BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
OCONOMOWOC CITY EMPLOYEES UNION, LOCAL 1747, AFSCME, AFL-CIO	
and	Case 47 No. 41918 MA-5499
CITY OF OCONOMOWOC	

Appearances:
Mr. Robert Chybowski, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1747, AFSCME, AFL-CIO.
Lindner and Marsack, S.C., Attorneys at Law, by Mr. Roger E. Walsh, on behalf of the City of Oconomowoc.

ARBITRATION AWARD

Oconomowoc City Employees Union, Local 1747, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Oconomowoc, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor Agreement. 1/ The City subsequently concurred in the request and the undersigned was appointed to arbitrate in the dispute. A hearing was held before the undersigned on May 16, 1989 in Oconomowoc, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by July 20, 1989. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the issues. The Union would state the issue as follows:

> "Was the collective bargaining agreement violated when the HMO insurance plan was changed by adding a copayment charge for generic drug prescriptions and by increasing the copayment amount for brand name drug prescriptions?
>
> "If so, what is the appropriate remedy?"

The Union asserts that its broader statement of the issue is more appropriate "primarily because other provisions of the Agreement (Jt. Ex. 1), specifically Article XXII - Grievance Procedure and perhaps Article II - Management Rights, are squarely at issue here because of the City's reversal after the Step 1 settlement of the grievance."

The City would frame the issues as being:

> Was Section 18.01 of the collective bargaining agreement violated when the HMO insurance plan was changed by adding a co-payment for generic drug prescriptions and increasing the co-payment amount for brand name drug prescriptions? If so, what is the appropriate remedy?

1/ The City waived any objection to arbitration during the hiatus.

It is concluded that the issues to be decided may be stated as follows:

Does the Director of Utilities' response to the instant grievance at Step 1 constitute a settlement of the grievance that is binding upon the parties?

If the answer is no, then the issue to be decided is as stated by the City.

CONTRACT PROVISIONS

The parties cite, in relevant part, the following provisions of their 1987-1988 Agreement:

ARTICLE XVIII - INSURANCE

18.01 - Hospital and Surgical Insurance. The City will provide hospital/surgical care and time loss and life insurance policy, which shall include full payment for a semi-private room, and major medical, with the City paying the premiums for the employees and their dependents. Should there be a change of carriers, none of the benefits in this policy shall be diminished.

. . .

ARTICLE XXII - GRIEVANCE PROCEDURE

22.01 - Definition and Procedure. Any difference of opinion or misunderstanding which may arise between the City and the Union, or any member of the Union, shall be handled as follows:

Step 1. The grievance shall be reduced to writing and presented by the aggrieved employee and the Union Grievance Committee to the Director of Public Works. A meeting between the above-named parties shall be held within ten (10) workdays of the presentation of the written grievance, and the Director of Public Works shall respond to the aggrieved employee and the Union Grievance Committee in writing within ten (10) workdays of such meeting.

Step 2. If a satisfactory settlement is not reached as outlined in Step 1, the grievance may be appealed in writing by the Union to the City Administrator, within fifteen (15) workdays of the receipt of the Step 1 answer. A meeting between the above-named parties shall be held within fifteen (15) workdays following such appeal, and the City Administrator shall respond to the aggrieved employee and the Union within ten (10) workdays of such meeting.

22.02 - Arbitration.

. . .

In rendering his decision, the Arbitrator shall have no authority to add to, subtract from, or modify the provisions of this Agreement.

BACKGROUND

The City provides three different health insurance plans for the employes in the bargaining unit represented by the Union: (1) Employers Group standard plan, implemented in February, 1985; (2) Employers Group HMO plan, implemented in February 1985; and (3) PrimeCare HMO plan, implemented in April, 1988. The employes choose the plan under which they wish to be covered. Prior to February, 1985, only a WPS standard plan was offered to the employes.

By letter dated November 30, 1988, Employers Health Insurance Company notified the City that it was raising the co-payment amounts for the PCS prescription benefit in its HMO plan, effective February 1, 1989. 2/ On or about December 7, 1988, the Union was given a copy of the letter by the City at a bargaining session for a successor agreement. On December 13, 1988, the Union filed the instant grievance on behalf of the nine employes covered by the Employers Group HMO plan. The grievance was filed with the Director of Utilities, Jeanne Jasper. As relief, the grievance requested "Coverage reinstated by insurance company or additional expense picked up by the City." Jasper responded to the grievance with the following letter to the Union's President, Anthony Kluz:

December 28, 1988

2/ The deductible amounts for prescription drugs under that plan had been 0 for generic drugs and $5.00 for brand name drugs.

Mr. Anthony L. Kluz
President, Local 1747, AFSCME, AFL-CIO
c/o Wastewater Treatment Plant
900 Worthington Street
Oconomowoc, WI. 53066

Re: Health Insurance Prescription Benefit Changes

Dear Tony:

I have been notified by Employers Health Insurance Company that the benefit change of prescription deductible amounts noted in Local 1747's grievance of December 13, 1988, can be reinstated. A determination of cost effectiveness will be made by City staff in reference to the choice between purchasing the additional coverage or self-insuring for this benefit.

Sincerely,

CITY OF OCONOMOWOC UTILITIES

Jeanne T. Jasper
Director

The City Administrator, Richard Mercier, was copied on the letter.

Jasper also responded on the grievance form in mid-January, 1989:

> Disposition of Grievance: The City will either pay additional premiums to cover the additional deductable (sic) amount or "self-insure" and reimburse employees directly for additional deductible costs.
>
> Jeanne Jasper

On February 1, 1989, the employes received the following memorandum from Mercier:

M E M O

TO: MEMBERS OF LOCAL 1747 COVERED BY EMPLOYERS HEALTH H.M.O.

FROM: RICHARD MERCIER, CITY ADMINISTRATOR

DATE: JANUARY 31, 1989

In response to a grievance filed on December 12, 1988, concerning notification received from Employers Health that deductible amounts for prescription drugs would increase by $3.00 per prescription effective February 1, 1989, you were notified that the City would cover either additional costs associated with higher premiums or would self-insure for this benefit by reimbursing employees $3.00 for each prescription purchased.

After additional evaluation, it is the position of the City that the current contract does not require the City to maintain benefits on an H.M.O. Therefore, additional charges due to the change in deductible amounts for members of the Employers Health H.M.O. will not be assumed by the City of Oconomowoc.

Mercier met with Kluz on February 2, 1989 to explain the City's position on the grievance and indicated that the City had reconsidered its position and decided that it was only required to maintain the coverage provided under the standard plan that was provided prior to offering the HMO plans, and not required to maintain the coverage provided in the HMO plans.

The parties then proceeded to arbitration of the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that this grievance was settled at Step 1 of the grievance procedure. Article XXII - Grievance Procedure, enables the parties to settle a grievance at Step 1, an appeal to Step 2 being made only

"if a satisfactory settlement is not reached as outlined in Step 1." The Union asserts that Jasper was authorized to settle the grievance and did so after investigating and consulting with others. There has been no evidence offered to suggest that Jasper was not authorized to act in the City's behalf in this matter. The Union officers were aware that Jasper had that authority and her responses demonstrate she knew she had the authority to settle the grievance. According to the Union, Mercier had no right to subsequently reverse the City's position, as there is nothing in the Agreement that suggests that a settlement of a grievance at Step 1 is subject to his approval. The Union also cites an award wherein it was held that the employer was bound by the settlement of the grievance at Step 1 and could not reverse the department head's action.

Regarding the interpretation of Section 18.01, the Union contends that the plain language of that provision requires that once insurance benefits are offered, they cannot be diminished. When the language was agreed to in 1976, the Union obviously agreed to let the City "shop" for medical insurance. The City may improve benefits where it finds it to be appropriate, and the offering of the HMO option was arguably an improvement in benefits. Given the existing language in 18.01, there was no need to change the Agreement when they were offered. According to the Union, the language of 18.01 is a "clear safeguard" in that regard, the protection against diminution of benefits being the quid pro quo for the right to change carriers.

The Union also contends that it would be an "awkward and unreasonable interpretation of Section 18.01" to find that the HMO benefits could be diminished based on there being no change in carriers. Further, the City has changed carriers since the language of 18.01 was first bargained.

Regarding the argument that Section 18.01 only applies to the standard plan, and not the HMO's, the Union asserts that the express language of that provision contains no exception to the requirement that "none of the benefits in this policy shall be diminished." That language applies to all policies guaranteed by Article XVIII.

The Union also asserts that the City cannot escape fault by claiming it was the insurance company, and not the City, that diminished the benefits. Such a claim would be absurd as it would presume the City has no control over the level of benefits the company will provide in return for the City's payments. Moreover, the Agreement makes the City responsible for seeing to it that insurance benefits are not diminished, and the evidence shows it could easily have done so in this instance.

With regard to the bargaining history presented by the City, the Union contends that in its proposals presented in October, 1988, the item pertaining to Section 18.01 was not a proposal per se, rather it sought merely to "discuss clarification" of that provision. That same position on seeking clarification of 18.01 was maintained in the Union's preliminary final offer. The parties were aware in the fall of 1988 that they differed as to the interpretation of Section 18.01, and the Union's proposal was presented as a "follow up" to the parties' agreement to hold a pending grievance, involving that provision, in abeyance. Kluz's testimony is cited as showing that the Union made it clear in negotiations that it did not agree with the City's interpretation of Section 18.01.

The Union requests that the City be found to have violated the Agreement and be made to provide the HMO prescription drug benefits at the pre-February, 1989 level and to make the employes whole for any losses they suffered due to the violation.

City

The City first contends that Section 18.01 only applies to the standard insurance plan, and not to the HMO plans the City offers. The present wording of that section was bargained into the parties' 1976 Agreement and has continued unchanged. The City only offered a standard plan at the time the wording was bargained. Hence, the only plan the wording could have referred to was the City's standard health insurance plan. The provision has never been revised so as to include the HMO plans. The City cites Elkouri and Elkouri, How Arbitration Works, (4th ed.) p. 348, for the principal that the intent of the parties at the time the language was written must govern. The City asserts its interpretation is also supported by the wording of 18.01. That wording speaks only to "policy" in the singular and "major medical," and there is no "major medical" coverage in the HMO plan. If the parties had intended that Section 18.01 cover the HMO plans, they would have changed the wording to reflect that when the Employers Group HMO was first implemented in 1985. The fact that they did not change the language indicates they never intended that Section 18.01 apply to the HMO's. This was the same position reflected in Mercier's letter of January 31, 1989. Thus, the bargaining history and the clear language of Section 18.01 indicate that provision does not apply to the HMO plans.

Next, the City contends that the clear language of Section 18.01 indicates that the promise not to diminish benefits only applies when the City changes insurance carriers. Elkouri and Elkouri is cited for the proposition

that where the language is clear, it will generally not be given a meaning other than that expressed. 3/ The City argues that the Union is ignoring that plain wording and attempting to gain here what it could not obtain in bargaining. The City cites the Union's proposal on Section 18.01 presented in bargaining two months before this grievance was filed. It is contended that the proposal was due to an earlier grievance over changes in the HMO plan where the City took the same position as it has in this case, i.e., that the prohibition on reduction in benefits only applies if there is a change in carrier. The Union took the position the prohibition applied at any time and in its preliminary final offer proposed wording that would provide for such a prohibition, as opposed to a mere clarification. The Union subsequently dropped its proposal and is attempting to obtain the prohibition through this grievance. The Union's dropping of its proposal is significant, since this grievance relates to a change that occurred after the Agreement expired, a period that will be covered by a successor Agreement. Under such circumstances, arbitrators are generally hesitant to read such provisions into an Agreement. Citing Elkouri and Elkouri.

With regard to a claim that Jasper's response to the grievance somehow bound the City, it is contended that her statement was not binding on the City. As the Utility Director, Jasper did not have the authority to bind the City since Section 22.01, Step 1, of the Agreement provides that a grievance is to be submitted to the "Director of Public Works," who shall respond to the grievance. Jasper was not the Director of Public Works, and there is no evidence she was acting on his behalf in responding to the grievance. Further, the language of Section 18.01 is clear and a party may insist on adherence to clear language. Only a duly authorized representative may bind the party to an amendment of the Agreement or a waiver of its terms. Citing, Republic Steel Corp., 5 LA 609, 618 (McCoy). Jasper did not have such authority, and the City is not bound by her statement. The City also asserts that the Arbitrator may not decide this case on the basis of Jasper's statement, since he would be adding a provision to the Agreement contrary to the proscription in Section 22.02. Further, an employe who was dissatisfied with the change in Employers Group HMO plan could have switched to the PrimeCare HMO plan.

On the basis of the above, the City requests that the grievance be denied.

DISCUSSION

It first must be determined whether this grievance was settled at Step 1 of the grievance procedure as the Union claims. The Union relies on the letter from the Director of Utilities, Jasper, and her response on the grievance form to support its claim.

In the grievance submitted on December 13, 1988 to Jasper, the Union requested that the City either have the prescription drug coverage reinstated as it had been or pick up the additional cost to the employes. Jasper's letter to the Union's President, Kluz, of December 28, 1988 indicated it would be possible to have the coverage reinstated and that the City would decide whether to have the coverage reinstated or to self-insure for the benefit, depending on which was most cost-effective. A copy of the letter was sent to the City Administrator/Treasurer, Mercier. Approximately two weeks later Jasper responded on the grievance form under the section headed "Disposition of Grievance":

> The City will either pay additional premiums to cover the additional deductable (sic) amount or "self-insure" and reimburse employees directly for additional deductible costs.

The City does not dispute that, ostensibly, Jasper's letter and grievance response granted the grievance and promised the adjustment requested by the Union in this grievance. The City does assert that Jasper, as Director of Utilities, did not have the authority to settle the grievance, i.e., bind the City in the settlement, since the Agreement specifies that a grievance is to be submitted to the "Director of Public Works" at Step 1. That argument is not convincing for a number of reasons. First, Jasper was the Director of Utilities and, as such, clearly a member of management who held a position of authority. Secondly, according to Kluz's testimony and notes, Jasper asked him about having a meeting about the grievance and indicated that the City was checking on the matter. Neither Jasper, nor anyone else in management, indicated that the grievance had been improperly submitted to Jasper. Third, Jasper copied Mercier on her letter of December 28, 1988 to Kluz wherein she indicated that the City would be making a determination on which method of adjustment the Union had requested would be most cost-effective for the City to choose. There is no evidence that Mercier or anyone else indicated to the Union that Jasper was in error or without the authority to settle the matter. From her letter, and according to Kluz's testimony, Jasper indicated she was consulting with other City officials on the matter, and the evidence indicates

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3/ (4th ed.) pp. 348-50.

that Mercier was aware of the grievance and Jasper's letter. At Kluz's request, Jasper also responded on the grievance form in mid-January, indicating the City would provide the adjustment requested by the Union, that it was only a matter of which method it would choose at that point. Mercier's memorandum of January 31, 1989 to the employes indicates he was aware of Jasper's responses to the grievance. There is no indication in that memorandum that Jasper had been without the authority to act on the City's behalf in the matter, rather, the memorandum indicated that "after additional evaluation" the City had changed its position on the grievance. Simply put, Mercier's memorandum indicated the City had changed its mind. The Union responded to Mercier's memorandum by indicating its disappointment that the City had "chosen to renege on the settlement that had already been agreed upon by both sides," and stating it would proceed to Step 2 of the grievance procedure, which it did that same day. Mercier, who represents the City at Step 2, responded in writing on February 2, 1989: "Grievance is denied the city is not in violation of the union contract." Again, there was no indication on the City's part that it felt that the grievance had been improperly filed with Jasper at Step 1 or that Jasper had lacked authority to settle the matter. It is clear that the Union had considered the matter settled, and Kluz's unrebutted testimony was that at their meeting on February 2, Mercier stated they "had been visited by the Holy Ghost" and reconsidered their position. There is, in fact, no indication in the record that the City ever raised the issue of Jasper's authority to settle the grievance until it filed its post-hearing brief in this matter.

There is also no question that the parties' grievance procedure presumes that a grievance may be settled at Step 1. Step 2 provides that "If a satisfactory settlement is not reached as outlined in Step 1 . . . ." This presumes the authority to settle at Step 1. Given the foregoing, it is concluded that Jasper, as Director of Utilities, was authorized by the City to settle this grievance at Step 1 and, in so doing, bind the City.

The City also asserts that Jasper's response cannot overcome the clear wording of Section 18.01 of the Agreement, and that the Arbitrator would be exceeding his authority by "adding" to the Agreement if he were to decide the grievance was settled based on Jasper's response to the grievance. There is, however, a difference between settling a particular grievance and agreeing, as part of a settlement, to amend the terms of the Agreement. That is not to say that the settlement of a grievance may not be offered as evidence of how the parties have interpreted a provision in the past, but that is an issue that would potentially arise in a future dispute. The issue here is whether the parties had a binding settlement of this particular grievance. In that regard, the undersigned is of the same mind as Arbitrator Kelliher in Standard Oil Co., 13 LA 799.

> "It is essential to good labor-management relations . . . that grievance settlements not be disturbed in the absence of a conclusive showing of changed conditions." At 800.

In that case, the issue was whether a prior settlement on the identical issue remained binding on the parties, and Arbitrator Kelliher concluded that it was still binding due to a lack of evidence of changed conditions. The only change in this case was that the City re-evaluated its position two weeks later and changed its mind about the settlement. That is not the type of change in conditions that is contemplated in the above statement.

For the foregoing reasons, it is concluded that Jasper's response to this grievance at Step 1, stating that the City would provide the adjustment of the grievance requested by the Union, constituted a binding settlement of this particular grievance relating to the change in the deductibles for prescription drugs under the Employers Group HMO plan. Having concluded that there is a binding settlement of the instant grievance, it is unnecessary to address the issue of whether the City violated Section 18.01 of the Agreement.

On the bases of the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

That the response of the Director of Utilities to the instant grievance at Step 1 constitutes a binding settlement of this particular grievance. Therefore, the City is directed to comply with that settlement by selecting either of the two methods of maintaining the deductible for prescription drugs in the Employers Group HMO plan at the pre-February 1, 1989 level, and to make the employes whole for any additional costs they incurred on or after that date due to the increase in the prescription drug deductibles in that plan.

Dated at Madison, Wisconsin this 12th day of October, 1989.

By _____
David E. Shaw, Arbitrator