

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
POLK COUNTY JOINT COUNCIL LOCAL 774, AFSCME, AFL-CIO
and
POLK COUNTY

Case #119
No. 67859
MA-14039

Appearances:

Steven Hartmann, Staff Representative, P.O. Box 364, Menomonie, WI 54751, appearing on behalf of Polk County Joint Council Local 774, AFSCME, AFL-CIO.

Mindy K. Dale, Weld, Riley, Prenn, & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, WI 54702-1030, appearing on behalf of Polk County.

ARBITRATION AWARD

Polk County, hereinafter County or Employer, and Polk County Joint Council Local 774, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The parties jointly requested that the Wisconsin Employment Relations Commission designate Commissioner Susan J.M. Bauman to serve as the arbitrator of a dispute concerning insurance coverage after leaving County employment. The undersigned was so designated. A hearing was held on August 5, 2008 in Balsam Lake, Wisconsin. The hearing was not transcribed. The record was closed on September 10, 2008, upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties were unable to agree on a statement of the issue and agreed that the arbitrator could frame the issue based on the evidence and arguments presented. The Union proposed the following statement of the issue:

Did the County violate the collective bargaining agreement when it refused to provide insurance for the subsequent month after it has taken the premium co pay out of the employee's check for the purchase of health insurance? If so, what is the remedy?

The Employer proposed the following statement of the issue:

Is the County violating the collective bargaining agreement by discontinuing insurance coverage on the last day of the month in which an employee ceases to be eligible (a COBRA qualifying event occurs) instead of continuing coverage for any period of time in which the employee has prepaid their contribution towards health insurance? If so, what is the remedy?

The undersigned adopts the following statement of the issue:

Is the County violating the collective bargaining agreement by failing to provide insurance coverage to employees for the month subsequent to separation from the County? If so, what is the remedy?

BACKGROUND and FACTS

Polk County owns and operates a nursing home, Golden Age Manor (GAM). The sale and change of ownership of GAM was scheduled to occur effective March 31, 2008, with all employees represented by the Union being laid off at that time. Although the sale of GAM has been stayed, a question that arose during the negotiations regarding the impact of the sale on the employees remains an active controversy and the parties agreed to move forward with the grievance. In addition, the question presented affects the County each time an employee separates from County employment.

Employees of GAM are paid every two weeks. Employees contribute 10% of the cost of their health insurance. This money is deducted from the first two paychecks of each month and pays for insurance for the following month. In March, the County, in anticipation of the sale of GAM, was not going to deduct employee contributions for health insurance for April. At some point, a grievance was filed and health insurance contributions were deducted as usual. However, the County informed the Union that employees would be refunded their portion of the health insurance premium, rather than receive health insurance coverage in April when they would no longer be employed.

The County's insurance plan is self-funded, administered through a third party vendor. The Union takes the position that since not only the employee's portion of the insurance premium is transferred into the Insurance Trust Fund during the month prior to coverage, but the Employer's portion is also transferred into the Trust Fund at that time, the employees are entitled to receive health insurance coverage for the month following their separation from service, in this case in April 2008 had the sale and transfer taken place.

The parties were unable to resolve their differences regarding this matter and it was properly submitted to arbitration.

Additional facts are included in the **Discussion**, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE IV - GRIEVANCE AND ARBITRATION PROCEDURE

. . .

Section 4.07 Arbitration

. . .

6. **Decision** The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall not modify, add to, or delete from the express terms of the Agreement.

ARTICLE XX11 - INSURANCE

Section 22.01 Employer/Employee Contribution

For fulltime employees choosing health insurance coverage, the employer agrees to contribute ninety percent (90%) of the cost of such coverage.

Regular Part-time employees entitled to health insurance benefits as set forth in Article XVIII will receive full insurance benefits. Future premiums will be prorated based on the average amount of time paid in the six months previous to April 30 and October 31. Once established on those dates, Health Insurance premiums will remain the same for the future six-month period when it will be re-evaluated.

. . .

Section 22.02 Enrollment Requirements

Employees who are eligible will be covered under the County health insurance policy provided they make application for this insurance within the first thirty-one (31) days of initial eligibility or within thirty-one (31) days of their initial attainment of full time status. It shall be the responsibility of the Employer to notify the employee of the application requirements within five (5) days of eligibility. Eligible employees who do not make application for this insurance within thirty one [sic] (31) days of employment shall be subject to late enrollment provisions as described in the Polk County Employee Health Benefit Plan booklet. Coverage dates will be administered as per the Polk County Employee Health Benefit Plan booklet.

**RELEVANT POLK COUNTY EMPLOYEE HEALTH BENEFIT
PLAN BOOKLET PROVISIONS**

I. INTRODUCTION TO THE SUMMARY PLAN DESCRIPTION

. . .

G. ELIGIBILITY, EFFECTIVE DATE, LATE ENROLLMENT, SPECIAL ENROLLMENT PERIOD, NEWBORN ENROLLMENT, CHANGES IN BENEFITS AND TERMINATION

1. ELIGIBILITY. The following persons will be eligible for coverage under this Plan:

a. All employees, as determined by the plan administrator, working at least 20 hours per week (actively at work) are eligible to enroll in the Plan. . . .

b. Eligible retirees, an employee who at age 55 (or age 50 for law enforcement) or older provided the retiree continues to make the required contributions. . . .

2. EFFECTIVE DATE. Provided the employee is actively at work on that date, the employee's and any dependent's effective date is the first of the month following completion of the following waiting period: 30 days of active work with the employer.

. . .

3. TERMINATION. A covered person's coverage under the Plan terminates when any of the following events occur:

a. The contribution for coverage under the Plan is not made by the due date.

b. When a covered employee ceases to be eligible under the terms of this Plan, coverage for the employee and all covered dependents terminates on the last day of the month in which the employee's eligibility ceases, VII.A.

...

VII. CONTINUATION OF GROUP COVERAGE

As required by the federal Consolidated Omnibus Budget Reconciliation Act (COBRA), if your eligibility for group coverage under the Plan ends because of one of the qualifying events shown below, you may be eligible to continue group coverage as shown below.

A. CONTINUATION OF GROUP COVERAGE

1. Qualifying Events. Coverage under the Plan may be continued by a covered employee, covered dependent spouse and other covered dependents, enrolled at the time coverage would otherwise end, or a child born to or placed for adoption with the covered employee during the period of continuation coverage, as a result of one of the following qualifying events:

a. Termination of employment (except for gross misconduct) of the covered employee, or reduction in hours resulting in a loss of group coverage.

...

2. Duration of Continuation Coverage. The maximum coverage can be continued depends on the qualifying event. Continuation coverage may be terminated earlier as shown below. The maximum period of continuation coverage starts on the day of the qualifying event.

a. **Maximum period**

(1) Termination and reduced hours. The maximum period of continuation coverage is 18 months. If a second qualifying event, other than the employer's bankruptcy, occurs during the 18 months, the maximum period of continuation coverage is 36 months.

...

3. Election of Continuation Coverage

a. You have 60 days to elect continuation of group coverage. The 60-day period begins on the date your group coverage would otherwise terminate due to a qualifying event or the date on which written notice of your right to continued group coverage is mailed, whichever is later.

b. If you wish to continue group coverage as shown above, you must apply in writing to your employer (not the plan manager). You must also pay your first monthly payment within 45 days of the date you elected to continue group coverage. Thereafter, your monthly payments are due and payable at the beginning of each month for which coverage is to be continued.

...

POSITIONS OF THE PARTIES

The Union argues that its members pay their 10% of the insurance premium one month in advance for insurance coverage the following month. In particular, in March 2008, money was deducted from the first and second paycheck for insurance for April. This money was deposited into the Insurance Trust Fund, along with the 90% employer share of the insurance premium. Inasmuch as monies are paid from the Trust Fund only to pay covered expenses, reinsurance premiums and the costs of the third party administrator, no refunds can be made to the affected employees and they must be provided health insurance coverage for the following month. The Union also contends that these payments result in coverage to the employee regardless of their status, as they could be covered by COBRA. Accordingly, it is the position of the Union that the grievance should be sustained and GAM employees as well as others that separate from County employment should receive health insurance benefits for the month following their separation. The Union also contends that it was unaware that the County did not provide insurance coverage for employees for the month subsequent to separation and, therefore, no past practice for such action exists.

The Employer contends that the collective bargaining agreement together with the plan documents are very clear in that insurance coverage terminates at the end of the month in which the qualifying event occurs. Eligibility is determined by status as an employee, not by the fact that money has been paid into the Insurance Trust Fund on an employee's behalf and by the employee. After employment has terminated, an employee has the option to elect COBRA continuation coverage, but there is no obligation for the County to pay for such coverage.

The County also argues that it has consistently applied the clear and unambiguous terms of the Health Benefit Plan. When an employee leaves County employment, health insurance premium contributions are not deducted during the last month of employment if there is sufficient notice to stop such deductions. If insufficient notice is provided, the County refunds, from the general fund, the affected employee(s). (Balancing entries are made between the Insurance Trust Fund and the general fund such that no refunds are paid out of the Insurance Trust Fund.)

Finally, the County argues that the timing of transfer of funds for health insurance premiums from the general fund to the Health Insurance Fund Trust account is irrelevant to the case at bar.

The County contends that the employees are not entitled to an additional month of insurance following their separation from County employment and the grievance should be denied and dismissed.

DISCUSSION

As indicated, this grievance arose during the negotiations over the impact of the proposed sale of the GAM. On March 15, 2008, the Union filed a grievance stating “The County refuses to pay the March insurance payments (employee & employer) into the self insurance fund on behalf of GAM employees to pay for April insurance coverage.” The grievance alleged that Article 22 Sections 1 and 2 and any other provisions of the collective bargaining agreement that may apply have been violated. The Union requested that the Employer pay the March payment (County’s 90%) into the Health Insurance Fund on behalf of GAM employees (as well as withdraw the employees 10% from employee wages and put this into the Fund) to provide health insurance benefits for the month of April. Subsequently these monies were placed in the Insurance Fund, the sale did not proceed as planned, and the grievance has evolved to the question presented here: Whether the County has a duty to provide insurance coverage to an employee for the month following separation from employment?

The collective bargaining agreement between the parties provides that employees are eligible for health insurance coverage after the first month of employment. Section 22.02 of the Agreement provides:

Employees who are eligible will be covered under the County health insurance policy provided they make application for this insurance within the first thirty-one (31) days of initial eligibility or within thirty-one (31) days of their initial attainment of full time status. . . .

The Agreement also provides that for fulltime employees choosing health insurance coverage, the Employer pays 90% of the cost of the coverage. The employees opting for such coverage pay 10% of the cost. It has been the undisputed practice of the County, since employees have contributed to the cost of their health insurance, to deduct the required amounts from the first two paychecks each month to pay for insurance coverage for the subsequent month. For example, the 10% would be deducted from the first two paychecks in July to provide insurance coverage for the month of August. Simply put, insurance is prepaid by employees the month before the coverage is provided. The Union appears to contend that the mere deduction of the 10% of the insurance premium is tantamount to a purchase of insurance for the following month, since the employees have paid for it. Whether such would be the case were the amount deducted to represent 100% of the premium is an interesting question which need not be addressed here. Payment of 10% of the premium is clearly insufficient to purchase a month of insurance coverage.

The contract between the parties is silent as to how such prepaid contributions are handled in the event the individual who has prepaid his or her portion for such insurance is no longer an employee during the subsequent month. That is, for the example above, if the employee is no longer employed by the end of July, the collective bargaining agreement provides no guidance as to whether the employee is to be refunded the contributions that had been deducted from his or her paycheck, or whether that individual is to be provided with insurance coverage in August. The former is the position of the County; the latter is the position of the Union. It is important to note that the terms of the collective bargaining agreement apply to existing employees, not to those who have separated from service with the County, whether as a result of resignation, layoff or termination. Accordingly, the clear and unambiguous language of the Agreement supports the position of the County.

The collective bargaining agreement, again in Section 22.02, incorporates by reference, the Polk County Employee Health Benefit Plan booklet:

. . .Eligible employees who do not make application for this insurance within thirty one [sic] (31) days of employment shall be subject to late enrollment provisions as described in the Polk County Employee Health Benefit Plan booklet. Coverage dates will be administered as per the Polk County Employee Health Benefit Plan booklet.

The Polk County Employee Health Benefit Plan booklet (SPD) describes who is eligible to be covered by the insurance:

1. **ELIGIBILITY.** The following persons will be eligible for coverage under this Plan:

- a. All employees, as determined by the plan administrator, working at least 20 hours per week (actively at work) are eligible to enroll in the Plan. . . .
- b. Eligible retirees, an employee who at age 55 (or age 50 for law enforcement) or older provided the retiree continues to make the required contributions. . . .

The SPD also describes when coverage terminates:

3. **TERMINATION.** A covered person's coverage under the Plan terminates when any of the following events occur:
 - a. The contribution for coverage under the Plan is not made by the due date.
 - b. When a covered employee ceases to be eligible under the terms of this Plan, coverage for the employee and all covered dependents terminates on the last day of the month in which the employee's eligibility ceases, VII.A.

Combined, these two provisions make clear that to be covered, one must be an active employee working at least 20 hours per week or a retiree, and that contributions must have been received by the Plan by the due date. When a covered employee is no longer eligible for coverage, i.e., is no longer an active employee or works less than 20 hours per week, coverage for that employee and any covered dependents terminates on the last day of the month in which the eligibility ceased.

In accordance with federal and state law, the Plan provides for continuation coverage commonly known as COBRA coverage. Individuals no longer eligible for coverage as employees become eligible for COBRA coverage upon the occurrence of a qualifying event. While there are a number of occurrences that constitute a qualifying event, termination of employment is the only one that is applicable in this matter. The SPD enumerates the process by which an employee obtains COBRA coverage. Of particular note is the fact that an employee *elects* such coverage:

3. Election of Continuation Coverage

- a. You have 60 days to elect continuation of group coverage. The 60-day period begins on the date your group coverage would otherwise terminate due to a qualifying event or the date on which written notice of your right to continued group coverage is mailed, whichever is later.

b. If you wish to continue group coverage as shown above, you must apply in writing to your employer (not the plan manager). You must also pay your first monthly payment within 45 days of the date you elected to continue group coverage. Thereafter, your monthly payments are due and payable at the beginning of each month for which coverage is to be continued.

The Union contends that there is nothing in the collective bargaining agreement or the SPD that prevents provision of COBRA coverage for the month following termination based upon the Employer payment of 90% of the premium and the employee's 10%. That is true: there is nothing in either document that prevents the extension of insurance coverage in this manner. More to the point, however, is that there is nothing in either document that mandates that coverage be extended, either as employee coverage or as COBRA coverage. The Union also appears to argue that by having the premium contribution deducted from his or her check, a constructive election of COBRA coverage has been made. Again, if the deduction represented 100% of the premium, that might be the case. Here, however, the deduction represents only 10% whereas COBRA coverage becomes available to an employee who elects such coverage and pays the entire premium due for a month of insurance coverage. Further, the SPD specifies that such election must be made within 60 days of the qualifying event or receipt of the COBRA notice from the Employer, whichever is later. Thus, the payment of premium into the Trust Fund during the month prior to termination cannot constitute the required election.

There is no question that the additional month of insurance sought by the Union could be provided to the affected employees. Indeed, many employers do provide insurance coverage for a month after an employee separates from employment, in much the manner that the Union argues that one has to wait for a month for coverage (with premium payments deducted from the first month's paychecks to pay for that coverage) and receive that month's coverage after the end of employment. However, the parties have not negotiated such an arrangement and the Union has not been able to demonstrate a past practice of this nature in Polk County. The fact that, administratively, the premiums are deducted a month before the coverage is provided does not obligate the provision of coverage for a month during which an individual is no longer an employee.¹

The Union also argues that a refund of premiums is inappropriate since payments from the Insurance Trust Fund can only be made for very limited purposes – to pay covered expenses, reinsurance premiums and the costs of the third party administrator. Since premiums have been transferred from the general fund to the

¹ Theoretically, the Employer could collect the 10% of the premium on the 1st of the month for which insurance is to be provided.

Insurance Trust Fund, no refunds can be made and insurance coverage must be provided. The Union is correct that monies cannot be paid from the Insurance Trust Fund to reimburse the employees. However, this does not happen. Employees are reimbursed from the General Fund, and the payments to the Insurance Trust Fund are reduced by a corresponding amount in order to balance the accounts. Accordingly, the fact that monies have been paid to the Insurance Trust Fund on behalf of individuals who are no longer employees does not necessitate the provision of insurance coverage to persons who are no longer County employees.²

In its reply brief the Union states:

Once the County has placed its 90% share of the premium contribution for each employee that amount is supposed to buy coverage for that employee (along with the employees [sic] 10%). If the arbitrator believes that the County is not required to provide coverage, than the “excess” premium, all 100% of it, should be paid to the employee.

The Union fails to provide any explanation for this statement, and the undersigned is unable to find a foundation for such a claim, either in the collective bargaining agreement between the parties or from the SPD. The County, pursuant to the contract, has obligated itself to provide health insurance coverage under the terms and conditions described above. It has not, in any manner, become obligated to make payments, other than wages, to its employees. The placement of the monies into the Insurance Trust Fund does not, in some unclear manner, transfer those funds into an employee property right. If insurance is not provided to an employee because he or she is no longer eligible for coverage, that employee is only entitled to that sum of money that has been deducted to pay for insurance coverage that is not provided.³

The Union also raises issues with respect to the timing of the payments of both the Employer and employee contributions to the Insurance Trust Fund. It alleges that the County has failed to make the payments on a timely basis, resulting in a loss of interest income to the Trust Fund, with the attendant result that insurance contributions must be higher to make up the lost interest. I decline to address that question inasmuch as the jurisdiction of the undersigned is limited to interpreting the collective bargaining agreement between the Union and the Employer and my decision is constrained by the language of that agreement: “The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall not modify, add to, or delete from the express terms of the Agreement.”

² Certainly it defies logic to contend that insurance coverage must be provided to an individual receiving single coverage in August who passes away in July, after premium contributions have been deducted from his or her paychecks in July.

³ Presumably at some point in time, the Employer provided health insurance coverage to employees without the employees paying a portion of the premium. If the case were analyzed under those circumstances, it would be even clearer that the employees, when they are no longer employees, have no claim to insurance benefits or to monies “refunded” from the Insurance Trust Fund.

As noted above, this grievance arose as a result of the County's attempt to sell the Golden Age Manor nursing home. The parties engaged in negotiations regarding the impact of that sale upon the employees. One of the issues was post-employment health insurance. According to the Union, it was only at that time that it became aware of the fact that the Employer did not provide health insurance benefits for the month subsequent to the termination of employment but, instead, refunded any premiums that had been deducted from employee paychecks. The Union, correctly, argues that the County cannot rely on past practice to support its position, as there was no mutuality with respect to this practice. The Union also argues that there is nothing in the collective bargaining agreement or the Insurance Plan documents that prevent the Employer from providing the insurance coverage that it seeks for its members. This, too, is true. The converse, however, is also true. There is nothing in the collective bargaining agreement or the Insurance Plan documents that direct the Employer to provide health insurance coverage for the month following the separation of an employee from the County. The Union was unable to achieve this result in its bargaining over the impact of the sale of GAM, and it cannot prevail in the instant grievance as there is no support in the collective bargaining agreement for the Union's position. As long as the employees are made whole, that is refunded any money deducted from their paychecks for health insurance premiums for the month after their employment ceases, there is no violation of the collective bargaining agreement.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 29th day of September, 2008.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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