BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 216-A OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

CITY OF ASHLAND, WISCONSIN

Case 83
No. 65554
MA-13249

Appearances:

James E. Mattson, Staff Representative, Wisconsin Council 40, 8480 East Bayfield Road, Poplar, Wisconsin 54864, for Local 216-A of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Scott W. Clark, City Attorney, P.O. Box 389, 214 West Main Street, Ashland, Wisconsin 54806, for the City of Ashland, Wisconsin, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, as Arbitrator to resolve a grievance filed on behalf of "Employees of Water/Wastewater." Hearing on the matter was held on May 23, 2006 in Ashland, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs by October 13, 2006.

ISSUES

The parties stipulated the following issues for decision:

> Did the Employer violate the terms of the parties' Collective Bargaining Agreement (Article 13.05) in regards to post retirement benefits to "Red Circled" union employees?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 13 – BENEFITS

. . .

13.05 "Red Circle" of Post Retirement Health for Utility Employees All Utility employees as of January 1, 1973, shall be provided with Medicare plus $22,500 supplementary health insurance upon retirement at age 65 or later, for both retiree and spouse. All Utility employees hired after August 30, 1993, will be provided with Medicare Companion Plan with 1993 options (six riders) supplementary health insurance upon retirement at age 65 or later for both retiree and spouse. There shall be no Medicare supplemental insurance for any Utility employee hired after January 1, 1997. Should a Utility employee elect to retire before age 65 on a retirement annuity, he/she would be required to pay his/her own premiums for current health insurance until reaching the age of 65 at which time the City will provide the supplementary coverage. Should an employee choose to leave the employment of the City before becoming eligible for a retirement annuity other than for a medical or disability retirement, he/she shall relinquish all rights to this supplementary insurance and any other benefits presently provided by the City. Any person employed by the Utility subsequent to December 31, 1972, must be employed at least twenty (20) years prior to retirement before becoming eligible for the supplementary health insurance coverage.

. . .

ARTICLE 26 – GRIEVANCE PROCEDURE

26.01 Should differences arise between the Union and the Employer as to the meaning and application of this Agreement . . . an earnest effort shall be made to settle them promptly under the provisions of this Article.

26.02 A reasonable effort shall be made to settle any differences between an employee and his/her foreman when a dispute arises. . . .

Step I: The aggrieved employee and the Union Grievance Committee shall set forth the grievance in writing to the superintendent or department head within ten (10) working days of the cause of the grievance or when the employee should have reasonably known of such cause. . . .

Step IV: Arbitration

. . .

3. Hearing-Decision. . . . The arbitrator shall not modify, add to, or delete from the express terms of this Agreement.

4. It is agreed that if any time limit set forth herein is not complied with, the grievance shall be deemed decided against the party who failed to comply with the time limit. The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure.

BACKGROUND

The Union filed the grievance on September 13, 2004. The grievance seeks that the City "reinstate post retirement health benefits stated in . . . Sec. 13.05", and details the history of the grievance as well as the history of Section 13.05. That history is the essential background to the grievance.

The grievance history starts with a meeting between Union officers John Radloff and Dave Wosepka with City Clerk Rae Buckwheat. Radloff and Wosepka initiated the meeting because they had been informed by certain retirees that the City was not providing the same benefit to all retirees under Section 13.05. More specifically, the retirees noted that not all retirees were incurring out-of-pocket expenses. Buckwheat was unfamiliar with the history of the provision and contacted the City's attorney, Scott Clark, to clarify the matter. Clark responded in a letter to Buckwheat dated September 1, 2004, which states:

> . . . In response to the questions raised . . . I am enclosing herewith a copy of a November 27, 2000 letter to me from Carol A. Larson, former City Clerk, regarding the post-retirement health insurance for the utility employees.
>
> Based upon the history and the acquiescence of the Union for many years, the benefits provided to retirees under the City's group health insurance plan are to continue based on the established past practice. . . .

The November 27, 2000 letter states:

> This letter will outline the changes we have made to retiree health insurance coverage over the years. The City has changed carriers and coverage levels for our group health insurance a number of times. These changes affected retirees as well as current employees. Retirees consist of two groups – those individuals (or their spouses) who are under age 65 and those who are over age 65 and also covered under Medicare.
>
> The City was insured by WPS for many years. In 1994, we changed carriers and obtained coverage through Blue Cross/Blue Shield of Wisconsin. For active employees and retirees under the age of 65, the only change in the benefit level

between the WPS group plan and the Blue Cross/Blue Shield plan was that the lifetime maximum payment was changed from an unlimited amount to a $5 million lifetime maximum. At the time of that change, however, WPS informed us that they would no longer allow additional enrollees into the "$22,500 Plan" -- a Medicare supplement plan. Through collective bargaining, the "$22,500 Plan" was preserved by "red circling" retirees and employees who turned 65 before January 1, 1994. (see Article 12.05 of collective bargaining agreement) Utility retirees and their spouses who turned 65 after January 1, 1994 could not be enrolled in that "$22,500 Plan" and were provided with continued coverage under the group health insurance plan through a Medicare carve-out arrangement.

In 1995, the City obtained coverage through Wausau Insurance Companies. We went from a plan with unregulated provider choices to a preferred-provider, point-of-service plan. Participants were required to choose a primary care clinic. They had to receive all their care from the primary care clinic, or obtain referrals for services outside the primary care clinic, in order for care to be paid at 100%. Services received outside the primary care clinic without a referral were subject to deductibles and co-payments.

In 1998, the City again changed carriers and coverage levels. Compcare Northwest (now known as Compcare Blue) became the City's provider. Under this policy, the lifetime maximum was dropped to $2 million, the co-pay and deductible amounts were raised for out-of-network services, the co-pay on prescription drugs was increased, co-payments were established for ambulance service and for emergency room care, and days of skilled nursing care and hospice care were reduced.

As I stated earlier, all of these changes were also imposed on the retirees who were on the City's group health insurance plan — both those who are under age 65 and those over age 65 who receive Medicare carve-out benefits. All these retirees are former union members who are exercising their right to continuation of coverage under the terms of their union contract.

By past practice, there has been no 'vesting" of benefits for retirees. Retirees have received the benefits negotiated through collective bargaining.

The letter also includes a document entitled "Tentative Agreement", dated March 1, 2000. Paragraph 1 of that document states:

Consolidate Local 216-A (DPW Streets & Parks) and Local 216-D (DPW Water & Wastewater Utility) in accordance with Department Consolidation Plan and Local 216-D Collective Bargaining Agreement, January 1, 1999, through December 31, 2001. Streets & Parks shall have the same benefits as Water & Wastewater Divisions except those benefits in Water & Wastewater Division which have been "red circled" and phased out or sunsetted.

As noted above, Buckwheat forwarded Clark's letter, including the documents quoted above, to the Union, which prompted the filing of the grievance.

After the filing of the grievance, the parties discussed the matter at some length, and the City stated its final position to the Union in a letter from Buckwheat to Radloff dated July 28, 2005, which states:

> . . . (P)roviding Medicare Plus $22,500 is impossible. The City will continue to provide the City's Group Policy with Medicare carve out provisions to satisfy the Medicare supplemental coverage. Although the current City Group coverage has a $250 deductible and a drug co-pay, there are many aspects of coverage that substantially exceed the benefits that were provided by the $22,500 plan. The City declines the suggestion of the Bargaining Committee to become a self-insurer of the benefits that used to be provided under the Medicare Plus $22,500 policy.

The "Medicare plus $22,500 supplementary health insurance" referred to in Section 13.05, and which is the subject of the grievance is referred to below as the $22,500 Plan.

The $22,500 Plan was included in the 1991-92 labor agreement between the City Water and Sewer Utilities Commission, referred to below as the Utility, and Local 216-D, which represented a bargaining unit of Utility employees. Article 15, Section 4 of that agreement states the benefit thus:

> All employees as of January 1, 1973, will be provided with Medicare plus $22,500.00 supplementary health insurance upon retirement at age 65 or later, for both retiree and spouse. Should an employee elect to retire before age 65 on a retirement annuity, he/she would be required to pay his/her own premiums for WPS Health Insurance until reaching the age of 65 at which time the Utility will provide the supplementary coverage. Should an employee choose to leave the employment of the Utility before becoming eligible for a retirement annuity other than for a medical or disability retirement, he/she should relinquish all rights to this supplementary insurance and any other benefits presently provided by the Utility.

In the bargaining for a successor to the 1991-92 agreement, the parties agreed to amend this provision. One of the amendments was to add a sentence between the first and second sentences of the 1991-92 statement of Article 15, Section 4. The added sentence reads, "All employees hired after August 30, 1993 will be provided with Medicare Companion Plan with 1993 options (six riders) supplementary health insurance upon retirement at age 65 or later, for both retiree and spouse." Another amendment was to change the second sentence of the 1991-92 statement of Article 15, Section 4 to read, "Should an employee elect to retire before age 65 on a retirement annuity, he/she would be required to pay his/her own premiums for current health insurance until reaching the age of 65 at which time the Utility will provide the

supplementary coverage." The successor to the 1991-92 agreement was in effect from January 1, 1993 through December 31, 1994.

The last labor agreement negotiated between the Utility and Local 216-D, was originally intended to be in effect between January 1, 1999 and December 31, 2001. In that agreement, the benefit once provided under Article 15, Section 4 had been renumbered as Section 13.05, and bore the heading "**'Red Circle' of Post Retirement Health for Utility Employees.**" It also included two sentences not present in Article 15, Section 4 of the 1993-94 agreement. The first became the third sentence of Section 13.05, and states, "There shall be no Medicare supplemental insurance for any Utility employee hired after January 1, 1997." The second became the final sentence of Section 13.05, and states, "Any person employed by the Utility subsequent to December 31, 1972, must be employed at least twenty (20) years prior to retirement before becoming eligible for the supplementary health insurance coverage." This sentence was present in the earlier agreements, stated as Section 5 of Article 15.

Prior to the City reorganization that merged the Utility with the DPW, Local 216-A represented a bargaining unit of City DPW employees. The City's agreements with Local 216-A prior to the merger did not provide a Medicare supplement. The first agreement that reflected a single bargaining unit for City employees was in effect from January 1, 2000 through December 31, 2001. Section 1.01 of that agreement notes: "This contract eliminates the separate designation and combines the members of former Local 216-A with former Local 216-D into one bargaining unit." The agreement continued Section 13.05 as stated in the final Utility agreement with Local 216-D.

The negotiations surrounding the consolidation of City Utility operations with the DPW were contentious. Anthony Murphy, then City Administrator, summarized the status of the reorganization in a memo to the Mayor and City Council dated January 5, 1999. The memo states:

> The reorganization is driven by the fact that the City expects to build a new water treatment plant. The new plant will allow the City to reduce staffing at the water treatment plant from six positions to one or two positions. Also, staffing at the wastewater treatment plant is currently at eight positions. Plant designs for the wastewater treatment plant indicate that the plant could be operated with five or six positions. A union employee currently manages the wastewater treatment. In September, the City Council accepted my recommendation to hire a water/wastewater superintendent as a part of the reorganization.
>
> It was my proposal that the utility employees be merged into the public works union so that . . . layoff . . . can be avoided. By having all of the employees under one collective bargaining agreement, the City could secure the flexibility needed to keep people productively employed . . . The City has tried to respect union desires to maintain employee seniority structures and to retain some of

their most important employment benefits. However . . . it has been our desire to have public works and utility employees compensated similarly. . . .

The union responded to the pending layoff letter by contacting members of the City Council. In the words of a union official, they decided to respond to the threat of layoffs, "politically." To the credit of the members of the City Council who were contacted, the union learned that a back door political solution wasn't possible and they then approached me with a desire to reopen collective bargaining talks . . . The two sides met . . . and, working from their proposals, the City submitted a revised offer . . . for a three year contract. . . . The City's offer provided for a three year-contract. The offer provides . . . an opportunity for us to gradually help public works salaries catch up to utility salary levels. At the end of the three years the base salary levels should be equal. The unions would be combined with separate seniority lists for layoff purposes. The two most important benefit issues, post retirement health benefits and certification pay, have been maintained for utility employees . . . We feel that all employees in the consolidated public works department should follow the benefits provided in the existing public works contract. We feel that our . . . offer is fair and meets most of the priorities identified by the union . . .

Needless to say, the process of negotiating has been very frustrating. The task is made more difficult by the following factors:

- The union feels powerful politically. When faced with a threat of layoff over the Utility Commission implementing wells for drinking water, the employees were very successful in their political efforts. Some may feel that a similar campaign could frustrate new plans
- Utility employees have tremendous benefits. While the Utility Commission directed utility operations, the Commission gave away the store. The Utility union has the best benefit package in the City and these employees do not want to give any ground on any of the benefits they receive.
- Water and wastewater employees are still adjusting to being City employees. Utility employees were very effective at manipulating management of the former utility and Utility Commission. They are still getting used to public works expectations and expectations of City administration. I'm sure that they liked the old organization better.
- Water and wastewater staffs are independent islands. With a few exceptions, water and wastewater employees do not seem to get along. They rarely share equipment or manpower. There is a strange jealousy between the two divisions.
- Wastewater staff comprises the bargaining team. The union bargaining team is John Radloff, Len Suminski and Dave Wosepka, senior employees at the wastewater plant. When negotiations broke down in November the union bargaining committee told us that they had a union meeting to discuss the

> City proposal. Later, I learned that the union meeting only involved wastewater employees, water employees did not know the status of negotiations. . . .
>
> . . . It is my hope that we may still reach an agreement. But, I am not optimistic. It appears that there may be too much distance between the two positions.

The parties ultimately bridged that distance. The language of Section 13.05 has not been changed since the merger. Neither party has offered a proposal to modify its terms.

As of the date of hearing, three retirees, who were members of the unit represented by Local 216-D or their spouse, were covered by the $22,500 Plan. The individual premium for that insurance is $6,868.00. Five retirees who were members of the unit represented by Local 216-D or their spouse were covered by a Medicare carve out of the City's group insurance plan. The individual premium for that insurance is $4,147.00. These five individuals, together with eleven employees who were represented by Local 216-D and are now City employees covered by Section 13.05 and their spouses qualify for $22,500 Plan benefits if the grievance is sustained.

The background summarized to this point is undisputed. The balance of the background is best set forth as an overview of witness testimony.

John Radloff

Radloff has served the City for thirty-one years as a Treatment Plant Operator and as a Lab Technician. He has served Local 216-A and Local 216-D as President and as Vice-President. He has also served on the Union's negotiating team from late 1998 until the present.

His work with the Union spanned the merger. Prior to 1998, the Utility did not have a formal negotiations team. Rather, the negotiations reflected round table discussions between Stephen Brand, the Utility Manager, the Utility Commission, and bargaining unit members. The merger process was City-initiated, involving considerable City pressure to equalize pay and benefits between the Utility and DPW. The wage gap between Utility and DPW employees was significant. During the initial bargaining concerning the merger, the City published an "at risk list" to let Utility employees know the positions that might be lost if the Union opposed the City's merger effort. In Radloff's view, Utility employees, during the initial negotiations on merger, drew "a line in the sand" concerning the preservation of Utility benefits. Without doing so, the wage equalization process would mean the Utility employees would give "something for nothing" to effect the merger. Radloff acknowledged, however, that red circle benefits did not get much across-the-table discussion. Rather, the parties focused on seniority issues, including the dovetailing of Utility with DPW employees and recall rights.

Radloff viewed the wage equalization process as significant. He calculated that between 1995 and 2002, rates for Utility positions increased seven per cent less than rates for DPW positions. In 1997, for example, Utility wages increased 3% while DPW wages increased 7%. In 2000, Utility wages increased 2%, while DPW wages increased 5%. By 2002, the City had equalized wage rates between Utility and DPW positions.

Radloff was not aware of the unavailability of the $22,500 Plan until he was contacted in the summer of 2004 by two retirees who could not understand why they were incurring costs other retirees were not. He could not recall any Utility employee, including Brand, telling him that the $22,500 Plan was no longer available. He was unaware of the content of Larson's November 27, 2000 letter until Buckwheat provided him a copy in September of 2004. Not until a meeting between Buckwheat and Union officials in August of 2004 was Radloff aware that the City was providing insurance to retirees other than the $22,500 Plan. He did not find the insurance provided by the City as an alternative to the $22,500 Plan, Medica, 1500-D, objectionable in itself. Rather, he stated "I like it from what I see so far." What he found objectionable was that Medica does not provide all of the benefits provided in the $22,500 Plan, particularly full coverage of prescription drug costs. The $22,500 Plan sets the standard for the City to meet regarding Medicare supplement insurance, even if the City is required to self fund the benefit.

Radloff could not recall any across-the-table discussions concerning the changes in the language from Article 15, Section 4 to Section 13.05. He could not recall any across-the-table discussions by which the City would self-fund any contractual insurance benefits. Radloff was present for Union/City cooperative discussions regarding insurance. Such discussions over time have become an almost annual event. Those discussions reflect that all City employees are part of a single insurance group, thus necessitating that insurance changes be implemented City-wide. The Union has played an active role in all the changes to City-provided health insurance. In his view, the group plan discussed by the Health Insurance Committee is distinguishable from the Medicare supplemental insurance covered by Section 13.05.

Carol Larson

Larson worked for the City as Deputy Clerk from 1979 through 1989, and as Clerk/Personnel Director from 1989 through 2003. Her duties in the latter position included collective bargaining, demanding her attendance at all collective bargaining sessions. She was not directly involved in Utility negotiations until after the merger.

In her experience, all City employees are part of a single insurance group, with retirees included as a Medicare "carve out". This meant that the retiree received the same benefits as City employees.

The existence of a single group demanded that insurance changes be made uniformly and the City, during her tenure as Clerk/Personnel Director made unions part of all discussions that produced changes to the insurance plan. After the change from WPS in 1994, no Utility

retiree who was not already covered by the $22,500 Plan could enroll in it. Utility employees who met the eligibility requirements of Section 13.05 and retired after the change to Blue Cross/Blue Shield received their insurance as a Medicare carve out. The City did not freeze the retirement benefits of any retiree during her tenure. Rather, benefits floated with the insurance group, reflecting the benefit negotiated in collective bargaining, and codified in the governing labor agreement. Those Utility employees who were enrolled in the $22,500 Plan before it ceased to exist continued to receive the benefits of that plan, unlike any other City employee or retiree.

Larson could not recall issuing the November 27, 2000 letter to any member of the Union, and could not recall ever issuing a general notice to all employees advising them of the unavailability of the $22,500 Plan. She believed that Brand informed Utility employees at the time of the change to Blue Cross/Blue Shield that the WPS provided $22,500 Plan would no longer be available to Utility employees who retired after the change from WPS. She could not, however, recall any specific discussion of this point at the bargaining sessions she attended. Each time the City changed insurance carriers, the City would discuss the changes with the unions and would supply the union and represented employees a booklet detailing the benefits provided by the new carrier. Cooperative discussions on insurance changes involved a single group for all City employees, and no City employee received any benefit other than those addressed by the discussion group which addressed insurance. She acknowledged that the Health Insurance Committee that addressed potential insurance changes was more concerned with the group health plan than with any issue concerning post retirement Medicare supplemental insurance. However, she believed the unions became aware of the unavailability of the $22,500 Plan at the same time the City became aware of it. There would be no reason to discuss changes to the group health plan, including a Medicare carve out, unless the parties were aware of the need caused by the unavailability of the $22,500 Plan for individuals not enrolled as of the change from WPS.

Leonard Suminski

Suminski has served as a City employee for roughly thirty-two years, and was a member of Local 216-D prior to the merger. He served Local 216-D as President and as Vice-President. In his view, the merger was accomplished against the background of City-threatened layoffs of Utility employees and of wage and benefit concessions from Utility employees to equalize them with DPW employees. He resigned his position with Local 216-D in disgust with the merger process.

From his view, the primary benefit that Utility employees retained through the merger was the red-circle benefits of Section 13.05. The Union struggled to retain its seniority rights and some job security. Prior to the negotiations surrounding the merger, Utility negotiations were an informal, round-table process.

Brand represented the Utility through the merger process, and Brand never informed Local 216-D that the $22,500 Plan was unavailable. Suminski was involved in the negotiation

that created the "six riders" Medicare supplement. During those negotiations, the City advised the Union that the $22,500 Plan was no longer available. He did not, however, take this to mean, nor did the City inform the Union that it meant, that the "six riders" benefit supplanted the $22,500 Plan for employees hired before its implementation. From his perspective, the work of the Health Insurance Committee concerned group health insurance benefits, not the Medicare supplement provided by the $22,500 Plan. The City never advised the Union that the $22,500 Plan was unavailable to employees after the City changed from WPS to Blue Cross/Blue Shield. He acknowledged that the City never agreed, at any bargaining session that he attended, to become a self-insurer of any health benefit, although he viewed City provision of an HRA as a type of self-insurance. He was not aware of the unavailability of the $22,500 Plan until retirees brought the issue to the Union in the summer of 2004.

Nils Lund

Lund worked for WPS between 1966 and 1976, left to work with independent insurance agencies, then returned to WPS between 1995 and his retirement in 2005. WPS created what became the $22,500 Plan in 1967, in response to concerns regarding Medicare coverage in Parts A and B. The Plan was developed to reimburse certain deductibles and to provide drug coverage. The $22,500 amount reflected a lifetime, per illness cap on WPS liability for deductible reimbursement, drug payment or any other Part A and B exposure. The cap started at $5,000.00, went to $15,000.00 and ended at $22,500.00. These caps, meaningful at the time implemented, were blown away by the pace of change and cost of medical technology. Effective January 1, 1994, WPS declined to provide the plan to anyone not currently enrolled in it. The full drug coverage provided by the plan is no longer commercially available from any insurer at any price.

Brian Knapp

Knapp, currently Interim City Administrator, originally served the Utility as its Accountant/Business Manager, starting in August of 1990. The City consolidated its financial department with the Utility's in 1995. The merger became complete by 1997.

The City has not directly provided an insurance benefit to any retired employee or their spouse beyond the premium payment. Knapp calculated that as of the end of 2005, based on current premium costs and standard actuarial assumptions regarding life expectancy, the City faced a potential liability of $2,403,443.00 to fund the post-retirement health insurance of represented and non-represented City employees and spouses eligible for Medicare supplemental insurance. The City does not currently fund this liability, but treats it as a pay as you go expense.

The City ended participation in the $22,500 Plan when WPS declined to accept further participants. Knapp played no role in Utility negotiations at the time WPS ended the Plan, but shared an office with Brand. Brand informed him that he advised the Union that the $22,500 Plan was unavailable and that he had tried to buy a substitute policy from WPS, but the policy

lacked the drug coverage of the $22,500 Plan. Brand informed Knapp that the Union would not accept the WPS-offered substitute without the drug coverage of the $22,500 Plan. Ultimately, the City, through Larson, informed Brand that the City could provide a Medicare carve out from the group insurance plan. Because the benefits of that plan included first dollar coverage, retirees did not experience any adverse cost impact. The City has consistently required insurers, since the change from WPS, to include a Medicare carve out in their bid. Knapp has discussed retirement benefits with Utility employees at the time of their retirement since 1994. He explained to each, and believed the employees understood, that they received benefits from a Medicare carve out of the insurance plan. He also believed that the retiring employees informed other union members. He believed the employees who complained to the Union in the summer of 2004 knew that they were not covered by the $22,500 Plan, but chose to ignore the difference between it and the Medicare carve out until the carve out reflected benefit changes that had a direct cost impact on them.

After the City changed from WPS to Blue Cross/Blue Shield, WPS could no longer bill the City directly for the premium due from individuals grandfathered in the $22,500 Plan. Union members complained when WPS billed the individuals directly. The City responded by setting up a bank account from which WPS could withdraw premium costs for the grandfathered individuals. Dave Wosepka was aware of this arrangement at the time of its creation. The number of grandfathered individuals serviced through this bank account has dropped from eight to four.

Over time, however, rising insurance costs forced the City, through its Health Insurance Committee, to make changes, including increasing deductibles and co-pays. All of these changes have been implemented after a consensus was reached with City unions. At no point has the City ever agreed to become a self insurer. He believed the Union and Brand discussed the unavailability of the $22,500 Plan during contract bargaining following City change from WPS. He understood, through discussions with Brand, that the Union was unwilling to have the reference to the $22,500 Plan removed from the contract, and that they viewed it as a benchmark. He did not, however, participate in bargaining at that time. City implementation of higher deductibles paid, in large part, via a City funded HRA is the closest it has come to playing the role of an insurer. City staffing and funding levels make it impossible for the City to be a provider of insurance coverage.

Further facts will be set forth in the **DISCUSSION** section.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence, the Union argues that the language of Section 13.05 is "clear and concise in its intent and meaning" and is "controlling in this instant case." The parties first negotiated the provision in 1973, setting forth the $22,500 Plan available upon retirement. In 1997, the parties modified the language to limit future entitlement to the $22,500 Plan. The language has continued, unmodified, through the present agreement.

Under relevant arbitral precedent, past practice is irrelevant since the language of Section 13.05 is clear and unambiguous. Even if it was relevant, there can be no past practice since the City never informed the Union that it had unilaterally modified the benefit due to its unavailability from WPS. The Union did not know of the alteration of the benefit until August of 2004, and grieved the City's action as soon as it was aware of the issue. Evidence implying Union knowledge of the change is unpersuasive. The absence of any City proposal to modify Section 13.05 underscores this. When the City learned of the unavailability of the $22,500 Plan, it was obligated to bring the issue to collective bargaining.

Arbitral precedent will not support the City's view that it "can simply walk away from its obligation to provide this contractually guaranteed benefit." The City's obligations are set by the collective bargaining agreement and the insurance policy is subordinate to it. Thus, inconsistencies between the insurance policy and the labor agreement are resolved by the labor agreement, not by the presence or absence of an insurance policy. The insurance policy reflects an agreement between the insurer and the employer and cannot trump the terms of a collectively bargained labor agreement.

Against this background, the Union concludes that the grievance should be sustained and that the appropriate remedy is that "the Arbitrator . . . hold the City responsible for the contractually guaranteed benefit of providing the $22,500 Plan or equivalent coverage for the red circled eligible employees."

The City's Brief

After a review of the evidence, the City contends that the $22,500 Plan "is not available from any insurer at any price." Since the labor agreement "does not provide for any alterations to Medicare Plus $22,500" and since the labor agreement does not "provide for an 'equivalent alternative'", it follows, as a matter of fact, that it is impossible for the City to meet its contractual obligation. Against this background, "the contract law of Supervening Impossibility would apply to this situation." Well-settled law, reflected in the "Restatement, Second, Contracts", other secondary summaries of law as well as judicial precedent from Wisconsin courts establishes that the impossibility of providing the $22,500 Plan relieves the City of the literal application of Section 13.05. Beyond this, there "is no evidence that the city agreed to be a self insurer of retiree health insurance."

Confronted with the impossibility of meeting Section 13.05, "the City has acted with the utmost in good faith." The City repeatedly advised the Union of the impossibility of providing the $22,500 Plan and "has and will continue to provide the substitute group health insurance with Medicare carve-out to the union retirees after 1/1/94." The Union has responded by declining to address the matter in collective bargaining. Resolution of the matter "is appropriate for collective bargaining and not grievance arbitration."

The Union's assertion that the City failed to notify the Union of the impossibility of securing the "$22,500 Plan" after WPS declined to offer it ignores that unit members knew

that the plan was unavailable and that the parties collectively bargained changes in the insurance benefit from January of 1994 through the present. Beyond this, Section 26.02 precludes an arbitrator from modifying the express terms of the labor agreement as the grievance seeks. At most, the grievance establishes a potential issue for bargaining to address the impossibility of literal application of Section 13.05 and its reconciliation with long practice.

The Union's Reply Brief

The Union "takes strong issue" with the City's assertion that "Union members knew the Medicare Plus $22,500 policy had not been available since 1994." Radloff's testimony rebuts this, as does the prompt filing of a grievance when the Union learned of the issue. That neither party brought the issue to the bargaining table since 1994 underscores this. The absence of written City notice to the Union is undisputed. Discussion and negotiation of insurance changes since 1994 establishes only that the parties never addressed the asserted "impossibility" of providing the WPS $22,500 Plan.

The City's provision of an alternative plan with some superior features can be acknowledged, but cannot obscure that the alternatives provide a lesser drug benefit. Nor will the evidence support any conclusion that the past practice asserted by the City was ever known or accepted by the Union.

The "Supervening Impossibility" doctrine ignores the existence of established arbitral precedent making the labor agreement superior to the insurance agreement. Section 26.02 should not be applied to this grievance. Accepting the City's view would permit it to "walk away from a contractually guaranteed benefit." This would "undermine the authority and reliability of the Labor Agreement." If the City cannot secure a provider for the $22,500 Plan, then it must "pay for such benefits through self insurance." The Union concludes that "(t)his may not have been the intention of either one of the parties but it is the required remedy in this case." The Union specifies the remedy thus:

> The Union requests the arbitrator direct the City to either find a comparable plan offering similar benefits to the Medicare $22,500 plan and in the event no such plan is available, the City shall pay directly for the contractually guaranteed benefits – primarily the 100% payment toward co-payment on prescription drugs for the red-circled eligible employees as per the terms of Article 13.05 of the parties' labor agreement.

The City's Reply Brief

An examination of the Union's brief establishes that its arguments belie its assertion that the terms of Section 13.05 are clear and unambiguous. More specifically, the Union's request for "equivalent" or "comparable" coverage ignores the absence of those terms in the labor agreement. Rather, the agreement demands a specific insurance plan, which is no longer available "anywhere at any price." Since there is no evidence that the City and Union agreed

to make the City a self-insurer, it follows that the Union's contentions seek to have the arbitrator violate Section 26.02.

Contrary to the Union's assertions, at least two Union witnesses acknowledged that they knew of the unavailability of the $22,500 Plan "in early 1994". Similarly, close examination of the arbitral precedent cited by the Union establishes that at least three of the cases involve contract language that imposed a self-insurance obligation on an employer. Examination of the record confirms the fundamental factual assertions of the City's brief and confirms that City provision of alternative coverage for the $22,500 Plan constitutes a binding past practice. Even if no practice is found, the amount of time in question establishes laches or waiver by the Union.

Even if the Union's asserted need for "equivalent" coverage is accepted, the City has provided equivalent or better coverage to replace the $22,500 Plan. The City has consistently sought to bargain the problems posed by Section 13.05, and has consistently indicated its willingness to bargain the matter whether by Union request or arbitration decision. Against this background, the "grievance must be dismissed and the parties ordered to negotiate replacement language for Article 13.05 based upon the established past practice."

DISCUSSION

The stipulated issue questions whether Section 13.05 obligates the City to pay the premium for a Medicare supplement insurance plan or to provide eligible retirees the precise benefits of the $22,500 Plan, which became commercially unavailable effective January 1, 1994. As noted below, the evidence will not support the Union's assertion of a City violation of Section 13.05. The ease of stating the conclusion should not, however, obscure the interpretive difficulty the grievance poses.

The strength of the Union's case is its assertion that the language of Section 13.05 clearly and unambiguously requires the City to provide the benefits of the $22,500 Plan, whether through a third party insurer or through self funding its benefit level. This contention cannot be brushed aside as frivolous. Rather, analysis of the contention must start with the fact that the language of the section supports the Union's view. The difficulty with the Union's view is that it is not the only plausible reading of the terms of Section 13.05.

The Union reads the section to clearly state two City obligations. The first is to those employees who meet the eligibility requirements of Section 13.05 regarding the $22,500 Plan within the effective term of the 2004-06 labor agreement. The second is to those employees who do not meet those eligibility requirements during the term of the labor agreement, but may at some point in the future. There is no dispute regarding the City's compliance with the first promise. The Union's assertion of the second promise is the crux of the dispute

More specifically, the Union reads the "upon retirement at age 65 or later" reference to state the two City obligations regarding the $22,500 Plan. The reference serves both as an

eligibility requirement for the immediate provision of plan benefits, and as a commitment of unlimited duration to those Utility employees hired prior to August 31, 1993 who will not meet the eligibility requirements of Section 13.05 until after the 2004-06 labor agreement's effective term. On this point, the Union's view is not the sole plausible reading of Section 13.05. As the City asserts, the first two sentences can be read to state no more than its obligation to provide the $22,500 Plan during the contract's term to those employees who then qualify for it. The ambiguity can be highlighted by the parties' conflicting views on why the first sentence continued in Section 13.05 after January 1, 1994. Under the Union's view, the City remained obligated to provide the benefit to a group of Utility employees who had yet to reach the age or years of service required to qualify for Medicare supplement insurance. Under the City's view, the sentence continues because the $22,500 Plan, under its terms, remains available to individuals who enrolled prior to January 1, 1994. Similarly, the Union's reading of the specific mention of the $22,500 Plan in Section 13.05 is clearer regarding the City's obligation to provide the $22,500 Plan during the term of the labor agreement to qualifying employees than regarding the City's obligation to provide it outside the term of the labor agreement to employees who do not yet qualify. If the parties wished to commit the City to an unlimited obligation to provide a level of benefits, why does Section 13.05 specifically refer to the $22,500 Plan without any reference to its benefit level? cf., for example, CITY OF RICHLAND CENTER, MA-5882 (Houlihan, 10/88), cited by the Union at 15 of its initial brief. In sum, each party states a plausible, but conflicting reading of Section 13.05. Thus, the section cannot be considered clear and unambiguous.

In my view, past practice and bargaining history are the most persuasive guides to the resolution of contractual ambiguity, since each focuses on the conduct of the bargaining parties whose intent is the source and the goal of contract interpretation. The parties produced evidence on each, but evaluation of that evidence is troublesome.

The source of the persuasive force of past practice is the agreement manifested by the parties' conduct over time, see, for example, Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements", from *Arbitration and Public Policy* (BNA Books, 1961) at 30-68. Here, evidence of past practice and bargaining history intersect. The City urges that it advised the Union that the $22,500 Plan became unavailable as of January 1, 1994, responding through bargaining and through its implementation of the Medicare carve out in an open, consistent fashion demanding enforcement as a binding practice. More specifically, the City contends that: it consistently maintained a single insurance group for all City employees at all times relevant here; never self-funded any insurance benefit; informed its Unions of plan changes when changes became necessary from at least 1993 to the present; and implemented those changes consensually over that time period.

The City's assertion of a binding practice is flawed. The evidence falls short of manifesting agreement between the parties on the City's response to the unavailability of the WPS provided $22,500 Plan after January 1, 1994. The City's view ignores that the parties did not share a common view of the obligation stated by Section 13.05. As noted above, the Union, unlike the City, reads the provision to embody two City obligations. The City's assertion of a past practice ignores the significance of this point. Knapp, for example, testified that Utility

employees were aware they were being provided benefits through a Medicare carve out. Beyond this, the record establishes that the Union knew of the unavailability of the $22,500 Plan not later than the negotiations for a 1993-94 labor agreement. This establishes no more than that the employees involved presumed that $22,500 Plan benefits continued to be provided to then enrolled retirees and available to a group of prospective retirees. Under Knapp's view, the complaints of retirees in the summer of 2004 reflected a cynical response to the presence of unwanted co-pays. However, there is no reliable basis to conclude the affected retirees or Union officials did anything cynical. Rather, the provision of the Medicare carve out after January 1, 1994 without cost to retirees is consistent with the view that the City continued to provide the benefits of the $22,500 Plan through another carrier. Until there was a cost impact, there was no reason to conclude the $22,500 Plan, as a statement of a benefit benchmark, rather than as the statement of a specific insurance carrier's plan, was no longer being provided.

Against this background, the City's view of Section 13.05 as a binding practice is unpersuasive. This conclusion highlights the interpretive difficulty of resolving the grievance.

Ultimately, the evidence falls short of establishing the City violation the grievance asserts. Section 13.05, read in light of what evidence there is of bargaining history and past practice, establishes that the parties agreed to City provision of a Medicare supplement plan, but not that the parties agreed to City provision of a benefit level, through self-funding if necessary.

Each testifying witness with bargaining experience, Union and City, stated that the City never agreed to self fund an insurance benefit. Whatever is said of the evidence regarding past practice, it underscores this testimony. Beyond this, the Union's attempt to create a self funding obligation has no support beyond the terms of Section 13.05. If the language of that section was clear and unambiguous, this would be enough. However, the ambiguity of the provision regarding the self-funding obligation is not clarified by evidence of bargaining history. In fact, bargaining history affords no support for the assertion that the City agreed to the two-fold promise the grievance reads into Section 13.05. Suminski's and Radloff's testimony indicate that the $22,500 Plan came into existence through informal, round table discussions. The assertion that the Union drew a line in the sand or gave a "quid pro quo" to impose a self funding obligation on the City's part lacks support in the evidence. The Union accurately points out that Murphy's January 5, 1999 memo describes "post retirement health benefits" as one of two key issues for Utility employees. This confirms one of the two promises the grievance seeks to impose on the City. The City has, however, never denied its obligation to provide a Medicare supplement under Section 13.05. It denies a requirement to self fund the benefit or to vest benefits at the level of the $22,500 Plan. The January 5 memo will not support the self-funding obligation the Union asserts. Significantly, the memo makes a generic reference to post retirement health and fails to make specific mention of the $22,500 Plan. Equally significant is Radloff's and Suminski's testimony that they could recall little, if any across-the-table discussion regarding the terms of Section 13.05. The self-funding/vesting obligation asserted by the grievance is a significant benefit, particularly within a small insurance group. This is impossible to reconcile to superficial or no across-the-table discussion. On balance, the record shows that Brand acted consistently throughout the merger process. He did his best to address the needs of

Utility employees, up to and including the creation of the Medicare carve out to replace the $22,500 Plan.

Asserted "quid pro quo" evidence also falls short of establishing City agreement to the benefit the grievance seeks. The 1997 wage increases show City/Union agreement to equalize DPW and Utility wage rates, but say nothing about the $22,500 Plan which was then neither in doubt nor under discussion. The 2000 wage increases are similar. Union negotiators acknowledge that what specific discussions there were during the merger turned on job security issues and seniority, not Medicare supplement insurance. In the absence of open discussions about the $22,500 Plan, it is unpersuasive to infer a "quid pro quo" to secure it as the two-fold benefit the grievance seeks.

Viewed as a whole, the record undercuts the grievance's assertion that Section 13.05 embodies a two-fold promise regarding post-retirement health benefits. Beyond this, the evidence affords some support for the City's view of the section. Bargaining history evidence regarding the language changes from Article 15, Section 4 to Section 13.05 between the 1991-92 and the 2004-06 agreements is murky at best. However, the deletion of specific reference to "WPS Health Insurance" in favor of "current health insurance" connotes some understanding that the carrier and benefits could change over time. Standing alone, this underscores the persuasive force of the Union's reading of the specific mention of the $22,500 Plan in the first section of Section 13.05.

The difficulty is that this conclusion does not stand alone. The references are ambiguous and evidence of practice and bargaining history point toward the City's view. From the time of the elimination of the WPS provided $22,500 Plan, the City acted consistently and openly. Neither Larson's nor Knapp's testimony can establish precisely what Brand or City negotiators said at the table in the creation of the Medicare carve out. However, the fact that specific reference to WPS was removed from the labor agreement establishes that something was said on the point. Knapp's mention of Brand's frustration with finding a substitute for the $22,500 Plan is credible and supports the inference that the creation of the Medicare carve out was not done behind the Union's back. That individual employees received retirement counseling, including the Medicare carve out, during this period is undisputed. That the City responded to Union concerns that employees were being directly billed for the $22,500 Plan by WPS, after the elimination of the $22,500 Plan is undisputed. That the City informed the Union of the unavailability of the $22,500 Plan during the creation of the "six riders" language is undisputed. That a Health Insurance Committee addressed insurance changes to the health insurance covering the City's single group between the elimination of the $22,500 Plan and the present is undisputed. That no plan book distributed to document these changes included the $22,500 Plan is undisputed.

As the Union accurately asserts, this falls short of establishing Union agreement to the replacement of the $22,500 Plan with the Medicare carve out. It does, however, establish two essential points. First, the parties agree that Section 13.05 requires the City to provide post-retirement Medicare supplement insurance to certain former Utility employees. Second, the

assertion that the City agreed to self fund the benefit levels of the $22,500 plan rests on the assumption of Utility employees which has some support in the language of Section 13.05, but no support in the bargaining history or administrative practice surrounding that section. There is no evidence the Union ever communicated its assumption regarding Section 13.05 to the City at any time in any forum prior to the assertion of the grievance. The grievance asserts a City violation of a provision which demands the self-funding of a benefit. There is no evidence that the parties ever agreed to this at the table. As underscored by Section 26.02, Step IV, 3, the function of grievance arbitration is limited to giving the parties the benefit of their agreement. An arbitrator lacks the authority to create agreement where none was reached, and the two points noted above establish that this is what the grievance seeks. The record, in sum, will not support finding a City violation of Section 13.05.

It is important to state the limits of this conclusion. That the record will not support finding the parties agreed to the two-fold promise the grievance asserts falls short of confirming the City's assertion that "the parties (must be) ordered to negotiate replacement language for Article 13.05 based upon the established past practice." Whichever party is dissatisfied with the Medicare carve out must address the point through negotiations before it can be enforced in grievance arbitration.

This conclusion underscores that this is not a case concerning the statutory duty to bargain. Even assuming the statutory issue can be addressed by an arbitrator, each party's assertion that Section 13.05 governs the grievance precludes the assertion that the matter demands bargaining during the agreement's term. The conclusion reached above highlights that the agreements reached at and after the elimination of the WPS $22,500 Plan address the City's obligation under Section 13.05 to provide post retirement Medicare supplemental insurance less than clearly. That lack of clarity cannot be resolved through this litigation. The Award precludes reading Section 13.05 to impose on the City the obligation to provide the benefit level once offered through the $22,500 Plan, by self-funding if necessary.

Nor do common law doctrines regarding contract interpretation, including the "impossibility of performance" considerations cited by the City, assist in resolving the grievance. Even assuming a grievance arbitrator should treat a labor agreement involving an ongoing bargaining relationship as if a contract involving a single transaction, the persuasive force of the City's contention is not that it did not comply with the terms of Section 13.05 because the obligation it undertook in bargaining became impossible. Rather, the persuasive force of the City's view is that it never agreed to undertake in bargaining the self funding obligation the grievance seeks to impose on it. The most forceful evidence against the City's view is Knapp's testimony that the Union rejected Brand's attempts to find a substitute for the $22,500 Plan and wished to keep it in the labor agreement as a benchmark. This testimony, in my view, would change the result in this case if it was established to have occurred. The evidence poses a number of problems, however. The first is the hearsay nature of the evidence. Knapp did not assert he was quoting Brand or the Union members to whom Brand spoke. It is clear that Brand did not use the term "benchmark" in his testimony to state a vested benefit. Nor is it clear that the term "benchmark" was used at the table or that Knapp's recall of Brand's discussion of the

bargaining reflected City or Utility desire to fund the level of benefits established by the $22,500 Plan whether or not WPS provided it. More significant is that the Union, through testimony and argument, denies that this exchange took place in bargaining. As a result, this piece of bargaining history evidence is less reliable than that discussed above.

The Union's assertion that the labor agreement governs the City's obligation to provide $22,500 Plan benefits without regard to the City's ability to contract with an insurer is persuasive. The conclusions reached above do not, however, turn on the availability of a commercial provider or on the cost of self funding. Rather, denial of the grievance reflects that the record does not establish that the parties agreed in bargaining to provide the two-fold benefit the grievance seeks to enforce. The doubt that surrounds the creation of the Medicare carve out can not be resolved against the City without persuasive proof that it agreed to the two-fold benefit. The lack of clarity in Section 13.05 must be addressed in bargaining rather than by implying the agreement that the evidence does not prove.

The parties have not questioned the timeliness of the grievance and the Award addresses the issues stipulated by the parties. The record will support the Union's assertion that it acted when it became aware of the issue. Wosepka did not testify because he was on vacation on the hearing date. The parties discussed the possibility of keeping the record open, but decided that his testimony was not essential. The Award entered below should confirm the point. Timeliness issues are similar to the assertion of a binding practice. City and Union arguments regarding when the Union knew, or should have known, that the Medicare carve out had supplanted the $22,500 Plan, miss the core of the dispute. The availability of the $22,500 Plan is essential to the City's reading of Section 13.05 but irrelevant to the Union's. As noted above, the Union reads two promises in Section 13.05 regarding the $22,500 Plan where the City reads only one. Arguments on timeliness or on what Wosepka knew and when he knew it skirt the fundamental divide between the parties' positions. Resolution of the grievance turns not on waiver, laches or past practice. Rather, the resolution reflects that the evidence will not establish that the parties ever agreed in bargaining to the two-fold obligation the Union reads into Section 13.05 regarding the $22,500 Plan.

AWARD

The Employer did not violate the terms of the parties' Collective Bargaining Agreement (Article 13.05) in regards to post retirement benefits to "Red Circled" union employees, since Section 13.05 does not obligate the City to provide, by self-funding if necessary, the benefit level of the $22,500 Plan.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 10th day of January, 2007.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator
RBM/gjc
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