

In the Matter of Arbitration Between

Education Minnesota – Greenway, Local No. 1330) BMS Case No. 07-PA-0004
)
(“Union”)) Issue: Health Insurance
)
) Hearing Site: Coleraine, MN
)
and) Hearing Date: 01-24-07
)
) Brief Filing Date: 02-20-07
Independent School District No. 316, (Greenway) Coleraine, MN)
) Reply-Brief Date: 02-27-07
)
(“Employer” or “School District”)) Award Date: 04-25-07
)
) Mario F. Bognanno, Arbitrator

Jurisdiction

Pursuant to the relevant provisions in the parties’ 2005-2007 Collective Bargaining Agreement (CBA) the above-captioned matter came before Arbitrator Mario F. Bognanno on January 23, 2007, in Coleraine, Minnesota. Appearing through their designated representatives, the parties identified two (2) issues for determination. Initially, the Employer raised a procedural issue, challenging the grievance’s arbitrability on grounds of timeliness and, thereafter, the parties subsequently agreed that if the matter was determined to be arbitrable, the substantive issue in dispute arises out of the Union’s allegation that the School District is in violation of Section 16D of the 2005-2007 CBA.

Each side was given a full and fair opportunity to present its case; witness testimony was sworn and subject to cross-examination; and exhibits were introduced into the record. The evidentiary record was closed on February 6, 2007, following receipt of telephonic testimony by Dr. Rod Thompson, the School District’s Superintendent until April 4, 2006. The parties submitted post-hearing

briefs on February 20, 2007, and reply briefs on February 27, 2007. On that date the case record was closed and the matter was taken under consideration.

Arbitrator-Intern Richard J. Dunn attended the hearing under the auspices of the State of Minnesota Bureau of Mediation Services' arbitrator training program. In that capacity, Mr. Dunn prepared a mock award. The instant opinion and award was drafted and decided solely by the undersigned arbitrator of record.

Appearances

For the Employer:

James E. Knutson, Attorney at Law

Rochelle Van Den Heuvel, Superintendent, ISD No. 316

Dr. Rod K. Thompson, former Superintendent, ISD No. 316

For the Union:

Debra M. Corhouse, Staff Attorney, Education Minnesota

Joan Barle, Chair, Negotiating Committee, Education Minnesota. Local, No. 1330

Allison Butterfield, Union President, Education Minnesota, Local No. 1330

James Poole, Staff, Education Minnesota

Paul Rygh, Retired Teacher, ISD No. 316

I. FACTS AND BACKGROUND

The Union, Education Minnesota, Greenway, Local No. 1330, is the bargaining agent for all non-supervisory professional staff (i.e., teachers) working for the Employer, Independent School District No. 316. Pursuant to Minnesota's Public Employment Labor Relations Act, the parties have entered into numerous

Collective Bargaining Agreements (CBAs), which are negotiated every two (2) years. The CBAs set forth terms and conditions of employment, including hospital and medical insurance (hereafter “healthcare insurance” benefits).

The Fighting Issue

The fighting issue in this case arises out of the Employer’s interpretation and application of the healthcare insurance language in the 2005-2007 CBA as it relates to retired teachers under the age of 65, with spouses under the age 65 (hereafter referred to as the “Grievants”). Effective March 1, 2006, the then retired pre-65 year old retirees with family coverage were and are being charged 20% of the family healthcare insurance premium rather than 20% of the single premium, as the Union argues should be the case.¹ On May 2, 2006, the Union filed the following grievance on behalf of the Grievants:

Retirees under the age of 65 are currently being charged 20% of the family premium from Medical Insurance. This is in violation of Section 16, part D of the Collective Bargaining Agreement and is contrary to what was agreed upon in our contract negotiations.

(Joint Exhibits 2 and 4). As remedy, the Union begs that henceforth the Grievants should be charged 20% of single premium, and that they should be reimbursed for the difference between the family and single premium overcharge. (Joint Exhibits 2 and 4). The parties were unable to resolve this matter. The Employer formally denied the grievance on May 26, 2006. (Joint Exhibit 4). Subsequently, the dispute was appealed to arbitration for a final and binding determination.

As background to the negotiations resulting in the 2005-2007 CBA, it is important to note that since FY 2002 the School District had been operating

¹ The terms “family”, “dependent” and “spouse” are used interchangeably in this decision, and the terms “family” and “single” are underlined for emphasis.

under a so-called “Statutory Operating Debt Plan” (SOD), and that in November 2005, the School District alerted the Minnesota Department of Education (MDOE) that its “un-appropriated fund balance” was \$1,738,051.67 – much larger than its 2003-2004 deficit of \$1,183,593.00. Accordingly, the School District petitioned the MDOE for a three (3) year extension to its SOD Plan, covering fiscal years 2007, 2008 and 2009. Ultimately, the MDOE granted the extension with the understanding that the School District must achieve a number of specific spending reductions and freezes, including, *inter alia*, 0% salary schedule improvements for the 2005-2006 and 2006-2007 school years; health insurance concessions and “caps” with ongoing annual savings of \$300,000 in School District premium-costs for active teachers and retirees, elimination of the School District’s prescription drug reimbursement program, and a decrease in the Employer’s share of insurance premiums to 80%; and significant wage and salary savings *via* reduction in licensed and non-licensed staffing levels. (Employer Exhibit 2).

As is subsequently reviewed, the parties’ healthcare insurance policy has been in flux over the course of the last three (3) rounds of collective bargaining, because of the School District’s chronic state of fiscal austerity. Employee coverage and benefits have been significantly reduced and the parties have even agreed to freeze the teacher salary schedule during the term of the 2005-2007 CBA.

Hospital and Medical Insurance in Flux

A. The 2001-2003 CBA provided Blue Cross/Blue Shield Arrowhead Pro-Care, Option 5, healthcare insurance coverage for active teachers. The School District initially paid 95% and the teacher paid 5% of the full premium, but effective September 1, 2002, these payment shares changed to 88% and 12%, respectively. In addition, employee co-payments were required for the first ten (10) office visits and first ten (10) purchases of prescription drugs. (Section 14D, Employer Exhibit 1).

Teachers who had retired on or after July 1, 1996, were covered by the same healthcare insurance plan that was provided for active teachers, except that Medicare-eligible retirees were covered by the existing Medicare supplement medical plan, provided that they were not participating in the School District's 403B plan.² (Section 16A, Employer Exhibit 1). With regard to retired teachers under Option 5, the School District paid 100% of single premium. However, in the case of retirees with dependent coverage the retiree and School District paid equal shares of the difference between the dependency premium and the "full" single subscriber premium, with the retiree's 50% dependency payment paid from his or her accumulated sick leave fund, if any. In addition, teachers who retired after January 2000 were required to make co-payments for their first ten (10) office visits and first ten (10) purchases of prescription drugs. (Section 16D, Employer Exhibit 1).

² Employees under the 403B Plan were eligible to purchase group healthcare insurance through the School District at the group rate. (Section 16A, Employer Exhibit 1).

B. The 2003-2005 CBA modified the 2001-2003 healthcare insurance coverage in two (2) critical respects. First, effective September 1, 2003, the School District's share of the healthcare insurance premium fell to 80% and the active teacher's share increased to 20%. (Section 14D, Joint Exhibit 3). Second, in the case of retirees, effective September 1, 2003, the School District promised to pay only 80% of single premium, with the retired teacher paying 20% of the single premium, which could not be paid out of the retiree's accumulated sick leave fund. For retirees electing family coverage, each side paid 50% of the difference between the dependent premium and the "full" single premium (i.e., the sum of each party's share of the single premium), with the retiree's 50% share being paid out of the accumulated sick leave fund, if any. (Section 16D, Joint Exhibit 3).

C. The 2005-2007 CBA again modified the insurance coverage for active teachers and retirees. The parties agreed to a new, high deductible healthcare group insurance plan for active teachers, namely, the Blue Cross/Blue Shield Arrowhead Pro-Care, Revised Plan 4, which became effective on March 1, 2006.³ They further agreed that the premium share paid by the School District and active teacher would remain at 80% and 20%, respectively. (Section 14D, Joint Exhibit 1). In addition, retirees under the age of 65 would be would be covered under Revised Plan 4 as set forth in Section 14D. (Section 16D, Joint Exhibit 1).

³ The newly introduced deductibles were \$600 and \$1,200 for single and dependent coverage, respectively. Also, the new plan eliminated office visit co-payments, replacing them with a deductible, and it increased co-payments for prescription drugs. These increases in employee out-of-pocket expenses essentially "financed" a reduction in insurance premium rates.

However, retired teachers age 65 and over who are Medicare-eligible would receive supplemental coverage under the new Arrowhead Pro-Care Senior Gold policy, if not participating in the School District's 403B plan.⁴ (Section 16A, Joint Exhibit 1). Under the supplemental plan for retirees age 65 and over, the School District promised: (1) to pay 100% of the Senior Gold policy's single subscriber premium up to a \$152.00 per month cap; (2) if the retiree's spouse is under 65 years of age, to pay 50% of the single subscriber premium under the Revised Plan 4's premium rate, with the retiree's 50% of the premium to be paid from the retiree's accumulated sick leave fund, if any; and (3) if the retiree's spouse is age 65 or older, to pay 100% of the Senior Gold policy's single subscriber rate up to \$152.00 per month. (Section 16D, Joint Exhibit 1).

2005-2007 Negotiations

The Union's witnesses testified that the representatives of the parties, teachers, retirees, plus health insurance analysts Messrs. Dennis Roy and Michael Barle, all met in the Choir Room on January 10, 2006, to review the healthcare insurance modifications that were on the bargaining table as part of the 2005-2007 negotiations.

Paul Rygh, a pre-65 year old retiree with family coverage, attended that meeting. While he realized that the parties' healthcare insurance arrangements would be changing, he testified that there was no indication at the meeting that retirees in his situation would experience an increase in premium costs. He observed that under the 2003-2005 CBA, the co-insurance formula required that

⁴ The record suggests that the retirees age 65 and over who moved to the Senior Gold policy lost their former prescription drug coverage.

he pay 20% of the single premium; whereas, under the 2005-2007 CBA, he was being charged 20% of the family premium. (Union Exhibit 1). Therefore, Mr. Rygh testified, while healthcare insurance premium-costs generally fell, his monthly insurance bill actually increased.

Joan Barle, chair of the Union's 2005-2007 Negotiating Committee, testified at length about the scope of healthcare changes that were on the table and about the need for the Union to accept a 2005-2007 salary schedule freeze. She too testified that there was no discussion of changing the Grievants' co-insurance formula at the January 10, 2006 meeting and, to corroborate this testimony, she called attention to the "talking points" agenda the Union had prepared for the meeting, which does not reference the pre-65 issue. (Union Exhibit 2). Ms. Barle next testified that on January 11, 2006, when the parties met in mediator-assisted negotiations, the Union relied on Superintendent Rod Thompson's handwritten changes to the language in Section 16D of the 2003-2005 CBA, which appear on a document identified as Union Exhibit 3. This document, Ms. Barle asserted, covered "all" matters of retiree healthcare insurance that were negotiated and its content does not support the conclusion that the parties agreed to change the basis or formula for computing family-coverage premium costs for the Grievants. More to the point, Ms. Barle testified that the parties inadvertently overlooked the pre-65 set of retirees during their negotiations and that, as a consequence, the 2003-2005 formula and "sick leave fund" provision continue to apply in the current CBA's 2005-2007 term.

Allison Butterfield, the Union's President, corroborated Ms. Barle's testimony. In addition, she testified that during mid-March 2006, she began receiving complaints from Grievants about the issue in dispute; on March 20, 2006, she spoke to Dr. Thompson who indicated that "he wasn't aware that the retirees were paying the 20% of the family" and that he would look into the matter and get back to her. (Union Exhibit 8). On April 17, 2006, Ms. Butterfield reminded Dr. Thompson that she needed a reply to the pending issue, and on April 18, 2006, the relevant parties met. (Union Exhibits 9 and 10). Ms. Butterfield testified that at this meeting, she presented the Union's numeric illustration of past and present premium payment schemes. (Union Exhibit 4). She further testified that after her presentation, Dr. Thompson seemed to agree with her assessment, uttering: "Oh, I can see that that's not right." Nevertheless, record evidence suggests that on May 2, 2006, Dr. Thompson emailed Ms. Barle expressing disagreement with the Union's position in this matter. (Union Exhibit 6). On that same day, the Union filed its grievance. (Joint Exhibits 2 and 4). On May 26, 2006, Ms. Butterfield emailed Dr. Thompson, indicating that she expected a "written response" to the grievance and that the Union would be going forward with its grievance. (Union Exhibit 12).

Dr. Thompson testified on behalf of the Employer. He stated that in November 2005 he learned that the School District's finances were worse than expected and that a three (3) year extension to its then existing SOD Plan was needed. Accordingly, in mid-January 2006, he and three (3) business and auditing colleagues met with Dr. Charles Speiker, Financial Management Team,

MDOE, to discuss additional aspects of cost freezes, cuts and caps that would be required in order to persuade the MDOE to extend the School District's SOD Plan. On January 30, 2006, Dr. Thompson wrote a memorandum listing these cost-cutting aspects: a list that the School District Board of Education had previously approved and the Union had begrudgingly accepted, he testified. (Employer Exhibit 2).

Dr. Thompson testified that at the parties' early January mediator-assisted meeting, he and the Union agreed on how the healthcare language would be revised; that it was he who scribbled the age-65 and over language in Union Exhibit 3; and that item #6 in Union Exhibit 3 essentially resulted in the 2005-2007 CBA's Section 16D, paragraphs two, three and four. (Joint Exhibit 1). He further stated that at that meeting, he also presented the pre-65 language in Section 16D, paragraph one, and that the Union agreed to it. Dr. Thompson maintains that after that meeting, he met with the MDOE and, thereafter, the tentative agreement was presented for explanation to Union members and retirees, with Messrs. Dennis Roy and Michael Barle handling the healthcare insurance parts of the presentation; and, next, that the tentative agreement was ratified and signed on January 17, 2006. Continuing, he testified that on February 16, 2006, he issued a memorandum addressed to retirees that laid out the negotiated healthcare insurance changes. (Union Exhibit 1). With respect to retirees and spouses under age 65, it states:

Effective March 1 2006, all employees, and retirees and spouses under age 65, will be covered by a new Blue Cross Blue Shield health insurance plan...

...Presently you are paying 20% of the single premium. Beginning with the March 2006 coverage, you will be responsible for 20% of the premium you hold. If it is a single premium, the co-pay will be 20% of \$548.50 = \$109.70 per month. If you have a family premium, the co-pay will be 20% of \$1215.00 = \$243.00 per month.

For those with family coverage, sick bank amounts will be refigured to reflect the premium change.

(Union Exhibit 1; emphasis added). Moreover, Superintendent Thompson admitted that at his meeting with Ms. Butterfield and others on April 18, 2006, he did say something like "Oh, that's not right!", but that he was making reference to the whole of Ms. Butterfield's numeric presentation, and not to the analysis in the upper right hand corner of the illustration, which supported the School District's position in this case. (Union Exhibit 4).

II. RELEVANT CONTRACT PROVISIONS

Section 14. Group Insurance Benefits

D. Hospital and Medical Coverage: The Board shall provide group hospital and medical coverage from Arrowhead Pro-Care Blue Cross and Blue Shield Revised Plan 4. The School District shall pay pay (sic) eighty percent (80%) of the premium for group hospital and medical insurance, and the teacher shall pay twenty (20%) of the premium. This is to become effective as soon as possible, but no later than March 1, 2006.

Section 16. Insurance Coverage For Retired and Disabled Teachers

A. All teachers who retire (see definition) on or after July 1, 1966, and who have reached a retirement age acceptable to the Teacher's Retirement Association or Federal Social Security and all teachers who become totally and permanently disabled on or after July, 1966, shall continue to be insured during 2005-2006 and 2006-2007 under the Arrowhead Pro-Care Blue Cross and Blue Shield Revised Plan 4 policy to become effective as soon as possible, but no later than March 1, 2006, covering teachers of Independent School District No. 316, except that if the retiree is eligible at age 65 for Federal Medicare, he/she shall be covered by the Arrowhead Pro-Care Senior Gold policy, except those under the Greenway 403B. ...

B. All teachers who have accumulated sick leave days to their credit at the time of retirement or at the time they become totally and permanently disabled shall be credited with an amount equivalent to the current value of their unused sick leave accumulation. ...

...

D. In the case of a retiree under the age of 65, the Board shall provide group hospital and medical insurance as set forth in Section 14, subdivision D of this Collective Bargaining Agreement.

In the case of a retiree, age 65 and older, the Board shall pay one hundred percent (100%) of the Arrowhead Pro-Care Senior Gold single subscriber policy up to \$152.00.

If the retiree's dependent is under the age of 65, the Board shall pay fifty percent (50%) and the retiree shall pay fifty percent (50%) of the dependent's single subscriber premium of the Arrowhead Pro-Care Blue Cross and Blue Shield Revised Plan 4 policy indicated in subdivision A. However, the fifty percent (50%) dependency premium cost which is the obligation of the retiree shall be paid by the School District from the retiree's accumulated sick leave fund. If the fund is exhausted, the retiree shall make arrangements with the District for payment of his/her fifty percent (50%) share of the dependency premium.

If the retiree's dependent is age 65 or older, the Board shall pay one hundred percent (100%) of the dependent's Arrowhead Pro-Care Senior Gold single subscriber policy up to \$152.00.

Section 28. Grievance and Arbitration Procedure

B. Procedure:

Either the Board or an employee of the Union may raise a grievance within thirty (30) days of the alleged violation, and if raised by the employee, the Union may associate itself therewith or disassociate itself there from at any time except as hereinafter otherwise provided. If raised by the Union, the employee may not thereafter raise the grievance himself, and if raised by the employee, he may not thereafter cause the Union to raise the same grievance independently. The Union may establish a grievance committee to initiate and process a grievance. If the Union disassociates itself from the grievance, the grievance committee shall, at that point, cease the processing of the grievance, and the grieving employee may continue processing the grievance independently.

Step 1: A discussion between the employee and his immediate superior with the objective of resolving the dispute expeditiously and informally. At

the employee's option, there may be present at such discussion a representative of the Union or any other school employee selected by the aggrieved employee who is not an officer, or representative of another teacher organization. The immediate superior, administration, or the Board may also have a designee present.

Step 2: If the dispute is not resolved satisfactorily to all parties at Step 1 within seven (7) days, then the grievance shall be reduced to writing on a form made available by the Superintendent and shall be submitted to the Superintendent, and the immediate superior shall submit a written decision on the grievance to the Superintendent, all within an additional seven (7) days. The Superintendent, or a designee, shall meet with the grievant and/or his/her representative or designee and any party may request that the immediate superior be present at said meeting and within ten (10) days of submission of the grievance to the Superintendent, he/she shall render a decision thereon in writing, and deliver said decision to the parties involved.

Step 3: If a party is dissatisfied with the Superintendent's decision, then within ten (10) days of the rendition, said party may appeal in writing to the Chairman of the Board of Education. The chairman shall schedule and hold a hearing thereafter within fifteen (15) days after the appeal is submitted, and the Board shall render its decision in writing within ten (10) days of such hearing. The Board at this step may act through a duly constituted committee composed of members of the Board.

Step 4: If the Union or employee is dissatisfied with the decision of the Board, the grievance may be submitted to arbitration provided that arbitration is not to extend to matters not deemed arbitrable under the existing Public Employment Labor Relations Act.

- (a) The request for arbitration must be in writing, addressed to the chairman, Board of Education, and must be made within ten (10) days after the rendition of the decision in Step 3.
- (b) The question in dispute shall then be referred to an agreed upon single arbitrator and in such agreement cannot be reached within ten (10) days, a single arbitrator shall be selected by the parties from a panel or panels submitted by the Commissioner of the Bureau of Mediation Services.
- (c) The arbitrator shall be bound by and must comply with all of the terms of this Agreement. He/she shall have no power to delete or modify the provision of the Agreement. He/she shall have the power to make appropriate awards. The arbitrator shall render a decision in writing within the statutory time limits. The decision of the arbitrator shall be binding upon both parties and all employees during the life of the Agreement. Fees and

expenses of the arbitrator shall be borne equally by both parties.

C. General Provisions:

2. No matter shall be entertained as a grievance hereunder unless it is raised with the other party within thirty (30) days of the occurrence giving rise to the alleged grievance.

Section 29. Severability Clause

A. If any provision of this Agreement is or shall at any time be determined contrary to law, then such provision shall not be deemed applicable, nor performed, nor enforced, and substitute action of provision shall be deemed negotiable upon the request of either party. Both parties shall cooperate in seeking such substitute action or provisions as will implement the intention of the parties to the maximum extent permissible under the law.

B. In the event that any provision of this Agreement is or shall at any time be held contrary to law, all other provisions of this Agreement shall continue in effect.

(Joint Exhibit 1)

III. Issues

The issues in this case may be stated as follows:

A. Whether the matter in dispute is arbitrable, based on Section 28's timeliness provisions?

B. Whether the School District is violating Section 16D of the CBA? If so, what is an appropriate remedy?

IV. Positions of the Employer

Initially, the Employer challenges the arbitrability of the grievance on grounds of timeliness. First, the Employer notes that the alleged violation occurred on March 1, 2006, and that the grievance is dated May 2, 2006, more than 41 "work" days later. Section 28C.2 unequivocally states that "No matter shall be entertained as a grievance...unless ...raised within thirty (30) days of the

occurrence giving rise to the alleged grievance.” (Joint Exhibit 1). Second, since the retirees under 65 received written notice of the policy change now in dispute on or about February 16, 2006, that may be the date on which to commence the thirty (30) workday count down; meaning, the Employer argues, that the grievance was filed 50 work days later, making it even more untimely. (Union Exhibit 1). Finally, pursuant to Section 28C.1 in the CBA, the Employer urges that the instant grievance involves a “matter of general application” so, technically, it was initiated at Step 2 of the grievance procedure and, therefore, it should have been reduced to writing and submitted to Dr. Thompson within seven (7) work days thereafter, and it was not. For these reasons, the School District urges that the grievance be dismissed for lack of timeliness.

Regarding this case’s substantive issue, the Employer begins by arguing that Section 16D is clear and unambiguous, and that the undersigned is compelled by Section 28B, Step 4(c) in the CBA to enforce it. Next, the Employer urges that the first paragraph in Section 16D clearly states that retirees under age 65 shall be provided with the active teacher’s healthcare insurance benefits as set forth in Section 14D, which clearly provides that the School District pays 80% of the healthcare premium and the retiree pay the remaining 20%, while making no distinction between single or family coverage. Active teacher co-insurance shares have long been paid on the basis of the type of coverage the teacher elected, and this was the case during the previous two (2) CBAs.

Moreover, the Employer contends that during the mediator-assisted negotiating session the parties did not “unintentionally omit,” make a “mutual

mistake” or “overlook” the healthcare benefits of the Grievants, as the Union contends. Rather, the under-65 year old retirees are clearly accounted for in the first paragraph of Section 16D. In addition, the Employer argues that to secure the MDOE’s grant of a three (3) year extension to its SOD Plan, the School District and Union were essentially compelled to reduce healthcare insurance costs and by requiring the Grievants to pay co-insurance based on type of coverage is wholly consistent with this cost-reducing strategy.

Finally, the School District argues that the language in Section 16D was totally revised; that on January 12, 2006, Dr. Thompson’s secretary gave the final contract language to the Union for its review and that, at that time, Dr. Thompson was meeting with MDOE personnel in St. Paul, Minnesota; and that the Union signed the final contract on January 17, 2006. Moreover, the Employer also points out that when it counted – during negotiations and before it signed the 2005-2007 CBA – the Union did not challenge the language in question. For these reasons, the Employer urges that the grievance be denied.

V. Positions of the Union

To begin, the Union underscores that the instant dispute centers on the School District’s allegedly improper decision to unilaterally change the Grievants’ payment formula by charging them 20% of the family premium as opposed to the single premium. The Union points out that this change took effect and was realized in mid-March 2006 when the grieving retirees received their insurance premium invoices, and that on March 20, 2006, Ms. Butterfield spoke to Dr. Thompson about this development and he promised to check it out and get back

to her. (Union Exhibit 8). Clearly, the Union urges, the grievance was “raised ... within thirty (30) [working] day,” of the time the retirees received their insurance premium invoices (and of Dr. Thompson’s February 16, 2006, memorandum addressed to Grievants), as required in Section 28B and Section C2 of the CBA; and that the verb “to raise” as used in these sections does not suggest that the grievance is any less timely because it was communicated verbally rather than in writing. Moreover, since the School District did not address the February 16, 2006, memorandum to the Union, the relevant “trigger” date in this case is the mid-March 2006 date.

Continuing, the Union avers that it was not until mid-April that Dr. Thompson finally met with representatives of the Grievants. (Union Exhibits 9 and 10). As a Step 2 grievance, the Union claims that it rightly brought its grievance to the attention of Dr. Thompson; and that a close reading of the Step 2 language indicates that it is the Superintendent, not the Union, who faces time constraints. The Union notes that it submitted the written grievance on May 2, 2006, and that it was denied on May 26, 2006. (Joint Exhibit 4). Finally, with respect to this issue, the Union observed that the Employer first raised the “timeliness” issue at the arbitration hearing and that the substantive issue in this case is one of “continuing” reoccurrence.

With respect to the substantive issue in this case, the Union argues that the parties neither negotiated nor agreed to change the formula the Grievants use for paying monthly healthcare premiums, and for that reason the 2003-2005 formula, namely, charging the Grievants 20% of the single premium, should

continue to apply.⁵ (Union Exhibits 3, 4 and 13 and Joint Exhibit 3). To underscore this contention, the Union notes that (1) Dr. Thompson did not expressly propose to change the referenced formula during the January 11, 2006 mediator-assisted Choir Room meeting and later on he did not seem to know anything about the change (Employer Exhibit 2 and Union Exhibits 2 and 8); (2) the Union did not see a final version of the CBA until the next day – January 12, 2006: a version that inadvertently included the first paragraph of Section 16D; and (3) the Employer’s interpretation of the first paragraph of Section 16D in the 2005-2007 CBA is simply inconsistent with the parties’ negotiating intent and the parties’ 2005-2007 negotiating history, which suggest that retirees under 65 years of age with under 65 year old spouses were mistakenly overlooked (see Union Exhibits 7 and 11).

Next, the Union calls attention to *Chisholm*. See *Housing and Redevelopment Authority of Chisholm v. Norman*, 696 N.W.2d 329, 337 (Minn. 2005)(the Court found that the public employer promised in the CBA to pay retiree healthcare premiums and the employee’s right to this payment vested at the time the employee retired).⁶ The Union urges that it knew of this decision and, therefore, would never have negotiated changes to the formula because it was vested for pre-65 year old retirees, and that in fact the 2005-2007 CBA

⁵ The relevant language in the 2003-2005 CBA states that [all] retirees shall pay 20% of the full single subscriber rate and that the parties’ shall split, 50%-50%, the difference between the dependent premium costs and full single subscriber rate. Moreover, it states that while the retiree’s 20% may not be paid from the retiree’s accumulated sick leave fund, the retiree’s dependent premium obligation may be paid from said fund. (Section 16D, Joint Exhibit 3).

⁶ This holding is later referred to as the “vesting rule.”

negotiations focused on changing insurance plans and not the basis or formula for paying premiums. (Union Exhibit 13).

Finally, the Union contends that the first paragraph in Section 16D of the 2005-2007 CBA only refers to retirees under the age of 65, making no reference to spouses. Therefore, the Union concludes, Section 16D applies only to under 65 year old retirees without spouses. Moreover, the Union argues, proof that the parties simply forgot about retirees under 65 years of age is found in the fact that Section 16D addresses both retirees age 65 and over and retirees age 65 and over with spouses.

For the above reasons, the Union urges that the grievance be sustained. Noting, however, if it is not, then the undersigned should strictly apply Section 14D to the Grievants by disallowing the School District from charging them 50% of the difference between the family premium and full single premium, which is being taken out of the accumulated sick leave fund, if any. The Union notes that this dependency charge is not authorized in Section 14D of the CBA.

VI. Opinion

Arbitrability: Timeliness

The Employer's arbitrability contentions are straight forward, beginning with the observation that both Section 28B and 28C2 in the CBA state that a grievance must be raised within thirty (30) working days of its alleged occurrence. And, in this case, if the grievance was initiated at Step 1 of the grievance procedure, then more than thirty (30) working days elapsed between the alleged violation and the filing of the written grievance form [(March 1, 2006)

– (May 2, 2006) = 41 work days or (February 16, 2006) – (May 2, 2006) = 50 work days, where the trigger date to begin counting work days is the date the CBAs amended healthcare insurance program took effect or the date of Dr. Thompson’s memorandum advising the Grievants of the impending changes, respectively]. (Union Exhibit 1).

Alternatively, the Employer argued, if the grievance was initiated at Step 2 of the grievance procedure, as it should have been, then, pursuant to Section 28C1, the Union had seven (7) days to reduce the grievance to writing. The School District contends that the Union also missed this seven (7) day time limit since it became aware of the grievance in mid-March 2006, raised the matter with Dr. Thompson on March 20, 2006, but waited until May 2, 2006 to submit the written grievance form.

In contradiction, the Union demurs on the following grounds. First, neither Section 28B nor Section 28C1 of the CBA requires that the grievance must be reduced to writing within thirty (30) days, rather these sections merely require that the grievance must be “raised” within thirty (30) days, as the Union alleged it did in this case. Second, given that the grievance in this case was initiated at Step 2 of the grievance procedure, nothing therein requires that it be reduced to writing within seven (7) days. Rather, the Union contended, the Step 2 reference to a written grievance applies only to grievances that were initiated at Step 1. Finally, the Union noted that the Employer did not raise the timeliness challenge until the day of the hearing and that the Employer failed to recognize that the nature of the aggrieved offense is such that it is “continuous.”

After giving these competing positions careful consideration, the undersigned concludes that the Employer failed to show by a preponderance of the evidence that the Union's grievance is not arbitrable by reason of timeliness. The Union correctly claims that neither Section 28B nor Section 28C1 require that the grievance must be reduced to writing within thirty (30) working days of its occurrence. Section 28B merely requires that the Union "may raise a grievance" and Section 28C1 states that "No matter shall be entertained as a grievance hereunder unless it is raised with the other party within thirty (30) days" (Joint Exhibit 1, emphasis added). The only contractual reference to the submission of a written grievance is the seven (7) day reference in Step 2 of the grievance procedure. Namely: "If the dispute is not resolved satisfactorily to all parties at Step 1 within seven (7) days, then the grievance shall be reduced to writing" (Joint Exhibit 1). Clearly, this reference addresses grievances that were initiated at Step 1, and not those initiated at Step 2 pursuant to Section 28C1, as in this case. (Joint Exhibit 1).

The language in Step 2 of the CBA is ambiguous with regard to when a grievance that is initiated at Step 2 needs to be reduced to writing and the record evidence is devoid of facts bearing on past practices relevant to resolving this ambiguity. More critically, however, the undersigned concludes that the School District implicitly waived any *bona fide* timeliness claim it might have had by not challenging the grievance's arbitrability on or about May 2, 2006, rather than waiting until January 23, 2007, the date this matter was heard in arbitration. Finally, as the Union correctly contends, with each passing month the alleged

violation on the merits of the substantive issue in dispute is repeated (i.e., retriggered), having the effect of restarting the work day countdown.

Merits of the Substantive Issue

The substantive issue in this case is whether the School District is in continuous violation of Section 16D and by reference Section 14D of the CBA by charging 20% of the Arrowhead Pro-Care Blue Cross/Blue Shield Revised Plan 4 monthly family premium to the Grievants in this case.

The Union contended that the retirees in question should be paying 20% of Revised Plan 4's monthly single premium, which is much lower than 20% of the family premium; that charging the Grievants 20% of the monthly family premium should cease; and that the Grievants should be made whole for the premium overcharges. In addition, the Union requested, that if the School District is not in violation of Section 16D, then Section 14D of the CBA ought to be strictly applied. That is, the practice of charging the Grievants' 50% of the difference between the family premium and the "full" single premium ought to cease and the affected retirees should be made whole inasmuch as Section 14D does not authorize this charge, although the 2003-2005 CBA did.

The Union's position is that parties did not negotiate the disputed single-to-family formula change, and that the parties mistakenly overlooked the Grievants' cohort of retirees when they modified the 2003-2005 CBA language in Section 16D. The Employer disagreed, asserting that the language of Section 16D plainly shows that the parties did not mutually and mistakenly overlook the referenced cohort. If they had made a mutual mistake, then, the Employer's

rhetorically argued, what meaning can possibly be given to language in the first paragraph of Section 16D, which states:

In the case of a retiree under the age of 65, the Board shall provide group hospital and medical insurance as set forth in Section 14, subdivision D of this Collective Bargaining Agreement.

(Joint Exhibit 1; emphasis added).

After carefully considering these contentions and, as previously discussed, the parties other arguments and the material facts of the case, the undersigned cannot disregard the above-quoted language, as the Union seems to want. The plain language of a contract is the best measure of the parties' intent notwithstanding the Union's evidence bearing specifically on the history of the parties' healthcare insurance negotiations. Moreover, the argument that the above-quoted paragraph in Section 16D of the CBA mistakenly found its way into the contract is trumped by its very presence in the CBA – a contract that the Union read and signed – and by School District witness testimony that the language was intended and that it is not the result of a “mutual mistake”. Accordingly, it is concluded that the Section 16D does incorporate the Grievants' cohort and that the first paragraph in Section 16D was not an inadvertent inclusion in the CBA that should be dismissed. Rather, the first paragraph in Section 16D was bargained language, as the Employer's convincingly showed.

Next to be examined is the meaning the first paragraph in Section 16D. The Union argued that the language in Section 16D only refers to retirees under 65; that it makes no reference to spouses; and, therefore, the Union continued the language only applies to under 65 year old retirees who do not claim

dependent or spousal coverage. The Employer disagreed with this interpretation of Section 16D and so does the undersigned. The language in Section 16D is not ambiguous. The first paragraph in Section 16D is not qualified in any way. It states that “retirees under the age of 65” shall be provided the healthcare insurance set forth in Section 14D, which can only mean that the healthcare insurance for all under 65 retirees is set forth in Section 14D of the CBA, regardless of the presence or absence of dependents or spouses.

Moreover, Section 14D in the 2005-2007 CBA, like Section 14D in the predecessor agreement, provides that active teachers shall pay 20% of the premium, which historically has meant 20% of the single or family premium, depending on the type of coverage chosen by the teacher. Thus, it seems indisputable that by referencing Section 14D, Section 16D implicitly provides for premium-cost differentiation based on whether the under age 65 retiree elects single or family coverage. For these reasons, the undersigned concludes that charging the referenced under age 65 cohort of retirees 20% of the family premium is not a violation of Section 16D, as the Union claims.

However, to charge the Grievant cohort 50% of the difference between the family premium and the “full” single premium (which may be paid from the retiree’s sick leave fund) is a contractual violation. This charge was properly applied under Section 16D in the 2001-2003 and 2003-2005 CBAs when all retirees were being respectively charged 0% and 20% of the single premium and, in addition, retirees with dependents were being charged 50% of the difference between the family premium and the “full” single premium, which was paid from

the retiree's accumulated sick leave fund, if any. (Joint Exhibit 3). However, relevant to the instant Grievants, the 50% language was deleted during negotiations of the 2005-2007 CBA, as is clear from a comparative analysis of the language in the three (3) contracts.

Still further, with regard to the Grievants in question, since they, like the active teachers covered by Section 14D, are now paying 20% and the School District 80% of the full family premium, it would seem that 100% of the family premium is covered with no remaining premium-cost to be paid. In contrast, under the 2001-2003 and 2003-2005 CBAs there was a residual premium-cost balance that needed to be paid.

Finally, because the set of Grievants in this case includes members with different dates of retirement, multiple remedies are implicit given the above determinations. For example, consider the subset of Grievants who already have retired during the term of the 2005-2007 CBA and qualified teachers under age 65 with spouses under age 65 who prospectively may retire during the term of the current CBA. These individuals may be charged 20% of the family premium, pursuant to Section 14D as referenced in Section 16D of the 2005-2007 CBA. However, these retirees may not be charged 50% of the difference between the family and single premium rates, and to the extent that this additional charge is being made, it must cease and the affected retirees shall be made whole.

But what about the Grievants who retired (1) prior to September 1, 2003 and (2) during the term of the 2003-2005 CBA? For guidance in answering this question and pursuant to Section 29, Severability Clause, in the 2005-2007 CBA,

the parties directed the undersigned to the “vesting rule” in *Chisholm* and to *Adams, et al. v. Independent School District No. 316 v. Education Minnesota – Greenway Local #1330*, a February 14, 2007 decision by the District Court in the 9th Judicial District, Itasca County, State of Minnesota. As this case caption suggests, the parties in *Adams* roughly parallels the parties to the instant arbitration.

In *Adams*, the Itasca County District Court ordered that pursuant to the 2001-2003 CBA, all School District employees who retired prior to September 1, 2003, must receive insurance benefits equal to 100% of the single premium and not the modified 80% of the single premium, as called for in the 2003-2005 CBA. As applied to the instant arbitration, *Adams* could be signaling that the Grievants who retired prior to September 1, 2003, should receive a remedy equal to Grievants’ post-March 1, 2006 accumulated payment difference between 20% of family and 20% of single premiums. The issue prompting this provisional remedy was neither addressed nor redressed in *Adams*, which may be the reason the Employer appealed *Adams* to the Minnesota Court of Appeals. Provisionally, therefore, pending the decision of the Appellate Court, *Adams* may also be signaling that this subset of Grievants should continue to receive a payment equal to the monthly equivalent of the referenced differential until such time that the School District ceases in making the 20% of family premium charge. Finally, *Adams* also seems to suggest that the School District is properly charging the pre-September 1, 2003 Grievants 50% of the difference between the family and “full” single premium rates. This same remedial structure may also apply to the

subset of Grievants who retired after September 1, 2003 and before March 1, 2006.

In its reply brief, the Union urged the undersigned to follow *Adams* and to fully remedy all of the affected Grievants, filling the remedial gaps *Adams* left behind. Whereas, the Employer urged the undersigned to withhold final judgments and refrain from issuing final remedies until the Appellate Court decides its appeal. Specifically, the Employer asks that the undersigned not rule on the set of Grievants (1) who retired prior to September 1, 2003 and who retired after September 1, 2003 but before March 1, 2006, while retaining jurisdiction until after the Appellate Court has entered its ruling; and (2) rule that the undersigned's decision will be subject to and in compliance with the decision of the Appellate Court.

VII. AWARD

(1) Given the forgoing analysis of the timeliness provisions in Section 28 of the CBA, the School District's implicit acquiescence or waiver of any timeliness claim it might have had, and the fact that the aggrieved violation is continuing in nature, the grievance is determined to be arbitrable and Employer's contentions to the contrary are rejected.

(2) As discussed and concluded above, Section 16D and by reference Section 14D in the CBA, apply to the Grievants in this case. With respect to the subset of Grievants who have or may retire during the term of the 2005-2007 CBA, the School District may charge 20% of the family premium. However, the School District may not impose on these Grievants a 50% charge based on the difference

between the family and single premiums. To the extent that the School District has imposed this charge, each affected retiree from this subset of Grievants shall be reimbursed said charges made since March 1, 2006. In addition, the School District shall continue to reimburse each affected retiree on a monthly basis until it ceases from making said charges.

(3) The undersigned grants the Employer's requests to withhold judgments and remedies with regard to the subset of Grievants who retired prior to September 1, 2003 and between September 1, 2003 and March 1, 2006 and, in doing so, he retains jurisdiction over this matter, awaiting the Appellate Court's decision in *Adams*. Once the Appellate Court's decision is made, the undersigned will decide all unsettled matters, assuming that the parties are unable to do so. With respect to future arbitral deliberations, if any, the undersigned will entertain written arguments anew and will request from each party a statement of its proposed remedy. Legal counsel is directed to keep the undersigned current in regard to on-going developments in this matter as well as to submission time-lines upon which they may have mutually agreed.

Issued and ordered on this 25th day
of April, 2007 from Tucson,
Arizona.

Mario F. Bognanno, Arbitrator