BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Case 500
No. 59496
MA-11313

Appearances:

Eggert & Cermele, S.C., Attorneys at Law, by **Ms. Rachel L. Pings**, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

Milwaukee Deputy Sheriffs' Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and Milwaukee County, hereinafter the County or Employer. The County subsequently concurred in the request and the undersigned, Coleen A. Burns, of the Commission's staff, was designated to arbitrate the dispute. A hearing was held before the undersigned on August 16, 2004, in Milwaukee, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs by October 19, 2004. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

Did Milwaukee County violate Sec. 3.11(5) of the Contract when it billed Deputy Wage for her health and dental premiums in July, 2000?

If so, what is the appropriate remedy?

CONTRACT LANGUAGE

3.11 EMPLOYE HEALTH AND DENTAL INSURANCE BENEFITS

. . .

(5) The appropriate employe monthly payment shall be made through payroll deductions. When there are not enough net earnings to cover such a required contribution, and the employe remains eligible to participate in a plan, the employe must make the payment due within ten working days of the pay date such a contribution would have been deducted. Failure to make such a payment will cause the insurance coverage to be canceled effective the first of the month for which the premium has not been paid.

. . .

6.01 ENTIRE AGREEMENT

The foregoing constitutes the entire Agreement between the parties by which the parties intended to be bound and no verbal statement shall supersede any of its provisions. All existing ordinances and resolutions of the Milwaukee County Board of Supervisors affecting wages, hours and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth. To the extent that the provisions of this Agreement are in conflict with existing ordinances or resolutions, such ordinances and resolutions shall be modified to reflect the agreements contained herein.

RELEVANT BACKGROUND

In February of 2000, Deputy Anne Wage, hereafter Grievant, began a series of leaves from her position as Milwaukee County Deputy Sheriff for the birth of her child. The Grievant was on paid leave through June 14, 2000. From June 15, 2000 through July 16, 2000, the Grievant was on unpaid leave. (Jt. # 1 and 3)

At all times material hereto, the Grievant remained covered by the County's health and dental insurance plan. The Grievant contributed $57.00 per month for this coverage until she received a "Milwaukee County Notice of Insurance Premium Payment Due." According to this Notice, the Grievant was required to pay $603.80 for her health and dental insurance coverage. (Jt. #1)

The Grievant paid this amount and then filed the instant grievance, alleging that, under the terms of the labor contract, the Grievant was required to pay $57.00/month and not $603.80/month for health and dental coverage. The grievance was denied and, thereafter, submitted to arbitration. (Jt. #1)

POSITIONS OF THE PARTIES

Association

Generally speaking, the County automatically deducts the bargaining unit employee's insurance contribution through payroll deductions. When an employee lacks sufficient payroll funds to cover this contribution, Sec. 3.11(5) permits the employee to make this contribution.

This contract language does not distinguish among possible reasons for a lack of sufficient payroll funds. The employee maintains the insurance coverage by paying the employee contribution "within ten working days of the pay date such a contribution would have been deducted." The contribution that "would have been deducted" is the employee contribution, which in the Grievant's case is $57.00.

Assuming *arguendo*, that Sec. 3.11(5) is deemed ambiguous, the Association's interpretation is still entitled to be given effect. The parties jointly introduced a packet of materials relating to Deputy Biro-Bauer, who utilized the same leaves as the Grievant, *i.e.*, Family Medical Leave Act and then unpaid Parenting Leave. While on unpaid Parenting Leave, this Deputy received a "Milwaukee County Notice of Insurance Premium Payment Due" for September, 1999, requiring her to pay only the $57.00 employee contribution. Although not intended to demonstrate a past practice, it is instructive as to how the County previously has interpreted the relevant contract provision.

Ms. Annette Garcia's explanation that mistakes are made when the Employee Benefits Department is unaware of a Deputy's leave status is, on its face, plausible. However, any assumption that Deputy Biro-Bauer's status was not known in September, 1999 is rebutted by the evidence that her leave had been granted at least five months previously.

The most reasonable conclusion to be drawn from the evidence of Deputy Biro-Bauer's billing is that Employee Benefits was complying with the requirements of the contract.

Ms. Garcia's claim of a long-standing contrary practice was not substantiated by other recalled examples, or documentation.

The language of Sec. 3.11(5) plainly and clearly demonstrates that the Grievant should have been billed for only her $57.00 employee contribution during her entire leave of absence, including the unpaid Parenting Leave portion. No contract language directs otherwise.

The County seeks to cloud the issue by relying upon Civil Service Rules and County Ordinances. The contract incorporates the rules and ordinances that do not conflict with the contract language. Neither the rules, nor the ordinances, provide guidance in this case.

The Arbitrator should find that the County has violated the collective bargaining agreement as alleged by the Association. In remedy of this contract violation, the County should be ordered to reimburse the Grievant in the amount of $546.80.

County

The grievance does not cite the provision of the collective bargaining agreement alleged to have been violated. Rather, the grievance claim is based upon the allegation that the Grievant should be treated in the same manner as Deputy Biro-Bauer.

Inasmuch as the Grievant and Deputy Biro-Bauer were not similarly situated, the grievance claim must fail. To the extent that the Grievant and Deputy Biro-Bauer are similarly situated, Ms. Garcia credibly testified that Deputy Biro-Bauer's failure to pay the full premium costs was a mistake. A mistake is not binding upon the County.

Sec. 6.01 of the labor agreement effectively subsumes the County's Civil Service Rules and Ordinances. Under Sec. 17.14(7), especially subsection (k), of Milwaukee County's General Ordinances and Civil Service Rule VIII, Section 2(d), once on unpaid leave, the Grievant is responsible for the entire insurance premium. As Ms. Garcia testified at hearing, this has been the procedure in effect for at least eight years.

The Grievant was treated just as everyone in her situation ought to be treated under the applicable contract provisions and practices. The Grievant has not sustained her burden of persuasion. The grievance should be denied.

DISCUSSION

The Association argues that Sec. 3.11(5) of the parties' collective bargaining agreement requires the Grievant to pay $57.00 per month for her health and dental benefits. Arguing that the grievance filed by the Grievant does not raise such a contractual claim, but rather, relies

upon past practice, the County asserts that the Grievant has not sustained her burden of persuasion and, thus, the grievance should be denied.

The grievance, as initially filed, raises a claim of past practice, but also raises a claim of contract violation. (Jt. #1) To be sure, the contract provision alleged to have been violated is Sec. 311.51. Given the fact that no such provision exists in the agreement, as well as the fact that the payment of health insurance premiums is addressed in Sec. 3.11(5) of the contract, one may reasonably conclude that the grievance reference to Sec. 311.51 was an error. Although the written report of the County's hearing officer refers to Sec. 311.51(5), the hearing officer understood that the contract provision relied upon by the Association related "to the appropriate employee monthly payment when there are not enough earnings to cover a required contribution," which provision is Sec. 3.11(5). (Jt. #1)

As the Association argues, this dispute involves the interpretation and application of Sec. 3.11(5) of the parties' agreement. Specifically, the parties dispute whether or not the Grievant's change in leave status, *i.e.*, from a paid leave to an unpaid leave, required the Grievant to pay $603.80 per month for health and dental insurance.

Sec. 3.11 is entitled "EMPLOYE HEALTH AND DENTAL INSURANCE BENEFITS." The first sentence of Subsection 5 states that "The appropriate employe monthly payment shall be made through payroll deductions." The second sentence of Sec. 3.11(5) states that "When there are not enough net earnings to cover such a required contribution, and the employe remains eligible to participate in a plan, the employe must make the payment due within ten working days of the pay date such a contribution would have been deducted."

In the second sentence, the use of the word "such," prior to the phrase "a required contribution," indicates a reference back to "the appropriate employe monthly payment" provided for in the first sentence. One may reasonably conclude, therefore, that the "required contribution" of the second sentence is the same amount as the "appropriate employe monthly payment" of the first sentence.

The most reasonable construction of the plain language of Sec. 3.11(5) is that this provision is intended to identify the process by which bargaining unit employees pay to the County the "appropriate employe monthly payment" for health and dental insurance. Specifically, if there are sufficient net earnings, then the payment is made by payroll deduction, but if there are insufficient net earnings, then the employee must make the payment with other monies.

The amount of the "appropriate employe monthly payment" is not defined. Thus, the provision is not clear and unambiguous. However, the plain language of this provision neither expresses, nor implies, that the amount of the "appropriate employe monthly payment"

fluctuates on the basis of whether or not there are sufficient net earnings for a payroll deduction. Thus, as the Association argues, the most reasonable construction of the plain language of Sec. 3.11(5) is that such a fluctuation is not intended.

The parties are in agreement that, if the Grievant had continued on a paid leave of absence, then the appropriate employee monthly payment for health and dental insurance would be $57.00, rather than the full monthly premium of $603.80. Under the most reasonable construction of the plain language of Sec. 3.11(5), the "appropriate employee monthly payment" for the Grievant's health and dental insurance is $57.00 per month, regardless of whether the Grievant is on a paid, or an unpaid, leave of absence.

Given the ambiguity of the Sec. 3.11(5) language, it is appropriate to consider the evidence of the parties' practices to determine whether or not the parties mutually intended any other construction of Sec. 3.11(5). In her testimony, Annette Garcia maintains that, for at least eight years, her Department has required employees on unpaid leave to pay the entire health insurance premium.

Given that this dispute involves the interpretation and application of the Association's collective bargaining agreement, the only relevant "past practice" is that involving the Association's bargaining unit employees. The record contains only one example of a "past practice" involving an employee in the Association's bargaining unit, *i.e.*, that of Deputy Biro-Bauer.

Deputy Biro-Bauer, while on unpaid leave, was required to pay the same amount for health and dental insurance as when she was on paid leave. Ms. Garcia states that this was a mistake. Mistake, or not, this one instance is not sufficient to establish a binding past practice. Nor does it provide a reasonable basis to conclude that the parties mutually intended Sec. 3.11(5) to be given another construction.

Sec. 6.01 of the collective bargaining agreement incorporates Civil Service Rules and Ordinances that are not inconsistent with this Agreement. The County relies upon Civil Service Rule VIII, Section 2, LEAVES OF ABSENCE WITHOUT PAY, to argue that the Grievant is liable for the full cost of the health and insurance premium. This rule states as follows:

> 2. Leave of absence without pay for a period exceeding thirty days may be granted by the department head or the appointing authority to any employee on regular appointment when the requesting employee,

. . .

(d) is requesting such leave subsequent to the birth or adoption of his/her child providing the leave requested does not exceed six months; or

. . .

As the Association argues, Civil Service Rule VIII, Section 2(d), provides authority for leaves without pay, such as that provided to the Grievant, but is silent with respect to health and dental insurance contributions. Thus, as the Association further argues, this Rule provides no guidance in construing the language of Sec. 3.11(5).

The County also relies upon Ordinance 17.14(7), EMPLOYMENT DEFINITIONS, which in relevant part states:

(7) Milwaukee County Health Plan (Fee For Service with Major Medical, Health Maintenance Organizations (HMO's) and Medicare Insurance). Group hospital and medical benefits shall be provided for eligible employees upon application of each employee in accordance with enrollment procedures established by the County. Eligible employees may choose to enroll in the Milwaukee County Health Plan (fee for service) or in a Health Maintenance Organization (HMO) approved by the County. Benefits shall be provided for in accordance with the terms and conditions of the Plan Document and the Group Administrative Agreement for the Milwaukee County Health Plan (fee for service) or the insurance contract of any Health Maintenance Organization approved by the County. On an annual basis, as determined by the County, eligible employees may change the plan selected. The County shall participate in the payment of the monthly costs of the premiums for such benefits as follows, unless the collective bargaining agreement specify otherwise:

. . .

(k) When an employee is absent from work without pay in any group health benefit deduction period to the extent that there are not sufficient earnings to permit the deduction of the monthly costs or premiums, the insurance shall lapse other than as provided in (f) and (g) above, unless the employee shall make a direct payment of such monthly costs or premiums to the Department of Human Resources Employee Benefits and Services Division on or before the date noted on the Milwaukee County Notice of Employee Insurance Premium Payment Due statement. The mailing of such statement shall relieve the County of any liability for not contacting an employee upon the expiration of the premium payment due date.

The first paragraph of Section 17.14(7) contains the following sentence: "The County shall participate in the payment of the monthly costs of the premiums for such benefits as follows, unless the collective bargaining agreement specify otherwise." Given that the most reasonable construction of the plain language of Sec. 3.11(5) of the collective bargaining agreement, discussed *supra*, requires the County to participate in the payment of the monthly costs of the premiums, the language of the parties' collective bargaining agreement does not "specify otherwise."

A fair reading of Ordinance 17.14(7)(k) reasonably supports the conclusion that this provision does not establish the amount the "monthly costs or premiums" to be paid by an employee, but rather, establishes a process by which such amounts are to be paid when the employee is absent from work without pay. By referring to "monthly costs" as well as to "premiums," the Ordinance expressly recognizes that such amounts may be less than the cost of the full premium.

As the County argues, the language of Ordinance 17.14(7)(k) is not inconsistent with the language of Sec. 3.11(5). It does not, however, require the Grievant to pay the full health and dental insurance premium, or any other amount in excess of $57.00 per month.

In summary, neither the Civil Service Rules and Ordinances relied upon by the County, nor the evidence of past practice, establishes that the parties mutually intended Sec. 3.11(5) to be given any construction other that which is reflected in the plain language. Giving effect to the most reasonable construction of the plain language, the undersigned concludes that the County violated Sec. 3.11(5) of the parties' collective bargaining agreement when it billed the Grievant $603.80 for her health and dental insurance coverage, rather than $57.00. The appropriate remedy for this violation of the parties' collective bargaining agreement is to make the Grievant whole by reimbursing her in the amount of $546.80.

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

AWARD

1. The County violated Sec. 3.11(5) of the Contract when it billed the Grievant $603.80 for her health and dental insurance coverage in July, 2000.

2. In remedy of this violation, the County is to immediately reimburse the Grievant in the amount of $546.80.

Dated at Madison, Wisconsin, this 7th day of January, 2005.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
6767