

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration

between

Board of Education of Howard County,

Employer

and

Howard County Education Association,

Union

AAA Case No.
16-390-00461-03

OPINION & AWARD

(Grievance of
Steven Ney)

APPEARANCES

For the Employer:

Mark C. Blom, Esquire, General Counsel
Mike Johnson, Finance Officer

For the Union:

James R. Whattam, Esquire, Counsel for MSTA
Marius Ambrose, UNISERV Director
Steven Ney, Grievant

Arbitrator:

Louis Aronin, Esquire

The instant grievance, involving the question of whether the Employer failed to properly pay health insurance to cover Grievant, Steven Ney, was heard before the undersigned duly selected Arbitrator at Ellicott City, MD, on January 6, 2004. All parties were given a full opportunity to present oral and documentary evidence, to examine and cross-examine witnesses, and to present their positions orally at the hearing.

RECEIVED

FEB 4 2004

OFFICE OF THE GENERAL COUNSEL

Based on the evidence and the parties' positions, the undersigned makes the following findings and Award.

ISSUE

1. Was the Grievance timely filed?
2. If so, did the Employer violate the parties' Agreement by failing to start health insurance for the Grievant until October 1, 2002, when the Grievant started to work on August 20, 2002? If so, what is the appropriate remedy?

BACKGROUND

The evidence reveals the following:

1. Grievant started his employment with the Employer on August 20, 2002. His health insurance did not start until October 1, 2002.
2. The Grievant advised his Union representative, shortly after he started to work, that he learned he did not have health coverage as of his starting date.

The Union representative, Mr. "A", testified that this issue had never before been raised in his 25 years of representing Howard County employees.

Mr. "A" stated that he discussed the failure to provide health insurance to Grievant, as of the date of his employment, with the Employer's finance officer and learned that coverage, for new employees beginning their employment with the start of the school year, began on October 1, and ran for one full year.

Mr. "A" testified that he discussed this matter with the Board of Education, including repayment to Grievant for health insurance coverage that Grievant had obtained.

Mr. "A" stated that, in early May 2003, he first learned that the Employer would not pay Grievant for his costs to obtain coverage. He testified that, only after learning the Board would not make Grievant whole, he filed the instant grievance, dated May 5, 2003.

3. The Employer's response at Step 1, dated June 9, 2003, was that the coverage was consistent with the parties' past practice.

The second step response, dated July 11, 2003, noted that the grievance was untimely and that there was no violation of the parties' Agreement because the practice was reasonable and well established.

4. The demand for arbitration was filed with the AAA on July 23, 2003, and a copy was provided to the Employer's counsel.

5. The Employer's Finance Officer, Mr. "J", testified that he has handled payroll and benefits for the Employer for 29 years.

He testified that the health insurance coverage begins October 1 and ends September 30 of each year.

He stated that the Employer had a "cafeteria" plan, regarding health insurance, which permitted employees to select among several options. The open enrollment period, during which time employees exercise their options for health insurance, occur annually and is different than the Plan Year, which is October 1 to September 30.

He testified that the Plan Year for health insurance has been consistent since 1984 (1985-1986 school year) and that, prior to that time, the Employer had a single health insurance plan rather than providing employees with options.

6. Mr. "J" testified that, since 1985, if an employee leaves on June 30, they still receive coverage until September 30 of that year.

He also stated that, if an employee started after October 1, i.e., in May, the employee would receive health insurance as of the date of their employment.

7. The Employer's finance officer testified that, if the health insurance became effective with the date of employment, the result would be a chaotic and overly burdensome problem for the personnel staff, who are getting new teachers on payroll at the start of the school year, i.e., August, and are unable to also process health insurance.

He stated that, at one time, the Employer considered making the health insurance effective September 1 and rejected that because it would involve a one-time cost of \$175,000.

8. The Employer's finance officer stated that, if the Employer moved to a Plan Year starting September 1, employees would be denied coverage for one month.

9. Mr. "J" testified, on cross-examination, that an employee, who started May 20 of any year, would receive coverage on June 1 of that year. That employee would make a selection from the available options and then be bound by that until the next open period.

He testified that, if a 12-month employee started June 1, the health insurance would begin July 1 of that year.

9. The finance officer testified that, if the Employer changed to a September 1 date, it probably would have to renegotiate coverage with its HMO.

10. Mr. "J" stated that an employee starting before October 1 of any year, has no insurance coverage until October 1 and that the coverage continues for one year until September 30, even if the employee quits before September 30.

PERTINENT AGREEMENT PROVISION

Article III – Grievance Proceeding

C. Any grievance shall be presented at Step 1 in writing, signed by the grievant, within twenty (20) school days from the date of its occurrence, or the date when the grievant knew or should have known of its occurrence. The Administrator's answer at each Step shall be given in writing within seven (7) school days after each step meeting, which shall be held within seven (7) school days following receipt of appeal. Unless a grievance is appealed to the next step within seven (7) school days of the Administrator's answer, it shall be deemed settled in accordance with the Administrator's answer, which shall be considered acceptable to the grievance and the Association.

In the event the grievant and the Association are not satisfied with the disposition of a grievance at Step Two (2), the grievance may be submitted by the Association within thirty (30) school days to binding arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association. The parties further agree to accept the arbitrator's award as final and binding upon them. Grievances filed by the Association are not subject to binding arbitration.

...

**ARTICLE XXII
INSURANCE PROTECTION**

A. Life Insurance

The Board shall pay the full cost for group term life insurance protection equal to a teacher's base salary (to the nearest thousand), with a minimum of ten thousand dollars (\$10,000) to be paid to the teacher's designated beneficiary upon death and, in the event of accidental death, a sum not less than two (2) times that amount.

B. 84-85 Medical/Dental Program

The Board shall pay ninety percent (90%) of the cost of a group medical, surgical, and major medical insurance plan for each teacher and dependents, if any, as governed by the insurance carrier. A teacher may select any insurance coverage alternative as to dependents as provided in the plan. The health insurance benefits included in the 1983-1984 plan shall be maintained.

For each teacher enrolled, the Board shall pay ninety percent (90%) of the premium cost for an individual Dental Program. The teachers may elect to purchase dependent coverage.

C. Variety of Insurance Program (VIP) Medical, Dental, and Vision Program

1. Teacher Election of Variety of Insurance Programs (VIP)

a. Each year during open enrollment, as established by the Board, each teacher will be required to make an election between participating in the VIP program or continuing his/her participation in the 1984-85 (XXIII, Section B) medical/dental programs.

Teachers hired after July 1, 1993, may not select the "Traditional Medical Plan."

b. This election will be irrevocable for the Plan Year (October 1 to September 30).

c. Each open enrollment period, as established by the Board, teachers who are still participating in the current insurance arrangement will be given an opportunity to participate in the VIP Program.

d. Once a teacher elects to participate in the VIP Program, he/she will not be allowed to participate in the prior insurance arrangement.

e. All new and/or rehired teachers, with a reporting date after June 30, 1985, will not have the opportunity to make this election but will automatically participate in the VIP Program when eligible.

f. The 1984-85 insurance arrangements is as follows:

...

2. Teacher Selection of Optional Benefits Under the VIP Program

a. If a teacher elects or becomes eligible to participate in the VIP Program, he/she must select among the optional benefits offered as part of the VIP Program. These optional benefits include:

- (1) One of two Medical Plans (see attachment) or one of several HMO options.
- (2) One of two Dental Plans.
- (3) Vision Care Plan with a 12-month benefit period (see attached).
- (4) Dependent Care Account.
- (5) Health Care Spending Account
- (6) Benefit Dollars in Cash

b. The selection of optional benefits is an irrevocable election for the entire Plan Year except the election may be revoked and a new selection of benefits made if the teacher has a change in family status (e.g., marriage, divorce, death of spouse or child, birth or adoption of child, or termination of employment of spouse). This applies not only to participation in the insured programs, but also to the level of participation in the Dependent Care Account and the Health Care Spending Account.

c. Each open enrollment period, as established by the Board, teachers electing or eligible to participate in the VIP Program will be given the opportunity to change the benefits they have selected. Each year teachers will be informed of any changes in the VIP Program. This will give each teacher the chance to review and compare various benefit alternatives in

order to make the proper selection during the open enrollment period.

d. Each Medical Plan alternative (including electing no Medical Plan) will have a specified number of "benefit credits" associated with its selection. These benefit credits may be used to purchase any of the optional insured benefits (Vision and Dental Plans or teacher contributions for medical coverage) or contribute to the Dependent Care Account or Health Care Spending account.

e. Each insured benefit option (Medical, Vision, and Dental Plan) will have a "price tag" or cost to a teacher if that particular benefit is selected. Benefit credits may be used to purchase or pay the price of each insured's benefit selected. Amounts contributed to the Dependent Care Account or Health Care Spending Account are optional with teachers choosing to contribute any amount within the plan limits. Teachers may, however, purchase benefits whose total price tags exceed their benefit credits. In this case, the teacher must make up the difference through teacher contributions. All contributions to the VIP Program will be on a pretax basis. This means that federal and state income taxes will not be withheld on teacher contributions nor will these contributions be included in teachers' gross wages as reported on W-2 Form. FICA tax will not be withheld. Teacher contributions will be included in the annual salary for retirement and life insurance purposes.

f. Participants in the Dependent Care Account must meet tax law requirements in order to participate in this plan. Contributions may only be used to reimburse a teacher for expenses actually incurred during the Plan Year for which they were contributed. Any amounts remaining in the Dependent Assistance Account at the end of the Plan Year will be forfeited.

g. The Health Care Spending Account will operate similar to the Dependent Care Account. The most important facts are that amounts contributed may only be used to reimburse expenses incurred during the Plan Year for which they were contributed, and amounts remaining at the end of the Plan Year will be forfeited.

h. Teachers may elect to receive their unused benefit dollars in cash, which will be added to their regular paycheck. If the teacher elects this option, the payments will be prorated on a per-pay basis. This amount is taxable.

i. Total teacher contributions and employer contributions to the Dependent Assistance Plan and/or Health Care Spending Account will all be prorated on a per-pay basis.

j. Teachers hired during the Plan Year will make their selection in advance of becoming eligible for VIP Program benefits. This election will be in effect for the remainder of the Plan Year (except for a qualified life status change creating a special enrollment period for individuals who did not enroll in a group health plan when they were first eligible due to the existence of alternative coverage).

POSITIONS OF THE PARTIES

Timeliness

The Employer asserts that the grievance was not timely filed, where the Grievant knew of the alleged violation when there was no deduction from his payroll for health insurance on October 2, 2002. It contends the grievance was not filed until 8 months later, despite the 20-day limitation in the parties' Agreement.

It argues that there is no provision for tolling of time limits, during the processing of the grievance, and that no written extension was granted by the Employer to file the grievance beyond the contractual time limits.

The Union contends that the grievance is timely because it was a continuing violation; the Employer was aware of the grievance because of discussions between the Union's representative and the Employer's representative for a period of time and that the Union did not file a formal grievance until settlement efforts failed.

The Union argues that it did not sit on its rights. It contends that the Employer proceeded to arbitration, thus waiving its right to contend that the grievance was not timely.

Merits

The Employer contends that Article XXII, Section C.1.b. of the parties' Agreement, defines the Plan Year as October 1 to September 30. Thus, it argues that the employees and the Union were aware of the Plan Year.

The Employer asserts that any change in the Plan Year will cost the Employer \$175,000, and create a major administrative problem, if staff had to get new employees on the payroll and also enroll them in the health insurance plan.

It contends that, pursuant to the Management Rights Provision, it had the right to continue the plan.

It argues that, if it makes a change, either employees are denied full yearly coverage or that they will get an extra month of coverage, September 1 to October 1, giving employees unjust enrichment.

It contends that changing the coverage to September 1 would adversely impact 5,300 employees and enrich only one employee, Grievant.

The Union asserts that the Employer need not change the Plan Year to provide coverage for employees who start prior to the start of the Plan Year.

It notes the current practice of providing coverage for mid-year hires without waiting for the coverage to start October 1.

It contends that coverage should start when employment starts, since the contract requires that all employees shall be covered and there is no requirement for 13 months of coverage.

It argues that administrative problems do not constitute a basis for not making a change in the effective date of the insurance.

DISCUSSION AND ANALYSIS

Timeliness

The parties' Agreement does provide for filing a grievance, in writing, within 20 school days of the date of occurrence. In the instant matter, the date of occurrence is probably September 1, 2002, the first paycheck after Grievant started, August 20, 2002. Thus, arguably, the instant grievance, filed May 5, 2003, was clearly untimely. However, the evidence indicates that the Employer was aware of the matter being grieved shortly after October 1, 2002, when the Union's representative, Mr. "A", started discussions with the Employer's finance officer regarding repayment to Grievant for his costs to obtain insurance for the two-month period prior to October 1, 2002. Thus, the Employer was aware of the issue within the time frame provided by the parties' Agreement for filing a formal written grievance.

Although a salutary effect is achieved by requiring absolute compliance with the time limits set forth in the Agreement, strict adherence to those time limits, which result only in prejudice to the Grievant, serve an undesirable purpose.

Where, as here, the Employer was aware of the issue raised in the grievance in a timely fashion and has not shown prejudice resulting from a consideration of the grievance filed May 5, 2003, to find the grievance untimely would place form over substance. We shall not sit at the altar of form and ignore substance and equity.

In fact, the Employer did not insist on the timeliness of a formal written grievance to discuss the issue raised in the instant matter. That, in the view of the

undersigned, is a further reason for viewing the grievance as properly before the undersigned.

Additionally, it may be argued, with some validity, that this is an on-going matter, in which proper insurance coverage is not being provided as required by the parties' Agreement.

Based on all of the above, we find that the grievance is properly before the undersigned.

Merits

The parties' Agreement provides that the "Board shall pay 90% of the cost of a group medical, surgical and major medical insurance plan for each teacher..." The Agreement then provides for an open enrollment period, during which time teachers may make an election between several plans.

It provides the election will be irrevocable for the Plan Year (October 1 to September 30).

It provides for certain types of insurance that shall be available and has distinctions between teachers hired after July 1, 1993, and for those who were employed, or rehired, after June 30, 1985.

There is a "cafeteria" plan in the Agreement with specific limitations.

The only references to the "Plan Year" are in Article XXII C.1.b., where the dates of October 1 to September 30 are designated, and in Article XXII, Subsection C.2, where it deals with the employees' exercise of options during the open enrollment period being fixed for the Plan Year. It notes an exception to the binding

nature of the election if there is a change in family status. It also provides for coverage for employees hired after the start of the Plan Year.

The Agreement refers to teachers, hired during the Plan Year, making their elections in advance of being eligible for VIP program benefits.

The sole reference to the Plan Year, being October 1 to September 30, is in a parenthetical statement in Subsection C.1.b. and that is in the context of the election that is made during the open enrollment period that the Board shall establish, and as to which there's no fixed contractual date or period.

On the whole, we have difficulty concluding that the Plan Year, of October 1 to September 30, mandates a conclusion that employees, hired before October 1, must wait until that time to be covered by insurance. A literal reading of the references to the Plan Year deals with the deviation of the election made by a teacher during the open enrollment period. They do not preclude coverage and an election from options at time of hire. In fact, Article XXII, C, 2, j provides that teachers hired during the Plan Year may make their election prior to becoming eligible for the VIP plan and that election will be effective for the rest of the Plan Year unless there is a change in the employee's "life status".

In fact, the record reveals that teachers hired in May are covered effective June 1, i.e., the next full month. Thus, the Plan Year, of October 1 to September 30, is not a fixed immutable period, barring insurance starting before October 1, or at a different time than October 1.

The evidence reveals that employees are covered for the entire 12 months, October 1 to September 30, regardless of the duration of their employment. Thus,

an employee, terminating their employment on June 30, the end of the school year, remains insured, and pays premiums for 3 months, i.e., July, August, and September, even if they obtain another job.

The result is rather ridiculous, because it results in double coverage, double payment, but the employee can only collect on one policy.

Conversely, as in the instant matter, an employee, who starts August 20, has no insurance for almost 1-½ months, August and September, and has to purchase their own insurance. Conversely, as the record reveals, an employee starting May 20 gets insurance June 1 and waits a shorter period and is not barred by the October 1 to September 30 Plan Year.

The Employer's explanation for this system, of not providing insurance for employees starting in August, the start of the new school year, is the administrative problem associated with getting new employees on payroll and also getting them covered by insurance.

We find no basis to conclude that the administrative burden warrants perpetuating the inequities of employees not having health insurance from the date of employment, or shortly thereafter, and also having insurance and paying for insurance after they leave the Employer's employ.

The contract does not mandate that insurance is limited to the period of October 1 to September 30 and, in fact, the Employer's practice permits deviations by starting insurance for employees hired during the school year to start the following full month.

Thus, we find that the Employer violated the parties' Agreement by failing to provide insurance for Grievant, on or about August 20, 2002, and requiring Grievant to obtain insurance for August and September 2002.

The Employer shall be required to start health insurance from the date that an employee commences employment; or within a reasonable period of that starting date, without reference to the Plan Year of October 1 to September 30.

Since our charter does not deal with the coverage other than the starting date of insurance coverage we shall not address the matter of coverage which continues beyond the employees employment and the potential inequities in that policy. ✓

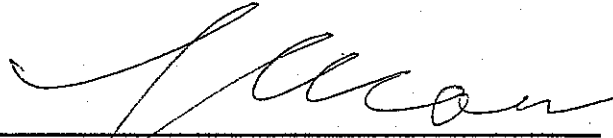
We find that Grievant is entitled to be made whole for all expenditures that he made to obtain health insurance coverage for the period August 20 to October 1, 2002.

AWARD

Based on the evidence, the parties' positions, and the discussion set forth above, the undersigned makes the following Award:

1. The Employer violated the parties' Agreement by denying Grievant, Steven Ney, health insurance coverage from the date of his employment until October 1, 2002.
2. The Employer shall make Grievant whole for all expenditures for health insurance for the period from the date of his employment to October 1, 2002, when he did receive health insurance coverage.

January 26, 2004



Louis Aronin
Arbitrator