

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**PROFESSIONAL CLERK-MATRON
DISPATCHER ASSOCIATION**

and

CITY OF OAK CREEK

Case 130
No. 62607
MA-12365

In the Matter of the Arbitration of a Dispute Between

**PROFESSIONAL POLICE
OFFICER'S ASSOCIATION**

and

CITY OF OAK CREEK

Case 131
No. 62608
MA-12366

Appearances:

Davis & Kuelthau, S.C., Attorneys at Law, by **Joel S. Aziere and Robert H. Buikema**, on behalf of the City of Oak Creek.

Robert West, Bargaining Consultant, WPPA/LEER, on behalf of the Professional Clerk-Matron Dispatcher and Police Officer's Associations.

ARBITRATION AWARD

Professional Clerk-Matron Dispatcher Association and Professional Police Officer's Association, hereinafter collectively referred to as the Association, and City of Oak Creek, hereafter City or Employer, advised the Wisconsin Employment Relations Commission that Coleen A. Burns, a member of the Commission's staff, had been selected to hear and decide the instant dispute. Thereafter, the Commission designated the undersigned as Arbitrator. The parties waived hearing and the record was closed on June 22, 2004, upon receipt of the parties' Stipulations of Fact and written argument. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The Association frames the issue as follows:

1. Are the grievances timely filed?
2. If so, did the Employer violate the Collective Bargaining Agreements when the dental insurance orthodontic benefit was changed?
3. If so, what is the remedy?

The City frames the issue as follows:

1. Whether the grievances were timely filed by the Police Union and the Clerks Union and, therefore, arbitrable under the grievance procedure set forth in the collective bargaining agreement?
2. If so, whether the City violated the terms of the collective bargaining agreement when Delta Dental unilaterally, and without prior knowledge of or consent of the City, changed the orthodontic benefit provided under the dental insurance plan named "DeltaCare" and, if so, the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article 8 Grievance Procedure (Police and Clerks Contract)

. . .

C. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing. All days referred to in this article shall be defined as working days, Monday through Friday, and shall exclude Saturday, Sunday and city holidays.

D. Steps in Procedure:

Step 1: If an employee has a grievance, the grievance shall be reduced to writing and signed by the employee and presented to the employee's immediate supervisor within ten (10) working days from the date the act or condition complained of occurred, or the employee with reasonable diligence could have known of the act or condition complained of. The immediate supervisor shall give his/her answer in writing within ten (10) working days from the receipt of the written grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later.

. . .

RELEVANT BACKGROUND

In November of 2002, Delta Dental advised the City that Delta Dental had changed the orthodontic benefit provided in one of two dental coverage plans offered to the Association's bargaining unit employees, *i.e.*, DeltaCare, and that the change would be effective January 1, 2003. On November 21, 2002, the City provided notice to the Association and all full time employees – including those represented by the Police and Clerks unions – of the changes in the DeltaCare benefit and the effective date of these changes.

Under the DeltaCare plan in effect in November of 2002, each participating member was responsible for a \$650.00 co-pay, after which Delta Dental paid 100% of the remaining charges. Under the plan in effect on January 1, 2003, the orthodontic benefit changed to 50% coverage of orthodontic work with a lifetime maximum of \$2,500.00.

On or about December 12, 2002, City Administrator Robert Kufrin sent a memorandum to the President of the Police union, which included:

Over the past several months our health insurance consultants have been working on renewing all of our different health insurances. One of the “off the shelf packages” that we purchase is our dental insurance. Neither DeltaCare

(the DMO – Dental Maintenance Organization) product nor DeltaPremier (broader product) are custom designed like our self-funded health plan.

When Delta Dental submitted the renewal for 2003, they arbitrarily changed the copayments and deductibles for the DMO product. The City cannot change their decision. The monthly cost to the City for the DeltaCare plan for 2003 is \$80.40 and the cost for DeltaPremier is \$81.37.

I realize that the change in the plan impacts some employees, which was the reason for the early notice so those who were considering braces would have the chance to get started in 2002 and avoid the higher copayments in 2003.

The City did not ask for this change and is not able to reinstate the old plan. The City is not willing to pay something to the impacted employees because the change was not self-induced. If you look at the fifth page from the back of the packet distributed with the agenda for November 8th Health Insurance Committee meeting (copy attached), you will see the details of the change. Each of the two plans has different benefits for participants and I hope that you can see the reasonableness of how the City dealt with the change.

The attachment described the change in the orthodontic benefit that had been announced on November 21, 2002.

On December 19, 2002, Police union Labor Consultant Pat Coraggio sent a letter to Kufrin, which included the following:

I am in receipt of your memo dated November 21, 2002 regarding changes in your current dental plan. I have reviewed this document with our insurance expert, Mr. Marty Tomczek and I have asked the Association President, Dan Sietzman to canvas the membership to determine if they are agreeable with the changes. I have just been advised on this date that the Association has held a meeting and after reviewing the changes, they are not agreeable to any changes in the dental plan during the term of this collective bargaining agreement. Therefore, pursuant to Article 20-Medical Insurance, paragraph J-Health Plan Modifications which reads in pertinent part as follows:

“The City agrees that it will not change or modify the insurances set forth in this article without the mutual agreement of the Association.”

Furthermore, it the Association's position that the City must maintain the same level of benefits and should there be a difference in the benefit level in full force and effect in calendar year 2003 or at anytime during the term of this collective bargaining agreement, the Employer must stand in the shoes of the carrier and pay the difference. If you have any questions regarding the Association's position, please feel free to have your legal counsel contact me.

On December 23, 2002, Kufrin responded to Coraggio with a letter that includes:

It is unfortunate that the Association chose to not be agreeable to the unilateral change by the dental carrier. If the Association or LAW can find a company that provides a comparable benefit plan, please let me know.

The City views both dental plans as equal options and as such if one plan changes or is eliminated and the other remains unchanged, the employees can elect a no change option. The City has not intention of paying the difference. It also appears that the Association does not want to accept any of the benefit enhancements that occurred in the health plan during the term of the agreement, so the City will be reevaluating that position as well.

If the Association is not willing to work with the City on the issue of managing health care benefits and costs, I suggest that they proceed to file a grievance.

The modifications to the DeltaCare orthodontic benefit announced in November of 2002 were implemented effective January 1, 2003. On January 8, 2003, Coraggio responded to Kufrin with a letter that includes:

I am in receipt of your letter dated December 23, 2002. After reviewing the contents of your letter, I believe it is imperative that this response be written. The letter sent to you regarding the dental insurance referred to only the dental plan and did not refer to the health insurance plan that is currently in effect or any modifications thereof.

Additionally, the language in the contract that provides for mutual agreement of any insurance changes was language that was voluntarily put into the contract by both parties. The City agreed to this language when the Association agreed to modifications and changes in the health insurance voluntarily. This was done in the spirit of cooperation and through the negotiating process. Accordingly, your reference to the Association not being willing to work with the City is unfounded and has no foundation to draw from. If you would like to have the

Association assist you in looking for a different plan, I would be more than happy to use the resources that we have available.

Your final suggestion in the letter to file a grievance is under consideration. However, a final point of clarification must be reiterated. It is the Association's position that the City will be and is responsible for standing in the shoes of the carrier for any diminished benefits which the City allows to happen during the term of the agreement. These areas which are changed from the plan that was in effect at the commencement of the contract must be self funded by the Employer and accordingly, any bills that are not paid and would have been paid shall be brought to the City's attention with the expectation of reimbursement. Should the City refuse to comply with their contractual commitment, the Association will review the avenues that are available to make sure that the City has bargained in good faith and will live up to their part of the contract.

If you have any questions regarding the above or if any clarification is needed, please feel free to contact the undersigned.

On January 20, 2003, the Police union filed a grievance, alleging that the City violated the terms and conditions of the collective bargaining agreement by modifying the Group Dental coverage without the mutual agreement of the Association. On January 28, 2003, Kufrin denied the Police union grievance on the basis that it was not timely filed.

On February 18, 2003, the Clerk's union filed a grievance, alleging that the City violated the terms and conditions of the collective bargaining agreement by modifying the Group Dental coverage without the mutual agreement of the Association. On February 20, 2003, Kufrin denied the Clerk's union grievance on the basis that it was not timely filed. Thereafter, both grievances were submitted to arbitration.

DISCUSSION

Although the parties did not stipulate to the issues, each party recognizes that the initial issue to be determined by the undersigned is whether or not the two grievances have been timely filed under the contractual grievance procedure. If the grievances have not been timely filed, then they are not arbitrable and must be dismissed.

Timeliness

The City argues that the grievances were not filed within the ten day time limit set forth in Article 8 of each bargaining unit's contract. The Association responds that the grievances

should be considered as recurring grievances, with the ten day time limit for filing a grievance commencing each time the insurance change impacts upon a bargaining member.

Under the language of the relevant collective bargaining agreements, a grievance is required to be presented “within ten (10) working days from the date the act or condition complained of occurred, or the employee with reasonable diligence could have known of the act or condition complained of.” As a review of each grievance reveals, the “act or condition complained of” is the modification of the Group Dental Coverage without the mutual agreement of the Association.” This modification went into effect on January 1, 2003.

The “act or condition complained of” in the two grievances is a single, discrete event, *i.e.*, the modification of the dental coverage benefit that went into effect on January 1, 2003. Thus, the undersigned rejects the Association’s claim that there is a recurring grievance.

As acknowledged in each grievance, on November 21, 2002 each union received notice of the modification of the Group Dental coverage and that this modification would be effective January 1, 2003. The City argues, therefore, that the “act or condition complained of” was known to reasonably diligent employees on November 21, 2002 and, thus, under the language of Article 8, this is the date which triggers the ten day limit for filing a grievance. As the Association argues, however, a reasonably diligent employee may not have known of the “act or condition complained of” until the insurance modification was implemented because, until the point of implementation, there is always the possibility of a change in the proposed modification.

To be sure, as the Association argues, it may have been in the best interest of the Association to determine whether or not any employee would be adversely impacted, or to be sure that a resolution was not possible, prior to filing a grievance. However, this interest of the Association does not take precedence over the contractual time limits for filing the grievance. If the Association required additional time to decide whether or not it wished to file a grievance, it could have sought an extension of time limits, as provided for in Article 8(C), or continued to pursue a resolution of the matter after the grievance had been filed, including suggesting an alternative carrier if the Association were able to find one.

The grievance time limits which the City seeks to enforce herein are not “traps” to ensnare the Association. Rather, they are a mutually agreed upon procedure to ensure that grievances are addressed in a timely manner.

Conclusion

On November 21, 2002, reasonably diligent employees of the Police and Clerk unions could not have known “of the act or condition complained of” in the grievance because, at that time, it was possible that there would be no modification to the dental benefit. However, any uncertainty as to whether or not the dental benefit would be modified and the nature of that modification was resolved on January 1, 2003, when the previously announced modification of the Group Dental coverage was implemented.

It may be, as the Association argues, that, on January 1, 2003, the Association did not know if the modification of the Group Dental coverage would impact any bargaining unit member, or the financial losses of those who might be impacted. However, neither uncertainty is relevant to the determination of the time limits for filing these grievances. The only relevant uncertainty was resolved when the modifications announced on November 21, 2002 were implemented on January 1, 2003.

Under the circumstances of this case, the ten day time limit for filing the Police and Clerk union grievances commenced on January 1, 2003. As set forth in the parties’ stipulations, the Police union filed its grievance on January 20, 2003 and the Clerk’s union filed its grievance on February 18, 2003.

The relevant contract language defines working days as excluding Saturday, Sunday and city holidays. The parties have not identified any relevant city holidays. Excluding Saturdays and Sundays, neither the Police union’s January 20, 2003 grievance, nor the Clerk union’s February 18, 2003 grievance, was filed within the contractual ten (10) working day time limit.

The contractual grievance procedures provide for extensions of time limits “by mutual consent in writing.” It is not evident that such an extension was requested, or granted.

The City raised its claim that the grievance was not timely filed when it initially responded to each grievance and maintained this claim throughout the processing of these grievances. The record does not establish that the parties have a practice of not enforcing the time limits for filing grievances.

The two grievances were not timely filed. The grievances are not arbitrable and, thus, have been dismissed.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The two grievances are not timely filed.
2. The two grievances are not arbitrable.
3. The two grievances are dismissed.

Dated at Madison, Wisconsin, this 30th day of November, 2004.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

