

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CITY OF GREEN BAY
DEPARTMENT OF PUBLIC WORKS LABOR ASSOCIATION**

and

CITY OF GREEN BAY

Case 461
No. 68199
MA-14152

Appearances:

Parins Law Firm, S.C., by **Attorney Thomas J. Parins, Jr.**, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305-0817, on behalf of the Union.

Ruder, Ware, L.L.S.C., by **Attorney Christopher M. Toner**, 500 First Street, Suite 8000, P.O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of the City

ARBITRATION AWARD

The City of Green Bay Department of Public Works Labor Association (herein the Union) and the City of Green Bay (herein the City) were at all times pertinent hereto parties to a collective bargaining relationship. At the time of the events herein, the parties' 2005-06 collective bargaining agreement had expired and the parties were in negotiations over a successor agreement. On August 6, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration concerning an allegation that the City had failed to pay for prescription medications for bargaining unit member Susan Klasen-Orsted in violation of the parties' collective bargaining agreement. John R. Emery, a member of the WERC's staff, was appointed to arbitrate the dispute. The parties agreed to submit the dispute on a stipulation of facts and documentary exhibits. The stipulation and exhibits were filed on July 25, 2009. The parties filed briefs on July 31, 2009 and reply briefs on August 28, 2009, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues. The Association would frame the issues as follows:

Did the City violate the collective bargaining agreement when it failed to cover, under the health plan offered by the City to the employees of the DPWLA, the EtheDent prescription of the employee, Sue Klasen-Orsted?

If so, what is the appropriate remedy?

The City would frame the issues as follows:

Did the City violate the contract when it denied coverage for prescription dental medication to the grievant?

If so, what is the appropriate remedy?

The Arbitrator adopts the issue as framed by the City.

PERTINENT CONTRACT LANGUAGE

ARTICLE 10. GRIEVANCE PROCEDURE

It is agreed by the parties that all grievances shall be settled in accordance with the procedure outlined as follows:

- (1) **Step 1:** All grievances shall be in writing and in triplicate copies, one copy to be given to the supervisor, one copy to the Association steward, and one copy kept by the employee registering the grievance. Said writing shall include the article(s) of the contract alleged to be violated. All grievances shall be filed within ten (10) working days of the date the alleged contract violation arose, or within ten (10) working days after the grievant or the Association knew or should have known of the event giving rise to such grievance. It is understood that no employee will be harassed or assigned less desirable jobs by their supervisor as a result of filing the grievance. The grievance shall be discussed with their supervisor by the employee and the Association steward. The Supervisor shall give the Association his/her decision and the reason therefore, in writing, within ten (10) working days of the filing of the grievance.
- (2) **Step 2:** In the event the matter is not resolved in Step 1, it shall be referred in writing to the Director of Public Works or his authorized representative within ten (10) working days following the receipt of the decision of the supervisor. The Director shall convene a meeting with the Association within ten (10) working days of the date he/she receives the grievance at Step 2. Within ten (10) working days of the meeting the Director of Public Works or his designee shall give the Association a decision and reason therefore in writing. The grievance may be advanced

to Step 3 within ten (10) working days of the receipt of the decision of the Director of Public Works.

- (3) **Step 3:** If the grievance is advanced to Step 3, it shall be referred to the Human Resources Director, or designee, who shall within ten (10) working days convene a meeting with Association representatives, the aggrieved employee(s), and others he/she shall deem relevant to the issues presented for purpose of attempting to reach a settlement. The Human Resources Director or Designee shall render a decision in writing within ten (10) working days of the completion of the meeting contemplated in this Step 3.
- (4) **Step 4:** If no agreement is reached in Step 3 the grievance shall be referred to arbitration as provided for in Article 11. **Arbitration** of this agreement.
- (5) All of the time limits set forth in this Article may be extended by mutual agreement of the parties.

ARTICLE 25. HEALTH, WELFARE AND DENTAL INSURANCE

Health and welfare and dental benefits and contributions to the City's insurance plan shall be as follows:

...

Effective January 1, 2005, a three-tier Rx plan will be implemented with a \$5 co-pay for generic, \$15 co-pay for name brand preferred, \$25 co-pay for name brand non-preferred. In cases where the generic and preferred brands have been determined by the attending physician to be ineffective, thus rendering the non-preferred brand therapeutically necessary, the non-preferred brand shall be covered as a preferred brand subject to medical necessity review and prior authorization by Wausau Benefits, Innoviant, or current administrator.

STIPULATION OF FACTS

The undersigned parties agree that the following are stipulated facts in the above mentioned matter. These facts may be used by the arbitrator in lieu of oral testimony in this matter. The stipulated facts are:

1. The City of Green Bay (hereinafter the "City") and the City of Green Bay Department of Public Works Labor Association (hereinafter the "Association") are parties to a collective bargaining agreement (hereinafter the "Contract"). A true and accurate copy of the 2007-08 Contract is attached hereto and marked as exhibit "A".

2. Sue Klasen-Orsted (hereinafter the “grievant”) is an employee of the City of Green Bay and member of the Association.
3. The City provides health insurance to Association members pursuant to Article 25 of the Contract. The City is a self-funded health insurance plan, and contracts with Fiserv Health, Wausau Benefits (“Innoviant”) as a third party plan administrator.
4. At the time the grievance was filed, the grievant had health insurance through the City for herself and dependents.
5. In December of 2007, grievant took one of her children to the dentist. At that appointment, the dentist issued a prescription for medicated toothpaste called EtheDent.
6. The toothpaste prescribed is not available over the counter and is available only through a prescription from a licensed medical professional and is dispensed in a container labeled “Rx only” (Attachment B).
7. On December 12, 2007, grievant took the prescription to the Wal-Mart pharmacy to be filled. After processing the prescription, the pharmacist told the grievant that the prescription was not covered by her insurance and she would need to discuss the matter with the insurance company.
8. Grievant paid for the prescription out of her pocket at a cost of \$9.32. (see Attachment C).
9. Pursuant to Article 25 of the Contract, the Grievant was required to pay a \$5 co-pay for any prescription covered under the City’s health insurance plan.
10. On December 14, 2007, the grievant contacted Jean Adams, Benefits Clerk for the City, and asked if the prescription would be covered. Adams informed the grievant that the prescription was not covered under the City benefits plan.
11. On January 24, 2008, the Association filed a grievance in this matter. The grievance was processed with denials at steps 1 and 2 of the grievance process. (Attachment D) A meeting was held as set forth in step 3 of the grievance process set forth set forth in the labor agreement. (Attachment E) At step 3 it was agreed that the time limits be tolled and the matter be referred to Innoviant, the administrator of the prescription plan, appeals process. (Attachment F)

12. Grievant sent a letter to Innoviant to appeal the decision to deny coverage of the prescription on April 11, 2008. (Attachment G) Innoviant denied the appeal by letter dated April 30, 2008. (Attachment H).
13. After the grievance was filed, the grievant received a response from Ms. Adams a copy of which is attached (Attachment I). Also included was a copy of the City of Green Bay PPO Plan 1 & PPO Plan 2 Health Booklet with the page #48 with a piece of tape attached by #19. A copy of the book is attached with #19 highlighted. (Attachment J).
14. The matter was forwarded to arbitration on August 5, 2008. (Attachment K)
15. A true and correct copy of the City of Green Bay Dental Benefits Summary applicable to the times relevant is attached as Attachment L.
16. Since December 12, 2007, the grievant has filled the prescription 5 times. These are:

12/12/2007	\$9.32
7/5/2008	\$9.32
9/26/2008	\$9.32
12/19/2008	\$12.46
5/07/2009	\$12.68

POSITIONS OF THE PARTIES

The Union

The Association asserts that the health plan offered by the City covered the Grievant's toothpaste prescription. The health plan has three components – dental benefits, medical benefits and a prescription drug plan. Each component has separate plan documents and summary booklets that detail the benefits and exclusions for that component. The prescription plan specifies the requirements for a prescription to be covered, which include that the medication must be necessary for the care and treatment of an illness and must be prescribed by a licensed medical professional, it must be a medication that can only be obtained by prescription and the amount of the prescription cannot exceed the limits set forth in the plan. The Grievant's prescription meets all these requirements. Further, none of the exclusions in the plan apply to the Grievant's prescription.

The City denied the Grievant's claim on two bases. The City first argued that the claim was precluded by an "over the counter" exclusion. The City has subsequently conceded that the toothpaste can only be obtained by prescription. The City now asserts that the prescription is covered by the "general exclusions" contained in the health booklet, which states that dental care and treatment are not covered. While this might be true as to the medical coverage, it cannot apply to the plan as a whole or it would make the dental coverage provisions superfluous. The same is true of the prescription benefit.

It should also be noted that the plan specifically covers drugs prescribed in dental care and treatment, such as anesthetics and analgesics, as well as injections used in oral surgery. These would all be excluded under exclusion #19, if it were to be interpreted as suggested by the City. In fact, however, other medications prescribed by dentists have been covered without problems. The language of the prescription plan also supports the argument that the Grievant's prescriptions were covered. The plan covers prescriptions issued by licensed medical professionals, which includes dentists. The parties could have excluded dentists had they chosen to do so, but they did not.

If the City's argument prevails it will have the effect of nullifying part of the health plan. The prescription plan covers all prescription medications unless they are excluded. There are no exclusions that apply here, so if the City were to prevail it would render the prescription language meaningless. It would also nullify the language in the dental plan regarding prescribed medications. These are bargained benefits, however, and the City should not be able to eliminate or change them unilaterally.

It is also irrelevant that the third party administrator denied the claim. The administrator does not dictate coverage, but only administers the plan that is negotiated by the parties. This was made clear when the Grievant appealed to the administrator at the City's suggestion and the response indicated that the City had already denied the appeal. Innoviant has no authority to change or modify the plan, but only to administer what the parties have agreed to. The City, not Innoviant, is responsible to cover the benefits provided by the plan.

Finally, the outcome of this grievance will have far-reaching consequences beyond the small amount of damages claimed here. If the City prevails, then in the future no prescriptions from a dentist will be covered. If so, this will affect many employees in the future.

The City

The City asserts that the grievance is untimely. The Grievant took the prescription to be filled on December 12, 2007. When the pharmacist told her the prescription was not covered, she paid the full price. She contacted the City Benefits Clerk on December 14 and was told the plan did not cover her prescription, yet she did not file her grievance until January 24, long after the time limit set forth in the contract. Arbitrators have routinely held that contract language specifying time limits for filing and processing grievances must be honored and grievances which do not conform to the contractual time lines are to be dismissed. (citations omitted)

The grievance is also substantively flawed. There is no provision in the health or dental plans which provides coverage for prescription dental medications. Paragraph #19 under general exclusions expressly excludes any dental care, treatment, or prescription medication in connection with any type of dental care. There is, therefore, no basis for a claim that the City violated Article 25. The dental plan includes a list of covered expenses that does not include prescription medications. Thus, under the principle of *expressio unius est exclusio alterius*, the failure to include medications in the list of covered items means it is excluded. This was also the conclusion drawn by the plan administrator when it considered the Grievant's appeal. In short, by leaving medications out of the specified plan coverages, the parties chose to not include them.

Union Reply

The Association maintains that the City has waived any objection it may have had to the timeliness of the grievance. At no time prior to submitting its brief in this matter did the City raise any objection based on timeliness. While the grievance was being processed the parties discussed timeliness in the context of tolling the timelines in order to appeal to the third party administrator, but the City said nothing about the timeliness of the grievance, itself. Had it raised this issue at the outset, the Association could have responded, but now is hampered by the City's late objection. Arbitrators have commonly held that where timeliness objections are, themselves, not raised in a timely fashion, they may be deemed as having been waived. (citations omitted) Even if it were found that the original grievance was not timely, the matter should still be heard under the principle of a continuing violation, since the prescription was refilled several times, to avoid the necessity of filing a new grievance at a later date, thereby saving time and resources for all involved. Further, the parties agreed during the processing that the grievance was not ripe because the Grievant had not exhausted her appeals through the third party administrator and, thus, put the grievance on hold until a determination from the administrator was obtained, which was not until April 30, so technically the grievance need not have been filed until May 14. it makes no sense then, that a grievance filed on January 24 should be considered untimely.

Substantively, the City's argument that dental prescriptions are not covered cannot be sustained. The City argues that nowhere in the health plan or dental plan covering dental prescriptions, but this is not true. There are no exclusions for dental prescriptions and to read the "general exclusions" language as broadly as the City suggests would have the effect of eliminating dental coverage altogether, which is clearly not the case. The dental plan provides coverage for periodontal and orthodontic care and treatment, either of which would apply to extend coverage here. The prescription here, meet the criteria for covered prescriptions in all respects, so, absent a specific exclusion, it should be covered. Further, the City's argument that the matter was resolved by Innoviant is false since the denial letter indicates that the appeal was reviewed and denied by the plan sponsor, which is the City. Finally, the original denial was based on an assumption that the prescription had an Association over-the-counter equivalent, which the City now concedes it does not. Thus, since the OTC exclusion does not apply and dental prescriptions are not specifically excluded, coverage for this claim should exist.

City Reply

The City points out that the Association acknowledges there is no provision in the health plan covering prescription toothpaste. In fact, the prescription drug plan is a subpart of the health plan, which specifically excludes dental care or prescription drugs for it from the provisions of the health plan. The union also concedes that there is no specific language in the dental plan covering prescription medications. Instead, the Association attempts to assert that such coverage is included unless it is excluded. This, however, contradicts the general principle that where a contract is silent, management rights control. Since the contract does not reference coverage for dental prescriptions, therefore, they are excluded.

The Association's argument that denying this grievance will render contract language meaningless is specious. The health and dental plans are clear as to what is and is not covered. The dental plan covers many services, such as basic services, major restorative services, prosthodontic and orthodontic treatment, including specifically enumerated coverage for anesthetics, analgesics and injections. All these are still covered, but the City should not be required to pay for benefits that are not covered.

DISCUSSION

Arbitrability

At the outset, I note first the City's contention that the grievance is not arbitrable and should be dismissed on procedural grounds. The City maintains that, under Article 10 of the contract, a grievance must be filed within ten working days of the date the alleged contract violation occurred, or within ten working days of the date the Grievant or Association became aware of the events giving rise to the grievance. In furtherance of its argument the City cites numerous arbitral authorities in support of the proposition that a grievance which does not comply with contractual timelines should be dismissed.

The facts reveal that the Grievant was aware that her prescription claim was denied no later than December 14, 2007, when she was informed by Jean Adams, the City Benefits Clerk, that the prescription was not covered. The grievance was filed on January 24, 2008, forty-one days (and substantially more than ten working days) later. There is no question, therefore, that the grievance was not filed within the contractual time limits. The record also reveals, however, that the City raised no objection to the timeliness of the grievance at the time it was filed, nor in any of the denials issued at the various steps in the grievance process. It is also true, as the Association notes, that during the processing of the grievance the parties agreed to toll the timelines while an appeal of the denial was being considered by the third party administrator. While this would not excuse an initial untimely filing of the grievance, it would have been a logical time for the City to have raised an objection to timeliness if it felt it was warranted. There is also nothing in the Stipulation of Facts that refers to any objection as to timeliness and, in fact, the first mention of any timeliness objection appears in the City's

initial brief, which was filed on July 31, 2009, more than eighteen months after the filing of the grievance.

The City is correct that timelines are inserted into contracts for good reason and that where parties have done so they should be honored. Thus, when a grievance is not filed within the contractual time limits an arbitrator is ordinarily well within his or her authority to deny the grievance on that basis alone. It is also true, however, that in order to enforce the time limits a duty is imposed upon the employer to raise any objection in a timely manner, as well. Here, there is no indication that the Grievant or Association was ever informed that the City considered the grievance untimely until over a year and a half had passed. Where a party delays in raising a procedural objection of which it has reason to be aware for such a length of time, it may be deemed that such objection to arbitrability is waived. I find, therefore, that the City's objection to arbitrability was not timely raised and the matter is arbitrable.

The Merits

The substantive issue in this grievance involves the construction of the documents defining and describing the scope of the parties' health and dental benefit plans, which are provided for in Article 25 of the contract. The City's health benefit plan is self-funded and is administered by a third party, Fiserv Health, Wausau Benefits ("Innoviant"). The City also provides dental benefits, which are also self-funded, and retains the services of Humana Dental Insurance Company to manage the plan. Article 25 itself provides that health, dental and prescription drug benefits are to be provided, and sets forth the parties' responsibilities for premium contributions, as well as setting forth deductibles and co-payment amounts for office visits and prescription drugs. The details of the benefits and plan coverages, however, are set forth in the two plan documents, City of Green Bay PPO Plan 1 & PPO Plan 2 (Exhibit J) and City of Green Bay Dental Benefits (Exhibit L). Exhibit J encompasses both the health insurance and prescription drug benefits, while Exhibit L describes the dental benefits.

The Association argues that the health, prescription and dental plans are comprehensive and, therefore, if a medication is prescribed by a dentist it should be covered under the prescription drug benefit. It asserts that if the exclusion for dental care set forth in the health plan's general exclusions were interpreted literally it would effectively nullify the dental plan, which would violate the agreement of the parties contained in Article 25. The City asserts that the plans are separate and do not provide for the coverage of dental prescriptions and that the City should not be required to extend coverage for something that was not bargained for.

In my view, logically the health and dental plans are separate and must be read individually, rather than taken as a comprehensive health and dental care plan. This is reflected by the fact that the plans are described in separate documents which do not overlap or refer to one another with respect to their applicability and that the plans are administered by two separate third party entities. The health plan includes the prescription drug benefit within its coverages. The prescription drug provisions are set forth in pages 30 – 35 of the health plan document (Exhibit J) In the "Covered Benefits" section it describes covered prescription

products, in pertinent part, as being 1) necessary for the care and treatment of an illness or injury and are prescribed by a duly licensed medical professional, 2) only obtainable by prescription and dispensed in a container marked "Rx only," and 3) in amounts not exceeding the days' supply outlined in the prescription benefits summary. The Association asserts that the prescription issued by the Grievant's dentist meets all of the above criteria and should be covered.

The City initially denied the claim on the premise that the prescription was for a fluoride toothpaste product that was obtainable over the counter, and was therefore excluded. The City has since withdrawn that argument, but still maintains that the prescription is excluded under the plan's general exclusions. These exclusions are set forth in pages 47 - 51 of the plan document. Of particular relevance is exclusion #19, which states:

- 19. Dental:** The care and treatment of teeth, gums or alveolar process or for dentures, appliances or supplies used in such care or treatment, or Drugs prescribed in connection with dental care. This exclusion does not apply to Hospital charges including professional charges for X-ray, lab and anesthesia, or for charges for treatment of injuries to natural teeth, including replacement of such teeth with denture, or for setting of a jaw which was fractured or dislocated in an Accident. This exclusion also does not apply to dentures as a result of extraction and initial replacement of natural teeth.

It is clear to me that this language excludes the Grievant's dental prescription from the health plan, which includes prescription drug coverage. The language explicitly excludes dental care from the scope of the health plan, including "drugs prescribed in connection with dental care." That definition clearly covers the prescription fluoridated toothpaste the dentist prescribed for the Grievant's daughter in conjunction with her orthodonture. Furthermore, the exceptions to exclusion that are contained in the paragraph clearly do not apply. The Association argues that the dentist is a licensed medical professional, as described in the prescription drug plan and that the prescription meets all the other criteria for coverage. It is a principle of contract construction, however, that specific language takes precedence over general language. The covered benefits section of the prescription drug plan sets forth the basic criteria for prescriptions to qualify for coverage. Section 19 of the general exclusions, however, specifically, excludes dental treatment and prescriptions from coverage under the health plan. The assumption underlying such an exclusion is that the prescription might well otherwise qualify under the plan description, but that, notwithstanding that fact, it is still not covered. This does not end the inquiry, however, because it still remains to be seen whether the Grievant was entitled to coverage of the prescription under the dental plan, which is separate from the health plan.

The prescription was for a fluoridated toothpaste intended to strengthen and prevent deterioration of the patient's teeth while undergoing orthodontic treatment. The covered expenses under the dental plan include preventive services, basic services, major restorative

services, prosthodontic services and orthodontic services. Prosthodontic and major restorative services do not apply to this situation. Under preventive services, covered services include oral exams (twice per year), periodontal (gum) exams, cleanings (twice per year), periodontal maintenance, bitewing x-rays (twice per year), topical fluoride treatment (twice per year), and emergency oral examinations and palliative treatment for pain relief. None of these apply to the case at hand. The topical fluoride treatment is clearly an office procedure, as indicated by the fact that it is only available twice per year. That is entirely different than a prescription for a toothpaste product intended to be applied by the patient and used continually. The basic services include fillings and crowns, local anesthetics and analgesia, general anesthesia, extractions, oral surgery and drug injections in conjunction therewith, site therapy, pulp caps, endodontics, recementation of crowns and bridges, occlusal guards, occlusal adjustments in conjunction with periodontal surgery, mouth x-rays, panorex x-rays, miscellaneous x-rays, sealants and space maintainers. Here again there is no category in the basic services section within which the Grievant's prescription would qualify for coverage. The Association argues that the provisions for anesthetics and analgesics show that prescription drugs are covered under the dental plan, but here, again, these medications are administered in the office in the context of undergoing a dental procedure and are not prescribed for dispensation by pharmacies. They are not the type of medications that a patient would expect to be purchasing privately and paying a co-payment amount for. Further, they are specifically intended for pain relief and not the purposes for which the Grievant's toothpaste was intended. Orthodontic services include the installation and maintenance of braces, but there is no provision for prescriptions. In short, therefore, there is no specific provision in the dental plan for prescriptions such as that given to the Grievant.

The Association asserts, however, that the prescription should be covered by virtue of the fact that it is not specifically excluded by the dental plan. It is the Association's position that all treatments not specifically excluded are covered by the plan. I disagree. The dental benefits section of the plan on page 5 specifically describes a covered expense as an expense incurred by the insured for services specifically listed in the plan. If not listed in the plan, therefore, a dental service, such as in this case a prescription, is not a covered expense. Moreover, inasmuch as the prescription plan included in the health benefit specifically excluded dental prescriptions, absent a clearly stated intent to provide prescription benefits within the dental plan, no such coverage can be deemed to exist.

For the foregoing reasons, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The City did not violate the contract when it denied coverage for prescription dental medication to the Grievant. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 16th day of November, 2009.

John R. Emery /s/

John R. Emery, Arbitrator