BEFORE THE BOARD OF ARBITRATION

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL UNION NO. 2494
(Master Unit)

and

WAUKESHA COUNTY

Case 183
No. 65422
MA-13219

(Insurance Grievance)

Appearances:

John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 44316, Racine, Wisconsin 53404-7006, appearing on behalf of AFSCME Local 2494, AFL-CIO.

Laurence Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of AFSCME Local 2494, AFL-CIO.

Mr. Scott C. Beightol, Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of Waukesha County.

ARBITRATION AWARD

AFSCME Local Union No. 2494 (Master Unit), hereafter the Union, and Waukesha County, hereafter County or Employer, jointly requested that the Wisconsin Employment Relations Commission appoint Coleen A. Burns, a member of its staff, as Chair of an Arbitration Board that included Union appointed Arbitrator Jack Bernfeld and County appointed Arbitrator Norman Cummings. A hearing was held before the Arbitration Board on February 21, 2006. The record, which was transcribed, was closed on May 6, 2006, following receipt of post-hearing briefs. On September 20, 2006, the Board of Arbitration held a telephone conference call to discuss this Award.

ISSUES

The parties stipulated that the grievance is properly before the Arbitration Board. The Union frames the issues as follows:

> Did the Employer violate the collective bargaining agreement when it unilaterally changed the terms of the CompCare health insurance plan on January 1, 2006?
>
> If so, what is the appropriate remedy?

The County frames the issues as follows:

> Did the County violate Sec. 15.01 of the parties' labor agreement when it offered to bargaining unit employees in 2006 the only CompCare HMO plan available from CompCare?
>
> If so, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE I
MANAGEMENT RIGHTS RESERVED

1.01 Except as otherwise specifically provided herein, the Management of the County of Waukesha and the direction of the work force, including but not limited to the right to hire, the right to promote, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish and/or create positions, the right to make reasonable rules and regulations governing conduct and safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical for County employees to perform such work), together with the right to determine the methods, processes, and manner of performing work are vested exclusively in the Management. Management in exercising these functions will not discriminate against any employee because of his/her membership in the Union.

. . .

ARTICLE VI
GRIEVANCE PROCEDURE

6.01 A grievance is a claim or dispute by an employee of the County concerning the interpretation or application of this Agreement. Any other complaint or misunderstanding may be processed through Step three (3) of the grievance procedure. To be processed, a grievance shall be presented in writing to the department head with a copy to the Director of Administration under Step two (2) below within thirty (30) days after the time the employee affected knows or should know the facts causing the grievance. Grievances shall be processed as follows:

. . .

Step four (4) If a satisfactory settlement is not reached as outlined in Step three (3), the grievance may be submitted to arbitration within twenty (20) work days; one (1) arbitrator to be chosen by the County, one (1) by the Union, and a third to be chosen by the first two and he shall be the Chairman of the Board. (If the two cannot agree on the selection of the third member, the parties shall request a panel of names from the Wisconsin Employment Relations Commission and shall alternatively strike a name from such panel until the name of one person remains who shall serve as Board Chairman.) The Board of Arbitration shall after hearing by a majority vote, make a decision on the grievance, which shall be final and binding on both parties. Only questions concerning the application or interpretation of this contract are subject to arbitration.

. . .

ARTICLE XV
INSURANCE AND WISCONSIN RETIREMENT FUND

15.01 Hospital and Surgical Insurance

A. The County will provide a Point-Of-Service hospital and surgical insurance plan and will also offer Health Maintenance Organization (HMO) plans as an alternative. Each plan specifies eligibility requirements and enrollments procedures.

B. Regular full-time and regular part-time employees are eligible to apply for the County's hospitalization plan within their first thirty (30) days of employment. The insurance will become effective on the first day of the month following sixty (60) days of employment after application acceptance.

C. Regular Full-Time Employees

Effective January 1, 2000, the County will pay ninety percent (90%) of the cost of a single or family HMO or Point-Of-Service (POS) plan. Eligible employees will pay ten percent (10%) of a single or family HMO or POS plan.

D. Regular Part-Time Employees

Effective January 1, 2000, the County will pay forty-five percent (45%) toward the cost of a single or family HMO or POS plan. Eligible employees will pay fifty-five percent (55%) of the cost of a single or family HMO or POS plan.

. . .

Sec. 15.08 Long Term Disability Insurance Effective 01/01/2001 the County will provide a Long Term Disability Insurance plan for regular full time and regular part time employees. Regular full time and regular part time employees will become eligible the first of the month following six (6) months of employment. The County has the right to change plan carriers, self insure or modify plan details provided the overall benefits in total are not reduced.

BACKGROUND

On November 1, 2004, the parties executed a collective bargaining agreement which, by its terms, is effective January 1, 2004 through December 31, 2006. At that time, the County offered two health insurance plans to bargaining unit employees, *i.e.*, a Point-of-Service plan through United Healthcare and an HMO plan through CompCare. The POS plan, but not the HMO plan, was a "self insured" plan.

By letter dated August 9, 2005, CompcareBlue advised the County of the following:

CompcareBlue has determined that we cannot renew the current HMO plan for 2006. Because the benefits are richer and the associated premium cost much higher than the other plan option available to employees of Waukesha County,

we feel we are placing ourselves in an adverse selection position that will lead to low participation and a high claims to premium ratio.

Instead, we will provide a renewal for a replacement plan that has a more similar benefit level to the other plan option, and should be more similar in cost, such that we can avoid the adverse selection issue and continue to provide a high quality CompcareBlue HMO plan for Waukesha County employees.

We will provide the replacement plan benefits and rates to you in the next week or so. I will be happy to discuss the attributes of the plan with you at that time. Thank you for your consideration, and for the opportunity to continue providing a CompcareBlue HMO plan.

By letter dated September 30, 2005, County Labor Relations Manager James H. Richter advised AFSCME Business Representative John P. Maglio of the following:

As you are aware, CompCare has informed Waukesha County that the current plan design will no longer be offered to County employees after this year. I have attached a copy of this communication for your information and file.

We have shared this information with you previously and with representatives of Local 1365 – Parks, Local 2494 – Public Health Nurses, and Local 902 – Social Workers. The purpose of this letter is to advise and inform both yourself and the leadership of Local 2494 – Master Unit of the forthcoming changes.

While the current plan will no longer be available, CompCare has made a different plan option available to the County. We will provide that option to Local 2494 – Master Unit effective 01/01/2006. The plan design features that will be in affect (sic) on 01/01/2006 are as follows:

Deductible:	Individual- $250.00	Family - $750.00
Co-insurance:	90%/10%	
Employee Co-insurance Maximum:	Single – $1,000	Family - $2,000
Physician Services Co-pay:	$20.00	
Preventative Care Co-pay:	$20.00	
Emergency Room Co-pay:	$75.00	
Urgent Care Co-pay:	$50.00	

Inpatient Co-pay:	Subject to deductible and co-insurance
Rx Coverage Co-payment:	$15/$20/$25

During the Open Enrollment process, County employees will have the opportunity to select the new CompCare plan design or the Point-Of-Service Health plan.

It is also our intention to have group meetings during the Open Enrollment process to provide employees the opportunity to obtain as much information as possible regarding their options and choices for 2006. We will also make ourselves available to discuss these options with employees on a one-on-one basis.

Based upon our prior meetings and discussions, I know that you have an understanding of the proposed changes; however, if you or any of the leadership from the Master Unit would like to meet and discuss this in further detail, please contact me.

Under the CompCare HMO insurance plan in effect in 2005, the single plan employee premium contribution was $52.98 and the family plan employee premium contribution was $137.75. Under the CompCare HMO insurance plan in effect in 2006, the single plan employee premium contribution was $45.83 and the family plan employee premium contribution was $121.45.

Under the CompCare HMO insurance plan in effect in 2006, the single plan employer premium contribution was $412.46 and the family plan employer premium contribution was $1,093.03. Under the CompCare HMO insurance plan in effect in 2005, the single plan employer premium contribution was $476.83 and the family plan employer premium contribution was $1,239.74.

On or about November 3, 2005, the Union filed a grievance with the following Circumstances of Facts: "The county informed the union effective 1-1-06, the plan design of the CompCare health insurance option will be modified from the status quo." The requested settlement or corrective action is: "Restore the compcare insurance benefits and access to the benefits to those in effect in calendar year 2005. Establish that the compare insurance benefits available in 2005 constitute the status quo between the parties. Make all effected employees whole for any and all lost monies and benefits. Establish an open enrollment period of (30 days) calendar days following the voluntary settlement of this grievance, or 30 calendar days following an arbitration award." Thereafter, the grievance was processed through the contractual grievance procedure; denied by the County and submitted to the Arbitration Board.

During the open enrollment process for calendar year 2006 health insurance, the Union's bargaining unit employees had the choice to select the County's Point-Of-Service (POS) plan or the CompCare HMO plan outlined in the above letter. The CompCare HMO plan outlined in the above letter was effective January 1, 2006.

In 2005, 92 of 450 Master Unit employees were covered by the CompCare HMO plan. In 2006, 65 of 450 Master Unit employees were covered by the CompCare HMO plan.

POSITIONS OF THE PARTIES

Union

At all relevant times, the parties have acknowledged that the County was obligated to negotiate any change in plan design and benefit levels. No insurance plan design changes were adopted as part of the 2004-2006 collective bargaining agreement. By offering the 2006 HMO CompCare plan; which was unilaterally altered to incorporate various out-of-pocket expenses which bargaining unit employees had not previously been obligated to pay, the County has violated the parties' collective bargaining agreement.

It is a well-accepted principle in industrial relations that insurance benefits are controlled by negotiations between the union and the employer and not by the insurance policy between the employer and the insurer. The County's argument that, since the health insurance carrier would not provide the County with the benefit levels that had been negotiated by the parties, then the County is relieved of its obligation to provide these benefit levels is fallacious.

The County's conduct flies in the face of well-established arbitral principles. The County made no attempt to mitigate by seeking out other HMO alternatives. One may reasonably conclude that the County had significant financial incentives to violate the collective bargaining agreement and that the significant savings that resulted from the illegal conduct of the County constitutes "ill-gotten gains."

The County's ability to gain financially, by brazenly violating the collective bargaining agreement, raises an important public policy question. Should a municipal employer be allowed to benefit substantively when it knowingly (or, charitably, should have known) that its conduct would violate the collective bargaining agreement to the substantial benefit of the municipal employer.

In the present case, the traditional make-whole remedy is not adequate. The Board of Arbitration has been provided authority to craft an appropriate remedy. An Arbitrator has the authority to award damages.

The Board of Arbitration should retain jurisdiction and order the parties to bargain over the distribution of the County's improper insurance savings. Absent a voluntary agreement between AFSCME Local 2494 and the County of Waukesha, the Union requests that the Board

of Arbitration award the $100,000.00 plus savings, in an equitable fashion to the members of this bargaining unit in order to restore the *status quo ante;* make these employees whole and preclude the County from retaining its illegal windfall profits.

The Union's bargaining unit employees have been victims of the County's illegal conduct. In the Union's opinion, it is fair and equitable to award all affected bargaining unit members' full reimbursement for all out of pocket costs incurred as a result of the County's illegal actions; without assessing these affected employees with the cost savings associated with artificially reduced insurance premium contribution.

Unit employees should be provided a special enrollment period which would permit current CompCare enrollees and all Master unit enrollees the opportunity to transfer to the no deductible, no co-insurance and lower prescription drug co-pays at 2005 HMO plan levels as an alternative to the POS offering. Employees should not suffer any loss in confidentiality as a result of applying for appropriate reimbursements.

Employer

Article XV, the contractual provision that addresses the provision of health insurance, requires the County to make both a POS plan and an HMO plan available to bargaining unit employees and to pay ninety percent (90%) of the premium cost of whichever plan is chosen by each full-time bargaining unit employee. Article XV does not require the County to make any specific POS plan or HMO plan available. Nor does it require that the plan options guarantee any specific benefit levels.

The contract is silent with respect to the issue of deductibles and/or co-insurance. At no time during the negotiation of the current agreement, did any County representative make any representation with respect to deductibles and/or co-insurance as those concepts applied to the CompCare HMO plan.

The August 9, 2005 letter from CompCare was unsolicited by the County. The decision to not offer the existing HMO plan to County employees beginning January 1, 2006 was solely CompCare's.

The relevant contract language has remained unchanged since 1996; the year in which the contract was amended to add the option of a POS plan. The language requiring the County to offer a HMO plan has been in the contract since 1984. The contract does not obligate the County to shop around for alternatives comparable to the 2005 CompCare HMO plan.

Given that the contract language is clear and unequivocal in that no specific benefit level is required, the Union's argument that there is "history" that implicitly requires the County to maintain a specific level of benefits is irrelevant. Moreover, the "history" evidence shows that the Union has accepted many similar, insurer-driven, mid-term changes without protest.

Any Union attempt to invoke a "status quo" analysis under the Municipal Employment Relations Act fails as a matter of law. Even if a "status quo" analysis were applicable, the County has established a valid business necessity; which is a valid defense to a unilateral change allegation.

In its letter of September 30, 2005, the County notified the Union of the "mid-term" changes and offered to meet with the Union to discuss the issue further. On October 25, 2005, the parties met and specifically bargained regarding the changes to the CompCare HMO plan. On November 8, 2005, the parties again bargained and the Union brought an offer to its membership; which offer was rejected.

The Union knew that the existing CompCare plan was no longer available anywhere else. The issue of CompCare's discontinuation of the existing HMO plan was discussed in bargaining with other County collective bargaining units. These other units, including those represented by AFSCME, agreed to the substitute CompCare HMO effective January 1, 2006.

The County has a contract with CompCare which provides that CompCare would offer the HMO plan to the County so long as twenty-five percent (25%) of eligible County employees participate. In 2005, twenty-three percent (23%) of eligible County employees participated in the CompCare HMO plan. The Union was aware of the 25% participation requirement and of CompCare's right to stop offering the HMO plan if that requirement were not met.

During the open enrollment period, the County offered the only HMO plan that CompCare had made available to the County for 2006. The County continues to pay 90% of the premium costs under the CompCare HMO plan. Employees pay a lower monthly premium contribution under the 2006 CompCare HMO plan than under the 2005 CompCare HMO plan.

The County continues to offer a POS plan and an HMO plan. The County continues to pay the premium percentages required by the contract. The County has met its contractual obligations. The grievance should be denied.

DISCUSSION

Issues

Each party's statement of the issues presumes a fact which is subject to determination by the Board of Arbitration, *i.e.*, that the CompCare plan changes were unilateral and that the CompCare plan was the only CompCare HMO plan available from CompCare. Rejecting each party's framing of the issue as inappropriate, the undersigned concludes that the issues are more appropriately framed as:

Did the County violate the parties' 2004-2006 collective bargaining agreement when the County offered to Local 2494 (Master Unit) bargaining unit employees the CompCare HMO plan effective January 1, 2006?

If so, what is the appropriate remedy?

Merits

In 2005, the Master Unit bargaining unit employees were eligible for one HMO plan, *i.e,* CompCare HMO Option 3 plan. Effective January 1, 2006, the County continued to offer only one HMO plan, *i.e.*, a CompCare HMO plan. This CompCare HMO plan had a significant reduction in benefit levels vis-à-vis the plan that was in effect in 2005. For example, prior to the changes effective January 1, 2006, the HMO plan did not have a deductible or a co-insurance. The HMO plan effective January 1, 2006 contained a deductible of $250 single and $750 family and co-insurance of 90%/10% with a maximum of $1,000 single/$2,000 family. The HMO plan effective January 1, 2006 also contained a number of co-pays which were significantly higher than that which had existed in the 2005 CompCare HMO plan. The Union, contrary to the County, argues that the County's failure to maintain the HMO health insurance benefit levels in effect in 2005 violates the parties' 2004-2006 collective bargaining agreement.

As set forth in Article I, Management Rights Reserved, the management rights provided in Article 1.01 are limited by other specific provisions of the parties' collective bargaining agreement. In the present case, each party recognizes that a specific provision is Sec. 15.01(A), which states as follows:

> A. The County will provide a Point-Of-Service hospital and surgical insurance plan and will also offer Health Maintenance Organization (HMO) plans as an alternative. Each plan specifies eligibility requirements and enrollments procedures.

As the County argues, this provision does not identify specific benefit levels. As the Union argues, health insurance is of such significance to bargaining unit employees that parties do not commonly negotiate a health insurance provision that provides an employer with *carte blanche* to unilaterally determine the content of the health insurance plan.

The second sentence of Sec. 15.01(A) addresses plan specifications. Under the contract construction principle of *expressio unius est exclusio alterius*, when the parties list specific items, without any more general or inclusive terms, they have indicated intent to exclude any unlisted items. Accordingly, the second sentence reasonably indicates that the only limitations on the POS and HMO plans are that they specify eligibility requirements and enrollments procedures.

Sec. 15.01(A) does not stand in isolation and must be construed in a manner that is consistent with other provisions of the contract. One such provision states as follows:

> Sec. 15.08 Long Term Disability Insurance Effective 01/01/2001 the County will provide a Long Term Disability Insurance plan for regular full time and regular part time employees. Regular full time and regular part time employees will become eligible the first of the month following six (6) months of employment. The County has the right to change plan carriers, self insure or modify plan details provided the overall benefits in total are not reduced.

It is not logical that the parties would grant the County greater authority to modify health insurance plans than a LTD plan. Moreover, by adding the second sentence, the parties have reasonably indicated that, when the parties intend the County to have any right to change plan carriers, self insure or modify plan details, then the parties expressly so state.

In summary, the language of Sec. 15.01(A) does not clearly and unambiguously provide the County with the right to unilaterally change HMO plan benefit levels. Nor does it clearly and unambiguously require the County to maintain HMO plan benefit levels. However, given the language of Sec. 15.08, the most reasonable interpretation of the language of Sec. 15.01(A) is that the County may not unilaterally change the benefit levels of the HMO insurance plans offered by the County.

Given the unclear and ambiguous contract language, it is appropriate to consider bargaining history and custom and past practice for evidence of the parties' mutual intent with respect to the interpretation of Sec. 15.01(A). Neither party offered any bargaining history with respect to the initial negotiation of the health insurance language now contained in Sec. 15.01(A).

James Richter, who has been the County's Labor Relations Manager since 1984, recalls that the portion of this provision that states "will also offer health offer Health Maintenance Organization (HMO) plans as an alternative" has been in the contract since 1984. According to Richter, since the 1980's, there have been changes to health insurance plans offered by the County, including HMO plans. Richter states that these changes have always been made with advance notice to the Union, but that the County has not always bargained with the Union prior to making health insurance changes.

Richter recalls that, in 1991, the County determined that one of the HMO's being offered to the Master Unit employees, *i.e.*, MaxiCare, would not be offered effective January 1, 1992 because the County was concerned about the stability and viability of this plan and the County knew that other County plans were similar in terms of networks and design. According to Richter, this determination was not negotiated with the Union and was not the subject of a grievance. The record does not establish otherwise.

Richter's letter of September 26, 1991, providing written notification of this determination to AFSCME Representative Victor Musial, states that ". . . the County has a number of reasons for this decision, including, but not limited to, the cost of the plan and the

fact that its (MaxiCare) participating physicians and hospitals as well as benefits are almost an exact duplicate of Wisconsin Health Organization (WHO); that WHO "has virtually the same doctor and clinics and in some cases even a broader provider network . . ." and that "In addition, a recent Milwaukee Business Journal article reported that MaxiCare's statewide enrollment has dropped to 19, 531 participants and that they suffered a loss of net income $1,373,017 for the year ending 12/31/90." In a September 1991 letter, the County advised MaxiCare participants that MaxiCare was not available beginning January 1, 1992; that these participants would have the opportunity, during the upcoming enrollment period, to switch to any of the other health insurance plans offered by the County; and that "The County's decision to delete MaxiCare from its health care options is based on a number of factors which include the cost of the plan as well as a concern about the future of MaxiCare." Musial was provided with a copy of this letter.

The evidence that the County made the determination to drop MaxiCare, without challenge from or negotiation with the Union, reasonably indicates that both parties understood that the County had the right to unilaterally discontinue a HMO plan which the County perceived to be in financial trouble when an alternative existing plan was "almost an exact duplicate of" the discontinued plan and employees covered by the discontinued plan had the opportunity to move into the alternative plan without loss of insurance coverage or benefit levels. This evidence reasonably suggests that the parties mutually understood that the County may, under certain circumstances, unilaterally discontinue an offered HMO insurance plan, but does not reasonably indicate that the parties mutually understood that the benefit levels of an HMO plan that is offered to bargaining unit employees may be changed without the agreement of the Union.

Richter recalls that, in 1996, the parties agreed to the current Sec. 15.01(A) language; which modified the prior language by referencing a Point-Of-Service hospital and surgical insurance plan. The record does not contain the specific language of the preceding agreement. Thus, it is unclear if the POS reference replaced a reference to another type of plan. Richter further recalls that, in 1997 and during the term of the 1996-98 labor contract, Master Unit bargaining unit employees had the choice of several plans, including a Blue Cross/Blue Shield administered self-funded indemnity plan, a POS, and several fully-insured HMOs.

Richter recalls that, when Blue Cross/Blue Shield notified the County that it would no longer provide stop loss insurance coverage as required by law, the County terminated the Blue Cross/Blue Shield plan effective March 1, 1997. County employees were notified of the County's decision to terminate in a letter dated January 30, 1997 and provided with an opportunity to enroll in the other insurance plans offered by the County. Richter recalls that there were differences in benefits between the Blue Cross/Blue Shield plan and the POS plan, but does not identify those differences. Although there was no specific testimony on this point, one may reasonably infer that differences exist between an HMO plan and an indemnity plan.

According to Richter, the County did not bargain with the Union over this decision to terminate the Blue Cross/Blue Shield plan effective March 1, 1997and no grievance was filed regarding this decision to terminate. The record does not establish otherwise.

The evidence that the County made the determination to terminate the Blue Cross/Blue Shield plan, without challenge from or negotiation with the Union, reasonably indicates that both parties understood that the County had the right to unilaterally discontinue a Blue Cross/Blue Shield administered self-funded indemnity plan when the County provided bargaining unit employees the right to enroll in remaining insurance plans without a gap in insurance coverage. The evidence that the remaining plans were not similar reasonably suggests that the parties mutually understood that, when the County cannot lawfully provide an insurance plan to bargaining unit employees, then employees enrolled in that plan may be displaced into another dissimilar plan. This termination occurred during the contract in which the health insurance language had been changed to reference POS and HMO plans. The absence of evidence that the terminated plan was either a POS or an HMO plan provides a reasonable basis to infer that this termination is not indicative of any mutual understanding with respect to the application of the language contained in Sec. 15.01(A).

Richter recalls that, in October 2000 and during the term of the parties' 1999-01 labor contract, he provided written notification to AFSCME Representative Laurence Rodenstein that, effective November 1, 2000, Waukesha County would no longer be able to offer the Family Health Plan HMO because it would no longer exist as a health insurance plan. According to Richter, the County did not bargain on this subject and no grievance was filed. The record does not demonstrate otherwise.

At the time of this notification, Rodenstein was provided with a copy of a letter that the County sent to AFSCME bargaining unit employees enrolled in the Family Health Plan HMO, including those in the Master Unit. This letter stated, *inter alia*, that the County had "made special arrangements with United HealthCare Corporation to permit you to enroll in the Waukesha County Point-Of-Service Health Plan effective November 1, 2000;" that CompCare had "declined to participate in this process;" and that "Following this special enrollment, you will have the ability to enroll in the CompCare HMO should you desire during the normal annual open enrollment period which will be conducted later this fall."

The evidence of the discontinuation of the Family Health Plan HMO reasonably indicates that both parties understood that, if one HMO provider went out of business, then the County was not required to provide the displaced employees with an HMO plan that provided the same benefit levels and that the displaced employees could be displaced into the existing POS plan until such time as these employees could use the annual open enrollment period to select between the remaining HMO and POS plans. This evidence reasonably suggests that the parties mutually understood that, under certain circumstances, the County is not required to continue every HMO plan or provide enrolled employees with the benefit levels of a discontinued plan.

The parties' 2002-2003 contract dispute was resolved by an Interest/Arbitration Award. The County final offer which was the subject of this Interest/Arbitration proceeding included the following:

4. Article 15.01 – Hospital and Surgical Insurance
Effective January 1, 2003 or first of the month following thirty (30) calendar days after the date of the arbitration award, whichever is later:

(a) Modify Point-of-Service Health Plan
1. Drug co-pay from $5.00 to $10 generic/$15 brand/$25 out of formulary
2. In-network benefits to provide for a 90%/10% co-insurance for in-network benefits; deductible; $100 single/$300 family, and an out of Pocket Maximum: $400 single/$800 family.

(b) Modify CompCare Health Plan to HMO option 3. HMO option 3 includes:
1. Lifetime Maximum: 2 million
2. Emergency room co-pays: $25 life threatening
$50 urgent care
3. Office Visit co-pay: $10
4. Inpatient visit co-pay: $50 per day, maximum $250 per occurrence
5. Durable medical equipment co-pay: $25
6. Skilled home care co-pay: $10
7. Drug Co-pay: $10 generic
$20 brand
$30 out of formulary

Prior to this final offer, the County had made offers that also contained proposals containing specified health insurance benefit levels.

The Union offer which was the subject of this Interest/Arbitration proceeding included a wage offer and the following sentence "Anything not contained herein shall remain as set forth in the 1999-2001 Agreement between the parties, except for any tentative agreement arrived between the parties prior to the certification of this offer." There were no tentative agreements relevant to this proceeding.

The offers exchanged during this bargain, as well as testimony and statements at the Interest/Arbitration hearing, reasonably indicate that the County and the Union negotiated the benefit levels of the CompCare HMO plan to be included in the 2002-2003 Master Unit collective bargaining agreement. Inasmuch as the County prevailed in the Interest/Arbitration proceeding, one may reasonably conclude that, with the issuance of the Interest/Arbitration Award, the benefits negotiated into the 2002-2003 Master Unit collective bargaining agreement included the health insurance benefit levels proposed in the County's final offer.

Richter states that the prescription drug co-pay amounts have always been negotiated with the Union and that, prior to the 2002-2003 agreement, neither the POS plan nor the HMO

plan, had deductibles or co-insurance. This testimony supports the Union's argument that, when there have been changes in insurance plan benefit levels, these changes have been negotiated by the parties.

Richter recalls that, when the parties began to bargain what would become the 2004-2006 Master Unit collective bargaining agreement, they had just arbitrated the 2002-2003 agreement. According to Richter, the County took the position that it needed time to find out the impact of the arbitrated health insurance changes and entered into this bargain with the idea that the County would not make any insurance changes in the Master Unit.

Rodenstein recalls that the County settlement proposal dated September 24, 2004 became the basis for the 2004-2006 Master Unit collective bargaining agreement. As Rodenstein further recalls, this proposal did not contain any changes to the health insurance plans. The 2004-2006 Master Unit agreement was executed on November 1, 2004.

It is not evident that Richter, or any County representative, made any statement to the Union that could be reasonably construed to be a representation that the County would maintain the CompCare benefit levels during the ensuing bargaining agreement. Nor is it evident that Richter, or any County representative, made any statement to the Union that could be reasonably construed to be a representation that the County would not maintain the CompCare benefit levels during the ensuing bargaining agreement. Rather, the record indicates only silence with respect to health insurance discussions. Given the evidence that changes in health insurance benefit levels had been a primary issue in the parties' previous contract dispute, the lack of health insurance proposals and health insurance discussion during the negotiation of the 2004-2006 Master Unit collective bargaining agreement provides a reasonable basis to infer that the parties intended to continue the *status quo* with respect to health insurance benefit levels.

On August 9, 2005, during the term of the parties' 2004-2006 Master Unit agreement, the County was notified that, effective January 1, 2006, CompCare would no longer offer the existing CompCare HMO plan design. The County was also notified that CompCare would be proposing an alternative plan design that was more similar to the then existing POS plan which, in CompCare's estimation, would result in a more similar cost and avoid adverse selection by employees into CompCare's plan.

Richter states that the County did not ask CompCare to make changes to the existing CompCare plan. The record does not demonstrate otherwise.

By letter dated September 30, 2005, the County advised John Maglio, the Master Unit AFSCME representative, of the specific plan design changes to the CompCare HMO that would be effective January 1, 2006. In this letter, the County offered to meet with the Union to discuss the matter. Thereafter, the parties met and agreed to convert the meeting into the first step of the grievance procedure. During the processing of the grievance, the parties attempted to resolve the grievance, but were unsuccessful.

During the fall 2005 open enrollment period, the County offered one HMO plan to the Master Unit employee, *i.e.*, the CompCare HMO with the benefit levels outlined in Richter's letter of September 30, 2005. As discussed above, the CompCare HMO plan implemented in 2006 had significantly reduced benefit levels and lower employee and employer premiums vis-à-vis that which had existed in 2005.

Summary

As discussed above, the most reasonable interpretation of the language of Sec. 15.01(A) is that the County may not unilaterally change the benefit levels of the HMO insurance plans offered by the County. Neither the evidence of bargaining history and past practice, nor any other record evidence, establishes that the parties' mutually intended another interpretation of this provision. Indeed, such evidence, while not without ambiguity, most reasonably indicates that there are circumstances in which the County has unilaterally discontinued an insurance carrier and the plan provided by that carrier and that benefit levels of existing POS and HMO plans have not been unilaterally changed by the County, but rather, have been the subject of negotiation between the Union and the County.

Inasmuch as CompCare was no longer willing to provide the plan design that was provided in 2005, the County did not, in fact, unilaterally change the CompCare plan. Given the conclusion that the contract language does not permit the County to unilaterally change the benefit levels of the HMO insurance plan offered by the County, the undersigned is satisfied that the County has a contractual obligation to continue to provide the CompCare Plan HMO benefits that existed in 2005. CompCare's unwillingness, or inability, to provide the requisite benefit levels does not relieve the County of this contractual obligation.

The Union argues that, when CompCare advised the County that it would no longer provide the existing HMO plan design, the County had an affirmative obligation to seek bids for the same benefit levels from alternative carriers. The undersigned does not agree.

The disputed health insurance changes involve shifting costs from the CompCare insurer to the insured employee. Under the circumstances of this case, the County could have met its contractual obligation by supplementing the CompCare HMO plan in effect in 2006 by funding the costs that were impermissibly shifted onto the insured Master Unit employees. For this reason, the County was not obligated to affirmatively seek alternative bids and has not established that it was not possible to perform its contractual obligations.

Conclusion

The County violated the parties' 2004-2006 collective bargaining agreement when the County offered to Local 2494 (Master Unit) bargaining unit employees the CompCare HMO plan effective January 1, 2006 because the County did not provide those employees with the health insurance benefit levels that are required by the parties' collective bargaining agreement, *i.e.*, those that existed under the 2005 CompCare HMO plan. The appropriate remedy for this contract violation is discussed below.

The relevant contract language is not as clear and unambiguous as to warrant the conclusion that the County knew, or should have known, that it was violating the collective bargaining agreement. Nor does the record otherwise establish that the County has acted in bad faith. Given the absence of a finding of intentional contract violation or other bad faith conduct, the Union's argument that the premium savings that accrued to the County as a result of the County's contract violation are "ill-gotten gains" or "windfall profits" that must be redistributed to bargaining unit employees, through further bargaining between the parties or decision of the Arbitration Board, is rejected. Notwithstanding the Union's argument to the contrary, a more traditional make-whole remedy is appropriate in this case.

As a result of the County's contract violation, the Union's bargaining unit employees were not provided with the choice of plans afforded by their collective bargaining agreement. Accordingly, the undersigned is persuaded that the make whole remedy should include an order that the County use its best efforts to secure a special open enrollment period for Master Unit employees so that Master Unit employees may elect to transfer to the CompCare HMO plan.

Under the make-whole remedy that is ordered by this Award, the County is required, as soon as administratively feasible, to compensate any Master Unit employee covered by the CompCare HMO insurance plan for all losses incurred by these employees as a result of the County's failure to maintain the benefit levels of the 2005 CompCare HMO insurance plan. Notwithstanding the Union's argument to the contrary, it is appropriate for the County to offset such compensation by the amount of the employee's savings from the employee's reduced employee premium contribution. In compensating employees under this make-whole remedy, the County shall take reasonable efforts to maintain the confidentiality of employee health information.

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

AWARD

1. The County violated the parties' 2004-2006 collective bargaining agreement when the County offered to Local 2494 (Master Unit) bargaining unit employees the CompCare HMO plan effective January 1, 2006.

2. To remedy this violation of the parties' collective bargaining agreement, the County shall immediately take the remedial make-whole action stated above.

3. The undersigned retains jurisdiction for the sole purpose of resolving disputes regarding the make-whole remedy and will exercise this jurisdiction if either party, within sixty days of the date of this Award, requests, in writing and with a copy to the opposing party, that this jurisdiction be exercised.

Dated at Madison, Wisconsin, this 6th day of October, 2006.

Coleen A. Burns /s/
Coleen A. Burns, Board of Arbitration Chair

I concur

Norman A. Cummings /s/
I dissent

Norman A. Cummings
County Member, Board of Arbitration

Jack Bernfeld /s/
I concur

I dissent

Jack Bernfeld
Union Member, Board of Arbitration

CAB/gjc
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