

IN THE MATTER OF THE ARBITRATION BETWEEN:

The Central Education Association

And

Independent School District No. 108

BMS Case No. 16 PA 0266

OPINION AND AWARD OF ARBITRATOR

Arbitrator

Richard A. Beens, Esq.

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St. Louis Park, MN 55426

APPEARANCES

For the Employer:

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For the Union:

Debra Corhouse Esq.

Minnesota Federation of Teachers

41 Sherburne Ave.

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Date of Award: July 28, 2016

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”) between Independent School District 108 (“Employer” or “District”) and The Central Education Association (“Union”).¹ Nancy Swiggum (the *de facto* “Grievant”), is employed by ISD 108 and a member of the Union.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on June 23, 2016 in Norwood Young America, Minnesota. Both parties were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written closing arguments were submitted simultaneously on July 25, 2016. The record was then closed and the matter deemed submitted.

ISSUES

Formulation of the issues was left to the arbitrator. I find them to be as follows:

1. *Is this grievance properly before the arbitrator? If so, then;*
2. *Did the School District violate the collective bargaining agreement when it required Union member Nancy Swiggum to contribute to her health insurance in 2015 and 2016?*

FACTUAL BACKGROUND

Independent School District 108 is a public school district organized under Minnesota law. It serves Norwood Young American and surrounding portions of Carver County. James

¹ Joint Exhibit 3.

and Nancy Swiggum were both employed as teachers in the district. While he retired in 2009, she still remains an employee and a member of the Union. Prior to James's retirement, he and Nancy each received individual health insurance coverage through one of the several group plans offered by the Employer.

When James Swiggum opted for early retirement in 2009, Article VIII, Section 8 of the then current CBA provided, *"If at the time of retirement the retiree has a spouse or dependents with no health insurance, the retiree shall receive the family health/hospital insurance plan."*² It also contained the following provision in Article IX:

Section 2. Family Coverage: *The District shall contribute a sum not to exceed \$706.06 per month for employees enrolled in the Blue Cross/Blue Shield First Dollar Plan ...toward the premium health cost for family coverage for each eligible teacher employed by the District and who qualifies for family coverage and who is enrolled in the Districts' Group Health and Hospitalization Plan.*

Just prior to his retirement, a district payroll clerk, Linda Eischens, sent a memo to James outlining his severance benefits and containing the following sentence: *"Since you & Nancy both work in the district, the district will pay full First Dollar family health insurance until you qualify for Medicare (age 65)."*³ As a result of these CBA provisions, Nancy Swiggum dropped her individual health coverage when James retired in 2009 and was thereafter covered under James's BlueCross/Blue Shield First Dollar Plan. From 2009 until 2015 the Swiggum's monthly premiums for the First Dollar Plan were less than the \$1412.12 per month the Employer was obligated to contribute pursuant to the CBA. However, in 2015 the First Dollar

² Joint Exhibit 1, Article XIII, Sec. 8, Subd. 1.

³ Union Exhibit 4.

Plan group rates for the family plan increased to \$1,951.50 per month or \$23,418.00 per year.⁴ Consequently, the Employer informed Swiggums that they would need to contribute \$539.38 per month to continue under the First Dollar plan.⁵ In light of this increase, ISD 108 Superintendent, Brian Corlett, advised Swiggums it would be in their economic interest to switch from a joint family health plan to individual single coverage. This was particularly true if they chose the BC/BS CCM (“CCM”) plan with a \$500.00 deductible. Under that scenario, James’ health insurance would still be fully paid by the Employer, but Nancy would have to contribute \$227.42 per month toward her single coverage monthly premium of \$532.⁶

Although the Swiggums choose to accept the CCM plan in June, 2015, the Union filed the present grievance.⁷ In essence, the Union alleges the Employer violated Article IX, Section 2 and Article X, Section 3 of the CBA and past practices by refusing to pay the Swiggums entire premium for family coverage from June, 2015 forward^[RB1].

Procedural issues raised by the Employer require additional factual background. The initial grievance was filed in the name of the Union on June 22, 2015.⁸ At the time the grievance was filed, James Swiggum had been retired for approximately six years and was neither an employee of ISD 108 nor a member of the Union. However, Nancy Swiggum was and still is a district employee and Union member. Between filing and September 18, 2015, the grievance was processed through three levels required by the CBA and, ultimately, denied by

⁴ Union Exhibit 5.

⁵ Union Exhibit 1.

⁶ Union Exhibit 2.

⁷ Joint Exhibit 4.

⁸ Ibid. It should be noted that the Union representative signing the grievance also inserted a handwritten date of “7/22/15.” However, undisputed testimony indicated this was an innocent error. There is no dispute about the actual date of filing, June 22, 2015.

the School Board.⁹ The Union requested a panel of grievance arbitrators from the Bureau of Mediation Services on October 1, 2015.¹⁰ A list was provided by the BMS on the following day.¹¹ However, arbitrator selection did not occur until seven months later on May 6, 2016.¹² Last, a summary of the Union's grievance position required by the CBA was not provided to the Employer until June 21, two days before the grievance hearing.¹³

APPLICABLE CONTRACT PROVISIONS¹⁴

July 1, 2007 through June 30, 2009 Contract¹⁵

Article VIII

Extra Compensation

Section 8, Early Retirement Benefits:

Subd. 1. The district will provide post-retirement health insurance upon retirement not to exceed ten (10) years. ... If at the time of retirement the retiree has a spouse or dependents with other health insurance, the retiree shall receive the single health/hospital insurance plan. The retiree will receive, in monthly installments, the difference between the District's single plan and the family plan contributions. For the retiree given the single health/hospital insurance plan, the District will pay the remaining amount to the retiree in monthly installments. This means the District will send out a 1099 tax statement. If at the time of retirement the retiree has a spouse or dependents with no health insurance, the retiree shall receive the family health/hospital insurance plan.

Article IX

Group Insurance

Health and Hospitalization Insurance:

Section 2. Family Coverage:

The District shall contribute a sum not to exceed \$706.06 per month for employees enrolled in the BC/BS First Dollar Plan, or \$697.46 per month for employees enrolled in

⁹ Joint Exhibits 5 through 9.

¹⁰ Joint Exhibit 10.

¹¹ Joint Exhibit 11.

¹² Joint Exhibit 12.

¹³ Joint Exhibit 13.

¹⁴ I have only included those CBA provisions I deemed relevant to the issues before me.

¹⁵ Joint Exhibit 1.

the BC/BS CMM Plan in 2007-2008 and 2008-2009 toward the premium health cost for family coverage for each eligible teacher employed by the District and who qualifies for family coverage and who is enrolled in the District' Group Health and Hospitalization Plan.

July 1, 2015 through June 30, 2017 Contract¹⁶

Article III

Definitions

Section 2. Teacher:

The term "teacher", shall mean any persons employed by the District in a position for which the person must be licensed by the State of Minnesota...

Article XV

Grievance Procedure

Section 1. Grievance Definition:

A "grievance" shall mean an allegation by a teacher resulting in a dispute or disagreement between the teacher and the District as to the interpretation or application of terms and conditions contained in this Agreement.

Subd. 3. Selection of the Arbitrator. ... Within ten (10) days after receipt of the panel, the parties shall alternately strike names, and the remaining name shall be the arbitrator to hear the grievance.

Subd.4. Submission of Grievance Information.

- a) *Upon the appointment of the arbitrator, the appealing party, shall, within five (5) days after notice of appointment, forward to the arbitrator, with a copy to the Superintendent, the submission of the grievance which shall include the following:*
 - 1) *The issues involved.*
 - 2) *Statement of the facts*
 - 3) *Position of the grievant.*
 - 4) *The written documents relating to Article XV, Section 5, of the grievance procedure.*

¹⁶ Joint Exhibit 3.

OPINION AND AWARD

The instant case involves a contract interpretation in which the arbitrator is called upon to determine the meaning of some portion of the collective bargaining agreement between the parties. The arbitrator may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the contract. The essential role of the arbitrator, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the agreement. Indeed, the validity of the award is dependent upon the arbitrator drawing the essence of the award from the plain language of the agreement. It is not for the arbitrator to fashion his or her own brand of workplace justice nor to add to or delete language from the agreement.

In undertaking this analysis, an arbitrator will first examine the language used by the parties. This objective approach "...holds that the meaning of the language is that meaning that would be attached to the integration by a reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration."¹⁷ If the language is clear and unambiguous, that is the end of the inquiry. A writing is ambiguous if judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one meaning.¹⁸

¹⁷ Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition, (2003), Chapter 9.1.B.I.

¹⁸ See *Metro Office Parks Co. v. Control Data Corp.*, 205 N.W.2nd 121 (1973).

I will first address the procedural issues. The Employer argues that the Union did not commence the arbitrator selection process within 10 day after receiving a panel from the Bureau of Mediation Services and, as a consequence, the case should be dismissed as untimely. The parties received the panel on October 2, 2015.¹⁹ Documents presented at the arbitration indicate the Union requested a meeting to strike arbitrators on January 6, 2016, over two months later.²⁰ It appears final selection was not made by the parties until May 6, 2016.²¹ Dismissing the case on these facts would elevate form over substance. Article XV, Subd. 3 states, “*Within ten (10) days after receipt of the panel, the parties shall alternately strike names...*” (Emphasis added). Clearly, the CBA places the burden of commencing arbitrator selection equally on both parties. It would be manifestly unjust to punish one party where neither made any effort at selection within the 10 day period mandated in the CBA. Where there is a shared duty, one party cannot sit on its hands and seek to punish the other party for doing the same thing. In this case, both parties violated the CBA time limit. Under the facts before me, I find the Employer’s inaction constitutes a waiver of the CBA arbitrator selection time limit.

The Employer next objects to arbitrability based on the Union’s failure to comply with the CBA requirement to submit grievance information to the Arbitrator within five days after notice of appointment.²² In this case, the information was supplied to the arbitrator just two

¹⁹ Joint Exhibit 11.

²⁰ Joint Exhibit 12.

²¹ Ibid.

²² Joint Exhibit 3, Article XV, Sec. 8, Subd. 4 a.

days before the hearing and months after notification of selection. This is a unique provision, the first I've encountered in over ten years as an arbitrator.

Giving the arbitrator advance knowledge of the grievance issues appears to be its primary intent. In view of the lengthy discussions and preliminary grievance steps attended by both sides, I find it difficult to believe either side was ignorant of the other's position. As a practical matter, arbitrators rarely, if ever, learn in detail about grievance issues prior to the hearing. Informing the arbitrator of pending issues in advance, be it two months, two days, or two minutes, makes little difference in the arbitral process. Evidence adduced and exhibits accepted at the hearing plus subsequent briefing and research is all that is needed for an informed arbitral decision. In point of fact, the material was provided to the arbitrator by the Union two days prior to the hearing. Interestingly, the CBA makes the Employer's duty to provide material to the arbitrator in advance optional.²³ While the submission was, indeed, late, I find no prejudice to the Employer in the Union's delayed compliance. Again, it would be manifestly unjust to deny the opportunity for grievance resolution on so thin a reed. Thus, I find the matter to be properly before me and ripe for determination.

The last procedural issue relates to retiree James Swiggum. The Employer contends that the CBA grievance clause is no longer available due to his retirement. I agree. This grievance was brought in the Union's name rather than either James or Nancy Swiggums'. This appears to be a fig leaf designed cover and evade clear case law. James Swiggum is no longer a "teacher" employed by the district as defined by Article III, Section 2 of the CBA. Consequently, he no

²³ Joint Exhibit 3. Article XV, Sec. 8, Subd. 4 b.

longer has access to the CBA arbitration provisions. His vested contract rights are controlled solely by the CBA in effect at the time of his retirement. These rights, if any, are now only enforceable in state courts.²⁴

On the other hand, Nancy Swiggum was in 2009 and still is employed as a teacher by ISD 108. As a result, she is entitled to all employee rights secured by the past and current CBAs including arbitration of grievances. At the hearing, both parties acknowledged that Nancy Swiggum is the only current district employee with an immediate stake in the outcome of this grievance. Thus, I find that, insofar as the present case only affects Nancy Swiggum's rights, she is the *de facto* grievant. Finally, I find this grievance is properly before me for resolution.

In my view, determination of this grievance on the merits also turns on contract language. In essence, the Union argues that Article VIII, Section 8 of the 2007-2009 CBA combined with the January 13, 2009 memo from the District payroll clerk, Linda Eischens, entitles James and Nancy Swiggum to free family health insurance for 10 years or until James qualifies for Medicare.²⁵ I disagree for several reasons.

While Article VIII, Section 8 in the 2007-2009 CBA contains no dollar limit on the District's contributions, Article IX, Section 2 in the same CBA caps their exposure for family coverage at \$706.06. It is hornbook contract and labor law that a CBA must be interpreted as a whole document.²⁶ Article VIII, Section 8 simply states, "...the retiree shall receive the family

²⁴ *Housing and Redevelopment Authority of Chisholm v. Norman*, 696 N.W.2d 329 (Minn. 2005). See also *Adams v. Independent School District No. 316*, 2008 WL 2573660 (Unpublished Minn. App, 2008) Further, the determination of whether or not James Swiggum is entitled to higher district contributions to health insurance contained in CBAs subsequent to his retirement is not an arbitrable issue.

²⁵ Union Exhibit 4.

²⁶ National Academy of Arbitrators, *The Common Law of the Workplace*, Second Edition (2005), §2.10.

*health/hospital insurance plan.” It does not say the retirees shall receive it free or without limitation. Reading the CBA as a whole requires inclusion of the Article IX, Section 2 provision capping the District contribution to the plan at \$706.06. That provision makes no exception for retirees. All of the applicable CBAs state, “*The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written Agreement...*”²⁷ Accepting the Union interpretation would require a change to what I view as the plain language of the contract.*

With the exception of the current contract, all subsequent CBA provisions relating to early retirement benefits specifically limit the District’s contribution to \$706.06 per person per month for First Dollar family health insurance.²⁸ Superintendent Corlett testified, and the Union did not rebut, that subsequent CBAs merely codified a practice that was previously understood by all parties. Next, there is no evidence that the ISD 108 payroll clerk had the authority to interpret or modify the contract when she wrote to James Swiggum, “... *the district will pay full First Dollar family health insurance until you qualify for Medicare (age 65).*” The phrase, “...*will pay full...*” appears nowhere in the CBA and would have the effect of modifying the contract. Acceptance of the Union position would require believing Eischens had authority to make such a change. On the contrary, Supt. Corlett gave unrebutted testimony that Ms. Eischens did not have such authority. Accepting Ms. Eischens’ letter as true would, again, require reading provisions into the CBA that simply are not there. The Union presented no

²⁷ See Joint Exhibit 1, Article XIV, Section 8 and Joint Exhibit 3, Article XV, Section 8.

²⁸ Union Exhibit 3, Joint Exhibits 2 and 3. (In Joint Exhibit 3, the current CBA, Article X, Section 2 increases the District’s contribution to \$750 per month for “*employees*” which would exclude James Swiggum.)

evidence beyond the payroll clerk's letter to support their interpretation of the contract. Further, they presented no evidence of a contract-modifying past practice.

How does the above analysis affect Nancy Swiggum? She is still employed by the District and has the right to the Union negotiated CBA arbitration process. From the time of her husband's retirement to the present, she is bound by the rights and limitations to employee health insurance set out in the contract. There is no CBA promise she would receive health/hospitalization insurance free of charge until her husband was eligible for Medicare. Every CBA from 2007 to the present caps the District's contributions to employee health insurance. That was true in 2009 and remains true today. However, as a currently employed teacher, she is entitled to subsequent raises in the District's health insurance contributions as stated in the current CBA.²⁹ The record indicates the District has acted accordingly and honored its contractual obligations.

In summary, James Swiggum is no longer employed by the District and, therefore, does not have access to the arbitration process. His retirement rights can only be adjudicated in a court of law. Nancy Swiggum is a current District employee and does have grievance arbitration rights. I find that she is subject to the CBA caps on District contributions to her health insurance at all times from 2009 to the present. While constantly rising health insurance costs present thorny economic problems for both employers and employees, both are bound by their freely negotiated collective bargaining agreements. Based on the clear contract language and facts before me, I see no alternative to denying this grievance.

²⁹ Joint Exhibit 3, Article X, Section 1.

Having found no basis to sustain the grievance, the issue of awarding monetary damages is moot.

AWARD

The grievance is DENIED.

DATED: _____

Richard A. Beens, Arbitrator