

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**SHEBOYGAN COUNTY HEALTH CARE FACILITIES EMPLOYEES,  
LOCAL 2427, AFSCME, AFL-CIO**

and

**SHEBOYGAN COUNTY**

Case 407  
No. 68914  
MA-14400

(O'Malley Grievance)

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**Appearances:**

**Sam Gieryn**, Staff Representative, Wisconsin Council 40, 187 Maple Drive, Plymouth, Wisconsin 53073, appearing on behalf of Sheboygan County Health Care Facilities Employees, Local 2427, AFSCME, AFL-CIO.

**Michael Collard**, Human Resources Director, Sheboygan County, 508 New York Avenue, Sheboygan, Wisconsin 53081-4126, appearing on behalf of Sheboygan County.

**ARBITRATION AWARD**

Sheboygan County Health Care Facilities Employees, Local 2427, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Sheboygan County, hereinafter referred to as the County, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance filed by Brenda O'Malley. The undersigned was so designated. A hearing was held at the Rocky Knoll Health Care Center in Plymouth, Wisconsin on August 20, 2009. The hearing was not transcribed. The parties filed briefs and reply briefs whereupon the record was closed October 20, 2009. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

### **ISSUES**

The parties were unable to stipulate to the issue(s) to be decided in this case. At the hearing, the Union framed the issue as follows:

Did the County violate the collective bargaining agreement when both it and its agent misled the grievant about the availability of an in-network provider of osseous surgery causing the grievant to obtain such services out-of-network, resulting in a 30% co-insurance charge rather than a 10% co-insurance charge?

In its brief, the Union framed the issue thus:

Did the Employer violate the collective bargaining agreement when it refused to pay the grievant's medical charges at the in-network rate?

The County framed the issues as follows:

- 1) Is this grievance substantively arbitrable?
- 2) If so, did the County violate the collective bargaining agreement when the grievant was unable to find an in-network provider who was able to provide a particular service?
- 3) If so, what is the appropriate remedy?

I have not adopted either side's proposed issue(s). Based on the entire record, I find that the issue which is going to be decided herein is as follows:

Under the facts presented here, did the County violate the collective bargaining agreement? If so, what is the appropriate remedy?

### **PERTINENT CONTRACT PROVISIONS**

The parties' 2007-08 collective bargaining agreement contained the following pertinent provisions:

#### **ARTICLE 17**

#### **INSURANCE**

Sheboygan County agrees that the employees covered by the provisions of this contract shall be entitled to those insurance benefits of whatever nature that may be provided by duly adopted resolutions of the Sheboygan County

Board of Supervisors and such resolutions shall be made a part of the herein contract by reference as though incorporated herein in complete detail.

. . .

## **ARTICLE 29**

### **GRIEVANCE PROCEDURE**

Any dispute between the Union and the County or between any employee and the County concerning the effect, interpretation, application or claim of breach or violation of this Agreement shall be termed a "Grievance". Any such grievance shall be handled according to the steps hereinafter set forth. . . .

. . .

Aside from the contract provisions just quoted, this case also involves the County's health plan document. None of its provisions are quoted here.

### **BACKGROUND**

The County operates Rocky Knoll Health Care Center in Plymouth, Wisconsin. The Union is the exclusive bargaining representative for certain employees at Rocky Knoll. The position of CNA is in the bargaining unit. Brenda O'Malley is a CNA at Rocky Knoll and thus is in the bargaining unit.

Broadly speaking, this is a health insurance case. As will be noted in detail below, O'Malley filed a grievance concerning an out-of-network co-payment that she made after she was unable to find a network provider to perform osseous surgery.

The County's health plan can be divided into two main areas: basic benefits and major medical coverage. The basic benefits are covered at 100%. The major medicals have co-pays, with the co-pay being 10% for in-network and 30% for out-of-network. For basic benefits, it does not matter if the doctor is in-network or out-of-network.

The County's health insurance plan is self-funded. The County contracts with a company named Prairie States Enterprises to administer the plan benefits on behalf of the County. That company processes medical and dental claims according to a health plan document.

The County also contracts with a network provider named HealthEOS to obtain "in-network" discounts. HealthEOS provides the County – and thus County employees – with access to network discounts from health care providers. In exchange for these discounts, the providers in the network require "steerage", which is a financial incentive to use in-network

providers. The financial incentive is a 20% difference in the co-pays for in-network compared to out-of-network services. As previously noted, if the employee uses an in-network provider, the employee pays 10% of the cost and the County's self-funded plan pays 90% of the cost. If the employee uses an out-of-network provider, the employee pays 30% of the cost and the County's self-funded plan pays 70% of the cost. The contract between the County and HealthEOS requires the County to impose a 30% co-pay for major medical services provided by non-network providers.

HealthEOS became the County's network provider in 2006. After it became the County's network provider, it did not provide County employees with a network provider list. Instead, employees were directed to obtain information about providers in the HealthEOS network via the HealthEOS website or the HealthEOS phone number.

The County sometimes receives calls from employees seeking referrals to medical providers. When that happens, the County does not provide referrals; instead, it refers the employee to HealthEOS.

The record indicates that several years ago, the parties agreed in bargaining to change the basic benefits provided by the County's health care plan. Many different types of services and procedures were affected by this change. One of the procedures which is no longer classified as a basic benefit under the County's health plan is osseous surgery; it is now covered under the other category (i.e. major medical) and thus is subject to a co-pay whether in or out-of-network.

Brenda O'Malley had osseous surgery in 2003. Osseous surgery is a type of dental surgery. It is performed by periodontists, but apparently not all periodontists perform it. When she had osseous surgery in 2003, the procedure was classified as a basic benefit under the County's health insurance plan and, as a result, was not subject to co-pays whether in or out-of-network. The doctor who performed the osseous surgery on O'Malley was Dr. Hoge. He is a periodontist in Sheboygan, Wisconsin.

### **FACTS**

Brenda O'Malley has family coverage under the County's health insurance plan. As a result, her husband Michael is a covered plan member.

In May, 2008, Michael O'Malley learned that he needed to have osseous surgery performed. After learning that, Michael O'Malley went to Dr. Hoge and got an estimate from him for the procedure. He went to Dr. Hoge because he knew that Dr. Hoge performed osseous surgery on his wife Brenda in 2003. Dr. Hoge's estimate for this procedure was \$3,300. After obtaining the estimate, Brenda O'Malley submitted it to the County's third party administrator (Prairie States) for pre-approval.

Initially, there was a question about whether osseous surgery was covered by dental insurance or health insurance. This question was answered when County Human Resources Director Michael Collard told O'Malley that although osseous surgery was a type of dental surgery, it was covered under the major medical portion of the County's health insurance plan, subject to the normal 10%/30% co-pays.

After that question was resolved, O'Malley contacted Prairie States. They told her that Dr. Hoge was not a member of the County's Preferred Provider Option Network (HealthEOS Plus) and as a result, if Dr. Hoge performed the osseous surgery, O'Malley would have to pay a 30% co-pay. They also told her to contact HealthEOS to find an in-network provider.

O'Malley decided she wanted to avoid the 30% co-payment she would incur if Dr. Hoge performed the procedure, so she attempted to find an in-network provider who would perform osseous surgery. (As previously noted, if she found an in-network provider, her co-payment would be 10% - not 30%).

O'Malley then called HealthEOS. Her written notes indicate that when she called them on June 5, 2008, she "asked for periodontal specialist" and in response, she was told "do not have any in network." O'Malley subsequently called HealthEOS numerous times – by her estimate, 10 to 15 times. In these calls, she told the HealthEOS representative that she was trying to find either an in-network periodontist or an in-network provider who performed osseous surgery. O'Malley was told by the HealthEOS representative that there were no periodontists in the network. As for O'Malley's request to find someone who performed osseous surgery, the HealthEOS representative could not find one. A possible reason for this is that network providers are listed by specialty, not by particular procedures or services they perform. Thus, the network lists health care providers by general specialties and location, but the network does not have any way to know which particular services are provided by which health care providers. At O'Malley's request, HealthEOS did provide her with the names of dentists and oral surgeons who were in network. All the doctors on the list which HealthEOS supplied practiced in Sheboygan County. O'Malley contacted all of them, but none performed osseous surgery. She also contacted some dentists which she found in the phone book, but none of them performed osseous surgery either.

O'Malley also sought assistance in finding a network provider that provided osseous surgery from Ruth Wilsing, who is a benefits specialist in the County's Human Resources Department. Wilsing instructed O'Malley to use the HealthEOS website. O'Malley did not have a computer, so she asked a co-worker, Teri Schwab, to go on their website and access the provider network list. Schwab tried to do so, but on that particular day, the HealthEOS website was inaccessible.

Having been unsuccessful in finding a network provider that performed osseous surgery, O'Malley and her husband decided to have Dr. Hoge perform the osseous surgery on her husband.

In early August, 2008, O'Malley contacted Prairie States again, and told claims processor Toni Albert that her husband's osseous surgery was scheduled to occur in three days with Dr. Hoge if an in-network provider could not be found. O'Malley asked Alberts to contact HealthEOS personally to inquire as to the availability of an in-network provider of osseous surgery. Alberts did that, but was not successful in finding an in-network provider of osseous surgery.

O'Malley's husband had osseous surgery performed by Dr. Hoge on an outpatient basis on August 7 and 14, 2008.

O'Malley subsequently received two separate "Explanation of Benefits" statements from Prairie States. These statements indicated that since the services (i.e. osseous surgery) had been performed out-of-network by a non-network provider, the Employer was paying 70% of the charges and she would have to pay 30% of the charges. She ultimately paid the 30% co-pay for her husband's osseous surgery.

Union Steward Lori Hanson subsequently contacted HealthEOS and inquired about the availability of in-network periodontists in the Sheboygan County/Milwaukee County areas. In response to her inquiry, Hanson was apparently given just one name. The name she was given was of Dr. Craig Byers who is a periodontist in the Greater Milwaukee area. It can be inferred from this that there were no in-network periodontists in Sheboygan County, but there was one in Milwaukee County, namely Dr. Craig Byers. Until Hanson made her call to HealthEOS and was given Dr. Byers' name, O'Malley did not know of Dr. Byers' existence as an in-network periodontist. She (O'Malley) was never given his name when she repeatedly called HealthEOS. After getting his name from Hanson, O'Malley contacted Dr. Byers and learned that he performed osseous surgery. Dr. Byers is part of the HealthEOS network, and had been for three years.

O'Malley then contacted HealthEOS again and asked them why they did not tell her that Dr. Byers is in the HealthEOS network. O'Malley testified that they did not give her a response.

The Union subsequently filed a grievance which alleged that O'Malley was told incorrectly that there was no in-network provider who performed osseous surgery when in fact there was, and as a result, O'Malley paid an out-of-network co-pay when she could have paid an in-network co-pay. The grievance alleged that as a result, O'Malley was deprived of the "opportunity to benefit from medical benefits provided under Article 17." The grievance was appealed to arbitration.

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No one from HealthEOS testified at the hearing.

## **POSITIONS OF THE PARTIES**

### **Union**

The Union's position is that the County violated the collective bargaining agreement when it did not let the grievant pay for her husband's osseous surgery at the in-network rate. It makes the following arguments to support this contention.

At the outset, the Union disputes the County's assertion that the grievance is not substantively arbitrable. It argues that it is substantively arbitrable. To support that premise, it notes that the grievance which was filed herein contended that the Employer's actions breached Article 17 (the Health Insurance provision). As the Union sees it, the instant grievance constitutes a grievance within the meaning of Article 29. Building on that premise, it's the Union's view that the grievance can be submitted to grievance arbitration.

Next, the Union sees this case as an agency case, so it calls attention to the fact that the County self-funds its health insurance plan and has contracted with companies to administer its health care plan (i.e. Prairie States) and provider network (i.e. HealthEOS). The Union avers that since the County has contracted with these companies relative to its health care plan, both are the County's agents.

Building on that premise, the Union relies on what it calls the long-standing principles of agency for the proposition that the actions of the County's agents are imputed to the Employer. Said another way, the County is responsible for the act of its agents.

Next, the Union asserts that when the grievant learned her husband needed osseous surgery, she did exactly what she had been directed to do by the County: she contacted the company who maintains the network provider list, namely HealthEOS. The Union avers that the method she chose to do that (i.e. by calling HealthEOS on the phone) was one of the ways the Employer had recommended to employees. The Union argues that the grievant did not refuse to use the internet to contact HealthEOS (as the Employer asserts in its brief). Before addressing what happened in O'Malley's calls to HealthEOS, the Union makes the following two points. First, it emphasizes that as the Employer's agent, HealthEOS was supposed to provide O'Malley with accurate information about the in-network providers. Second, it notes that O'Malley's account of what happened in those phone calls was not contradicted because no one from HealthEOS testified at the hearing. Having noted those points, the Union next addresses what happened in her calls to HealthEOS. In one of her first calls to them, specifically her June 5, 2008 call, she (i.e. O'Malley) asked if there was an in-network periodontal specialist (i.e. a periodontist) and the response which she got back was that there were not any in-network. The Union emphasizes that essentially the same thing happened in subsequent phone calls. Again and again, O'Malley called HealthEOS and asked them for either an in-network periodontist or someone who performed osseous surgery. Each time, she was told there were not any in the network. As the Union sees it, these facts establish that the grievant made a reasonable effort to try to find an in-network periodontist who could perform

her husband's osseous surgery. The Union also submits that after being told numerous times by HealthEOS that there were no in-network periodontists, O'Malley relied on their assertions and had an out-of-network periodontist – Dr. Hoge – perform her husband's osseous surgery.

Next, the Union focuses on what happened following O'Malley's husband's osseous surgery. What happened was this: O'Malley learned that the information which she had been supplied by HealthEOS about the availability of an in-network periodontist was incorrect because there was, in fact, an in-network periodontist who could have performed her husband's osseous surgery. That periodontist was Dr. Byers. The Union points out that the reason O'Malley did not contact Dr. Byers before her husband's surgery was because she was not given his name. In other words, she didn't know of his existence. It was only after she was given his name by the union steward that she discovered that she had been provided misinformation about the availability of an in-network periodontist. According to the Union, this misinformation prevented O'Malley from obtaining the in-network rate she would have qualified for if she had gotten the correct information from HealthEOS.

The Union argues that what the County essentially did following this discovery was to throw up its hands, so to speak, and say they are not responsible for what happened to O'Malley. The Union disputes that. It contends that the County is indeed responsible for the act of its agent (HealthEOS), especially since its agent gave O'Malley incorrect information about the availability of an in-network periodontist. To support this contention, the Union again emphasizes that on June 5, 2008, a HealthEOS representative told O'Malley there were no in-network periodontal specialists when in fact there was (namely, Dr. Byers). As the Union sees it, this establishes that the HealthEOS agent misled O'Malley by giving her inaccurate information about the availability of an in-network periodontist. According to the Union, this inaccurate information deprived O'Malley of the opportunity to obtain the needed medical service with a 10% co-pay (rather than paying a 30% co-pay as she did).

Finally, it's the Union's view that what happened here constituted a contract violation which can be remedied by the County. Here's why. First, the Union avers that under Article 17 of the collective bargaining agreement, the Employer owes an affirmative duty to provide a workable health plan that allows employees to receive its benefits (in this case, a 10% co-pay as opposed to a 30% co-pay). Second, aside from that contract provision, the Union relies on what it calls the principles of "standard contract jurisprudence", equitable estoppel and "the implied covenant of good faith and fair dealing." As a remedy, the Union asks the arbitrator to order the County to reimburse O'Malley the 20% difference between the 30% co-pay that she paid for the osseous surgery performed by Dr. Hoge and the 10% co-pay that she would have paid had in-network provider Dr. Byers performed the osseous surgery. As the Union sees it, the fact that this proposed remedy might create a dispute between the County and its agent (HealthEOS) does not render the proposed remedy inappropriate. The Union contends that if the County and its agent have a dispute regarding who is responsible for the misinformation supplied to O'Malley, they can resolve that dispute through their own dispute resolution procedure.



## County

The County's position is that the grievance is not substantively arbitrable. With regard to the merits, it contends that it did not violate the collective bargaining agreement when the grievant was unable to find an in-network provider who was able to provide a particular service. It makes the following arguments to support these contentions.

The County initially asserts that this grievance is not substantively arbitrable. As the County sees it, this dispute is not really a contractual dispute per se in that it's not related to the language of the collective bargaining agreement. To support that premise, the Employer notes that the grievance does not identify a contract provision that was allegedly violated. Instead, the Employer notes that the Union relies on such terms as equitable estoppel, agency and misrepresentation – terms which the County maintains have no bearing whatsoever on the issue herein. The County avers that since no interpretation or application of the contract language is involved here, this dispute is not a grievance within the meaning of Article 29. Building on that point, the Employer argues this dispute is beyond the arbitrator's jurisdiction to address.

With regard to the merits of the grievance, the County contends that “to the extent that the essential terms of the health care plan may be considered incorporated into the collective bargaining agreement”, it did not violate any provision therein by its conduct. It notes at the outset that the medical service performed here (i.e. osseous surgery) was covered under the major medical portion of the Employer's health care plan, subject to normal co-pays (i.e. 10% if done by a network provider and 30% if done by a non-network provider). The Employer further notes that the grievant used an out-of-network provider – Dr. Hoge – so she paid the 30% co-pay. According to the Employer, there is no reason to change that payment so that she somehow qualifies for the in-network rate (i.e. a 10% co-pay) when she had the work done by a doctor who was out-of-network. The Employer opines that if it were to do that, and charge her just a 10% co-pay for a service provided by an out-of-network provider, it would breach its contract with HealthEOS. In making that argument, the Employer acknowledges that the grievant made several attempts to find an in-network provider so that her co-payment would be 10%. As the Employer sees it though, “there is no evidence that the grievant was denied information about network providers. When the grievant inquired about a provider, she was told whether that provider was in the network or not.” The County maintains that the grievant's attempts to find an in-network provider were hampered by the fact that she was not just looking for a specialist. Instead, she was looking for someone to perform a particular type of procedure (namely, osseous surgery). The Employer avers that the network lists health care providers by their general specialties, not by particular procedures or services that they perform. Building on that premise, the County avers that neither it nor HealthEOS knew which medical services/procedures are performed by the in-network providers. Building on that, the Employer asserts it was a difficult task when the grievant told the HealthEOS representative that she wanted to find someone to perform osseous surgery. As the County sees it, “the core of this dispute is that the grievant believes that the health network should have done a better job in finding a health care provider for her.” Said another way, it's the

County's belief that the Union's complaint essentially boils down to this: HealthEOS did not do an adequate job of referring the grievant to a network provider. The County implies that even if that's the case, in order for that to constitute a contract violation, there "would have to be some provision in the collective bargaining agreement that imposed on the County the obligation to provide such referrals." The County argues there is no such provision in either Article 17 or elsewhere in the collective bargaining agreement which obligates the County to refer patients to specific providers. The County maintains that neither it nor HealthEOS is a referral service, and it never contractually promised to help employees find network providers who offered specific services. More specifically, the County avers it never promised to help the grievant find a network provider who was willing and able to perform the apparently unusual procedure she wanted performed. According to the County, "it is up to employees to find their own providers." As for the Union's claim that the inability of HealthEOS to find a network provider for the grievant's husband to have osseous surgery deprived her and the Union of the benefit of the bargain struck by the parties with regard to health coverage, the Employer calls that claim "absurd".

The County argues that if the grievance is sustained and the County is ordered to henceforth refer employees to specific providers, this "would literally require the network to keep track of every single procedure or service provided by every one of its hundreds of thousands of health care providers throughout its worldwide network and then provide perfectly accurate information to employees about the network providers best positioned to provide any requested service."

In sum, it's the Employer's position that it had no contractual obligation to find an in-network provider of osseous surgery for the grievant, so neither it nor HealthEOS did anything which constituted a contract violation. It maintains that the grievance is without merit and should therefore be denied.

### **DISCUSSION**

Since the County contends that the grievance is not substantively arbitrable, that is the threshold issue. I find, contrary to the County's contention, that the grievance is substantively arbitrable. Here's why. The first paragraph in Article 29 defines a grievance, in part, as a "claim of breach or violation of this Agreement." I read the instant grievance to allege that the Employer's actions breached Article 17 (the Health Insurance provision). That being so, the instant grievance can fairly be said to fit into the broad definition of a grievance contained in Article 29. The grievance procedure then goes on to provide in Step 4 that unresolved grievances can be submitted to arbitration. Putting the foregoing points together, it follows that the instant grievance is substantively arbitrable and properly before the arbitrator for a decision on the merits.

. . .

I've decided to begin my discussion on the merits by noting that I consider this to be an unusual contract interpretation case for the following reasons. First, normally in a contract interpretation case, the language involved is key to resolving the dispute and the parties dispute its meaning. Here, though, the contract language is not the key to resolving the dispute and I have not been asked to interpret any contract language. While the parties have a health insurance provision in Article 17 of the collective bargaining agreement, none of the language therein is in issue. Additionally, the Employer has adopted a health plan document. That document provides in pertinent part that the Plan (i.e. the County) will pay "70% of non-Network Provider charges; or 90% of Network Provider charges. . ." While I'll address this language in more detail below, it suffices to say here that the parties agree that this language means that employees pay a 30% co-pay for services performed out-of-network, and a 10% co-pay for services performed in-network. Second, normally in a contract interpretation case, it is the employer that has taken some action which is then challenged by the union. In this case though, it wasn't the County whose actions precipitated the grievance. Instead, as will be noted in more detail below, the entity whose actions precipitated the grievance was HealthEOS, the County's network provider.

Having made those preliminary comments, I'm now going to go back to the language in the health plan document dealing with the co-pays. As previously noted, the parties agree that this co-pay language says that employees have to pay a 30% co-pay for services performed out-of-network and a 10% co-pay for services performed in-network. On its face, applying this language to a given factual situation seems relatively simple: if an employee has a medical procedure/service performed by a doctor in-network, they pay a 10% co-pay; if it's done by someone out-of-network, then they pay 30%. In this case, there's agreement that the doctor who performed the medical procedure on the grievant's husband – Dr. Hoge – was not in the HealthEOS network. Since Dr. Hoge is not part of the HealthEOS network, if one were to look no further than the facts just identified, then the grievant had to pay a 30% co-pay.

However, in this case, there are additional facts that complicate matters. As the late Paul Harvey used to say, "there's more to the story. . ." I'm referring, of course, to the grievant's efforts to find an in-network doctor.

The County essentially wants me to overlook the facts pertaining to the grievant's efforts to find an in-network doctor and base my decision instead on just the facts already noted (i.e. that the grievant picked Dr. Hoge to perform the osseous surgery and Dr. Hoge is an out-of-network doctor). However, as will be noted in more detail below, I think the facts relative to the grievant's efforts to find an in-network doctor are critical to the outcome of this case. Consequently, the focus turns to a review of same.

After the grievant learned that she would have to pay a 30% co-pay if Dr. Hoge performed her husband's osseous surgery, she made numerous attempts to try to find an in-network doctor who could perform that procedure so she would only have to pay a 10% co-pay. Specifically, she called HealthEOS numerous times trying to find an in-network provider. Before I address what she (i.e. the grievant) talked to HealthEOS about, I've decided to note

that no one from HealthEOS testified at the hearing. Thus, only the grievant testified about her phone calls with HealthEOS. Aside from her testimony, the grievant kept notes of what transpired in those calls. As will be noted later, that's important to the outcome herein.

One thing that the grievant talked with HealthEOS about in her phone calls was that she (i.e. the grievant) was looking for someone who performed osseous surgery. This request was problematic because network providers are listed by specialty, not by the particular procedures or services they perform. Said another way, the network lists health care providers by their general specialties, but HealthEOS does not know which particular procedures and/or services are provided by which providers. As a result, it wasn't HealthEOS' job to find someone who could perform osseous surgery for the grievant. That was the grievant's job. What I mean by that is this: HealthEOS is to supply the name or names of in-network providers to the employee who asks for that information. After the employee gets that information from HealthEOS, then it is up to the employee to call the in-network provider and find out if that provider is willing and able to perform the particular procedure or service that the employee wants or needs performed.

According to the Employer, that never happened here and the grievant never asked for a specific provider. The record facts show otherwise. In making that statement, what I'm referring to is this: while the grievant did tell the HealthEOS representative that she (i.e. the grievant) was looking for someone to perform osseous surgery, the grievant also specifically asked if there was an in-network periodontist. That being so, the County's assertion in its brief that "the grievant did not know what type of specialist might support the type of procedure that was needed" is incorrect. The grievant knew that periodontists perform osseous surgery because she (i.e. the grievant) had osseous surgery herself in 2003. That's how she knew to ask for a periodontist. Her written notes say that when she called HealthEOS on June 5, 2008, she asked them if there was an in-network "periodontal specialist" (i.e. a periodontist). This written statement conclusively establishes that the grievant asked HealthEOS for a specific provider (i.e. a periodontist), and not just someone who performed osseous surgery. Additionally, I'm persuaded that the grievant did not limit her inquiry for a periodontist to just her specific geographic area (for example, say, Sheboygan County). If she had limited her inquiry for a periodontist to just providers in Sheboygan County, my decision in this case would be different. I find that given the open-ended nature of her inquiry though, the representative from HealthEOS should have given her the name or names of **any** periodontist that was in-network. Had HealthEOS done that, it would have been up to the grievant to contact them, see if they perform osseous surgery, and if they did, decide if she was willing to travel to say, Madison or Milwaukee, for the procedure. However, on June 5, 2008, the representative from HealthEOS told the grievant that there were not **any** periodontists in the network. None. That's also what the grievant was told in her subsequent calls to HealthEOS. Ultimately, the grievant accepted that assertion when she could not find an in-network periodontist on her own. However, there was a problem with what the HealthEOS representative told the grievant. It was this: the grievant later learned from a co-worker that there was an in-network periodontist, namely Dr. Byers in Milwaukee. In my view, the fact that Dr. Byers practices in Milwaukee – as opposed to Sheboygan County where

the grievant lives and works – is not dispositive. What's important is that the grievant specifically asked on June 5, 2008 if there was a periodontist in-network, and the response that she got back from the HealthEOS representative was that there were not **any** in the network. That information turned out to be incorrect because it overlooked Dr. Byers. It would have been one thing if it was the grievant who overlooked Dr. Byers' name from a list of in-network providers she was supplied by HealthEOS. However, she did not overlook Dr. Byers; instead, it was HealthEOS that overlooked him. Simply put, that should not have happened. By not telling the grievant about Dr. Byers, or giving her his name, HealthEOS gave the grievant inaccurate information about in-network providers (specifically, in-network periodontists). HealthEOS is obligated to give accurate information to employees who ask about in-network providers. That did not happen here, so HealthEOS dropped the proverbial ball.

The next question is what to do about it. Although it was HealthEOS that erred, as opposed to say - the County – I am nonetheless going to hold the County responsible for the act(s) of its agent. Here's why. The collective bargaining agreement which I am applying is between the Union and the County. HealthEOS is not a named party. That being so, I do not have jurisdiction to order HealthEOS to do anything. I am empowered though to remedy breaches of the collective bargaining agreement. I find that under the unique facts presented here, the County violated the collective bargaining agreement, specifically the health plan document which is incorporated into the collective bargaining agreement via Article 17, when its agent, HealthEOS, failed to supply the grievant with accurate information about an in-network periodontist. As noted above, on June 5, 2008, the grievant asked if there was a periodontist in-network and the response that she got back from the HealthEOS representative was that there were not **any** in the network. That statement later turned out to be incorrect because there was, in fact, an in-network periodontist (namely, Dr. Byers in Milwaukee County). Since the grievant did not learn of Dr. Byers existence until after an out-of-network provider (namely, Dr. Hoge) had performed her husband's osseous surgery, I find that a contract breach occurred which needs to be remedied. The remedy which I find appropriate under the circumstances is for the County to pay the grievant the 20% difference between the 30% co-pay that she paid for the osseous surgery performed by Dr. Hoge and the 10% co-pay that she would have paid had in-network provider Dr. Byers performed the osseous surgery. In ordering this remedy, I am well aware that this remedy is based on the assumption that the grievant would have traveled to Milwaukee County to have Dr. Byers perform the osseous surgery (rather than go to Dr. Hoge in Sheboygan County) just to save 20%. That's admittedly speculation. Be that as it may, I conclude that even though my remedy is based on that assumption, this remedy will ensure that the next time an employee seeks information from the County's network provider by phone about in-network providers, they will be provided with accurate information about **all** in-network providers.

In light of the above, it is my

**AWARD**

That under the facts presented here, the County violated the collective bargaining agreement. In order to remedy this contractual breach, the County shall pay the grievant the 20% difference between the 30% co-pay that she paid for the osseous surgery performed by Dr. Hoge and the 10% co-pay that she would have paid had in-network provider Dr. Byers performed her husband's osseous surgery.

Dated at Madison, Wisconsin, this 10th day of December, 2009.

Raleigh Jones /s/

Raleigh Jones, Arbitrator