BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARSHFIELD POLICE OFFICER BARGAINING UNIT

and

CITY OF MARSHFIELD

Case 166
No. 65798
MA-13325

(HRA Grievance)

Appearances:

Mr. Nicholas E. Fairweather, Attorney, Cullen, Weston Pines & Bach, LLP, 122 West Washington Ave, Suite 900, Madison, Wisconsin, appearing on behalf of the Marshfield Police Officer Bargaining Unit.

Mr. James R. Korom, Attorney, von Briesen & Roper, S.C., P.O. Box 3262, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin, appearing on behalf of the City of Marshfield.

ARBITRATION AWARD

The Marshfield Police Officer Bargaining Unit, hereinafter "Union," and the City of Marshfield, hereinafter "City," requested that the Wisconsin Employment Relations Commission assign a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was assigned to arbitrate the dispute. The hearing was held before the undersigned on July 11, 2006, in Marshfield, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on November 6, 2006, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

1. Did the City violate Article 23 of the collective bargaining agreement when it unilaterally implemented a health reimbursement arrangement (HRA) overlay for calendar year 2006?

2. And if so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 3 – RESERVATION OF RIGHTS

1. The officers recognize the right of the City and the Chief of Police to operate and manage its affairs in all respects. The officers recognize the exclusive right of the Chief of Police to establish reasonable departmental rules and regulations.

. . .

3. The City and the Chief of Police, and the Police and Fire Commission shall retain all rights and authority to which by law they are entitled.

4. The powers, rights and/or authority claimed by the City are not to be exercised in a manner that will undermine the Police Officer Bargaining Unit, or its members as an attempt to evade the provisions of this agreement, or to violate the spirit, intent, or purpose of this agreement.

5. The City possesses the sole right to operate the City government and all management rights repose in it. These rights, which are normally exercised by the Chief of Police include, but are not limited to, the following:

   A. To direct all operations of the City Police Department;

   B. To hire, promote, transfer, assign and retain officers in positions with the City and to suspend, demote, discharge and take other disciplinary action against officers pursuant to the authority and under the rules, regulations, and policies of the Marshfield Police and Fire Commission.

C. To relieve officers from their duties because of lack of work or for other legitimate reasons.

D. To maintain efficiency of City Police Department operations entrusted to it.

E. To introduce new or improved methods or facilities.

F. To change existing methods or facilities.

G. To determine the methods, means, equipment and personnel by which such operations are to be conducted.

H. To take whatever action which must be necessary to carry out the functions of the City in situations of emergency.

I. To take whatever action is necessary to comply with State or Federal law.

J. To establish reasonable work rules.

K. To determine the number, structure and location of departments and divisions within the Marshfield Police Department; the kinds and amounts of services to be performed by the Marshfield Police Department, and the number and kind of positions and job classifications needed to perform such services.

L. Nothing in this Agreement shall be construed as imposing an obligation upon the City to consult or negotiate with the Association concerning the above areas of discretion and policy.

. . .

ARTICLE 23 – HOSPITALIZATION PLAN (INSURANCE)

1. The City shall offer the Security Health Plan of WI, Inc. with Major medical coverage, with a $250 annual deductible per individual and maximum family out-of-pocket expense of $750. In addition, there will be a co-pay on prescription drugs utilizing a $10 for generic/$20 for Brand Name benefit card. Major medical will remain in place for other than prescription drugs as long as it remains a no cost item and is available from the provider. Premium costs will be shared 85%/15% between the City and Officer respectively.

. . .

ARTICLE 38 – DURATION OF AGREEMENT

This Agreement will become effective January 1, 2004, and shall remain in full force to and including December 31, 2004. In the event agreement is not reached for renewal of the Agreement, the existing terms and conditions shall continue to apply until settlement is reached in negotiations; however, the state law, if any, shall continue to apply at that time.

BACKGROUND AND FACTS

During 2003, the City began to investigate solutions to the ever-rising insurance plan costs by hiring a consultant to analyze the City's four existing health insurance policies and recommend any changes. The City also established a labor management committee comprised of representatives from the City and all bargaining units to explore alternate options to the indemnity plan.

The City and Union reached agreement for purposes of collective bargaining and ratified a one-year labor agreement for 2004. The agreement provided employees the option to participate in a major medical health insurance plan from Security Health. Employees paid 15 percent of the premium costs and the City paid the remaining 85 percent of the premium cost with an identified deductible cost and a prescription drug card.

On October 19, 2004 the City Finance, Budget and Personnel Committee met and approved a Health Reimbursement Arrangement (hereinafter, "HRA") and a change in the flexible benefit plan administrator. The Common Council for the City approved the HRA overlay at its October 25, 2004 meeting. Thereafter, a memorandum was distributed to staff with their October 29, 2004 payroll check. The memorandum informed employees of the Council's actions, indicated the monthly premium rates with and without the HRA overlay, and invited employees to various presentations where health insurance, flexible benefits and the HRA would be explained. With the HRA, the family premium cost was $164.04 less per month than it would have been without the HRA and the single premium cost was $70.97 less per month than it would have been without the HRA. Attached to the memorandum was the following Employee Instruction Sheet:

> City of Marshfield is implementing a Section 105 Health Reimbursement Arrangement to help provide better health care to employees and their families. They are working with Diversified Benefit Services, Inc. (DBS) to manage this plan. This years (sic) plan year will be 1/1/05-12/31/05.
>
> The program works as follows:
>
> * Your employer implements a health insurance plan with deductibles.

* You and/or your family members incur expenses like you normally would. The services you receive are applied toward the deductible.

* An Explanation of Benefits form (EOB) will be sent from the insurance company to you stating the amount of services applied toward the deductible and coinsurance.

* Affix a completed Health Reimbursement Plan claim form to the EOB and send a copy of the EOB to DBS. EOB forms can also be faxed to DBS at 262-XXX-XXXX.

* DBS reviews the EOB and then reimburses you up to the deductible amounts listed below. All reimbursements are tax free.

* Requests received by a Friday will be processed by the following Friday.

* Your EOB forms are confidential and will only be seen by a DBS Claims Specialist. No one at your employer will see the EOB form.

* You have 60 days at the end of the deductible plan year to submit claims for deductible expenses.

* You will receive an Annual Activity Report.

* City of Marshfield assumes all costs associated with the administration of this plan.

Plan Information

Deductible Level (In-Network):	$1000 (up to 3 per family)
Employee Responsibility:	First $250 (per deductible)
Employer Responsibility:	Remaining $750 (per deductible)

The HRA will reimburse for In Network Deductibles. The HRA will only reimburse up to the annual In-network maximum amount listed above.

Note: You are responsible for paying the doctor and/or hospital bills. The plan will reimburse you directly after you have submitted copies of your EOB Forms. You must be an active employee or on COBRA to receive the payment. Any expenses reimbursed to you through this plan ARE NOT eligible for reimbursement under any other program or insurance policy. The program reimburses for expenses applied to the In or Out of Network deductibles.

If you have question on the program, please call DBS at 1-800-XXX-XXXX.

The City negotiated with all of its bargaining units regarding implementation of the HRA overlay. During negotiations, the City took the position that it had the unilateral right to implement the HRA and the Union asserted that the City did not retain such a right. Eventually, the parties were able to agree on Side Letter which read as follows:

> The City of Marshfield and MPPA (the "Association"), hereby agree as follows:
>
> 1. The parties agree to implement the DBS Section 105 Plan Service Agreement dated November 10, 2004, and to abide by the terms of that Agreement. The City shall pay all City and DBS Section 105 costs and charges for administering the HRA.
>
> 2. All employees in the bargaining unit represented by the Association agree to execute any necessary documents or forms to participate in the HRA system, including forms to facilitate the transfer of funds through direct deposit or other electronic means.
>
> 3. This Side Letter of Agreement will automatically expire at the end of the year 2005 unless the parties agree to continue the HRA. Written notice of intent to continue the HRA must be received by either party by October 1, 2005. Having received this notice on a timely basis then, effective at the end of the day on December 31st of the same year the terms participation in this Side Letter of Agreement shall become null and void except that the parties agree to revert to the status quo on this subject which existed immediately prior to the execution of this agreement as if this Side Letter of Agreement had never existed.
>
> . . .

The City offered 11 presentations to employees regarding the flexible benefits and HRA program. The presentations included training on how to process claim forms. Few Union employees attended the presentations. The HRA program was implemented effective January 1, 2005.

The Union filed a petition for interest arbitration in January 2005 after the parties were unable to voluntarily reach agreement on a labor agreement to succeed the 2004 version. The interest arbitrator issued his decision on July 24, 2006. Neither parties' final offer contained any proposals relating to health insurance plan modifications for current employees, but the City sought to create a different level of benefits for new employees.

On October 27, 2005 the City's Human Resources Manager, Lara Baehr, sent written notice to Union President, Nick Poeschel, indicating that the City intended to continue participation in the HRA for 2006. In consideration of the City's desire to continue the HRA, Union membership voted which resulted in the majority, 23 to 9, voting to decline continued participation in the HRA program. Poeschel informed Baehr in e-mail correspondence on November 14, 2005 of the vote and explained that the cost savings were not worth the amount of work required to complete the transactions. After receipt of Poeschel's notice, Baehr drafted the following letter dated December 19, 2005:

> RE: 2006 Health Reimbursement Arrangement (HRA)
>
> I received your e-mail dated November 14, 2005 regarding the Unions desire to not participate in the HRA overlay for 2006 because employees do not desire to submit paperwork for reimbursement. We are disappointed to hear that the Police Unit is not interested in helping the City control health insurance costs. The City is currently working with Security Health Plan find ways to address the Union's concerns.
>
> Per your e-mail the Police Unit is no longer interested in participating in the HRA overlay for 2006 and continuing the Letter of Agreement signed in 2004. With this in mind we are therefore back in the same position as before the agreement. We believe that the City has the right to have all employees participate in the HRA overlay without violating the labor agreement. The Police Union will participate in the HRA for 2006. This will mean no employees will lose any benefits as a result of this matter. Rather, the City will simply be self-insuring over some of those benefits through the HRA overlay.
>
> Please let me know if you have any questions.
>
> Respectfully,
> /s/
> Lara Baehr
> Human Resources Manager

All other bargaining units within the City agreed to continue to the HRA for 2005. All City employees completed paperwork for the Health Reimbursement Arrangement, which is virtually the same as the paperwork an employee completes for a Section 125 plan. In order for an employee to receive reimbursement from the HRA, after the employee receives an Explanation of Benefits from the insurance carrier, they submit a form which requests his/her name, social security number, name of employer, e-mail address, amount of reimbursement requested, indicates who incurred the expense and signs and dates the form. The employee then has the option to either send the form to the administrator by mail or may utilize the City's fax machine. The employee is then sent a reimbursement from the HRA administrator.

On February 28, 2006 the Union filed a grievance alleging a violation of Article 23 in as much as:

> On November 17, 2004, the Bargaining Unit and City entered into the Side Letter Regarding HRA covering the implementation of a DBS Section 105 Plan Service Agreement (Health Reimbursement Arrangement) for the calendar year of 2005. The City and the Bargaining Unit have been parties to collective bargaining agreements setting forth the wages, hours and conditions of employment the most recent of which has as its term January 1, 2004 through December 31,2004. On January 19, 2005 the Bargaining Unit filed a Petition for Final and Binding Arbitration Pursuant to Section 111.77, Wis. Stats. with the Wisconsin Employment Relations Commission (WERC). In an e-mail message dated November 14,2005, Bargaining Unit President Poeschel notified Lara Baehr, Human Resources Manager of the Bargaining Unit's desire not to participate in a HRA Side Letter for the calendar year 2006. In a letter addressed to President Poeschel dated December 19, 2005, Human Resources Manager Baehr advised in part, "We believe the City has the right to have all employees participate in the HRA overlay without violating the labor contract. The Police Union will participate in the HRA for 2006. This will mean no employee will lose any benefits as a result of this matter. Rather, the City will simply be self-insuring over some of those benefits through the HRA overlay." In an e-mail dated December 21, 2005, Business Agent Wisbrocker advised the City that the original side letter allowing the HRA in 2005 contained specific language that read in part "3. This Side Letter will automatically expire at the end of the calendar year 2005 unless the parties agree to continue the HRA. Written notice of the intent to continue the HRA must be received by either party by November 1, 2005. If this Side Letter Agreement expires, the parties agree to revert to the status quo on this subject which existed immediately prior to the execution of this agreement as if this Letter of Agreement had never existed." The City continued the HRA for the 2006 calendar.

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

ARGUMENTS OF THE PARTIES

Union

The City breached its agreement with the Union when it did not revert to the status quo as required by the Side Letter. The parties negotiated the Side Letter which allowed the City to implement the HRA for one year. The Union informed the City of its decision to not use the HRA for 2006, but rather than honor the terms of the Side Letter, the City continued the HRA which was in conflict with the negotiated terms.

The City does not have the right to unilaterally implement the HRA. At the expiration of the Side Letter, "the parties are required to return to the status quo as set forth in the language of the collective bargaining agreement ..." WPPA v. CITY OF RHINELANDER, MA-13247 (Emery, 6/06). The City acknowledged the need to negotiate a side letter of agreement when it did so for 2005. Because it implemented the HRA and failed to bargain over the implementation for 2006, it has violated Article 23 of the collective bargaining agreement.

The City is violating the clear terms of the labor agreement and has implemented a change without bargaining it. The Union requests that the Arbitrator sustain the grievance and order the City to return the parties to the *status quo* which is the agreement that preceded implementation of the HRA.

City

This case involves the City's decision to provide health insurance benefits through a partially self funded arrangement. That arrangement saved taxpayer dollars. No employee lost any contractual benefit as a result of the arrangement and no contract provision was violated. As such the grievance should be denied.

The labor agreement does not restrict how the City is required to pay for health insurance benefits. Article 23, Section 1 states that the City will pay medical claims above a $250 annual deductible per individual and a maximum family out-of-pocket expense of $750. It further states that employees pay $10 for generic and $20 for brand name drugs and the City pays the rest. The fact that the City is choosing to pay medical claims above the contractual deductible out of one pocket rather than out of the other is not a violation of the plain language of Article 23, Section 1.

There is a history of the Union granting the City flexibility in administering the details of the health insurance coverage. Doctors move on and off the preferred provider list. Drugs move from the generic category to the brand name category. The City has changed the drug card administrator without negotiating with the Union. The Union did not challenge any of these actions. The past practice of the parties is to allow the City flexibility in how the benefits guaranteed by Article 23 are delivered is within the bounds of discretion.

Finally, Union employees have not suffered any inconvenience or delay as a result of the HRA. No employee testified that he or she had unpaid claims. No employee testified that they had lost benefits. There is no remedy which the Arbitrator can award and thus, the grievance is moot and should be denied.

DISCUSSION

This is a contract interpretation case. It is not a prohibited practice case wherein one side has asserted that the other failed to bargain or a declaratory ruling case to determine

whether the HRA is a mandatory subject of bargaining. Inclusive to this disagreement is the issue of whether a side letter negotiated during the term of the agreement with an expiration date that coincided with the end of the collective bargaining agreement, is a part of the labor agreement or if it no longer survives. Add to this scenario the fact that the record is void of any evidence as to the status of bargaining post 2004, but having taken judicial notice of Arbitrator Amedeo Greco interest arbitration decision, I realize the parties' contract was in hiatus from January 1, 2005 to July 24, 2006. I will limit my decision to the issue stipulated to at hearing. Any and all arguments asserted by the parties that are not relevant to the arbitration of this issue will not be addressed unless they relate to the underlying issue.

Merits

The Union's challenge is with regard to Article 23. Specifically, the Union asserts that the City has refused to revert back to where the parties were in 2004 as it relates to health insurance by unilaterally adopting and imposing the HRA overlay in contradiction to the language of Article 23. The City maintains that no violation of Article 23 has occurred.

It is the role of the arbitrator in a contract interpretation case to ascertain the meaning of the contract language giving rise to the parties' dispute. If the plain meaning can be established from the language used, then it is unnecessary to resort to interpretation. But, if "plausible contentions may be made for conflicting interpretations," Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. p. 434 (2004) then there is ambiguity and it is appropriate to consider extrinsic evidence such as use of dictionary definitions, bargaining history, past practice and manner of dealing.

Article 38 of the parties' labor agreement provides that "… the existing terms and conditions shall continue to apply until settlement is reached in negotiations." The parties' collective bargaining agreement expired at the conclusion of 2004. A successor agreement was issued by Arbitrator Greco in July, 2006. Although this grievance arose following the expiration of the 2004 agreement, given Article 38, the terms and conditions of the 2004 agreement continued and therefore are the basis for this award.

While Article 3, Reservation of Rights, provides the City with broad management rights in Section 3, the exercise of those powers, rights and authority is limited by the Section 4. Section 4 states that the City's rights are limited by any specific provision of the labor agreement, but it also dictates that the City will avoid actions which "undermine the … bargaining unit or its members as an attempt to evade the provisions of this agreement" and those which "violate the spirit, intent or purpose" of the labor agreement. Thus, the City's decision to continue the HRA must be evaluated in this context.

Article 23, Section 1 states:

> The City shall offer the Security Health Plan of WI, Inc. with Major medical coverage, with a $250 annual deductible per individual and maximum

> family out-of-pocket expense of $750. In addition, there will be a co-pay on prescription drugs utilizing a $10 for generic/$20 for Brand Name benefit card. Major medical will remain in place for other than prescription drugs as long as it remains a no cost item and is available from the provider. Premium costs will be shared 85%/15% between the City and Officer respectively.

The City and Union agreed that Security Health would be the insurance plan carrier. They further included language that specifies that the Security plan will contain "major medical coverage" and will have a $250 annual deductible per individual with a $750 maximum out-of-pocket obligation. Both of these clauses reference the Security plan and relate to plan design. Consistent with the contract construction principle of *expressio unius est exclusio alterius*, when parties specify certain items, without any more general or inclusive terms, they intended to exclude the unlisted items. Thus, it is reasonable to conclude that by specifying the carrier and deductibles, there was an intent to guarantee these terms, but it is equally clear that the language does not specify which Security Health plan would be offered, which services are included in major medical coverage and who is responsible for medical expenses in excess of $250 per individual and $750 per family.

Moving to the next sentence, it combines the issue of major medical and prescription drugs in a confusing manner and ultimately creates a mechanism for the City to opt out of the major medical portion if it is no longer available from the provider. This sentence indicates that the parties foresaw the possibility of changes to the parties' insurance plan and created an automatic method for removing major medical procedures from the insurance plan.

Both the City and Union take the position that the language is clear and unambiguous. The Union argues that the language of Article 23 does not allow for implementation of the HRA while the City maintains that the language of Article 23 provides "that the City will pay medical claims above the $250 annual deductible per individual, and with a maximum family out-of-pocket expense of $750." City br. p. 10-11. The City and the Union disagree as to the meaning of Article 23, despite the fact that they both believe the language is clear. Just as it is possible to conclude that the phrase "a $250 annual deductible per individual" is part of the description of the insurance plan, in may also serve as a command capping the individual employee's obligation at $250. Given these differing interpretations, I conclude that the language is susceptible to more than one meaning and therefore it is necessary to consider extrinsic evidence.

Consideration of the usual and ordinary meaning of a word can aid in determining the meaning of contract language. Deductible is defined in *Webster's New Collegiate Dictionary*, Merriam Co. p. 293 (1981) as "a clause in an insurance policy that relieves the insurer of responsibility for an initial specified loss of the kind insured against." The deductible therefore does not establish the insured's obligation, but rather is designed to express the amount to which the insurer has no obligation. In drafting Article 23 and choosing to utilize the term "deductible", the parties defined the employee's obligation, but did not address who is obligated for amounts in excess of the initial $250. By not specifying who or how the

additional expenses would be paid, it is a right retained by management consistent with Article 3 of the parties' agreement. The definition of deductible supports the City's position.

Looking next to bargaining history, no evidence was offered addressing pre-Side Letter bargaining in general or specific to Article 23 and no evidence of pre-HRA health insurance procedures were offered or admitted to the record.

The Union argues that the Side Letter entered into for 2005 is evidence that the City knew it was obligated to bargain regarding implementation of the HRA. In response, the City maintains that the 2005 Side Letter is not relevant because it expired and therefore should not be considered by this Arbitrator. Moreover, it maintains that its decision to negotiate and eventually enter into a Side Letter regarding the HRA is not evidence that it understood it was obligated to bargain on the issue, but rather was part of its on-going efforts to maintain a positive working relationship with the Union. Both sides initially included their divergent opinions as whether the Side Letter was contractually necessary, but neither phrase was included in the executed agreement. While the Side Letter serves as evidence that the parties negotiated and reached agreement with regard to implementation of a Section 105 plan for 2005, the timing of the negotiations for this Side Letter negate any inference that it was entered into because the City believed it had a statutory obligation to negotiate. The facts establish that only after the City decided to implement the HRA did it begin to negotiate with the Union and then at the Union's behest. The City's decision to negotiate was likely a calculated effort to preempt any litigation which would stall implementation of the HRA. Negotiations in this context do not provide any assistance in determining as to the meaning of Article 23.

Moving next to the City's asserted past practice, it argues that the parties have a practice of allocating decision-making authority to the City as to how health insurance benefits are guaranteed. The City cites three instances. The first two instances relate to changes made by the insurer with regard to physicians and prescription drugs and the Union's acquiesce to the changes The record establishes that the preferred provider list of physicians changed with physicians' moving on and off of the list. The City also submitted evidence documenting the movement of certain prescription drugs from the generic to brand name list and vice versa. The City maintains that in both of these situations, which occurred regularly during the term of the insurance contract and the labor agreement, the Union deferred to the City and thereby created a past practice of granting the City flexibility in how benefits are administered.

While it is true that the Union did not challenge the movement of physicians and prescription drugs from the carriers, I am not persuaded that these two examples are sufficiently similar to the deductible issue pending in this case. It is common knowledge in the context of preferred provider lists and drug card designations that physicians and specific prescription drugs shift from one list to another and do so for a number of reasons, some of which have nothing to do with either the insurance carrier or the employer. No evidence was offered by the City indicating its involvement in or the method by which it guaranteed employees health insurance benefits when a physician or prescription drug was moved on or

off a list. Given that the City was not involved in the administration of these benefits, these instances do not support the City's position.

The third instance cited by the City occurred in 2004 when it changed its prescription drug card administrator and the new administrator was either unable or unwilling to abide by the co-pay language of Article 23. The City argues in its brief that it created a mechanism to reimburse employees for the drug co-pay charges in excess of the negotiated language. The record is inadequate as it relates to this instance. Therefore, I cannot find it to be evidence of the parties course of dealing.

In conclusion, the Side Letter of Agreement expired on December 31, 2005 at which time the 2004 labor agreement was in full force. Article 23 of the agreement provides employees with specific health insurance terms, but is silent as to how those benefits shall be administered. The City maintained the specific deductibles identified in the labor agreement for the Union employees while simultaneously contracting for different benefits with the insurance carrier. The parties' labor agreement does not specifically prohibit this action and therefore, the City's action was sanctioned by its management rights clause when it implemented the HRA for deductibles.

The Union argues that the parties were obligated, pursuant to the Side Letter, to return to the status quo for 2006 and that since there was no HRA overlay in 2004, then the status quo was not achieved because the HRA was in effect in 2006. While it is true that the HRA did not exist in 2004, this is a contract interpretation case and my analysis is limited to determining whether the contract language, specifically Article 23, allows or negates the City's implementation of the HRA for 2006. As such, the Union's assertion that the status quo was not achieved is beyond the scope of my authority.

AWARD

No, the City did not violated Article 23 of the collective bargaining agreement when it unilaterally implemented a health reimbursement arrangement (HRA) overlay for calendar year 2006.

Dated at Rhinelander, Wisconsin, this 9th day of February, 2007.

Lauri A. Millot /s/
Lauri A. Millot, Arbitator

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