

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WAUWATOSA

and

**WAUWATOSA PROFESSIONAL FIREFIGHTER'S ASSOCIATION,
LOCAL 1923, IAFF-CLC**

Case 133
No. 68283
MA-14182

Appearances:

Beth Aldana, Attorney at Law, 7725 West North Avenue, Wauwatosa, Wisconsin, 53213, appearing on behalf of the City of Wauwatosa.

Scot Fridrick, Post Office Box 26214, Wauwatosa, Wisconsin, appearing on behalf of the Wauwatosa Professional Firefighter's Association, Local 1923, IAFF-CLC.

ARBITRATION AWARD

The City of Wauwatosa ("City") and the Wauwatosa Professional Firefighter's Association, Local 1923, IAFF-CLC, ("Union") are parties to a collective bargaining agreement ("Agreement"), which Agreement provides for final and binding arbitration of disputes arising thereunder. The Union, with the concurrence of the City, requested that the Wisconsin Employment Relations Commission designate a commissioner or staff member to serve as arbitrator of the instant dispute. The undersigned was so designated. A hearing was held on December 17, 2008, in Wauwatosa, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. At the parties' discretion, no stenographic transcript of the proceeding was made. Thereafter, each party submitted an initial brief and a reply brief, the last of which was received on February 6, 2009, whereupon the record was closed.

Now, having considered the record as a whole, the Arbitrator makes and issues the following award.

ISSUE

The parties agreed to allow the undersigned to frame the issue based on the evidence and arguments presented. A written proposed statement of the issue was presented at hearing by the City, which read as follows:

1. Whether under CBA the issue is arbitrable when Union contends prescription was not dispensed in the amounts requested by union?
2. Whether City violated contract when grievant was provided prescribed medication for the co-pay provided in contract but when medication is dispensed over time where there is a high risk of waste if dispensed at one time?

A written proposed statement of the issue also was presented at hearing by the Union, which read as follows:

Did the City violate the cba when it refused to release the full amount of a prescribed medication in one visit to a pharmacy?

The undersigned adopts the following statement of the issue:

1. Is a dispute related to the disbursement of a prescription medication substantively arbitrable under the Agreement?
2. Did the City violate the Agreement when it caused the amount of medication identified in a single prescription to be disbursed in a staggered fashion over a period of time? If so, what is the appropriate remedy?

REVELANT CONTRACT LANGUAGE

Article VII – Insurance

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- H. Retail Prescription. Effective January 1, 2005, employees shall pay \$12 for each generic prescription, \$20 for each formulary prescription, and \$31 or 20% (whichever is greater) not to exceed \$65 per prescription for each non-formulary prescription. Effective January 1, 2007, employees shall pay \$15 for generic prescriptions, \$24 for formulary prescriptions, and \$40 or 20% (whichever is greater) not to exceed \$80 per

prescription for non-formulary prescriptions. Effective November 1, 1994, the quantity of prescribed drugs available each time a prescription is filled under the RESTAT drug card program shall be the greater of 100 units or a 34 day supply.

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Article XXVI – Grievance Procedure

Section 1: The Union and the City recognize that grievances involving interpretation, application or enforcement of the terms of this Agreement, and the application of work rules, regulations and conditions of employment should be settled promptly and in a just manner.

...

Article XXVII – Final and Binding Arbitration

Section 1: . . . The arbitrator shall neither add to, nor detract from, nor modify the language of this Agreement in arriving at a determination of any issue presented, and shall expressly confine himself to the precise issues submitted for arbitration.

...

Section 3: . . . The arbitrator shall have initial authority to determine whether or not the dispute is arbitrable under the terms of this Agreement, but only in the event that a challenge to such issue was duly made in writing prior to the selection of the arbitrator and served upon the other parties. Once it is determined that the dispute is arbitrable, the arbitrator shall proceed in accordance with this Article to determine the merits of the dispute submitted to arbitration.

...

BACKGROUND

Since 1992, the Grievant has been employed as a firefighter with the City's Fire Department. As a member of the Grievant's family, the Grievant's spouse is covered by the health insurance benefits set forth in the Agreement, which benefits include a prescription drug program.

The Grievant's spouse has a medical condition which is treated with several medications. One of these medications, Rebif, is quite expensive. A single dose of Rebif costs approximately \$193. The medication is prescribed to the Grievant's spouse in a quantity of ninety-six doses, the cost for which approaches \$20,000 for the City. The Grievant's spouse takes Rebif three times per week, allowing a ninety-six dose prescription to last for approximately eight months.

In addition to being expensive, Rebif is particularly susceptible, in various ways, to waste. The medication, for example, has specific refrigeration requirements, and improper storage could cause it to become spoiled. A household refrigerator can provide the correct temperature settings, but is not the ideal storage container for the medication. Further, the medication can and often does cause significant, sometimes life-threatening side-effects. Even patients who have tolerated Rebif in the past can quickly develop side-effects that will require them to stop taking the medication immediately. Because of these issues, the standard approach in the pharmaceutical industry is to limit a patient taking Rebif to a thirty-day supply of the medication. The Grievant's spouse typically retrieves other medications from the pharmacy on a monthly basis.

Out of concern for the cost of a single Rebif prescription – which would have far exceeded a \$10,000 maximum established by RESTAT, the City's pharmaceutical benefit manager – the City has attempted to orchestrate an arrangement under which doses of Rebif could be released to the Grievant's spouse in a staggered fashion, while still requiring only one co-payment for each prescription.¹ At one point, for example, the City and the Union's health-care liaison, Dave Toppel, agreed that the Grievant's spouse would have the Rebif prescriptions released from the pharmacy in three batches of thirty-six, thirty-six, and twenty-four doses.² The pharmacy where the prescription was being filled, however, repeatedly attempted to charge a co-payment on visits when one was not owed. Out of frustration with such glitches, the Grievant filed the grievance that is before me, asserting entitlement under the terms of the Agreement to the entire ninety-six doses of Rebif at such time as the prescription was filled.

Subsequent to the filing of the grievance, the City's health and productivity coordinator, Michael Loy, attempted to remedy the problem by devising a new prescription release strategy. First, Mr. Loy arranged for the release of a thirty-day supply of the Rebif to the Grievant's spouse and then, under a subsequent arrangement, for the release of a fifty-day supply. As the written summaries of these refill schedules reveal, however, there was much confusion on Mr. Loy's part that undermined the acceptability of such arrangements, including a mistaken belief that each pre-filled syringe would provide two doses and miscalculations as to the number of doses that would be required to make a thirty-day or fifty-day supply. Ultimately, the Grievant became frustrated with the various misunderstandings related to the Rebif prescription, and this matter was pursued to arbitration.

¹ Such arrangements never created a dispute between the City and the Union with regard to co-payments. The City has consistently acknowledged that each prescription should only result in a single \$24.00 co-payment.

² There is no contention that such arrangements were in any way binding.

Prior to the time when the current dispute arose, the City and the Union never have discussed whether a medication could be dispensed in a staggered fashion. Although other City employees are taking expensive medications covered under the City's drug program, no one has ever demanded that they be dispensed in such quantities.

DISCUSSION

The City's position in this case is that the terms of its Agreement with the Union do not require release of all ninety-six doses when the Rebif prescription is filled. In fact, the City contends that the Agreement does not even address the subject of how medications are to be disbursed, rendering this matter unarbitrable due to lack of subject matter jurisdiction. According to the City, the retail prescription provision set forth at Article VII, Section H merely establishes the co-payment rates and how much of a prescription a covered individual is entitled to for a single co-payment. The proper disbursement of medications, the City asserts, is a subject that has been left, as it should be, to the expertise of pharmacists and pharmaceutical benefit managers. Moreover, the City emphasizes that staggered disbursement is particularly important in the present case, because the Rebif has been prescribed to the Grievant's spouse in such large quantities and it is so expensive and susceptible to waste.

At the outset, it is necessary to address the City's contention that this matter is not substantively arbitrable. The Agreement confers to an arbitrator the authority to rule on challenges to arbitrability. The Agreement also, however, explicitly states that the arbitrator's authority to do so shall be limited to cases in which such challenges were made, in writing, prior to the selection of the arbitrator and served on the other party. The record before me does not establish that such a procedure was followed, nor do the arguments submitted by the parties address that issue. There is no need, however, to dwell on this apparent shortcoming. Under the terms of the Agreement, grievances are to relate, among other things, to "matters involving interpretation, application or enforcement of the terms of [the] Agreement". Here, the issue in dispute is precisely the subject addressed by Article VII, Section H. Thus, whether it is because of the City's possible failure to follow the contractually-established procedural requirements for bringing arbitrability question before an arbitrator or because the subject of this dispute is one that is addressed directly by the terms of the parties' Agreement, I am compelled to conclude that this case is arbitrable.

I also have concluded that the City's consistent unwillingness to provide a full prescription of Rebif to the Grievant's spouse – even though that prescription has never exceeded the greater of 100 units or a 34 day supply – is a violation of the Agreement. It is true, as the City suggests, that the first two sentences of Article VII, Section H address the amount of co-payment required under the retail prescription drug benefit. Further, the third and last sentence of the provision certainly functions, as the City also argues, to place a cap on the quantity of medication that can be had for a single co-payment, but it does more than that. By establishing the maximum "supply" that is to be "available" to a covered individual "each

time a prescription is filled”, the sentence, in very plain language, says how much medicine a person gets to take home. To not recognize that meaning would be to detract from the Agreement. And to find that the sentence allows the City to store part of the “supply” at the pharmacy or anywhere else would be to add to the Agreement. It is outside of my contractually-conferred jurisdiction to do either.

Because this language is unambiguous, there is no need to consider the bargaining history evidence presented in this case. Further, much of the other evidence presented by the City – regarding the exorbitant cost of Rebif, its susceptibility to waste, the industry standard for disbursing Rebif prescriptions, and the evidence regarding how often the Grievant and the Grievant’s spouse visit the pharmacy to retrieve other medications – turns out to be irrelevant. Article VII, Section H does not provide for exceptions, even in such special circumstances.

CONCLUSION

The grievance is sustained. The City shall provide the full amount of future Rebif prescriptions, provided such amount does not exceed the limit specifically set forth in the Agreement. Further, the City shall make the Grievant whole for out-of-pocket costs, if any, incurred as a result of the City’s breach of the Agreement.

Dated at Madison, Wisconsin, this 28th day of April, 2009.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator