

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CHIPPEWA FALLS UNIFIED SCHOOL DISTRICT EMPLOYEES,
LOCAL 1241, AFSCME, AFL-CIO**

and

CHIPPEWA FALLS UNIFIED SCHOOL DISTRICT

Case 148
No. 69133
MA-14492

Appearances:

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 411 Colfax Street #1, Augusta, Wisconsin 54472, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Stephen L. Weld**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the District.

ARBITRATION AWARD

The Chippewa Falls Unified School District Employees, Local 1241, AFSCME, AFL-CIO (herein the Union) and the Chippewa Falls Unified School District (herein the District) are parties to a collective bargaining relationship. At the of the events pertinent hereto the parties' were negotiating a successor agreement to their collective bargaining agreement covering the period July 1, 2006 through June 30, 2009, and, in fact, reached a tentative agreement on June 25, prior to expiration of the agreement. On August 24, 2009, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the District's alleged failure to pay its proportionate share of the health insurance premiums of bargaining unit member Ed Cadwell. The undersigned was assigned to arbitrate the matter. A hearing was conducted on October 20, 2009. The proceedings were not transcribed. The parties submitted briefs on November 23, 2009, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues.

The Union proposed framing the issues, as follows:

Did the District violate the grievance settlement and collective bargaining agreement concerning accruals while on leave when it refused to pay the District's portion of the health insurance premium while the Grievant was on long term disability leave?

If so, what is the appropriate remedy?

The District would frame the issues as follows:

Did the District violate Article 15, Section 1 of the collective bargaining agreement and/or the August 30, 2004 grievance settlement when it notified the grievant of its intention to have him pay the entire health insurance premium for the months of July, August and September as a result of its repudiation of the practice of subsidizing health insurance premiums for employees on unpaid leave?

Is the District entitled to reimbursement for health insurance premium payments for the months on August and September 2009?

The Arbitrator frames the issues as follows:

Did the District violate the collective bargaining agreement, the August 30, 2004 grievance settlement, or past practice, when it notified the Grievant that he was responsible for the entirety of his health insurance premiums while on long term disability after the adoption of the parties' 2009-11 collective bargaining agreement?

If so, what is the appropriate remedy?

If not, is the District entitled to reimbursement for premiums it paid on the Grievant's behalf in August and September 2009?

PERTINENT CONTRACT LANGUAGE

ARTICLE IX – LEAVES OF ABSENCE

Section 1 – Application. Applications for leaves of absence for personal reasons shall be made to the superintendent. The granting of such leave and the length of time for such leave shall be contingent upon the reasons for the request. All leaves of absence under this contract shall be without pay. Seniority shall not accrue after thirty days of leave of absence.

Section 2 – Absence due to Illness or Accident. A period of not more than one (1) year shall be granted as leave of absence due to personal illness, or for disability due to accident, provided a physician's certificate is furnished from time to time to substantiate the need for continuing the leave. Additional time may be extended in such cases by mutual consent of the Union and the Board.

Section 3 – Seniority. Seniority shall continue to accrue during leaves of absence due to personal illness and disability due to accident.

ARTICLE 15 – INSURANCE

Section 1 – Health Insurance. The Board agrees to pay 100% of the single; 90% of the family district health insurance plan premium with a \$50.00 single/\$200.00 family deductible for all full-time employees who are scheduled to work at least six hours per day during the school year. School year employees will continue to pay summer insurance premiums.

...

Section 4 - Long Term Disability. An employer paid long-term disability insurance will be provided for all persons classified as full-time employees (at least six hours per day during the school year), effective January 1, 1986. The annual amount payable to be equal to 90.0% of earnings. The waiting period without pay is 90 days.

Section 5 – Workers' Compensation. The Board shall pay the existing percentage health insurance premium payments for up to three calendar years for employees who are on workers' compensation leave.

OTHER RELEVANT LANGUAGE

GRIEVANCE SETTLEMENT – ACCRUALS WHILE ON LEAVE

WERC Case 132 No. 62154 MA-12180

...

2. An employee who is out on leave for Workers Compensation or Long Term Disability for a period of one year or less shall receive all benefit accruals and rights as if they were actively at work. Anytime during that one year period that an employee would return to work from Workers Compensation or Long Term Disability, such return would start the one year cycle over again. There is no proration of benefit accruals and rights during this one year period.

...

5. Longevity, WRS, Health Insurance, and Seniority
 - a. Seniority and health insurance shall continue for a period of up to thirty-six months as per labor agreement.
 - b. Longevity shall continue to accrue.
 - c. WRS credible years of service and contributions shall continue (paid if on WC leave, or WC leave and LTD leave, but not if only on LTD leave).

BACKGROUND

The Grievant, Ed Cadwell, is a long-time employee of the District. In 2009, Cadwell was off work for an extended period on Long Term Disability due to knee replacement surgery. Prior to July 2009 the District had paid its portion of Cadwell's health insurance premiums while he was off work. Cadwell had also had knee surgery in 2006, resulting in an extended disability leave, during which time the District continued to pay its portion of his health insurance premiums. On May 4, 2009, while the parties were in negotiations over a successor agreement, but prior to the expiration of the 2006-09 collective bargaining agreement, the District gave notice to the Union that it was repudiating certain practices, including that of contributing to the health insurance premiums of employees on unpaid leave of absence. This intention was reiterated in another letter from Superintendent Michael Schoch to AFSCME Staff Representative Mark DeLorme on June 10, which stated as follows:

Dear Mr. DeLorme:

Employers are allowed to put bargaining units on notice that effective with the end of the current contract, certain past practices will cease. This can happen where past practices are contrary to clear contract language or where the contract is silent. The process is called repudiation. Units can then bargain, if they so desire, to retain or formalize the practice.

By virtue of this letter then, the Chippewa Falls Area Unified School District is again notifying AFSCME Unit, Local 1241 of the AFL-CIO that, effective with the expiration of the current 7/1/06 to 6/30/09 contract, it is repudiating the following practices:

- 1) the practice of paying union rate for summer workers working outside their unit and contract.
- 2) The practice of paying union scale base rate to subs working in a position longer than 30 days.

- 3) The practice of the Letter of Understanding, dated 10/26/06, allowing some 9 and 10 month clerical employees to convert vacation days to salary. All 9 and 10 month clerical employees shall accrue and use vacation according to contract.
- 4) The practice of allowing those employees with “an assumed paid lunch” to leave their building during that time.
- 5) The practice of continuing pay checks throughout the summer of AFSCME employees who terminate (i.e., resign, retire, etc.)
- 6) The practice of subsidizing insurance premiums for any AFSCME employee out on unpaid leave or disability. Employees would be expected, consistent with the practice for all other employee groups, to be responsible for the full insurance premium. This does not apply to someone within the provisions of FMLA.

If a new contract is not in effect at the time that the current contract expires, then these practices will remain in effect until such time as a new contract is in place.

Michael Schoch
Superintendent

The parties reached a tentative agreement on a new contract on June 25, 2009 and the new contract was ratified shortly thereafter.

Upon expiration of the 2006-09 agreement, the District notified Cadwell that he would now be responsible for his entire health insurance premiums while he remained on disability. On July 29, 2009, Cadwell filed a grievance alleging that the District’s refusal to contribute to his health insurance premiums violated the collective bargaining agreement, as well as the terms of a grievance settlement entered into by the parties in 2004. The District denied the grievance and it was advanced to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that this situation is governed by a grievance settlement entered into by the parties in 2004. The settlement clarifies and/or modifies the language of Article XV of the contract to provide that the District will continue to pay its portion of the health insurance

premiums of bargaining unit members while they are on long term disability. Further, the settlement was appended to the contract to make it clear that its terms were intended to survive the grievance and apply prospectively. Since that time, the District has paid its portion of employees' health insurance premiums, including the Grievant's in an earlier instance, while they are on long term disability.

The Union maintains that a grievance settlement is a form of collective bargaining agreement and that by appending it to the contract the settlement terms were merged into the contract. Such terms cannot be repudiated by one party, but can only be removed or modified through collective bargaining. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 22804-B (WERC, 3/89); VILLAGE OF EAST TROY, WERC CASE 36, NO. 45340, MA-6564 (Yaeger, 12/91). This settlement was intended to express the parties' interpretation of the language of Article XV as evidenced by the fact that since the settlement the District has continued to pay its premium share for employees on long term disability since that time. By its terms, it was also not intended to be subject to repudiation, since much of the language was clearly intended to apply to employees in future situations and not just the grievants in that case. The District does not have the right, therefore, to merely repudiate the settlement on its own, but must negotiate with the Union if it wishes to eliminate or modify it.

Assuming that the grievance settlement may be repudiated, the Union asserts that there is also a past practice of paying premium contributions for employees on long term disability and that such practice may not be repudiated. In testimony and in several exhibits, the District Superintendent, Human Resources Director and Attorney make reference to a "practice" of paying premium contributions. In order to be binding, such a practice must be unequivocal, clearly enunciated and acted upon and readily ascertainable over time as a clear and established practice accepted by both parties. All those criteria are met here. There are two different types of past practices: ones which do not relate to specific contract provisions and ones which interpret or modify specific contract terms that may be ambiguous. The latter form is the type of practice involved here. Such practices cannot be repudiated because they clarify an ambiguous provision in the agreement and thus become "the definitive interpretation of that term until there is mutual agreement on rewriting the contract." *Common Law of the Workplace*, p. 91, Theodore St. Antoine, ed. (2nd ed., 2005) Further, to allow the employer to repudiate the practice here would work a severe hardship on the Grievant and all similarly situated employees. Insurance is an important benefit to employees and to allow the District to determine when it does and doesn't have to contribute without bargaining the issue would be grossly unfair.

The District

The District asserts that the collective bargaining agreement and grievance settlement do not require it to subsidize health insurance premiums for employees on unpaid leave who are not eligible for workers' compensation. Here, the Grievant was off work for 24 weeks, during which time he used up all his sick leave, vacation and FMLA leave. He then went on Long Term Disability. There is no evidence of any agreement by the District to cover long

term disability for non-work related reasons. Under Article XV of the contract, the District is only required to subsidize insurance premiums for employees off work due to a work-related injury. The parties could have expanded to obligation to other situations, but did not. Article XV links insurance coverage with work so, just as school year employees must pay their own premiums in the summer, employees who are on unpaid leave of absence must, as well. This is also consistent with the provisions covering laid off employees and teachers on unpaid leave.

The 2004 grievance settlement also does not require the District to subsidize premiums for employees on unpaid leave who are not eligible for workers' compensation. The grievance settlement addresses benefits for employees receiving workers' compensation benefits. Further, it does not cover insurance benefits, but deals with benefit accruals, specifically sick leave, vacation and holidays according to District Business Manager Chad Trowbridge, who was involved with processing the grievance. The parties did not discuss insurance for employees on long term disability because it was not the subject of the grievance.

There is also no binding past practice of the District contributing to insurance premiums for employees on long term disability. The only such occurrence was the Grievant's leave of absence in 2005-06 following knee surgery. He was off work for more than one year and the District agreed to pay his premiums on a non-precedent setting basis. It is also noteworthy that although the grievance settlement occurred in 2004 it was not referred to in that instance. Further, in June 2009 the District properly put the Union on notice that it was discontinuing the practice upon ratification of the successor agreement. The Union did make any proposals regarding the practice in negotiations and indicated it had no intention of bargaining over the practice. Once the new agreement took effect the practice expired and the District had no further obligation to contribute to the Grievant's premiums.

As and for a remedy, the District maintains that the Grievant owes the District for two months insurance premiums, representing coverage provided in July and August 2009 while he was still on disability and for which he did not pay.

DISCUSSION

In this case, the Grievant, Ed Cadwell, was off work for an extended period of time in 2009 on long term disability (LTD) due to knee replacement surgery. Because his leave was not due to a work-related injury, Cadwell did not qualify for worker's compensation benefits. Nevertheless, the District contributed to Cadwell's health insurance premiums while he was on LTD, even though Article XV of the contract, which describes employees' health insurance benefits and eligibility, does not specifically provide for it. The District's contributions ceased on July 1, 2009, the effective date of the parties' 2009-11 collective bargaining agreement, pursuant to a letter the District had provided to the Union on June 10, 2009 repudiating "...the practice of subsidizing insurance premiums for any AFSCME employee out on unpaid leave or

disability.”¹ The Union asserts that the District was bound to continue making premium payments throughout the entire period of Cadwell’s disability under the terms of the parties’ 2004 settlement agreement in WERC Case 132, No. 62154, MA-12180. In the alternative, the Union asserts that there was a binding past practice of subsidizing health insurance premiums during periods of non-work related disability, which the District was not entitled to repudiate unilaterally. The District contends that the 2004 grievance settlement does not apply to long term disability insurance and is irrelevant. It further maintains that there was no binding practice regarding contributions to health insurance premiums of employees off work on LTD or, in the alternative, that it effectively repudiated such practice by its letter of June 10th and the practice expired after June 30th.

I turn first to the question of the applicability of the grievance settlement. At hearing, there was conflicting testimony as to how broad the settlement’s application was intended to be. District Business Manager Chad Trowbridge testified that the grievance had to do with benefit accrual while employees were off work on workers’ compensation and that there was no discussion of long term disability during settlement negotiations. He further stated that because the contract provides for continued premium contributions where an employee is on workers’ compensation, health insurance contributions was not an issue in the grievance or settlement. Union Steward Buck Hebert, however, testified that he was involved in the settlement of the 2004 grievance and that it did cover health insurance benefits and did apply to employees on long term disability.

The language of the settlement agreement makes it clear that it applies to employees on long term disability, as well as those on workers’ compensation. The first sentence of paragraph 2 states: “An employee who is out on leave for Workers Compensation or Long Term Disability for a period of one year or less shall receive all benefit accruals and rights as if they were actively at work.” By referencing long term disability, and by using the disjunctive “or,” the parties made it clear that the settlement was intended to apply to employees on long term disability, whether or not they were also on workers’ compensation. I find, therefore, that the settlement agreement by its terms does apply to employees, such as the Grievant, who are on long term disability.

It remains to be determined, however, whether the settlement agreement covers employer contributions to health insurance while an employee is off work on long term disability. I find that it does not. Ordinarily, the right to premium contributions might be deemed to be subsumed within the phrase “all benefit accruals and rights” referenced above. However, in subparagraph 5a, which is the only direct reference to health insurance in the agreement, it states: “Seniority and health insurance shall continue for a period of up to thirty-six months as per labor agreement.” Clearly, this ties the issue of health insurance coverage to the language of Article XV of the contract, which is where the health insurance benefit is

¹ The Grievant made a partial payment toward his July 2009 premiums, which the District accepted, but the District is seeking full reimbursement for premium payments made for the months of August and September.

defined. Article XV, Sec. 5, which covers workers' compensation, states: "The Board shall pay the existing percentage health insurance premium payments for up to three calendar years for employees who are on worker's compensation leave." It seems clear to me, therefore, that by the reference to "thirty six months" subpar. 5a of the settlement agreement was intended to address health insurance contributions as they relate to workers' compensation only and did not address the question of health insurance contributions in the context of long term disability. Because the contract itself is silent as to whether premium contributions continue for employees on long term disability, and the record does not indicate the existence of any practice in this regard at the time, one cannot infer anything from the settlement agreement on this subject.

The next issue is whether there was an existing practice of the District contributing to health insurance premiums for employees on long term disability and, if so, whether the District effectively repudiated any such practice at the time of the negotiation of the 2009-11 contract. The Union asserts that there was such a practice and that, because it modified or clarified contract language, it became, in effect, part of the contract. As such, it could not be repudiated by the District, but that the District was required to negotiate for its elimination. The District maintains, in the alternative, that there was no binding practice in this area, but, assuming there was, the District properly repudiated it and it expired when the new contract took effect on July 1, 2009.

The evidence indicates that there have not been many instances where an employee has gone on long term disability without also qualifying for workers' compensation. In this record, other than the instant case, the only other occurrence was when the Grievant was on long term disability in 2006 for knee surgery. Significantly, however, in both instances the District continued to make contributions to the Grievant's health insurance premiums. Thus, in every instance of record where this circumstance arose the District made the premium contributions. The District points out that the understanding between the parties regarding the Grievant's 2006 surgery was non-precedential. (Jt. Ex. 14) However, a review of Joint Exhibits 13 and 14 makes it clear that the non-precedential nature of the agreement referred to an extension of the contract's one year limitation on disability leave, as outlined in Article IX, and made no reference to insurance contributions. Further, when the parties were in negotiations over their 2009-11 contract the District put the Union on notice that it was repudiating "the practice of subsidizing insurance premiums for any AFSCME employee out on unpaid leave or disability." (Jt. Ex. 1) In the same letter, the District explained the reason for, and effect of, repudiation: "Employers are allowed to put bargaining units on notice that effective with the end of the current contract, certain practices will cease...Units can then bargain, if they so desire, to retain or formalize the practice." This begs the question, if the District did not believe there was a practice it was bound to honor, why take formal, affirmative action to repudiate it? I conclude, therefore, that prior to July 1, 2009 there was a practice of the District continuing to make health insurance premium contributions for employees on long term disability. The remaining question, then, is whether the District effectively repudiated the practice.

There are different types of past practices and whether they may be unilaterally repudiated depends upon the nature of the practice. Here, the question is whether under Article XV the District is or is not required to continue making health insurance premium contributions for employees on long term disability. Article XV, Section 1 provides that the District will pay 100% of the single premium and 90% of the family premium for all full time employees, defined as those scheduled to work at least six hours per day during the school year. As previously noted, Section 4, which addresses long term disability, is silent on the subject of continued premium contributions, neither specifically preserving nor cancelling them. The District argues that because Section 5, which addresses workers' compensation, specifically provides for continued premium contributions, one must conclude that it is, therefore, not provided for long term disability. That is only one possible interpretation, however. Another would be that since leaves of absence for injury are limited to one year under Article IX, Section 2, health insurance premium contributions would ordinarily expire at that time, as well. The reference to health insurance in Article XV, Section 5, therefore, might plausibly have been intended only to extend the benefit from one year to three only in workers' compensation cases.

Where contract language is susceptible of more than one meaning it is ambiguous. The practice in place herein clarified that ambiguity by providing for continued premium contributions. The subject of the circumstances under which a past practice may be repudiated and the means by the repudiation may be accomplished were discussed persuasively by arbitrator Richard Mittenthal in "*Past Practice and the Administration of Collective Bargaining Agreements*." In that treatise, Mittenthal specifically discussed practices clarifying ambiguous contract language, as follows:

Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of an ambiguous provision, it becomes, in effect a part of the provision. As such it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.

It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc. ²

² Proceedings of the 14th Annual Meeting of National Academy of Arbitrators, at 30-58 (BNA Books, 1961), cited in BARRON COUNTY (SHERIFF'S DEPARTMENT), MA-8382 (McLaughlin, 6/95).

Here, as previously, discussed, the practice in question clarified a contractual ambiguity as to whether the District's obligation to make health insurance premium contributions continues while employees are on long term disability. Such a practice can only be altered or eliminated by mutual agreement. The District's attempt to unilaterally terminate the practice by giving notice of repudiation to the Union while the parties were negotiating the 2009-11 contract was not effective. If the District wishes to eliminate the practice, such change must be negotiated.

Inasmuch as the practice was not effectively repudiated, the District is not entitled to complete reimbursement for the premiums it paid for the Grievant's health insurance in August and September. It is, however, entitled to reimbursement for the Grievant's portion of the health and dental insurance premiums. For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The District violated the collective bargaining agreement and past practice, when it notified the Grievant that he was responsible for the entirety of his health insurance premiums while on long term disability after the adoption of the parties' 2009-11 collective bargaining agreement. The District shall continue to pay its proportional share of insurance premiums for employees on long term disability until a change in the practice or contract language is negotiated, but is entitled to reimbursement for the Grievant's share of health and dental insurance premiums for August and September 2009.

Dated at Fond du Lac, Wisconsin, this 16th day of February, 2010.

John R. Emery /s/

John R. Emery, Arbitrator

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