

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD
ARBITRATION PROCEEDINGS
CASE #A2005-144
STAGE II-APPROPRIATE REMEDY

In the Matter of the Arbitration Between

BOARD OF EDUCATION,
BUFFALO, NY PUBLIC SCHOOLS

- and -

BUFFALO TEACHERS FEDERATION, NEA-NY

Subject: Remedy for the
Proven Violation of CBA
Article XXVI(2)(A)(1)

Dana Edward Eischen, Arbitrator

Appearances

For the Federation: Robert W. Klingensmith, Jr., Esq.
Jerry A. Gambino, Esq.

For the Employer: Damon & Morey, LLP
By:
James N. Schmidt, Esq.
On the brief:
Christopher D. Ahlers, Esq.
Mollie L. Mallia, Esq.

Also Present

For the Federation: Philip Rumore, BTF President
Robert Sacks, NEA Consultant

For the Board: Patricia A. Pancoe, Esq.
Executive Assistant for Labor Relations

PROCEEDINGS

This is Stage II of a bifurcated arbitration proceeding of BTF Grievance No. 04-076 (dated May 20, 2005 and amended June 7, 2005), which alleges “Board Resolution IX D38 (adopted May 11, 2005 and implemented September 1, 2005), violated the current CBA; including but not limited to Articles XXVI(2)(A)(1); XXXVII; and XXXIX D, F.” [Board Resolution IX D38 was not actually implemented until September 1, 2005 due to litigation- -including an Erie County Supreme Court grant of a conditional injunction pending arbitral disposition of grievances filed by BTF and other affected labor organizations- - which was vacated when the Court's condition of a bond undertaking was not met].

BTF Grievance No. 04-076 claimed that the District violated the CBA when it “shifted” all health care coverage provided under Article XXVI(2)(A) to a single health insurance carrier, Blue Cross/Blue Shield of Western New York (“BC/BS-WNY”), unilaterally implemented steps to enroll all employees covered by Article XXVI(2)(A) with BC/BS-WNY as the single-carrier for all health care coverage and stopped allowing teachers “the option of participating in one of the three Health Maintenance Organizations, Independent Health (Encompass/Gold Plan), Community Blue 1 or Univera-Choice Care”. The remedy sought in that grievance was as follows: “District should immediately cease and desist from changing health care providers. All carriers that are specified must be made available as per CBA. All affected individuals and dependents made whole”.

Following a February 1, 2006 arbitration hearing and consideration of post-hearing briefs, I issued a Stage I Interim Award and Opinion, dated March 30, 2006, which sustained BTF Grievance No. 04-076 on its merits and retained jurisdiction for additional proceedings to determine what, if any, appropriate remedy should be awarded for the District's violation of Article XXVI(2)(A). That Stage I Interim Award reads as follows:

INTERIM AWARD OF THE IMPARTIAL ARBITRATOR

NYS Public Employment Relations Board Case #A2005-144 (BTF Grievance No. 04-76)

- 1) The District violated Article XXVI(2)(A)(1) the Collective Bargaining Agreement when it unilaterally implemented the "Health Insurance Resolution" it had adopted on May 11, 2005.
- 2) In accordance with the joint request of the Parties, jurisdiction is retained to receive further evidence at additional hearings now scheduled to commence on April 11, 2006 and to determine what remedy, if any, is appropriate in this case.

The Opinion which accompanied that Stage I Award reads in pertinent part as follows:

The clear and unambiguous language of CBA Article XXVI (2)(A) obligates the District to provide teachers with the option of the specified four different carriers. The Maintenance of Benefits clause obligates the District to continue the past practice of providing teachers with the option of the specified four carriers. It appears evident beyond reasonable contention that dropping three of the four carriers specified in the CBA and shifting to single-carrier health care coverage constitutes unilateral modification of the contract language by the District. Just as incontrovertible, that change was not done by an instrument in writing signed by both parties but rather, as the Board's May 11, 2006 Resolution recites, by unilateral action over the clearly expressed objections of the Union.

Based on all of the forgoing, I conclude that the Federation met its burden of proving *prima facie* violations of the CBA, as claimed in BTF Grievance No. 04-706, when the District effectively re-wrote the literal language of Article XXVI(2)(A) unilaterally and over the express objections of the other party to that Agreement. Judgement is reserved on the issue of appropriate remedy, which could include, but is not limited to: remand to the Parties for attempted resolution, a cease and desist order, restoration of the *status quo ante* and/or "make-whole" damages. . . . In accordance with the joint request of the Parties, jurisdiction is retained to receive such evidence at additional hearings now scheduled to commence on April 11, 2006 and to determine what remedy, if any, is appropriate in this case.

Subsequent days of transcribed arbitration hearings were held on April 11, June 5, June 6, June 26, June 27 and July 1, 2006, at which time the Parties had full opportunity to present testimony and documentary evidence in support of their respective positions on the remedy issue . The record was closed for Stage II of these proceedings with the submission and exchange of another set of post-hearing briefs, devoted solely to the issue of appropriate remedy for the proven breach of the Agreement by the District.

POSITIONS OF THE PARTIES

The following statements of position are edited from the respective Stage II post-hearing briefs:

Federation

The arbitrator has already ruled in his earlier written decision that the District has violated the CBA. The focus of the matter now is, per the direction of the arbitrator: "...what is the appropriate remedy to correct and rectify the violation..." (tr. 6/27/06, p 31, lines 15 - 18; see also Jt Ex 12, p. 18). The Union asserts that the appropriate remedy for the violation of the CBA includes (1) specific performance (a/k/a "restore the four") which restores the *status quo ante*; (2) reinstate the people who were laid off in furtherance of the violation; (3) distribute any additional or remaining savings to those deprived of the choice required by the CBA; and (4) individual dollar damages for out-of-pocket costs (which have been deferred to the retained jurisdiction of the arbitrator).

In the merits case, the District had claimed that there was a "replication" of the plans provided by the single carrier which satisfied its duty under the CBA. The arbitrator has ruled against that claim but now, in the remedy portion of the present arbitration, the District claims that "replication" obviates the need to remedy the breach which has already been found. Even though the plain and unambiguous language requires otherwise. The District asserts that "replication" of what it considers "the coverage" satisfies the contract, if not as performance, then as remedy. When contract language is clear and long contract practice under that language is clear, it is little short of duplicity to claim it means something else. The loss of the choice of four insurance carriers cannot be remedied by provision of a medical coverage the District says is "the same" even if it were "the same". The arbitrator ruled that the burden is on the District to prove this contention. The Union asserts (1) that replication is irrelevant, (2) that replication cannot be a remedy, and (3) that, in any event, there has been no replication.

The Union submits that one part of a proper remedy must include "Restore the Four", *i.e.*, specific performance (by providing the teachers the choice of three HMOs from the three different companies (community Blue, Independent Health and Univerra) and "the Plan" (which is the indemnity plan administrated by BC/BS). Also, the Union has shown that the appropriate remedy requires returning to work and making whole the teachers laid off in furtherance of the District's switch to a single health provider, plus an award directing the District to pay to the BTF members the improper savings which the District reaped as a result of the improper switch to a single health insurance provider. [By stipulation of the Parties, issues concerning individual dollar damages have been deferred for possible Stage III arbitration].

The relief sought by the BTF should be granted in its entirety. Every iota of evidence shows the District's violation of the CBA was flagrant, deliberate, done consciously and intentionally. The District's conduct was doubly egregious because it chose to violate the contract while it was well into negotiating for the very change it imposed unilaterally. The

District acted with arrogance and condescension in its open and defiant choice to dishonor the contract it had made, apparently believing that they would retain their unjust rewards.

This is not a matter of ambiguity where there may be a doubt and thus a benefit of the doubt. This was conscious and deliberate conduct. The District could have sought a declaratory judgment from a court to see if it could legally do what it did. The District did not respect the contract enough to do that. The District has involved all of us in a shell game. The contract requires the District to provide a choice of four carriers but instead the District chooses to provide a "benefit". It is as though the contract required the District to provide a Buick, as though the District kept the money instead of getting the Buick, and says we will reimburse you for cab fare (with the proviso that you document the trip to our satisfaction). This is called a "bunko" game.

This is not a situation where "reasonable minds" could disagree on what the District's contractual obligation is. This is not a situation where a well-intended administrator makes a judgment call that turns out to be wrong. This is an entire governmental entity which deliberately and knowingly chose to violate the legal obligation it had undertaken in this and prior contracts and had honored for at least two contracts. The District then compounded the harm by laying off bargaining unit employees as a hedge because it anticipated that any impartial arbitrator would reject its wrongful act. The District to date has not restored the choice or reinstated the wrongfully laid-off bargaining unit employees and it continues to accumulate its ill-gotten rewards.

While not in any fashion a defense to a violation of the contract the District has predicated its explanation in part upon an alleged need to close the gap in its spending plan. This "gap" is a product of a Control Board restriction that the District must project cost increases but is forbidden to project revenue increases, even though there have been and continue to be such revenue increases. The "rule" that the District cannot project revenue increases does not mean there were none. Indeed, the CEO testified the budget increased \$100 million or more each year. The reality is that there were substantial revenue increases every year. See Tr. 6/6/06 p. 97-8; 100-101 This is more of the smoke and mirror game the District is using. All of the relief sought by the BTF is essential to restore (or compensate for the loss of) the status quo ante and to undo the harm the District deliberately created. A strong message must be sent.

Employer

No doubt the Union will argue that having found a breach of contract, the Arbitrator must necessarily impose a remedy. But any remedy should be tailored to the special circumstances of this case, where a technical breach of the Agreement has not resulted in any compensable harm. While a few of the Union members indicated they had to pay out-of-pocket expenses they would not have had to pay before the change, they have all been made whole. Others testified that they could not continue to see the same provider, or receive the same health service, however these concerns were fully remedied. Indeed, in a project of this magnitude it was inevitable that there would be a few disruptions in the continuity of coverage, due to misunderstandings or mis-communications regarding the scope of coverage.

But those disruptions have all been resolved, without any long-term harm to members of the Union. Further, the District has committed to make whole any member who has suffered an out-of-pocket loss and the Parties have stipulated that this Arbitrator should retain jurisdiction to resolve any contested claims for reimbursement. Only in the final stages of the proceeding, through its attorney, did the Union state it was seeking the following remedies: (1) the restoration of the choice of four carriers, (2) a distribution to the Union of the "value of the choice", in the form of damages equal to the money saved by the District in selecting a single carrier, (3) "making whole the people who were laid off in furtherance of the breach of the Agreement", and (4) compensation for deprivations incurred under the single carrier coverage that they would not have incurred under their prior coverage. However, the Union provided no substantive legal arguments in support of the remedies it belatedly sought.

The District currently faces a severe and crippling budget deficit, which is only becoming progressively worse with the passage of time. It is under a significant amount of pressure from the Buffalo Fiscal Stability Authority to submit a balanced budget. The District has affirmatively tried to close its enormous budgetary gaps without drastically reducing staff or eliminating essential academic programs. With no other viable solution, the District made the responsible decision to effect significant savings by changing to a single health carrier. Under the single carrier, Union members continue to have a choice among the same four plans, and there has been no change in benefits. Any remedy imposed by the Arbitrator should be narrowly tailored to minimize the financial impact on the District.

Because of the significant public policy considerations involved in this dispute, and because any change in coverage was merely *de minimis*, the Union is not entitled to restoration of the *status quo ante*. An award of specific performance cannot be granted because an adequate remedy exists at law and because specific performance would place a disproportionately large burden on the District, while providing little benefit to Union members. As demonstrated through the District's exhibits and testimony, the District has replicated each plan, and has reimbursed Union members for all out-of-pocket expenses. Further, the District's commitment to replication of health insurance benefits and reimbursement is ongoing, and the District will continue to make whole any Union member affected by the change.

In addition, the Union is in no way entitled to payment of the money saved from the selection of a single carrier because it is an untimely request, there is no legal basis justifying such a payment, and because such a remedy would constitute punitive damages. Punitive damages are not an appropriate remedy in a contract dispute, nor are they an appropriate remedy against a public corporation with an essentially public function.

The Union's claim regarding the restoration of individuals laid off on or about September 1, 2005 has no place in this dispute over the administration of health insurance benefits. There is no causation between the selection of a single carrier and the layoff of those individuals. They would have been laid off even if the District had not changed to a single carrier.

Based on the foregoing, the Arbitrator should reject the Union's request for a return to the *status quo ante*, punitive damages in the form of the savings realized by the District through the change to a single carrier, and the reinstatement of Union members laid off.

OPINION OF THE IMPARTIAL ARBITRATOR

In the Stage I Award, I held that the District violated the Article XXVI(2)(A)(1) the Collective Bargaining Agreement when (effective September 1, 2005) it unilaterally implemented the "Health Insurance Resolution" it had adopted on May 11, 2005. The District made that blatant power play after the BTF rejected the District's proposal during contract renewal negotiations that the Parties mutually undertake such a modification of the the clear contract language of their CBA. (The District's resort to unilateral imposition of its cost-cutting "single-carrier" bargaining proposals was preceded by failure or inability to offer a sufficiently enticing *quid pro quo* "carrot" to induce BTF agreement and the Union's rejection of a District ultimatum to "agree or else").

It is evident that the Board initially threatened unilateral action as a bargaining ploy but then carried through on its threat out of frustration or desperation when it failed to induce or compel Union agreement to the change-over. There is no doubt that the District is in severe financial straits but it was not a legally viable option for the Board to ignore the language of the Agreement by unilaterally imposing and implementing the change-over to a single insurance carrier.

As indicated in the Stage I Opinion and at the Stage II hearings, the presumptive remedy for such unilateral modification/disregard of clear and ambiguous contract language is a cease and desist order, restoration of the *status quo ante*, and make-whole monetary "damages" for individuals who suffered proven out-of-pocket losses as a consequence of the violation. [In that regard, the violation and the usual appropriate remedies are analogous to those in cases when the Employer disregards or unilaterally rewrites clear contract language limiting its managerial right to subcontract bargaining unit work. See Chapter 10, *Remedies in Arbitration*, § 10.28 *Remedies in Non-Disciplinary Cases* in The Common Law of the Workplace: The Views of Arbitrators (NAA, 2nd Edition, 2005)].

Accordingly, I held in my Stage I Award that whether “benefit replication” by BC/BSWNY renders the proven *prima facie* violation of the literal language of Article XXVI(2)(A) merely “cosmetic” or “technical”, under the legal maxim *de minimis non curat lex*, and/or whether public policy or impossibility militate against restoration of the *status quo ante* are issues upon which the District must shoulder the burden of going forward and the overall burden of persuasion by a preponderance of record evidence in the Stage II hearings. By the same token, the Federation was tasked with substantiating in Stage II its claim that the District’s proven violations of the CBA caused BTF and/or individual teachers to suffer compensable damages which should be remedied by a “make-whole” monetary remedy.

The Parties are entitled to know what conclusions I reached based on the Stage II evidence and the standards of judgement I used to fashion the appropriate remedies set forth elsewhere in the Stage II Award, *infra*. In the absence of restrictive contract language, broad remedial power inheres in an arbitrator to grant whatever “make-whole” damages are necessary to rectify proven contract violations. But there is a “great difference between the possession of power and the proper occasion for its exercise”. Stein, *Remedies in Labor Arbitration*, Proceedings of the 13th Annual Meeting of NAA, 39, 45-47 (BNA Books, 1960). *See also* Aetna Portland Cement Co., 41 LA 219, 222 (H. Dworkin, 1963); Madison Bus Co., 52 LA 723, 727-728 (R. Mueller, 1969); Shell Oil Co., 44 LA 1219, 1221-1222 (B. Turkus, 1965) [“(remedial) power is a heady wine which carries with it an equally potent obligation to exercise care in its use”]; Arbitrator Beek in 68 LA 1146, 1152-1153 [refusing to order any “extraordinary” remedy”]; Arbitrator Jackson in 68 LA 682, 683, 686 [“the remedy that is most suitable and equitable is that which was in the contemplation of the parties” (even

though he had been expressly authorized to determine “what should be the remedy,” and although he stated that regarding “the form of remedy, the arbitrator's authority is broader than a court's”}.

Because I am of the school of arbitrators who proceed with great caution in devising new “creative” remedies, I endorse the well-reasoned standards suggested by Arbitrator M. S. Ryder in Jeffrey Mfg. Co., 34 LA 814, 825 (M.S. Ryder, 1960):

(i) Arbitral remedies should be limited in form and scope to most directly effectuate the intent and purposes of the provision(s) in the labor agreement which establishes the contract rights which were violated;

(ii) The party called upon to give remedy should not be subjected to well-founded surprise by the form, nature, extent and degree of the remedy, *i.e.*, what is awarded should be within the realm of conceivable and reasonable remedial expectations of the party in error or of other parties were they to be similarly circumstanced;

(iii) Remedies that are punitive in monetary or exemplary nature should be avoided, on the ground that parties bargaining collectively in a more or less perpetual relationship should not seek that one or the other partner be punished for a mistake. To so seek and to obtain punishment is putting a mortgage on the future happiness of the joint relationship.

My approach to the subject of appropriate arbitral remedies is also influenced by the penetrating insights of the late Professor David Feller, one of the greatest legal scholar/lawyer/arbitrators of the 20th Century and architect of the *Steelworkers Trilogy*. On the subject of the proper role of arbitrators in fashioning remedies for proven violations of collective bargaining agreements, Feller had this to say in *Remedies: New and Old Problems*, pp. 109-133 in Arbitration Issues for the 1980s Proceedings of the 30th Annual Meeting of the NAA (BNA Books, 1981):

[I]t is my view that an arbitrator's sole function in deciding what remedy should be given, where he finds that the employer has not complied with the rules set forth in the collective agreement, is to determine what the agreement says about remedy. In so doing, he is performing a quite different function than a court is performing when it determines what remedies for breach of contract should be awarded. . . . The arbitrator's function is not to award damages. What he sometimes does may look like damages. Indeed, when back pay is involved, his order looks like damages because it involves the payment of money. But it is not. It is what the arbitrator finds is the remedy provided for in the agreement. As the parties' “contract reader,” the arbitrator determines what remedy is provided for in the agreement and awards it. (Citing Theodore St. Antoine, *Judicial Review of Labor Arbitration*

Awards—A Second Look at Enterprise Wheel and Its Progeny, in Arbitration 1977, Proceedings of the 30th Annual Meeting of the NAA (BNA Books, 1978).

* * *

My second proposition, therefore, is that unless the contrary is stated in the agreement, as it sometimes may be, the primary authority implicitly granted to the arbitrator is the authority to award specific performance of the provisions of the agreement. There has been much discussion- foolish, I believe-as to the authority of an arbitrator to issue an injunction. The argument is foolish, I submit, because that is all that an arbitrator ever does, or should do. When an arbitrator orders the company to reinstate a grievant, he is issuing an injunction. When an arbitrator directs the company to remedy a condition that is unsafe, he is issuing an injunction. He is ordering the company to take specific action.

* * *

If it were possible to have an instantaneous grievance and arbitration procedure, in which all violations of the rules set forth in the agreement could be instantly grieved and decided, the only remedy power of the arbitrator would be to order the employer to do that which the contract specifies he should do. . . . The concept of an instantaneous procedure, like the concepts of infinity and a perfect vacuum, is impossible of achievement but serves as a conceptual end point defining the rules governing the process. There must always be a time gap between the uncorrected event upon which the grievance is based and the arbitrator's determination that the event constituted a failure of the employer to comply with the rules. The usual function of a money award is precisely to fill that time gap.

* * *

This leads to my third proposition: The power to order specific performance, retroactively if necessary, which the parties may be assumed to have vested in the arbitrator is ordinarily limited to the payment of sums calculated in terms of the collective bargaining agreement, not by measures external to it.

* * *

This is, concededly, a narrow view of the arbitrator's function. But the institution of grievance arbitration as we know it today has been built upon the assumption that arbitrators are not courts and do not have the power, unless they are expressly given it, to see that "justice and equity" are done. They are, and should be, restricted to performing the narrow function that the parties have given them. Concededly, in determining the meaning of an ambiguous contractual provision, or in determining what remedy should fairly be read into an agreement, the arbitrator should choose the alternative among those offered to him which best corresponds to what he believes the parties intended and that, in turn, may involve an assumption that the parties intended to do that which is right as the arbitrator sees it.

During six (6) days of Stage II hearings, the Parties presented testimony and extensive documentation from District administrators, Union officials and teachers from the bargaining unit; as well as from insurance consultants, physicians, officials of the BFSA and executives of the various health insurance and health care benefit providers. After reviewing nearly a thousand pages of testimony and related reams of documents and carefully considering the legal, policy and equity arguments raised in the voluminous post-hearing briefs, I find that the District did not persuasively demonstrate that the proven contract violation was *de minimis* as to either individual teachers or the Union or that restoration of the *status quo ante* is either impossible or contrary to public policy.

Specifically, the extensive effort by BC/BS, insurance consultants and District employee benefit specialists to “replicate” all of the choices, services and coverages provided by the literal language fails to render the District’s unilateral re-write of Article XXVI(2)(A)(1) nugatory, cosmetic or inconsequential. Even if, *arguendo*, there were not large holes in the fabric of the so-called “replication”, the whole concept is irrelevant because the District simply did not have the right to make this unilateral modification of the Agreement—especially after it had sought but failed to obtain the concurrence of the Union which is the other party to the bilateral Collective Bargaining Agreement. It begs the question to argue the tautology that all interested parties may well be better off in the long run if this financially imperilled School District can save millions of dollars with “almost- as- good- as” single-carrier health insurance coverages. But that is a contract modification which can only be made by an instrument in writing signed by both Parties to the Agreement.

It is the District’s unilateral, dictatorial modification by management fiat of a solemnly negotiated bilateral contract provision which is the crux of the violation, irrespective of touted efficacy of the end-result. By arrogating unto itself a power which it did not legitimately possess, the District not only hi-jacked the contract right of individual teachers to choose a carrier and plan but also effectively misappropriated the value of any *quid pro quo* the BTF might rightfully have obtained in return for agreeing to such a significant cost-saving change. Any doubts about how real and valuable that right of concurrence is for these Parties are dispelled by consideration of the following recent policy statement by the ghost at their bargaining table, *i.e.*, the BFSA (Emphasis added):

Negotiating Raises in a Wage Freeze Environment

Given the combined structural budget gap in the City and its covered organizations, it is unlikely that the wage freeze can be lifted wholesale over them in the near term, absent structural changes. According to the BFSA Act, the structural budgetary gap (in all four years of the financial plan) would have to be alleviated in the City and all covered organizations before the freeze can be lifted.

A single union can negotiate raises in a new contract which can be paid out even during the wage freeze if the contract brings ongoing budgetary savings which contribute to alleviating the fiscal crisis in a meaningful way.

Given the wide differences in employee responsibilities and contractual arrangements, there are many and varied options for alleviating the citywide fiscal crisis. **The wage freeze can be lifted union-by-union.**

For BFSA to approve the agreement, **the savings must be permanent and real, rather than speculative or contingent.**

While it may be possible, with new State aid assistance, to "pay" for contractual changes in 2006-07, **the contractual changes must result in long-term savings that help resolve the growing budgetary gaps associated with the fiscal crisis.**

Based on all of the foregoing, my primary remedy in this case is a directive to the District to restore the *status quo ante* which prevailed prior to its September 1, 2005 unilateral modification of Articles XXVI(2)(A)(1), undertaken pursuant to the so-called "Health Insurance Resolution" adopted by the Board of Education on May 11, 2005. To avoid undue hardship for the District and BC/BS, I am granting the District approximately two-months of lead time to prepare for and implement that rescission and reversal of the contract modification which it attempted improperly to impose on the Union and the BTF members by unilateral action. Because such a change-over to a single-carrier can only be accomplished by agreement between the District and the BTF on modifications to the language of XXVI(2)(A), the Parties may wish to discuss that issue as part of the ongoing negotiations in which they are currently engaged with the able assistance of a PERB-appointed mediator. However, unless the District and the BTF reach an agreement to retain the single-carrier change-over or arrive at some other mutually agreeable alternative, the District must reinstate the *status quo ante* under XXVI(2)(A) on January 1, 2007.

No such grace period is granted regarding my retroactive reinstatement to employment of those teachers whom the District laid off wrongfully, in furtherance of its ill-conceived effort to force ↗

the Union into submissive acceptance of the unilateral modification of XXVI(2)(A) which the District imposed, effective September 1, 2005. It is clear from the record that this heavy-handed bullying tactic was part and parcel of the violation covered by BTF Grievance No. No. 04-076 and well within the ambit of the Union's request for "make-whole" damages for teachers adversely affected by that violation. In the final analysis, those pre-emptive lay-offs in anticipation of the predictable reversal of its unilateral contract modification by an impartial arbitrator seriously compounded the District's culpability and liability in this case.

As discussed in the Stage I Opinion, the instant grievance was filed on May 20, 2005 (amended for typographical error on June 7, 2005) but the anticipated July 2005 implementation of the unilateral change-over to a single carrier was postponed by litigation until September 1, 2005. In the meantime, under date of July 29, 2005, the District's Executive Director for Human Resources sent a number of teachers the following letter: (Emphasis added):

I regret to advise you that your position as a/an [Job Title] in the Buffalo Public Schools is eliminated effective August 31, 2005. As you may have heard, the District will be moving its teachers, engineers, white collar and blue collar unions to a single health insurance carrier. However, **because of the pending arbitration hearings which might force the District back to multiple carriers, the District must make cuts now, and bring employees back only if and when it is clear that the single health issue is decided in the District's favor. Until that time, an arbitrator could order the District to pay millions of taxpayer dollars to health insurance companies instead of putting the money in the classroom.** This would cost the District many millions of dollars more than a single health insurance carrier, and would create a budget deficit in the middle of a school year, which would make mid-year cuts necessary. Such devastation of our students' educational lives is unacceptable.

Please let me assure you that we are working diligently to review all of our positions and funding options, as well as assessing our legal options. **We are also endeavoring to negotiate "around the clock" to try to reach agreement with the unions on the single health care provider issue in order to prevent the need for the reductions in force.**

Your name will be placed on a preferred eligibility list for hire in your tenure area. If enough retirements occur, or there is a change in circumstances allowing restoration of your position, we will advise you immediately. In addition, **if we are able to realize savings that we are certain will not be taken away by an arbitration award later, we will restore positions promptly.** It is our sincere hope that we can call teachers back to work at the earliest possible date. If we had agreement on single provider health insurance, that would be immediately.

The Superintendent wants to meet with any laid-off employee who wishes to do so. A meeting time has been set up for affected members of the Buffalo Teachers Federation on Friday, August 5, from 9:00 AM until 10:00 AM in Room 801 City Hall. No RSVP is required, but if you have questions about the meeting, please feel free to call me . . .

Any doubts about the District's coercive intent in issuing these letters or the arrogance of power exhibited therein is obviated by the record evidence concerning the meeting between several of the laid off teachers and the Superintendent of Schools. In the Stage II arbitration hearings, three (3) recipients of the lay-off letters, Attendance Teacher Hoa Mai, School Library Media Specialist Laurie Twistbinder and Drop-Out Prevention Coordinator Sharon Lewis testified concerning their attendance at the August 5, 2005 meeting with Superintendent James A. Williams in his office at City Hall. The unrefuted, mutually corroborating testimony of these witnesses that Superintendent Williams expressly linked their threatened imminent lay-offs to the pending arbitration of BTF Grievance No. 04-076 is typified by the following sworn statement by Ms. Twistbinder (Emphasis added):

Q. Did you attend that meeting?

A. Yes, I did.

Q. Will you tell us what the superintendent said?

A. **The superintendent said that if we who had lost our jobs would go back and pressure our union to drop the grievances, we would have our jobs back immediately and the grievance applied to the single health carrier.**

* * *

Q. Did he say that the District would have to go to the single health carrier in order to restore the jobs or words to that effect?

A. At the time he just said we had to drop the grievances.

Q. Do you recall what the grievances were about? Did he explain that at the meeting?

A. It was explained at the meeting and the way it was explained, he had Mary O'Shei read all this information about the single health carrier and that was how the meeting started and then when we questioned why are you telling us this, we are here because we were laid off, we won't have health coverage; he just said to her, go ahead and finish. **And we then asked all our questions, why we were laid off, why wasn't our department -- why wasn't it across the board and that was when he told us that he would rehire us immediately if we could pressure our union to go along with the single health carrier and drop the grievance.** [Note: Mr. Twistbinder went on to testify that the District subsequently laid off the other teachers but recalled her and instead laid off a more junior School Library Media Specialist because apparently she had been laid off out of seniority order].

Based on the foregoing evidence, my remedy award includes an order to the District to reinstate to employment Attendance Teacher Hoa Mai, Drop-Out Prevention Coordinator Sharon Lewis, the School Library Media Specialist laid off in lieu of Laurie Twistbinder and all other similarly situated teachers adversely affected by the District's pre-emptive September 1, 2005 layoff, pursuant to the July 29, 2005 letters quoted, *supra*. The District shall reinstate these improperly laid-off teachers effective September 1, 2005, with seniority unimpaired and with "make-whole" back-pay and benefits from September 1, 2005 until date of reinstatement. The District is also directed to pay interest at the statutory judgment rate on the monies owed to those wrongfully laid-off teachers reinstated under the terms of this Award.

Logic and reason support the conclusion that to make those Grievants "whole" and to prevent unjust enrichment of the District by its improper lay-off, interest must be awarded on the monies due those wrongfully laid-off teachers under this Award. Prior to 1962, the NLRB did not award interest on such damages and labor-management arbitrators usually followed that lead. *See Sinicropi, Remedies in Arbitration*, Ch. 20 "Interest, Costs and Attorney's Fees", pp. 450-60 (BNA: Washington, DC, 2nd ed., 1991). However, the same noted authority points out that more recently many arbitrators are following the dictum that historical denials of interest by labor arbitrators "may be an unsolved mystery, but that is no reason to ignore reason". *See Kaiser Permanente Medical Care Program* 89 LA 841, 845 (Alleyne, 1987); *see also Allied Chemical Co.* 47 LA 686 (Hilpert, 1966).

The Union's belated demand for an aliquot distribution to bargaining unit members of the millions of dollars of cost-savings to the District by its invalidated unilateral single-carrier conversion is not granted because it was raised *de novo* at the Stage II hearings and cannot reasonably be read into the *ad damnum* portion of the grievance, which requests: "All affected individuals and dependents [be]

made whole". Saving new issues for the arbitration hearing, the last and most formal step of the grievance resolution machinery process tends to undermine the integrity of the grievance procedure. For that reason, black letter law in labor arbitration holds that, where written grievances and grievance procedure discussions clearly limit the issues in dispute, arbitrators should foreclose introduction of new claims at the time of the hearing (other than fundamental jurisdictional challenges). See, International Paper, 105 LA 970, 974 (Duda, 1996); Mason & Dixon Tank Lines, 94 LA 1225, 1228 (Byars, 1990); City of Cadillac, 88 LA 924, 925 (Huston, 1987); NLRB Union, 76 LA 450, 456 (Gentile, 1981); Ralston Purina Co., 71 LA 519, 523-24 (Andrews, 1978). Were the rule otherwise, the most basic purpose of the Parties' grievance resolution mechanism would be frustrated, *i.e.*, full disclosure, discussion and consideration of issues at informal and earlier stages of the grievance procedure with the goal of resolution short of arbitration.

Finally, this Stage II Award reflects the joint request of the District and the Union that I reserve judgement but retain jurisdiction to decide with finality, in possible Stage III proceedings, any unresolved claims for reimbursement of out-of-pocket expenses incurred by individual teachers under the invalidated single-carrier change-over, which said teacher(s) would not have incurred if covered by the plan and carrier selected by them under the literal language of XXVI(2)(A).

In closing this Stage II Opinion concerning the appropriate remedies in this case, I turn once again to the ageless wisdom of Professor David Feller, set forth in the concluding paragraph of his seminal article *Remedies: New and Old Problems, op. cit.*, p. 133:

There is a story that judge Learned Hand, when departing from one of his meetings with justice Holmes, said: "Do justice." Holmes is reported to have replied, "My job is not to do justice but to see that the game is played according to the rules." Holmes was not speaking of remedies and of arbitration. But his thought is apt. The arbitrator's function is not to do justice, even with respect to remedies. His function is to read the contract, including its provision as to remedies, and to tell the parties what those provisions mean as applied to the particular case. Where the agreement is silent, he may find implied in it, as the common law of industrial relations, the kind of remedies customarily provided in collective agreements

or by arbitrators. Those remedies are almost universally injunctive in nature and, where the payment of money is involved, based on calculations interior to the agreement. The remedy in a particular case may be more or less than justice. But, as the parties' "contract reader," the arbitrator's function ends when he tells the parties what the remedy provided in their agreement is and directs performance of that remedy.

This is, concededly, a narrow view of the arbitrator's function. But the institution of grievance arbitration as we know it today has been built upon the assumption that arbitrators are not courts and do not have the power, unless they are expressly given it, to see that "justice and equity" are done. They are, and should be, restricted to performing the narrow function that the parties have given them.

REMEDY AWARD OF THE IMPARTIAL ARBITRATOR
NYS PERB CASE No. A2005-144 (BTF Grievance No. 04-76)

- 1) Effective January 1, 2007 the District shall reverse, rescind, cease and desist unilateral implementation of the "Health Insurance Resolution" of May 11, 2005.
- 2) The District shall reinstate forthwith all teachers laid-off on September 1, 2005, pursuant to letters issued July 29, 2005; with seniority unimpaired, with "make-whole" monetary damages for back-pay and benefits from lay-off date to reinstatement date and with interest thereon calculated at the statutory judgement rate.
- 3) Jurisdiction is retained to decide with finality, in possible Stage III proceedings, any unresolved claims for reimbursement of out-of-pocket expenses incurred by individual teachers under the invalidated single-carrier change-over, which said teacher(s) would not have incurred but for the District's unilateral change of the plan and carrier selected by them under the literal language of XXVI(2)(A).
- 4) Jurisdiction is retained to resolve any disputes which may arise over the interpretation and application of this Stage II Award.



Dana Edward Eischen

Signed at Spencer, New York on October 21, 2006

STATE OF NEW YORK }
COUNTY OF TOMPKINS } SS:

On this 21st day of OCTOBER 2006, I DANA E. EISCHEN, do affirm and certify, upon my oath as Arbitrator, that I executed the foregoing instrument and I acknowledge that it constitutes my Stage II Remedy Award in NYS PERB Case No. A2005-144 (BTF Grievance No. 04-76).