:

"It is not the failure to sign the MOU which violates the agreement. It is the failure to provide the contracted benefit which violates the agreement."

Id at 17

Having made that observation, the Arbitrator noted that signing the MOU would be one way, but not necessarily the only way, for the District to fulfill its contractual obligation. As a remedy, he ordered the District to provide drug coverage for the eligible retirees, but did not mandate that it sign the MOU.

So to, here the District had a contractual obligation to provide its Medicare eligible retirees, who still had balances in their insurance premium accounts, with prescription drug benefits consistent with those enjoyed by the active employees. It is clear that the District violated that obligation when Poches told Gehm that upon her retirement she would have to go on Medicare Plan D at her own expense and that the District would not make up the difference in coverage, whether by signing the MOU or by other means, even though she was entitled to premium benefits under the Experience Based Retirement Incentive. The introduction of Medicare Part D changed the landscape of prescription drug coverage for eligible retirees, but it did not relieve the District of its contractual obligations. Once the District announced its intention to disregard its obligation, the Association was within its rights to file a unit grievance, which it did. Whether or not retirees may individually pursue grievances, it is clear

that retirement insurance benefits are bargained for benefits and are a form of compensation which is earned during the period of employment, even though not available until retirement. As such, the Association is entitled to grieve violations of those benefit provisions on behalf of its membership. The District's obligation prospectively is to provide prescription drug coverage to Medicare eligible retirees consistent with the coverage provided to active employees and to assume the cost of that benefit up to the stated monthly premium as calculated in Article X, Section H.1.(B). It is also obligated to make whole Judy Gehm and any other qualifying Medicare eligible retirees for any out of pocket prescription drug expenses since August 1, 2007 that they would not have incurred but for the District's violation.¹

For the foregoing reasons therefore, and based upon the record as a whole, I hereby issue the following

AWARD

The grievance is arbitrable.

The District violated the collective bargaining agreement when it failed to sign the Memorandum of Understanding with the WEA Trust or otherwise provide supplemental prescription drug coverage for Medicare-eligible retirees with remaining retirement insurance premium benefits. As and for a remedy, the District shall make available prescription drug coverage for qualifying Medicare eligible retirees equivalent to the benefits provided to active employees. The District shall also make whole any qualifying Medicare eligible retirees for any out of pocket prescription drug expenses incurred since August 1, 2007 as a result of the District's failure to sign the WEA Trust MOU or provide alternative coverage.

Dated at Fond du Lac, Wisconsin, this 5th day of June, 2008.

John R. Emery /s/

John R. Emery, Arbitrator

¹ I do not award relief for any claims prior to Ms. Gehm's inasmuch as the record is silent as to any other retirees whose benefits were reduced. If such retirees exist, they had an obligation to assert their rights at the time their claims arose and cannot be rewarded now for their failure to pursue them.

