

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**ONEIDA COUNTY DEPUTY
SHERIFF'S ASSOCIATION**

and

ONEIDA COUNTY

Case 135
No. 57254
MA-10567

(Grievance of Dan Bixby)

Appearances:

Mr. Richard Thal, General Counsel, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, appeared on behalf of the Association.

O'Brien, Anderson, Burgy, Garbowicz & Brown, Attorneys at Law, by **Mr. John O'Brien**, P.O. Box 639, 221 First Street, Eagle River, Wisconsin 54521, appeared on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and County respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide the grievance of Dan Bixby. A hearing, which was not transcribed, was held on April 21, 1999 in Rhinelander, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on June 18, 1999. Based upon the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Association frames the issue as follows:

Did the County violate Sec. 14.01 of the parties' collective bargaining agreement when the grievant was denied health insurance coverage for his wife's reversal of tubal ligation surgery? If so, what is the appropriate remedy?

The County framed the issue as follows:

Is sterilization reversal a covered procedure under the Oneida County Health Care Plan?

Having reviewed the record and the arguments in this case, the undersigned finds the Association's issue appropriate for purposes of deciding this dispute. Consequently, the Association's issue will be decided herein.

PERTINENT CONTRACT PROVISIONS

The parties' 1995-97 collective bargaining agreement contained the following pertinent provisions:

ARTICLE XIV - INSURANCE

Section 14.01 - Hospitalization: All employees who desire hospital and sickness insurance, shall be included in the regular County program of hospital and sickness insurance now in force, or as the same may be hereinafter modified or improved, with the County to pay one hundred percent (100%) of the premium which may be administered and funded by the County under a partially-funded insurance plan to be implemented on July 1, 1987. **Effective January 1, 1991** - All employees who desire hospital and sickness insurance, shall be included in the regular County program of hospital and sickness insurance now in force, or as the same may be hereinafter modified or improved, with the County to pay ninety-five (95.0%) percent of the premium and the employee will pay five (5.0%) percent of the premium, which may be administered and funded by the County under a partially self-funded insurance plan to be implemented on July 1, 1987. Employees who have retired at age 55, shall be allowed to be continued by paying One Hundred Percent (100%) of the premium if this does not raise the premiums for the balance of the Oneida County employees and subject to its approval by the insurance carrier for the County. The present medical and hospitalization benefits will not be reduced but the County may from time to time change the insurance carrier if it elects to do so. The County agrees to notify the Association of the terms of the proposed change. If a change in insurance carriers is grieved, the sole issue to be determined is the comparability of benefits expressed in total dollar value to the insured.

The hospital and surgical care insurance shall be equivalent to the co-pay aggregate liability plan provided by Blue Cross/Blue Shield, a copy of which shall be attached to the contract, which plan is further explained. . .

The County agrees to reimburse any portion of the final \$250 of the \$500 deductible which has been incurred and paid each calendar year subject to a maximum reimbursement of \$500 each calendar year under the family plan. Under the family plan, family members who have pooled their charges to satisfy the deductible would be reimbursed any portion of the final \$500 incurred and paid by the employee in excess of \$500. . .

BACKGROUND

Among its many governmental functions, the County operates a Sheriff's Department. The Association represents various employees in that Department. The County and the Association have been parties to a series of collective bargaining agreements, one of whose provisions provide health insurance benefits to bargaining unit members.

Prior to July 1, 1987, the County purchased health insurance through Blue Cross/Blue Shield United of Wisconsin. The County and Blue Cross/Blue Shield were parties to an insurance contract which provided in pertinent part that:

No benefits will be provided for services or supplies:

1. Which are not specifically described in this contract
2. Which are not **MEDICALLY NECESSARY**;

. . .

22. For treatment of sexual dysfunction not related to organic disease;

. . .

Since July 1, 1987, the County has partially self-funded its health insurance plan.

The County's first third-party administrator was National Benefit Consultants (NBC). When NBC managed the County's health care plan, it provided a benefits booklet which summarized the benefits available under the County's group medical insurance plan. This booklet used the same language which was used in the Blue Cross/Blue Shield health insurance contract. Specifically, it provided in pertinent part that:

No benefits will be provided for services or supplies:

1. Which are not specifically described in this contract
2. Which are not **MEDICALLY NECESSARY**;

...

22. For treatment of sexual dysfunction not related to organic disease;

...

NBC was the third-party administrator from July 1, 1987 through May 31, 1993.

In 1991, while NBC was the third-party administrator, bargaining unit member James Wood inquired of NBC whether a vasovasostomy would be a covered expense. A vasectomy is the surgical method of male sterilization, and a vasovasostomy is a reversal of a vasectomy. On April 10, 1991, an NBC claims analyst advised Wood in writing that a vasovasostomy was a "covered expense" under the County's health care plan. A month later, Wood had the vasovasostomy performed. Since the vasovasostomy was a covered expense, Wood did not have to pay for this surgical procedure himself.

On June 1, 1993, Midwest Securities Administrators (MSA) took over the administration of the County's health care plan. Thus, on that date, MSA became the County's third-party health insurance administrator. That same year, the County hired Anita Simes, a consultant at R.J. Flahive, to revise the existing Oneida County Health Care Plan booklet to make it easier to understand. One of the revisions which was made in that booklet is pertinent here. Specifically, a change was made in the "General Exclusions" section to Item Number 22. Prior to the change, Item Number 22 in the exclusions in the old plan document stated that no benefits would be provided "For treatment of sexual dysfunction not related to organic disease." In the revised plan document, exclusion number 22 was renumbered exclusion number 19 and was changed as follows:

19. For treatment of sexual dysfunction not related to organic disease; for reversal of sterilization procedures;

The underscoring indicates the new language.

When the language underlined above was added to the "General Exclusions" in the Health Plan booklet, Simes was not aware that the County's previous third-party administrator (NBC) had determined in 1991 that a vasovasostomy qualified as a covered expense for unit member James Wood.

After the revisions were made to the County's Health Care Plan booklet, that document and a cover memo were distributed to County employes by the County's Personnel Department. The cover memo provided in pertinent part:

Attached you will find a new copy of your health plan document. It has been revised and written in a manner that is easier to understand. There have been no changes made to your current coverage.

FACTS

Dan Bixby is a member of the bargaining unit. His wife, Robin, is included under his insurance coverage.

In April, 1998, Robin Bixby underwent surgery to reverse tubal ligation. Tubal ligation is a surgical procedure for female sterilization.

Prior to his wife's surgery, Bixby asked Lisa Charbarneau, an employe in the County's Personnel Department, whether surgery to reverse sterilization would be covered. After she reviewed the Oneida County Health Care Plan booklet, she concluded that it was not covered and she told Bixby that surgery to reverse sterilization would not be covered. Bixby then called the third-party administrator (MSA) and asked them the same question. An unnamed MSA representative told Bixby the same thing Charbarneau had, namely that under the County's Health Care Plan booklet, surgery to reverse sterilization would not be covered.

Since the County considered sterilization reversal to be a non-covered procedure under its health care plan, Bixby paid for his wife's sterilization reversal procedure himself. The procedure cost \$6,727.

Later, after Bixby learned that Wood's reversal of sterilization procedure had been covered by the County's Health Care Plan, he grieved. He contended that since Wood's reversal of sterilization procedure had been considered a covered expense, his wife's reversal of sterilization procedure should be too. This grievance was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association contends that the County violated Section 14.01 of the labor agreement when it denied Bixby health insurance coverage for his wife's reversal of tubal ligation surgery. It makes the following arguments to support this contention.

It avers at the outset that Section 14.01 provides that the County cannot unilaterally reduce the level of health insurance benefits. According to the Association, that section obligates the County to provide the same health insurance benefits to employees now as it provided in 1987. It notes in this regard that in 1991, unit employee James Wood received insurance coverage for a sterilization reversal procedure. It further notes that this occurred after the County's third-party administrator (NBC) decided it was a covered expense. The Association submits that when NBC decided that sterilization reversal was a covered procedure, that was the equivalent of the County making that determination, so the County may not now claim that it neither knew of, nor acquiesced in, that decision. The Association argues that this 1991 decision that sterilization reversal is a covered expense under the County's health care plan set the standard which is to be applied here.

Next, the Association addresses the County's argument that a single instance of providing health insurance benefits for reversal of sterilization procedures does not constitute a practice. As the Association sees it, requests for health insurance coverage for reversal of sterilization procedures are not likely to arise often, so it is unreasonable to expect that such a practice would exist over a long period of time. That being the case, the Association asserts that where the situation arises infrequently and when there is a single incident parallel to the situation before an arbitration, then such a single incident should be sufficient to establish a binding past practice that can only be changed through bargaining. The Association believes that the County must follow its 1991 practice here and provide health insurance coverage for reversal of sterilization procedures. According to the Association, it would be grossly unfair for the County to pay for James Wood's sterilization reversal procedure in 1991 but not pay for Robin Bixby's similar procedure in 1998.

Next, the Association contends that the County's reliance on the Health Care Plan booklet is misplaced. This argument is premised on the Association's belief that this dispute requires "an interpretation of the collectively bargained contractual rights, not an interpretation of [the] health care plan document unilaterally created by the County." The Association acknowledges in this regard that the County's Health Care Plan document now specifically lists "reversal of sterilization procedures" as a named exclusion. Be that as it may, it is the Association's position that the County's addition of "reversal of sterilization procedures" to its health care plan document does not provide the County with a proper basis for changing its practice of paying for such procedures. As the Association sees it, the fact that the County unilaterally changed one of the general exclusions in 1993 to henceforth exclude "reversal of sterilization procedures" cannot eliminate the County's contractual obligation to maintain the established level of health insurance benefits. To support this premise, it cites an arbitration award wherein the arbitrator found that listing an additional exclusion in a health insurance summary booklet did not justify elimination of a benefit that had been provided in the past. The Association argues that the County is similarly obligated to abide by the terms of its

contract with the Association, and cannot reasonably rely on its unilateral change of the general exclusions section of the health care plan document to justify denying a benefit to Bixby when it provided Wood with the same health benefit in 1991.

In sum, the Association asks that the grievance be sustained and sterilization reversal be found to be a covered procedure under the County's health care plan. In order to remedy the County's contractual breach, the Association requests that the County be ordered to reimburse Bixby the amount that he paid for his wife's surgery.

County

The County contends it did not commit a contract violation by not reimbursing the grievant for his wife's sterilization reversal surgery. In its view, it properly denied the grievant's request for insurance coverage for that surgical procedure. It makes the following arguments to support this contention.

First and foremost, the County relies on the language found in the current Health Care Plan booklet. The County notes that exclusion number 19 in that booklet states that "reversal of sterilization procedures" is not a covered expense. In its view, that language makes it crystal clear that the County's present health insurance plan does not cover sterilization reversal. The County maintains that the language just cited required it to deny the grievant's request that it provide him insurance benefits for his wife's sterilization reversal surgery.

Next, the County avers that its prior health insurance plan booklet (i.e. the one patterned after the Blue Cross/Blue Shield plan) did not cover sterilization reversal either. To support this premise, it relies on the testimony of County witness Anita Simes who testified that, in her opinion, sterilization reversal was not covered by the Blue Cross/Blue Shield plan. In her view, the phrase "for treatment of sexual dysfunction not related to organic disease" applied to sterilization reversal procedures, so sterilization reversal was not a covered procedure. The County summarizes both of the points just referenced by asserting that neither the current insurance plan booklet nor the one that preceded it provided that sterilization reversal was a covered medical procedure. The County avers that unless a medical procedure is specifically covered, it is excluded from the plan's coverage.

Next, the County argues that it is not bound to cover sterilization reversal because of the fact that in 1991 an employee underwent sterilization reversal for which he was reimbursed by a former plan administrator. As the County sees it, that single instance is not sufficient to create a past practice which binds the County to do the same thing here. To support this premise, the County avers that "there is nothing to show the County knew this had been done or acquiesced in it." It also implies that the 1991 decision to pay for Wood's sterilization

reversal was a mistake. To support this premise, the County cites Simes' testimony that she disagreed with NBC's decision to categorize a vasovasostomy as a covered expense. Finally, the County asserts that the 1991 situation does not meet the traditional elements necessary for the creation of a binding past practice (i.e. unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed practice accepted by both sides).

In sum, the County claims that the present insurance booklet does not cover sterilization reversal, the prior insurance booklet did not cover sterilization reversal either, and one prior instance is not sufficient to create a binding past practice. The County therefore asks that the grievance be denied.

DISCUSSION

My discussion begins with an overview of the contract provision which the Association alleges was violated herein: Sec. 14.01. That section allocates premium responsibility for hospitalization insurance and provides for a plan "administered and funded" by the County. The parties have construed the words just quoted to allow the County to use a third party administrator to administer the plan. The section then goes on to set a standard for the health plan (namely, a former "plan provided by Blue Cross/Blue Shield") and insurance benefit levels. It further provides that "the present medical and hospitalization benefits will not be reduced. . ." The plain meaning of this phrase is that the County cannot unilaterally reduce medical and hospitalization benefits. Said another way, the County is not free to reduce medical and hospitalization benefits on its own volition.

In my view, this case can fairly be characterized as an alleged reduction in benefits case. The following shows why. Bixby's wife had a sterilization reversal procedure performed. The County does not consider sterilization reversal a covered procedure under its health care plan, so the County did not pay for it; this decision meant, of course, that Bixby had to pay for it himself. The Association contends that by not considering sterilization reversal a covered procedure and paying for it, the County has reduced health insurance benefits in conflict with Sec. 14.01. The County disputes that assertion; in its view, it has not reduced benefits by considering sterilization reversal a non-covered procedure.

There is nothing in Sec. 14.01, or anywhere else in the labor agreement, about sterilization reversal, specifically whether it is or is not covered under the County's health care plan. That is not surprising. Such details are not normally addressed in the labor agreement, but rather are addressed in some type of insurance document or booklet. In this case, the details of the County's health care plan are addressed in an insurance plan document. That being so, the focus turns from Sec. 14.01 to the insurance plan document itself.

The threshold question is which insurance plan document: the current MSA plan document or the one that preceded it (i.e. the NBC plan document). While the language in those documents has yet to be reviewed, suffice it to say here that the MSA plan document contains language not found in the NBC plan document or the Blue Cross/Blue Shield insurance contract. This point is important because as previously noted, Sec. 14.01 incorporates the elements of a health insurance plan into the collective bargaining agreement, at least for the purposes of contract administration review. That plan was the former “plan provided by Blue Cross/Blue Shield.” Also as previously noted, Sec. 14.01 then goes on to mandate that the level of benefits provided therein “cannot be reduced”. Since the Association contends that the County has reduced a medical benefit that was previously provided, it logically follows that the only way to determine if that is the case is to compare the current benefit level to what existed previously.

Having so found, attention is turned to the NBC insurance plan document (i.e. the one which preceded the current MSA document). The NBC plan document contained the identical language used in the Blue Cross/Blue Shield insurance contract. Both provided in pertinent part:

No benefits will be provided for services or supplies:

...

22. For treatment of sexual dysfunction not related to organic disease;

...

On its face, exclusion number 22 above does not say anything about sterilization reversal.

Insofar as the record shows, the question of whether sterilization reversal is covered under the County’s insurance plan has arisen just twice in this bargaining unit: the current case and an instance in 1991. What happened in 1991 was that unit member James Wood inquired whether a vasovasostomy (i.e. the sterilization reversal procedure for men) was a covered expense. In response to his request, the County’s third party administrator, NBC, determined that a vasovasostomy was a covered expense under the County’s health care plan. Implicit in this finding was that exclusion number 22 above did not apply to sterilization reversal procedures. Wood subsequently had the vasovasostomy procedure performed, and did not have to pay for it because it was considered a covered expense.

Not surprisingly, the County tries to disassociate itself from NBC's decision. First, it contends that it neither knew of, nor acquiesced to, NBC's decision. Based on the following rationale, the undersigned does not find this contention persuasive. There is nothing in the record which supports the conclusion that NBC's decision was outside or beyond the scope of its authority as the County's third party insurance administrator. That being so, the converse must be true, namely that NBC's decision was within the scope of its authority as the County's third party insurance administrator. It follows from this that when NBC made the decision that sterilization reversal was a covered procedure under the County's health care plan, it was functioning as the County's agent. Consequently, NBC's determination that sterilization reversal qualified as a covered expense was the functional equivalent of the County making that determination. Second, the County implies that NBC's decision that sterilization reversal was a covered procedure was a mistake. The undersigned does not find this contention persuasive either. The only record evidence which the County cites to support this contention is that its insurance consultant, Anita Simes, disagreed with NBC's decision to categorize a vasovasostomy as a covered expense. Suffice it to say that just because Simes disagreed, in hindsight, with NBC's 1991 decision does not prove that NBC's decision was wrong or a mistake. Finally, in its opening statement at the hearing, the County raised the possibility that there may have been medical reasons for Wood's vasovasostomy being performed, which would distinguish it from Bixby's wife's situation. The record evidence did not substantiate this contention. Wood testified that he had the vasovasostomy performed for personal reasons – not medical reasons. This testimony established that there were not medical reasons for Wood's vasovasostomy. Given the foregoing, I find that the County's attempts to disassociate itself from NBC's 1991 decision are not successful.

Having so found, the focus turns to what happened subsequently. In 1993, a different company, MSA, took over as the County's third party health insurance administrator and in 1994, the existing insurance plan booklet was revised. The one revision that is pertinent here is that new language was added to exclusion number 22, and that exclusion was renumbered number 19. The new language which was added said no benefits will be provided "for reversal of sterilization procedures." There is no question what this new language means. Its meaning is crystal clear – it provides that sterilization reversal is not a covered procedure under the County's health plan.

When the question subsequently arose whether Bixby's wife's sterilization reversal was a covered procedure, each side relied on the facts cited above which support their view: the Association relied on NBC's 1991 decision that a vasovasostomy was a covered expense, while the County relied on the language which was added to the insurance plan booklet in 1994. These two views conflict and cannot be reconciled. That being so, the crux of this case is which view controls the outcome here.

Based on the following rationale, I find that the Association's view controls. First, at the beginning of this discussion it was noted that Section 14.01 provides that the County cannot reduce the level of health insurance benefits provided to bargaining unit members. That section obligates the County to provide the same health insurance benefits to employees as it previously did. It has also been noted that in 1991, unit employee Wood received insurance benefits for a sterilization reversal procedure after the County's third party administrator decided that it was a covered expense. The record indicates that in this bargaining unit, requests for insurance coverage for sterilization reversal are not common. In fact, Wood's request was the first. Since sterilization reversals are, at least in this bargaining unit, infrequent at most, NBC's decision set an important precedent that one of the medical procedures that was covered under the County's health insurance plan was sterilization reversal. Second, it has also been noted that in 1994, the County rewrote portions of the insurance plan booklet and added sterilization reversal as a named exclusion. After this change was made, the County issued a cover memo which said in pertinent part: "there have been no changes made to your current [insurance] coverage." This statement was incorrect because, in point of fact, there was a substantive change relating to sterilization reversal. That change was that sterilization reversal was named as an exclusion, and hence a non-covered procedure, whereas NBC had previously decided that sterilization reversal was a covered procedure. By changing the language contained in the old exclusion number 22, the County sought to eliminate, and thought it had eliminated, the precedent established in 1991 that sterilization reversal is a covered expense under the County's health care plan. It would be one thing if the Association had agreed with this language change after bargaining occurred concerning same. However, that was not the case. Instead, what happened was that the County simply unilaterally made a change to the insurance plan and implemented it via new language to exclusion number 19. This new language reduced one of the health insurance benefits provided to unit employees. This reduction violated that portion of Sec. 14.01 wherein the County obligated itself to maintain an existing level of health insurance benefits. Given the County's contractual commitment in Sec. 14.01 to not reduce health insurance benefits, the County cannot rely on the current insurance plan booklet to justify denying sterilization reversal coverage to Bixby. Notwithstanding what the current insurance booklet says, in the Sheriff's Department bargaining unit sterilization reversal is a covered procedure under the County's health insurance plan.

Any matter which has not been addressed in this discussion has been deemed to lack sufficient merit to warrant individual attention.

In light of the above, it is my

AWARD

That the County violated Sec. 14.01 of the parties' collective bargaining agreement when the grievant was denied health insurance coverage for his wife's reversal of tubal ligation surgery. In order to remedy this contractual breach, the County shall reimburse Bixby the amount that he paid for his wife's surgery.

Dated at Madison, Wisconsin this 30th day of August, 1999.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

