BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN, LOCAL 108

and

ST. CROIX COUNTY, WISCONSIN

Case 197
No. 63336
MA-12550

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the Labor Association of Wisconsin.

Mr. Stephen L. Weld, Weld, Riley Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of St. Croix County.

ARBITRATION AWARD

The County and the Association are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint one of three members of its staff to serve as Arbitrator to hear and decide this grievance and, pursuant to this request, Coleen A. Burns was so appointed. Hearing on the matter was conducted on August 25, 2004 in Hudson, Wisconsin. A transcript was prepared of the hearing, and the record was closed on October 22, 2004, following receipt of the parties' post-hearing briefs.

ISSUES

The parties did not stipulate the issues for decision. The Association frames the issues as follows:

Did the Employer violate the terms and conditions of the collective bargaining agreement when the Employer changed the procedure in which to determine equitable employee contributions to the County's self-funded plan to be effective in January, 2004?

If so, what is the appropriate remedy?

The County frames the issues as follows:

Did the County violate Article 3, Article 4 or Article 11 of the collective bargaining agreement when it excluded non-represented employees from the group for the purpose of determining health insurance premiums?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHTS

Section 1: The County possesses the sole right to operate County government and all management rights repose in it. The County agrees that in exercising any of these rights it shall not violate any provisions of this Agreement. These rights include, but are not limited to, the following:

1. To direct all operations of County government.

. . .

ARTICLE 4 - MAINTENANCE OF STANDARDS

Except as provided by this Agreement, the County agrees that all reasonable conditions of employment in existence at the signing of this Agreement shall be maintained at not less than the highest minimum standards and the conditions of employment shall be improved wherever specific provisions for changes are made elsewhere in this Agreement.

The parties unqualifiedly agree to bargain regarding any changes which occur in the wage, hours or conditions of employment which may arise out of application of this Article during the term of this Agreement. If Agreement cannot be reached, the issue may be submitted by either party to arbitration in accordance with the procedure as outlined in Article 8, Section 5.

. . .

ARTICLE 8 – GRIEVANCE – RESOLUTION OF DISPUTES

Section 1. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this Contract.

. . .

Section 5. Arbitration:

. . .

3. **Costs:** Both parties shall share equally the costs and expenses of the arbitration proceeding, including transcript fees and fees of the arbitrator. However, if only one (1) party demands a transcript, that cost shall be paid fully by the party demanding the transcript. Each party shall bear its own costs for witnesses and all other out-of-pocket expenses, including possible attorney's fees. Testimony or other participation of employees shall not be paid by the County, unless the employee in question is called during his or her working hours to testify on behalf of the County. The Arbitration Hearing shall be conducted in the Courthouse Government Center.

. . .

5. **Decision of the Arbitrator:** The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the application or interpretation of the Contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

BACKGROUND

On August 19, 2002 the County and the Association met to commence negotiations for the 2003-2004 collective bargaining agreement. Subsequently, the parties reached certain tentative agreements that included an agreement that the County would pay 90% of the health insurance premium and the employee would pay 10% of the health insurance premium. The Association did not ratify the tentative agreements and, following further negotiation and mediation, the parties submitted their contract dispute to final and binding interest arbitration.

The parties received their interest arbitration Award on October 13, 2003. The interest arbitrator ruled in favor of the County and, as a consequence, Article 11 was revised to include the requirement that the Association's bargaining unit contribute 10% of the total monthly health insurance premium.

At all times material hereto, the County has self-funded a health insurance plan that is offered to all County employees. The 2003 health insurance premium was calculated by dividing the total of component costs equally among all County employees, including retirees, who participated in the plan, with the effect that the monthly premium was the same for each plan participant. In 2003, this calculation produced a monthly premium of $885.26 per month.

By memo dated October 23, 2003, the County notified all County employees, including the Association's bargaining unit members, that, effective January 1, 2004, their monthly health insurance premium would be calculated in a different manner. Specifically, the County stated that it was dividing the plan participants into two groups, *i.e.*, represented and non-represented employees, and that the premium of each group would be established independently, *i.e.*, by dividing the total component costs associated with each group by the number of plan participants in that group.

As a result of this change, the non-represented employee 2004 monthly premium was established at $745.21 and the represented employee monthly premium was established at $982.42. Effective January 1, 2004, the 10% contribution required of non-represented employees was $74.52 per month, which is less than the amount of the 10% contribution required of represented employees, *i.e.*, $98.24 per month. Had the County not changed the method of premium calculation, then the monthly premium of represented and non-represented employees would have been the same, *i.e.*, $909.50, and the 10% required employee contribution would have been $90.95 per month.

On or about October 30, 2003, the Association filed the instant grievance alleging, *inter alia*, that the County had violated Articles 3, 4, and 11 of the collective bargaining agreement when it changed the procedure for determining employee health insurance contributions. The grievance was denied at all steps and submitted to arbitration.

POSITIONS OF THE PARTIES

Association

Historically, the County has included represented and non-represented employees in the plan participation group when calculating the monthly health insurance premium. This method of calculating the health insurance premium is set forth in the County's "Premium and Funding Policy," implemented in January of 2002.

Prior to the issuance of the October 23, 2003 memo, the County did not discuss or propose any change in the plan participation group. Based upon the existing method of calculating the insurance premium and the 2004 premium increase of 2.7%, the Association understood that the 2004 monthly premium would be $885.26 times 2.7%, or $909.16 and, thus, the 10% employee contribution awarded under the interest arbitration award would be $90.92 per month.

The effect of the County's unilateral decision to split the plan participation group into represented and non-represented employees was to increase the represented employee premium to $982.42 and decrease the non-represented employee premium to $745.21. As a result, non-represented employees pay $23.72 per month less for their 10% premium contribution than represented employees. The County's unilateral action reduced the Association's bargaining unit employees' wages by 1%. The County's unilateral conduct is contrary to the long-standing practice of how the parties interpreted the plan participation group and violates the maintenance of standards provision of Article 4 of the labor contract.

How Arbitration Works, Elkouri and Elkouri, 5th Ed., at page 511-12, establishes that arbitrators have recognized that the collective bargaining agreement controls over the insurance contract. The County is an agent, or co-agent, of the insurance contract because the County self-funds insurance. By unilaterally altering the insurance contract, the County has acted in an unreasonable, arbitrary and capricious manner by knowingly violating the terms and conditions of the agreement.

As set forth in the grievance, the remedy requested of the grievance arbitrator is

1) the County reimburse and make whole all Sheriff's Department bargaining unit employees in the amount of $23.72 per month per bargaining unit employee which represents the excess premiums that have been deducted from the affected employees commencing with the December 2003 implementation date;

2) the County reimburse the Association all costs and fees associated with the filing and processing of the instant grievance

3) any other award deemed reasonable to the Arbitrator;

4) to order the County to cease and desist from further violations of this nature.

County

The County may not unilaterally implement changes in the health insurance plan design of employees represented by the Association. The County may, however, unilaterally implement changes in the health insurance plan design of it non-represented employees. However, in order to effectuate changes to the plan design of non-represented employees, the County needed to establish a separate insurance group of non-represented employees. Although the County was not prepared to implement plan design changes in 2004, it is continuing to discuss this issue.

Contrary to the argument of the Association, the County's conduct is not an "unreasonable, arbitrary and capricious application" of its management authority. Management's right to place represented and non-represented employees in separate insurance pools has been upheld in arbitration. CHARTER INTERNATIONAL OIL CO., 71 LA 1072 (1978)

Article 3, Management Rights, is not violated because the County's conduct has not violated any provision of the agreement, including Article 11, Medical Insurance. Nothing in Article 11, or any other provision of the contract, specifies how the premium is to be calculated or determined, or that non-represented employees be included in the insurance group.

The County's 2002 health insurance policy was discussed periodically with members of the health insurance team, comprised of management and union employees, but, as Administrator Whiting testified at hearing, the County did not negotiate its 2002 insurance policy with either of its unions. Nor is it incorporated by reference in their collective bargaining agreements.

Arbitrator Morvant, in BORDEN CO., 39 LA 1020 (1962), rejected a union claim that a maintenance of standard clause nullifies a broad management rights provision. The Association's claim that an insurance pool of all employees is a standard required to be maintained under Article 4 similarly must be rejected.

Although the Association alleges that the County's conduct was discriminatory against its bargaining unit members, the County's motivation was not anti-union animus. As Arbitrator Taylor found in CHARTER, *supra,* management should not be judged guilty of discrimination or favoritism if management has made a change in an administrative area that is clearly within its jurisdiction.

The Association has requested a remedy that is without merit and contractual authority. Should the Arbitrator conclude that the County has violated the contract, the remedy would not exceed $7.32 per month per bargaining unit employee, the amount needed to place the

Association in the position it would have enjoyed if the County had not separated the two groups.

The Association's request that it be reimbursed for "all costs and fees associated with the filing and processing of this grievance to arbitration" directly conflicts with Article 7, Section 5, of the labor contract, which requires each party to "bear its own costs for witnesses and all other out-of-pocket expenses, including attorney's fees."

The grievance is without merit. The grievance should be dismissed in its entirety.

DISCUSSON

Issue

The Association, in its post-hearing brief, asserts that the Association's bargaining unit members were the only County employees required to make retroactive health insurance contributions. The grievance filed by the Association does not raise any issue with respect to this conduct of the County. Nor was this issue raised by the Association at the start of the arbitration hearing. Thus, the legitimacy of the County's conduct in requiring retroactive health insurance payments is not a part of this grievance.

The grievance, as filed, contains the following statement of the issue:

> Did the Employer violate the terms and conditions of the collective bargaining agreement when the Employer changed the procedure in which to determine equitable employee contributions to the County's self-funded plan to be effective in January, 2004?
>
> If so, what is the appropriate remedy?

After reviewing the grievance, as filed and processed through the contractual grievance procedure, the undersigned is satisfied that, with the deletion of the word "equitable," the Association's statement of the issue is appropriate. The word "equitable" is deleted because it follows that, if the County conduct does not violate the terms and conditions of the collective bargaining agreement, then, for the purposes of this proceeding, the resulting employee contributions are "equitable." Accordingly, the undersigned has adopted the following statement of the issues:

> Did the Employer violate the terms and conditions of the collective bargaining agreement when the Employer changed the procedure in which to determine employee contributions to the County's self-funded plan to be effective January, 2004?

If so, what is the appropriated remedy?

Merits

Although the grievance, as filed, alleges a violation of Articles 3, 4, and 11, the only provision of the collective bargaining agreement relied upon by the Association in post-hearing written argument is Article 4, Maintenance of Standards. More specifically, the Association argues that the parties have a past practice of determining health insurance premium amounts; that under this practice, the insurance pool consists of all County employees who participate in the County's health insurance plan; and that the Maintenance of Standards clause imposes a contractual duty upon the County to continue this practice.

Although the Association argues that the change in the method of determining health insurance premiums impacts upon a mandatory subject of bargaining and, thus, is protected by Article 4, Maintenance of Standards, the undersigned notes that this provision does not contain any reference to mandatory subjects of bargaining. Nor does it refer to past practices. Rather, the first paragraph of Article 4 states:

> Except as provided by this Agreement, the County agrees that all reasonable conditions of employment in existence at the signing of this Agreement shall be maintained at not less than the highest minimum standards and the conditions of employment shall be improved wherever specific provisions for changes are made elsewhere in this Agreement.

This language is not a model of clarity. However, the language "except as provided by this Agreement," establishes that other provisions of the agreement must be considered when determining the conditions of employment that are controlled by the language of this paragraph.

The language of Article 3, Management Rights, expressly reserves to the County the right to operate and manage County government. The only expressed limitation upon this right is that the exercise of these rights may not violate a provision of this agreement.

The language of Article 4, which recognizes the supremacy of other provisions of the contract, as well as common sense, dictate that Article 4 is not to be construed so expansively as to obliterate the rights reserved to management in Article 3. It follows, therefore, that decisions that are reserved to management under Article 3, are not frozen in place at the time that the parties sign the agreement, but rather, are subject to change by management during the term of the contract.

At all times material hereto, the County has had a self-funded health insurance plan. The testimony of Administrative Coordinator Whiting establishes that, prior to 2002, the County did not have any established method of determining the cost of health insurance premiums; that Whiting, with the assistance of the County's Corporation Counsel, Finance Director, Finance Committee and County Board, developed the policy that was implemented by the County in January 2002; and that this policy was not negotiated with the Association. (T. 45-46)

As the Association argues, and Administrative Whiting acknowledges, prior to October 23, 2003, the County had not discussed with the Association its decision to change the method of computing health insurance premiums. (T. 85) The Association asserts that Deputy Winberg (T. 23-24) testified that, during contract negotiations the County only proposed that the employees pay ten percent of the health insurance premiums based upon the 2003 rate of $885.26 times an increase in premiums of 2.7%, or $909.16. However, the discussions between the parties recalled by Winberg (at the top of page 23) did not contain any reference to specific premium or contribution amounts. In Winberg's subsequent testimony, (bottom of page 23 and the top of page 24), in which he refers to specific premium or contribution amounts, Winberg is not reporting discussions between the parties, but rather is confirming his understanding of what the premiums would have been under the contract decided by the interest arbitration award had the County not changed the method of computing the insurance premiums.

The WERC closed the Interest Arbitration Investigation on April 14, 2003. (Jt Ex. #11) Kathy Spott recalls that, at the health insurance team meetings, which were discontinued "around" May of 2003, the County projected various health insurance premium increases for 2004, *i.e.*, 12%, 9% and 2.7%. (T. 14-16) It is not evident, however, that, during negotiations on the 2003-2004 contract, the County made any assertion that the Association's 2004 health insurance premiums would increase by 2.7%, or, in fact, projected any 2004 health insurance premium amounts. According to Whiting, health insurance premium amounts are not generally finalized until September or October of the preceding year. (T. 75)

Notwithstanding the Association's arguments to the contrary, the record does not provide a reasonable basis to conclude that, at the time the parties signed their agreement, the parties had any "practice," or other agreement, regarding the determination of health insurance premiums, other than that management determined the method of computing health insurance premiums. The undersigned is persuaded, therefore, that the County's prior method of determining health insurance premiums is not a "condition of employment" that "existed at the signing of the parties' agreement," as that term is used in Article 4, but rather, involved the exercise of a management right, reserved to management under Article 3. Accordingly, contrary to the argument of the Association, the County's decision to change the method of computing health insurance premiums does not violate the first paragraph of Article 4.

The County argues that it placed non-represented employees in a separate health insurance pool so that the County would have the ability to unilaterally impose health insurance plan design changes upon its non-represented employees. Although this argument is consistent with the testimony of Administrative Coordinator Whiting (T. 57), other evidence indicates that this was not the only motivating factor. For example, the October 9, 2003 minutes of the Finance Committee (Jt.Ex. #6) state as follows:

> 2004 Health Insurance. Whiting recommended staying with PreferredOne with SunLife as the re-insurer. The renewal is effective November 1. Internal premium rates will be effective January 1, 2004 with contributions reflected in December. Whiting noted with non-represented employees paying 10% and represented employees paying roughly 3.5%, splitting the group into non-represented and represented would be more equitable. Administrative fees, the specific stop loss premium, and the aggregate premium remain the same for two groups, but the SunLife aggregate attachment point is different for the two groups. . . .

Whiting's memo of October 23, 2003 includes the following:

> . . . The second concern was in how to determine an equitable reconciliation of differing employee contributions to the County's self-funded plan. Represented employees are contributing the equivalent of 3.6% of the 2003 premium, non-represented employees 10%. Splitting the group into two groups, represented and non-represented employees, seemed the fairest way to manage the disparity in employee contributions and acknowledge the reality that non-represented employees benefits are subject to change by action of the Board, while represented employee benefits are subject to collective bargaining. At the time that renewal proposals were being sought, all labor contracts were pending arbitration.

The most reasonable conclusion to be drawn from the record is that the County changed the method of computing health insurance premiums because it would enhance the County's ability to unilaterally change the health insurance plan design of non-represented employees and to manage the disparity in employee contributions, which at the time was due to the fact that the County had unilaterally imposed a 10% employee contribution upon its non-represented employees, but had not been successful in negotiating a voluntary agreement in which represented employees would contribute 10%. Given the County's rationale for its conduct, as well as the undersigned's conclusion that the prior method of calculating premiums is not required to be maintained under Article 4 of the 2003-2004 contract, the undersigned rejects the Association's claim that management has acted in an unreasonable, arbitrary or capricious manner.

In post-hearing brief, the Association argues that the County violated the second paragraph of Article 4 because the County did not bargain with the Association regarding the change in the method of determining health insurance premiums. This second paragraph states as follows:

> The parties unqualifiedly agree to bargain regarding any changes which occur in the wage, hours or conditions of employment which may arise out of application of this Article during the term of this Agreement. If Agreement cannot be reached, the issue may be submitted by either party to arbitration in accordance with the procedure as outlined in Article 8, Section 5.

As with the first paragraph of this provision, the above language is not a model of clarity. Nevertheless, it is evident that the referenced duty to bargain is imposed equally upon both parties. It follows, therefore, that the party seeking to enforce this provision of the contract needs to make a request to bargain. It is not evident that the Association made such a request to bargain. Thus, assuming *arguendo*, that the new method of determining health insurance premiums is a "change" over which the "parties unqualifiedly agree to bargain," the undersigned finds no violation of this provision in the present case.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate the terms and conditions of the collective bargaining agreement when the Employer changed the procedure in which to determine employee contributions to the County's self-funded plan to be effective January, 2004.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 19th day of January, 2005.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/gjc
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