BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 1947-B, AFSCME, AFL-CIO	Case 34 No. 51165 MA-8516
and	
CITY OF TOMAH	

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Richard A. Radcliffe, Assistant City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear a grievance involving insurance for retirees. A hearing was held on August 3, 1994, in Tomah, Wisconsin, and the parties completed filing briefs by January 26, 1994.

ISSUES:

> The City raises an issue of arbitrability and asks whether the arbitrator has jurisdiction to arbitrate the dispute between the City and the retired employees? If so, the City would then ask: Does the City's change in its group health insurance plan violate the provisions of Section 18.03 of the collective bargaining agreement as it applies to retired employees?
>
> The Union asks: Did the City violate the collective bargaining agreement by adjusting the health insurance deductible for retirees from $100 and $200 a year to $1,000 and $2,000 a year? If so, what is the appropriate remedy?

Tne Arbitrator will address both issues in the Discussion section of this Award.

CONTRACT LANGUAGE:

ARTICLE XIII - GRIEVANCE AND ARBITRATION PROCEDURE

13.01 A grievance is defined as any difference or dispute regarding the interpretation, application or enforcement of the terms of this Agreement.

. . .

ARTICLE XVIII - INSURANCE

18.01 The Employer agrees to pay the following premiums of the Group Hospital, Surgical, Outpatient and Diagnostic coverages, with major medical, the Plan now provided by the City:

Single	100 %
Family	90 %

The deductibles that are applicable in 1985 shall be paid by the Employee.

. . .

18.03 Employees who retire at age fifty-five (55), or later, shall be eligible to participate in the City's group health insurance, at their own expense, until eligible for Medicare or the statutory provisions governing health insurance participation, whichever is greater.

18.04 The City reserves the right, from time to time, to change its insurance carrier or insurance policy or to self-fund its health insurance; provided, however, if the City exercises this right, levels of coverage, including applicable deductibles and choice of practitioner, shall be maintained at a level which is at least equal to the levels of coverage in existence at the time of the change.

In the event the City self-funds, it will place the insurance contributions made by the parties in a segregated fund to be used exclusively for health insurance purposes. Tle City will further comply with any state or federal mandates. The City will abide by any rules or regulations set forth by the office of the State Insurance Commissioner. The City agrees it will apply the presumption of coverage standard. Tle Union reserves the right to challenge the

reasonableness of the premium amount at the time of the premium change.

BACKGROUND:

This grievance arose when, during the mid-term of the collective bargaininp, agreement, the City changed its insurance policy and raised the deductibles from $100 and $200 per year to $1,000 and $2,000. The deductibles paid by employees remained at $100 and $200, and the City self-funded the difference of $900 and $1,800 for current employees, but retirees became responsible for the $1,000 and $2,000 deductibles.

The City's cost for insurance was rapidly escalating when it came time to renew its insurance policy with Blue Cross & Blue Shield. The insurance agent for the City, William Bohn, brouaht up the option of using higher deductibles which would be self-funded with another administrator, Midwest Security, handling the deductible portion. Bohn testified that in determining the premium rate, it was anticipated that retirees or those in COBRA would be paying the full deductible. The premiums went down substantially for both the current employees and retirees. The drop in premium was the direct result of the hicher deductibles, as premiums are tied to deductibles, although they are also based on experience.

The former Cltv Clerk, Phillis Zimmerman, is a retired employee, havinc, worked for the Citv for 37 vears. She helped administer health insurance before she retired. She recalled that before retirees were covered in 1987, there was a plan with the Wisconsin Emplover-s Group with 80-20 co-insurance, where employees paid 20 percent of claims. After retirees became covered in 1987, retirees always paid the entire premium and deductibles.

Section 18.04 was first negotiated into the 1993-94 collective bargaining agreement. City Administrator David Bemer was involved in the negotiations for that agreement. The Union was concerned about deductibles, and the City agreed to include language guaranteeing that the deductibles would not change. The deductibles for retirees had always been the same as current employees in the past. During negotiations, the parties did not discuss changing the language of Section 18.03.

Following negotiations, when the City proposed a $1,000 and $2,000 deductible during the term of the contract, the Union did not object. Union Steward Paul Marten testified that the Cltv told the Union that nothing would change. 'ne City pavs the difference in deductibles for current employees, but the Union found out later that retirees were bein- held responsible for the entire $1,000 and $2,000 deductibles.

Bemer sent out the following notice to employees on April 6, 1994:

Effective April 1, 1994, your Medical Benefit Plan includes the

following:

As shown in your Certificate, your benefit coverage with Blue Cross & Blue Shield is:

$1,000 Deductible $2,000 Family
100% Coverage Thereafter
Out-of-Pocket Limit $2,000 per Family

Your employer has contracted with Midwest Security Administrators, Inc. to administer the following optional benefits, on a Customary, Usual and Reasonable basis as determined above, in addition to the benefits stated above:

Deductible per Calendar Year:

Individual……. $100
Family……. $200

Coinsurance…. After deductible is satisfied for the Calendar Year, the Plan will then pay, on a Customary, Usual and Reasonable basis, 100% of the first $900 ($1,800 per family) of covered expenses incurred each calendar year.

The above benefits are provided by your employer and are intended to supplement the medical benefits provided by your insured group health plan.

The premiums under the 100/200 deductible plan ran $218.06 for a single policy and $466.77 for a family policy. Under the 100012000 deductible, the rates went down to $154.82 and $331.41 for single and family respectively.

While there was a savings for both employees and the City in the premium payments, the City took additional risks in self-funding the deductibles. If the savings from premiums would not cover the amount the City pays out in deductibles, the City has to come up with more money.

Tne additional risk to retirees or COBRA participants may be as much as $175.68 per year for a family policy and $141.12 per year for a single policy, if the retiree or COBRA participant were to reach the maximums on the deductibles.

THE PARTIES' POSITIONS:

The Union:

The Union asserts that it has standing to file a grievance about an issue affecting retirees. It notes that unions often bargain provisions that affect employees when they retire, such as

health insurance and sick leave conversion. Tle Union believes that bargaining provisions that affect current employees when they retire are mandatory subjects of bargaining, and it would be unreasonable to find that the Union must negotiate for these benefits but then have no standin- to enforce such benefits. What good is it for the Union to negotiate benefits for prospective retirees if the Employer can refuse to complv with those benefits and the Union cannot enforce the negotiated language?

The dispute falls within the definition of a grievance, the Union contends, and it conferred with retirees regarding the filing of this grievance, even though the Union may take a grievance with or without the aggrieved employee. Tle grievance belonas to the Union, and the Union has standing to arbitrate it. The retirees would not be able to grieve it.

While the City submitted cost-benefit comparisons to show that there may be savings to retirees under its scheme, the Union disputes the relevance of such data. The issue is whether the Citv violated the collective bargaining agreement. The City previously had an insurance plan with a 1001200 deductible. Then it went to a 1,00012,000 deductible, requiring the retirees to pav for the entire 1,00012,000 deductible but paying the difference for current employees.

The Union argues that the term "employee" must apply to retirees. Section 18.01 states that the deductibles that were applicable in 1985 shall be paid by the employee. 'ne retirees are not paving deductibles that were applicable in 1985 and are paving deductibles that are substantially higher. Moreover, the Union submits that Section 18.04 refers to the applicable deductibles being maintained at a level equal to levels of coveraae in existence at the time of the change.

The Union seeks a make whole remedv and an order that retirees pav the 1001200 deductibles in the insurance plan.

The Citv:

The City asserts that the'arbitrator does not have jurisdiction to handle this matter. Section 13.01 defines a grievance and implies that the dispute is between the parties to the agreement. Only the parties to the agreement have the ability to arbitrate disputes, and retirees are not included in the recognition clause and are not parties to the agreement.

Just as grievances are creatures of contract, the scope and limits of arbitral authority are controlled by contract. The United States Supreme Court has stated that a party cannot be required to submit to arbitration any dispute which he has not agreed to submit, and the Wisconsin Supreme Court has indicated that judicial review is available to review the procedural issue of arbitrability.

The City believes that the retired employees are not without relief, and they retain common law standing upon which they can seek relief in the circuit courts in the state. But because they are not parties to the current collective bargaining agreement, they cannot proceed either directly or indirectly through the Union.

As to the merits, the Citv relies upon Section 18.03 of the bargaining agreement, while the Union relies on Sections 18.01 and 18.04. Ile City finds that Sections 18.01 and 18.04 are general provisions which apply to the parties to the agreement, while Section 18.03 applies specifically to post-retirement insurance benefits. Specific provisions in a contract control over general provisions, and Section 18.03 allows retirees to take insurance "at their own expense. " If the insurance company raised premium rates or deductibles on the City's plan, the retirees would have to pay them.

When the City amended its plan to reduce its overall expenses of insurance, the deductibles went up but premiums went down. Tle actual, current expense of the plan as a whole as it relates to retirees may or may not change. If the City had not made this change, the premium rates would have risen substantially.

The Union proposed language requiring the City to maintain levels of coverage and applicable deductibles and choice of practitioner at a level equal to that before the City can amend its insurance policy. 'ne City agreed to this language. However, it maintains that the applicable deductibles as stated in Section 18.01 apply to current employees. Had the Union sought to protect retirees as well, that language would need to be bargained into the provisions of Section 18.01 and 18.04, which was not done. 'Merefore, the City was free to amend its policy as long as it maintained the applicable deductibles and levels of coverage for current employees.

T'he City argues that there can be no violation of Section 18.03, and because Sections 18.01 and 18.04 apply only to current employees, there is no violation. 'nere is no relevant past practice, except that retirees always paid their premiums and deductibles.

As to a potential remedy, the City states that if the grievance is granted, the appropriate remedy would be to order reinstatement of the prior health insurance plan with common deductibles of 1001200 for both current employees and retirees. The City points out that this remedy would hurt everyone, and the City's flexibility would be thwarted and premiums would increase. The City asks that the grievance be denied.

DISCUSSION:

Arbitrability:

I find that the Union has standing to bring this grievance under Sections 13.01 and 18.03

of the collective bargaining agreement. Section 13.01 defines a grievance as "any difference or dispute regarding the inte[pretation, application or enforcement of the terms of this Areement.

" T'his grievance is about the interpretation, application or enforcement of Section 18.03 of the contract, as well as the application of Sections 18.01 and 18.04 to Section 18.03.

Section 18.03 states that employees who retire may participate in the City's group health insurance plan at their own expense. Therefore, Section 18.03, which applies specifically to retirees, is a term of the contract, and the Union may seek to interpret or enforce this term as well as any other tertn of the contract.

Case law provides some guidance regarding the status of retirees. In Allied Chemical and Alkali Workers of America vs. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), the U.S. Supreme Court has said that retirees are not to be considered employees, and not members of the bargaining unit, but that if an employer consents to contract provisions for the benefit of retirees, they have vested contract rights:

> Since retirees are not members of the bargaining unit, the bargaining agent is under no duty to represent them with theemployer. . . This does not mean that when a union bargains forretireeswhich nothing in this opinion precludes if the employeragreesthe retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioners' consent. (Footnote 20)

Other federal courts, relying on the principles set out in Allied Chemical, found that once a company binds itself by contract to provide benefits for retirees, the company could violate their contractual rights by failing to provide for those contracted benefits. 1/ Thus, while retirees are not employees and an employer has no duty to bargain with them, a union may arbitrate contractual provisions that apply to retirees.

Accordingly, the Union has standing in this grievance to seek an interpretation of the benefits for retirees under Article 18, and the grievance is arbitrable.

The Merits:

1/ See United Steelworkers of America, AFL-CIO vs. Canron, Inc., 580 F.2d 77 (1978). See also Textile Workers of America, AFL-CIO, Local 129 vs. Tle Columbia Inc., 471 F.Supp. 527 (1978), where a U.S. District Court ordered arbitration based upon a contract violation, noting that the union had a legitimate interest in protecting the rights of retirees and was entitled to seek enforcement of the contractual provisions for retirees through the arbitration process.

Section 18.03 provides that:

1/ See United Steelworkers of America, AFL-CIO vs. Canron, Inc., 580 F.2d 77 (1978). See also Textile Workers of America, AFL-CIO, Local 129 vs. Tle Columbia Inc., 471 F.Supp. 527 (1978), where a U.S. District Court ordered arbitration based upon a contract violation, noting that the union had a legitimate interest in protecting the rights of retirees and was entitled to seek enforcement of the contractual provisions for retirees through the arbitration process.

> Employees who retire at age fifty-five (55) or later, shall be eligible to participate in the City's group health insurance, at their own exl&nse, until eligible for Medicare or the statutory provisions governing health insurance participation, whichever is greater. (Emphasis added.)

T'he "group" plan mentioned above was changed during the term of the bargaining agreement, and where the retirees had paid the same deductibles as current employees in the past, they now pay much larger deductibles, although the monthly premiums are smaller. The change has the potential of increasing retirees' expenses.

However, the agreement only provides that retirees are eligible for the group plan at their own expense. The language says nothing about the deductibles. Tle fact that they had paid the same deductibles as regular employees in the past was a function of the group plan for the City, not a negotiated benefit. When the plan changed to include larger deductibles, the retirees were obligated to pay those larger deductibles because it was part of the group plan, which was to be at their own expense by virtue of Section 18.03.

The parties agreed to different terms for current employees. The City agreed to pay 100 percent of the single premiums and 90 percent of the family premiums. It made no such agreement to do so for retirees. Retirees pay all of the premiums, and the City pays no portion of premiums.

Also, the parties agreed in Section 18.01 that the deductibles that were applicable in 1985 would be paid by employees. While the Union argues that retirees are employees, that argument is fairly easily rejected both by common sense as well as the Supreme Court case noted earlier. Employees are those who are employed by someone, retirees are those who are no longer employed. Retirees have none of the benefits of the collective bargaining agreement except those which specifically address them. In this case, only Section 18.03 addresses retirees. The deductible levels in Section 18.01 do not apply to retirees.

The parties had a chance when adding the language of Section 18.04 to address the impact of larger deductibles for retirees. When this language was negotiated for the 1993-94 contract, the parties did not discuss changing the language of Section 18.03. In Section 18.04, the City agreed to maintain the applicable deductibles at the same level in existence at the time it would change to a different carrier or self-funding. The "applicable deductibles" are those found in Section 18.01, which as noted before, does not apply to retirees but only current employees. Section 18.03, which applies specifically to retirees, does not state the level of deductibles like Section 18.01 does.

Reading Article 18 as a whole, I conclude that the grievance lacks merit.

AWARD

The grievance is arbitrable and it is denied.

Dated this 21st day of April, 1995, at Elkhorn, Wisconsin.

By _____
Karen J. Mawhinney, Arbitrator

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