

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN CITY HALL EMPLOYEES, LOCAL 1564, AFSCME, AFL-CIO

and

CITY OF SHEBOYGAN

Case 150
No. 69872
MA-14781

Appearances:

Samuel Gieryn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, for the Union.

Jonathan T. Swain, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, for the City.

ARBITRATION AWARD

The City of Sheboygan and Sheboygan City Hall Employees, Local 1564, AFSCME, AFL-CIO asked me to serve as arbitrator of a dispute over the cost of mail order drugs. Hearings were held in Sheboygan, Wisconsin on June 1 and July 8, 2010.

A stenographic transcript of the hearing was prepared but the Union objected to use of said transcript by the arbitrator unless the City was willing to bear the cost of providing the Union with a copy of the transcript. The City was not willing to pay said cost. The parties' contract is silent on the question of transcripts and the cost thereof. I sustained the Union's objection based on my understanding of my arbitral ethical obligations and ruled that the record in this matter would consist of my recollections of testimony (as refreshed by my notes) and the exhibits and written argument of the parties. I received a courtesy copy of the stenographic transcript but did not refer to same in the preparation of this Award.

The parties filed post-hearing briefs and reply briefs - the last of which was received September 17, 2010.

ISSUE

The parties were unable to agree on a statement of the issue to be resolved through this Award but agreed that I had the authority to frame the issue after giving due consideration to their respective positions. The Union proposed the following statement of the issue:

Did the Employer violate the collective bargaining agreement when it charged employees a two-month co-pay for a three-month supply of drugs via mail order?

The City stated the issue as follows:

Did the parties, the course of negotiations, agree upon a health insurance program which includes a two month co-pay for a three month supply of prescription medication obtained by mail order?

Having considered the parties' statements of the issue, I conclude the issue is best framed as follows:

By charging employees a two month co-pay for a three month supply of prescription mail order drugs, is the City violating the agreement bargained by the parties for the period January 1, 2010-December 31, 2011?

DISCUSSION

The parties' 2007-2009 contract stated the following in pertinent part:

3. Effective upon ratification of the 2007-2009 agreement the employees' prescription drug coverage for up to a thirty-four (34) day supply shall include an employee co-pay of \$10 for generic or for brand name drugs when no generic is available and \$20 for brand name drugs when a generic version is available. A ninety (90) day supply of maintenance drugs shall be made available via mail order for the same price.

Thus, during the term of the 2007-2009 contract, employees received a 90 day ("three month") supply of mail order prescription drugs for the same cost as a 34 day ("one month") supply received directly.

It is undisputed that during bargaining for the successor to the 2007-2009 contract, the City advised the Union (and all other unions representing City employees) that it would be seeking agreement by all unions to the same package of insurance benefits. Although it is hotly disputed between these parties, I am satisfied from the evidence presented that early in the bargaining process, the City advised the Union that part of the insurance package it was seeking included an increase in the cost of a "three month" supply of mail order drugs from

the current “one month” to “two months.” However, there is no direct or persuasive evidence that this proposed change was thereafter discussed at the bargaining table between the parties.

On December 29, 2009, the City and the Union reached a tentative agreement on a 2010-2011 contract. The tentative agreement was summarized in a 10 pages document signed by the parties. As to health insurance benefit changes, the signed tentative agreement contained the following statement as to drug benefits:

9. Health Insurance-Article XIX. Section 1 (b). (See attachment) Adopt Drug card as follows:
 1. Generic- \$5.00
 2. Preferred Drug- \$20.00
 3. Preferred Drug- \$40.00

The “attachment” referenced was a single page entitled “City of Sheboygan Health Insurance Benefit 2010” and contained a “Prescription Drugs” entry which stated:

In Network	Generic/Brand/Non-Preferred \$5/\$20/\$40
Out of Network	Deductible & Coinsurance Apply

Because: (1) the written tentative agreement does not contain a reference to a “one month” increase in the cost of a “three month” supply of mail order prescription drugs and; (2) there is no evidence that during the bargaining that produced said tentative agreement the Union ever affirmatively agreed (either verbally or in writing) to the cost increase sought by the City, I conclude that the parties did not agree to such an increase. Thus, the City is violating the agreement reached by the parties when it charges employees for the increased cost.

In reaching this result, I acknowledge all of the following:

1. The City advised the Union that it was seeking a single common package of insurance benefits that would apply to all employees and that part of that package was a “one month” increase in the cost of mail order drugs.
2. During December 2009, the City held informational meetings attended by City employees (including Union officers and bargaining team members) at which the increased cost of mail order drugs was discussed.
3. The same day the December 29, 2009 tentative agreement was signed by the City and the Union, the City sent an email to all City employees the subject of which was “Changes to our Medical/Prescription Drug Plan” and which stated in pertinent part:

In our negotiations with our Unions the following change has the potential to impact all covered members of our Medical/Prescription Drug Plan because of how late negotiations have gone. This change will go into effect on January 1, 2010.

Covered members' prescription drug co-pay shall increase to \$5.00 for Generic, \$20.00 for brand name drugs, and \$40.00 for Non-Preferred. Mail order is two times the co-pay for a three-month supply.

No Union represented employee responded to the email by advising the City that the Union had not agreed to the increased mail order drug cost.

4. The City's 2010-2011 contracts with all other City employee unions contain the "one month" increase in cost.
5. It was not until the parties attempted to reduce the tentative agreement to writing that the dispute over mail order drug cost increase arose.

There is no doubt the evidence summarized above creates an inference that the Union did agree to the cost increase. However, I believe some affirmative conduct by the Union was needed to create the agreement in question. As discussed above, the Union never expressed agreement to the cost increase-either verbally or in writing. While the City is correct that the written version of a tentative agreement may not cover all matters, the absence of a reference to the increased cost in question certainly does not undercut the Union's assertion that it never agreed to cost increase in question. Thus, it is my Award that by charging employees a two month co-pay for a three month supply of prescription mail order drugs, the City is violating the agreement bargained by the parties for the period January 1, 2010-December 31, 2011.

Dated at Madison, Wisconsin, this 14th day of December, 2010.

Peter G. Davis /s/

Peter G. Davis, Arbitrator