

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MUSKEGO POLICE ASSOCIATION

and

CITY OF MUSKEGO

Case 83
No. 69742
MA-14721

Appearances:

Attorney Andrew D, Schauer, Staff Counsel, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin, appeared on behalf of the Union.

Lindner and Marsack, S.C., by **Attorney Jonathan T. Swain**, 411 East Wisconsin Avenue, Milwaukee, Wisconsin, appeared on behalf of the City.

ARBITRATION AWARD

At all times pertinent hereto, the Muskego Police Association (herein the Union) and the City of Muskego (herein the City) were parties to collective bargaining agreements dated September 10, 2009 and covering the period January 1, 2009, to December 31, 2010, covering two separate bargaining units of City of Muskego police employees and providing for binding arbitration of certain disputes between the parties. On March 31, 2010, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the City's method of charging for co-pays on medical expenses, and requested a panel of the WERC staff from which to select an arbitrator to decide the issue. The undersigned was subsequently selected to hear the dispute. The hearing was conducted on August 25, 2010 and the proceedings were transcribed. The parties filed briefs by November 3 and, on November 16 notified the Arbitrator that they would not be filing reply briefs, whereupon the record was closed.

ISSUES

The parties did not stipulate to the framing of the issues:

The Union would frame the issues, as follows:

Did the City violate the collective bargaining agreement when it began to charge two different health insurance premium copayments, allowing them to charge the employees an additional copayment just to continue their existing health insurance coverage?

If so, what is the remedy?

The City would frame the issues, as follows:

Did the City violate the collective bargaining agreement, specifically Article 12 of the Police Association agreement, when it changed, for calendar year 2010, the City's healthcare provider from Humana to WPS, when the coverage provided by WPS was equal or better than the coverage provided by Humana?

If so, what is the remedy?

I frame the issues, as follows:

Did the City violate the collective bargaining agreement, specifically Article 12 of the Police Association agreement, when it changed, for calendar year 2010, the City's healthcare provider from Humana to WPS and offered the employees the HealthEOS plan at additional cost?

If so, what is the remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 12 - HEALTH AND WELFARE (POLICE)

Section 2. Health Insurance. The Employer shall provide hospital and surgical, major medical, outpatient and diagnostic coverage during the term of this Agreement. The Employer may offer additional insurance programs during the term of this Agreement provided it continues existing basic health insurance coverage.

Section 3. The City shall have the right to change the healthcare provider during the term of this Agreement; the replacement coverage shall be equal to or greater than the benefits in effect as of June 1, 2002. In the event a successor agreement is not reached as of the effective date of the expiration of this Agreement, these benefits, as well as the City's premium contribution, shall be subject to the dynamic status quo document.

Section 4. Premium Co-payment. Effective January 1, 2009 employees will contribute eight percent (8%) of the applicable monthly premium for health insurance up to a maximum contribution of \$90.00 per month for family coverage, \$68.00 per month for limited family coverage and \$45.00 per month for single coverage. Effective January 1, 2010 employees will contribute eight percent (8%) of the applicable monthly premium for health insurance up to a maximum contribution of \$110.00 per month for family coverage, \$78.00 per month for limited family coverage and \$50.00 per month for single coverage. These deductions will be made on a pre-tax basis pursuant to the City's premium only cafeteria plan. The insurance plan will be the Humana Plan, National POS, as discussed. The City will continue the current Health Reimbursement Account based on the deductible limits which were in effect during the 2006-2008 contract.

The City will offer a Health Risk Assessment (HRA) Program in 2010 for the 2011 calendar/plan year to covered employees and their covered spouses. Covered employees and covered spouses who do not participate in 2010 for 2011 will pay nine percent (9%) of premium in 2011 at uncapped levels. This process will be repeated each year for the following calendar/plan year.

STIPULATIONS

During the arbitration proceeding the parties agreed to the following stipulations of fact:

1. The parties agreed to hear the grievances of both units, and that the decision of the Arbitrator will be binding on the parties as to both units. It will not be a divided award dealing with the units separately.
2. The parties agree that the City is deducting from City employee and Union member Nicholas Fons' pay the amounts listed on Union Exhibit 2 from his checks for health insurance.
3. The parties agree that page 13 of Joint Exhibit 12 say what it says with regard to what a preferred health care provider is.
4. The City was motivated by whether or not it could stay within its budget to accept WPS's bid or to stay with Humana.
5. The City stipulates to the inclusion into the record of the testimony of Association members Steve Westphal, Jason Ondricka, Gary Mrotek and Angela Mesich contained in their emails made part of the record.
6. No parties raised any timeliness or procedural defects during the hearing. As such, the controversy is properly before the Arbitrator on the merits.

BACKGROUND

The City of Muskego Police Department has two bargaining units within it, both represented by the Wisconsin Professional Police Association (WPPA). The Muskego Police Association represents the Department's employees who have power of arrest and the Muskego Police Telecommunicator Unit, Local #443, represents the Department's Telecommunicator/Clerical employees. The collective bargaining agreements for both units contain identical language covering health insurance benefits, as set forth above. The language permits the City to change healthcare providers during the term of the contract, as long as the coverage is equal to or greater than the benefit levels in existence as of an earlier date.

For a number of years prior to 2009 the City had contracted with WPS to provide the City's health insurance plan. One of the healthcare providers included within the WPS preferred provider network was the Aurora healthcare system. In 2008, the City learned that Aurora would be leaving the WPS network and began to solicit bids from other insurance companies in order to retain the Aurora network, as well as to find a more cost effective plan. Ultimately, the City decided to contract with Humana, which included the Aurora network, for health insurance benefits in 2009. In late 2009, the City learned that Humana's insurance rates for 2010 were going to increase by 26.9%. Accordingly, the City once again began seeking a new health insurance provider and ultimately decided to once again contract with WPS. The WPS plan provided the same basic benefits as the Humana plan and even made improvements in a number of areas. It also included an extensive list of preferred providers in Southeast Wisconsin, but not the Aurora network. The City discussed the situation with the Unions, which expressed concerns about the loss of the Aurora network. As a result, the City also elected to offer an additional program, HealthEOS, which included the Aurora network, at an additional cost. After the change to WPS, one police officer changed to the HealthEOS plan in order to continue using Aurora doctors and facilities. All other officers and telecommunicators remained in the WPS plan.

On December 15, 2009, both bargaining units filed grievances alleging that the City violated their respective contracts by changing to the WPS plan, which did not include the Aurora network. As a remedy, the Unions sought reimbursement of any additional monies paid in out-of-network costs by employees in the WPS plan using Aurora providers, or, in the alternative, reimbursement of any monies paid in extra premium contributions in order to participate in the HealthEOS plan, which included Aurora. The grievances were denied and were advanced to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union acknowledges that the plain language of the contract gives the City the right to change healthcare insurance providers, but asserts that it may only do so if the coverage is

equal to or better than that in effect as on June 1, 2002.¹ It maintains that it has long been recognized by the parties that access to the Aurora network of healthcare providers is an important feature of the healthcare benefit for bargaining unit members and, in fact, the decision to switch from WPS to Humana in 2009 was, at least in part, based on a desire to maintain access to the Aurora network, which had severed its relationship with WPS.

In November 2009, subsequent to signing the 2009-2010 collective bargaining agreements, the City switched again to the WPS plan in a cost savings move, which specifically excluded the Aurora network as a preferred provider. By offering the option of the HealthEOS plan, the City is not offering an additional health insurance program, but is merely offering access to the Aurora network at an additional cost. Offering the same benefits at additional cost is a violation of the contract.

The Union is also concerned that if the City has an unfettered right to eliminate provider networks, it could continue to reduce in-network providers to an unreasonable level while charging the same premiums. Aurora is an extensive network with a multitude of affiliated doctors, clinics, hospitals and pharmacies in the Muskego area. Eliminating it may require employees to travel a considerable distance to obtain comparable care, increasing their costs thereby. If they wish to continue using Aurora providers, they must either pay out-of-network rates or pay the additional cost of the supplemental plan. One employee, Nick Fons, has elected to pay the additional premium, at an additional cost of \$155.74 per month. Several others were forced to leave their previous Aurora physicians and find new doctors who were covered under the WPS plan.

The Union asserts that the contract does not define the term “coverage,” nor does it specify what is meant by “the benefits in effect as of June 1, 2002.” The City’s own actions in the past reveal, however, that it considered the Aurora network to be part of the coverage provided by the contract and it should not now be able to eliminate the Aurora network on a hyper-technical reading of the contract language. The Mayor even acknowledged that the decision to switch to Humana in 2008 was based on a desire to retain the Aurora network. The Union concedes that under certain circumstances a provider could be eliminated from the network without a violation of the contract, but not where, as here, the parties had discussed the importance of the particular provider to the employees. It is also a question of scale. Thus, a single doctor or hospital could be removed without serious disruption, but not an entire network of providers and facilities. At that point it affects the level of benefits which the employer is required to maintain.

The City

The City argues that the grievance must be denied on a number of grounds. It asserts that the contract does not contain language mandating access to specific providers, but permits

¹ The relevant provision in the Telecommunicators’ contract ties the benefit level to that in effect as of June 1, 2004, but the difference in dates is not material to this award.

the City to change healthcare providers. Further, provider networks are not considered coverage or benefits under the health care plan, the usage of the Aurora network was not so extensive that the loss of it makes the WPS plan unequal to the Humana plan and the City did offer an additional plan, Health EOS, which included access to the Aurora network for those employees who wanted it, while keeping the cost of the WPS plan within the contract parameters. In fact, the employees have not had their benefits reduced, but have had them enhanced by the switch to WPS.

The Union argues that the contract requires that the health plan offered by the City include access to the Aurora network of providers. The contract contains no such requirement. The Union could have bargained for such language, but did not. In changing to WPS, therefore, the City did no more than exercise its contractual rights. The Union agrees that the City may change healthcare providers and that any such change will result in some disruption. Patricia Jehn, a longtime insurance professional, testified that no two networks are identical. Union witnesses did not dispute this. It is also true that provider networks may change during the term of a contract as provides join or leave insurance networks. For this reason, the contract does not guarantee that an employee will be able to stay with the same physician through the term of the contract, or that all providers will remain within the network. The Union's argument that the City cannot change from Humana to WPS because the Aurora network is not included is, therefore, unsupported by the contract.

The Union's position is apparently based on its belief that a provider network associated with a health insurance plan is a "benefit" of the plan and that, therefore, retention of the network is a requirement of switching plans in order to comply with the contract requirement that the replacing coverage be equal to or greater than the previous coverage. Coverage under a health plan, however, is determined by the Certificate of Coverage or Plan Document, which defines the benefits payable under the plan. Thus, benefits are defined in terms of services, such as office visits, hospital care, prescription drugs, eye exams and the like. Coverage is defined as the degree to which the costs of the various benefits are covered under the plan. COLES COUNTY, 117 LA 462 (Peterson, 2002)

The Union also maintains that the loss of the Aurora network had such a dramatic effect on the employees that it renders the WPS plan incomparable. The record reveals otherwise. City records reveal that, on a city-wide basis, over 85% of 2008 claims would have been covered under the WPS plan and that only 7.7% of claims paid in 2008 were paid for visits to Aurora providers. Further, of all eligible city employees only three union employees and four non-union employees have opted for the HealthEOS network that includes Aurora.

The City offered the WPS plan, as it had the right to do under the contract, and the cost of participating in the WPS plan is consistent with the contract provisions. The contract also permits the City to offer additional insurance programs, which it did by offering the HealthEOS plan. Health EOS was added separately from the WPS plan in order to retain access to the Aurora network for those employees that desired it because WPS does not have a direct relationship with Aurora. There is additional cost to opting for the Health EOS plan due

to the cost of access to the network, as well as the fact that Aurora is a higher cost care system. This also resulted in additional cost to the City. Nothing in the contract requires the City to add an expanded network with additional programs, but neither does it prohibit it from doing so at additional cost. Had the City not offered HealthEOS the WPS plan would have been equal or better than the Humana plan and the addition of the HealthEOS plan does not, then, make the switch to WPS a violation of the contract.

DISCUSSION

The grievances at issue here involve the City's decision in November 2009 to change health insurance providers from Humana to WPS, which did not include Aurora group healthcare providers in its preferred provider network. The Union concedes that the contract gives the City the authority to unilaterally change insurance providers, but with the caveat that the replacing coverage must be equal to or better than the benefits in effect in June 2002. It is the Union's contention that provider networks constitute benefits under the health insurance provision and that the elimination of the Aurora network by the change to WPS rendered the replacement coverage inferior to the benefits previously in effect. The Union also takes issue with the City's offering of an additional plan, HealthEOS, which included Aurora, at additional cost. The Union thus contends that the net effect of the switch to WPS was that bargaining unit members either received reduced benefits or had to pay more for the same level of benefits, in either case violating the contract.

The operative language in both collective bargaining agreements is the same:

"The City shall have the right to change the healthcare provider during the term of this Agreement; the replacement coverage shall be equal to or greater than the benefits in effect as of June 1, 2002. In the event a successor agreement is not reached as of the effective date of the expiration of this Agreement, these benefits, as well as the City's premium contribution, shall be subject to the dynamic status quo document."

The question posed by these grievances is whether the coverage provided by the WPS plan was equal to or greater than the benefits in effect as of June 1, 2002. The record does not provide detail as to what benefits were in effect on June 1, 2002, however, so I will assume, *arguendo*, that they were identical to the benefits in effect at the time of the switch to WPS.

From the Union's point of view, the key difference between the WPS plan and the predecessor plans was the exclusion of the Aurora system of healthcare providers. The Union does not assert that the exclusion of a particular provider or group of providers from the network is *per se* a reduction in the level of benefits, such that it violates the contract. Rather, it asserts that the Aurora system is unique due to the extensive number of providers it includes and the fact that, in the Union's view, the City had previously recognized the importance of retaining the Aurora system. The City counters by pointing out the vast number of providers, other than Aurora, included under the WPS plan and the number of benefit enhancements that

WPS provided that were not included under the Humana plan. It also notes that the Aurora system was not widely used by City employees when it was included and that, for those employees who wanted access to Aurora, it offered a separate plan, HealthEOS, which includes Aurora at an additional cost.

The Union presents a novel theory. Typically, as the City's authorities indicate, insurance benefits are defined as those healthcare services that are included within the plan and coverage constitutes the degree to which the benefits are paid for under the plan. The Union asserts, however, that under certain circumstances a network of healthcare providers can be considered a benefit under a healthcare plan, the elimination of which by a successor plan would render it inferior to the predecessor plan. The circumstances it lists here under which this might occur are where 1) the parties have agreed that a certain provider is to be included in the plan, 2) the network includes a significant percentage of the providers utilized by the bargaining unit, or 3) the network comprises such a large component of the local healthcare providers that its elimination would significantly limit the access of employees to healthcare services. Arguably, there is merit to this assertion. Certainly, where there is an agreement between the parties, or where the loss of a provider network would eliminate access to the other plan benefits, such network could be considered so inextricably tied to the plan that it could be considered a benefit in its own right. The benefits offered under the plan would be significantly diminished if there were no providers available to provide them or if access to them involved additional cost. On the other hand, both the Humana and the WPS plan documents explain that the list of in-network providers is subject to change and that participants may not always have access to the same providers. As it happens, however, I do not find that the circumstances listed above exist in this case, making such an analysis unnecessary.

In the first place, the evidence in the record is insufficient to establish an understanding between the parties that the inclusion of Aurora was a defined benefit under the contractual healthcare plan. The testimony of Union Representative John Dillon on this point was that in 2008 the Mayor approached the Union and indicated the City was taking bids for a new insurance carrier and wanted to keep the Aurora system within its network, if possible. It ultimately selected Humana, which included Aurora, as the carrier for 2009. The testimony of Mayor John Johnson was that he discussed the change of carriers with the Union and that controlling costs, as well as retaining Aurora as a provider, motivated the City's decision to switch to Humana. While this testimony indicates that the City did consider retaining Aurora as desirable, it is not a reflection that the City considered Aurora a defined benefit under the plan and does not rise to the level of an agreement between the parties that access to Aurora was a component of the health plan.

The evidence also does not support a finding that the Aurora network was particularly extensively used by members of the bargaining units. In 2008, when Aurora was within the preferred provider network, only 7.2% of claims paid on a city-wide basis were paid to Aurora providers. The data is not broken down to indicate to whether Aurora providers were used by bargaining unit employees to a greater or lesser extent than the city-wide experience, but

neither is there evidence suggesting a departure. After the City switched to WPS and introduced the HealthEOS plan, the employees had the option of selecting providers within the WPS network, keeping their Aurora providers on an out-of-network basis, or selecting the HealthEOS plan, which included Aurora in its provider network, at additional cost. So far as the record before me indicates, only one bargaining unit member opted to switch to the HealthEOS plan in order to retain access to Aurora providers. Four other employees responded to an email questionnaire from Dillon, indicating that they had used Aurora providers before the switch and would have continued to do so had Aurora remained within the network. Nonetheless, the employees did apparently find other satisfactory providers within the WPS network. These figures do not persuade me that Aurora's usage by the bargaining units was so significant, or so much more desirable, in comparison to other providers that its removal from the plan network reduced the quality of the plan benefits in a marked degree.

Finally, the record reveals that Aurora is, indeed, a major healthcare provider in the Muskego area. In fact, Union Exhibit #1 lists four pages of Aurora doctors, clinics, hospitals and pharmacies throughout Southeast Wisconsin. Nevertheless, the WPS network is likewise very extensive, including a large number of clinics, doctors, pharmacies and hospitals in the greater Milwaukee area. Just the list of in-network providers actually used by City employees in 2010 comprises most of a four page printout. Consequently, it does not appear to me that there is a strong argument here that the switch to WPS had a significant impact on whether the employees had access to an adequate number of providers, only on their ability to exercise their preferences and, as noted above, even this inconvenience does not seem to have affected many employees.

In addition, when evaluating the comparative quality of the insurance plans, the additional benefits included in the WPS plan must also be considered. Patricia Jehn, an agency manager for WPS, described the benefits in the WPS plan that were not part of the Humana plan. These include waiver of co-pays and quantity limits for diabetic supplies, payments to independent anesthesiologists, pathologists and radiologists at the in-network rate, increase in the number of mammograms to one per year, payment of refractions as part of eye examinations, payment for pre-authorized non-emergency ambulance transportation, elimination of a \$5000 cap for durable medical equipment, increase in coverage for confinement in a skilled nursing facility from 60 days per year to 60 days per confinement, nutritional counseling up to \$500 per year, limited acupuncture coverage and payment for out of network prescription drugs at preferred pharmacy rates. Taken together, it seems to me that these enhancements make the WPS plan at least equal to, if not better than, the Humana plan. In sum, therefore, assuming *arguendo* that a provider network could constitute a "benefit" under the plan, I do not find that the loss of access to Aurora in this case materially altered the quality of the other benefits under the plan such that the WPS plan was not equal to or better than the coverage it replaced.

Finally, the City offered employees who wanted to keep their Aurora doctors the option of enrolling in the HealthEOS plan, which included Aurora. The Union objects to this on the basis that in its view the City is merely charging the employees more money to keep the same

plan they had under Humana. The City views HealthEOS as an additional insurance program, offered pursuant to the health insurance provision. The Union concedes that there is no guarantee that an employee can always keep his or her preferred healthcare providers, even under the same plan and, as noted above, I have determined that in this case the loss of Aurora did not automatically render the WPS plan inferior to Humana's. Thus, I find that the employees had no reasonable expectation of being able to maintain their Aurora coverage under the WPS plan. That being said, the HealthEOS plan was, as the City argues, an additional insurance plan offered specifically for those employees who desired to continue using Aurora providers, albeit at an additional cost. The employees were not required to subscribe to HealthEOS and so the fact that they had to pay extra for it was not a violation of the contract.

For the reasons set forth above and based upon the record as a whole, I hereby enter the following

AWARD

The City did not violate the collective bargaining agreement, specifically Article 12 of the Police Association agreement, when it changed, for calendar year 2010, the City's healthcare provider from Humana to WPS and offered the employees the HealthEOS plan at additional cost. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 10th day of February, 2011.

John R. Emery /s/

John R. Emery, Arbitrator