

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE POLICE ASSOCIATION

and

CITY OF MILWAUKEE

Case 599

No. 71508

MA-15151

(Smoking Cessation Violation)

Appearances:

Mr. Brendan P. Matthews, Attorney, Cermele & Matthews, S.C., 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, appearing on behalf of Milwaukee Police Association.

Mr. Thomas J. Beamish, Assistant City Attorney, City of Milwaukee, Office of the City Attorney, Milwaukee City Hall Suite 800, 200 East Wells Street, Milwaukee, Wisconsin, appearing on behalf of the City of Milwaukee.

ARBITRATION AWARD

Milwaukee Police Association, hereinafter "Association" and the City of Milwaukee, hereinafter "City," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators from which to select a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was selected. The hearing was held before the undersigned on August 15, 2012 in Milwaukee, Wisconsin. The hearing was transcribed. The parties submitted briefs and reply briefs, the last of which was received by October 22, 2012, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Association frames the substantive issues as:

Whether the City violated Article 21 of the 2007-2009 collective bargaining agreement in the manner in which it determined the employee premium contributions for persons determined to be smokers? If so, what is the appropriate remedy?

The City frames the substantive issues as:

Whether the City violated Article 21 of the 2007-2009 collective bargaining agreement in the manner in which it determined the employee premium contributions for persons determined by the HRA to be tobacco users? If so, what is the appropriate remedy?

Having considered the facts and arguments of the parties and the absence of the term “tobacco users” from the parties’ collective bargaining agreement, I accept the Association’s framing of the issue.

RELEVANT CONTRACT LANGUAGE

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ARTICLE 21 HEALTH INSURANCE

1. Benefits

a. Basic Plan

During the term of this Agreement, Basic Plan health insurance benefits shall be the same as the Basic Plan benefits that were provided in the 2004-2006 City/Association Agreement, including the following:

...

e. Provisions Applicable to All Plans:

(1) The City will not pay for any services or supplies that are unnecessary according to acceptable medical procedures.

...

(6) An annual Health Risk Assessment (HRA), which shall include basic biometrics, a written health risk assessment

questionnaire and a blood draw, shall be implemented as soon as practicable following execution of the Agreement.

- (7) Both a Wellness and Prevention Program and Committee shall be implemented. A description of both the program and the committee is appended hereto as Appendix I.

. . .

3. Cost of Coverage – Basic Plan or HMO Plan

a. Employees in Active Service

(1) Basic Plan – Calendar years 2007, 2008, 2009

(a) Prior to implementation of a Health Risk Assessment (HRA), an employee enrolled in the Basic Plan shall contribute an amount toward meeting the subscriber cost in the Basic Plan of \$75.00 per month for single enrollment when such employee's enrollment status is single and \$150.00 per month for family enrollment when such employee's enrollment status is family.

(b) Effective the first full calendar month following implementation of the annual HRA, but not sooner than January 1, 2009, for active employees enrolled in the Basic Plan, the employee contributions shall be as follows:

i. The employee contribution shall increase to \$85.00 per month for single enrollment when an employee's enrollment status is single and to \$170.00 per month when an employee's enrollment status is family.

ii. The employee contributions shall also increase \$20.00 per month over the amounts specified in 3.a.(1)(b)i., above, for each adult covered by the plan (maximum of two, excluding dependent children) who chooses not to fully participate in and complete the HRA.

- iii. For an employee in the single plan and for an employee and his or her spouse (if applicable) in the family plan who participate fully in the HRA and who do not smoke (as determined by the HRA), the employee contribution shall be \$75.00 per month for single enrollment when an employee's enrollment status is single and \$150.00 per month for family enrollment when an employee's enrollment status is family. The amount of employee contribution shall be deducted from the employee's pay check on a monthly basis. Any subscriber costs for single or family enrollment in excess of the above-stated amounts shall be paid by the City.

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(3) HMO – Calendar Year 2009

- (a) Effective January 1, 2009, an employee enrolled in an HMO plan shall contribute \$20.00 per month toward the monthly subscriber cost of the HMO plan when such employee's enrollment status is single and \$40.00 per month toward the monthly subscriber cost of the HMO plan when such employee's enrollment status is family.
- (b) Effective the first full calendar month following implementation of the annual HRA but not sooner than January 1, 2009, an employee enrolled in an HMO plan shall contribute the following amounts:
 - i. An employee shall contribute \$30.00 per month toward the monthly subscriber cost of the HMO plan when such employee's enrollment status is single and \$60.00 per month toward the monthly subscriber cost of the HMO plan when such employees' enrollment status is family.
 - ii. An employee shall also contribute an additional \$20.00 per month over and

above the amount specified in (3)(b)i., above, for each adult (maximum of two, excluding dependent children) who chooses not to fully participate in and complete the HRA.

- iii. For an employee in a single HMO plan and for an employee and his or her spouse (if applicable) in a family HMO plan who participate fully in the HRA and so do not smoke (as determined by the HRA), the employee contribution shall be reduced to \$20.00 per month for single enrollment when an employee's enrollment status is single and \$40.00 per month for family enrollment when an employee's enrollment status is family.

...

APPENDIX I

WELLNESS AND PREVENTION PROGRAM AND WELLNESS AND PREVENTION COMMITTEE

A Wellness and Prevention Program and a Wellness and Prevention Committee shall be implemented to promote the wellness and prevention of disease and illness of City employees, retirees and their family members. The Wellness and Prevention Program shall include an annual Health Risk Assessment (HRA) and may contain, but shall not be limited to, some or all of the following components: benefit communication, medical self-care, nurse line, consumer health education, injury prevention, advanced directives, preventative medical benefits, target at-risk intervention, high-risk intervention, disease management, condition management, wellness incentive or other components agreed upon by the City and the unions.

The City shall retain a consultant to assist in developing a plan for a comprehensive wellness and prevention program for the City and to assist in making program adjustments.

A Wellness and Prevention Committee shall be established to assist the consultant in the design of the Wellness and Prevention Program and to provide oversight of the program. The Wellness and Prevention Committee shall be

comprised of nine union members appointed by the unions and three management representatives appointed by the Mayor. The unions shall select the nine union representatives. The committee shall be structured to include two MPA members determined by the MPA.

Decisions of the committee shall be by consensus. Consensus shall be reached when ten committee members agree. The committee shall make no decisions that require employees to pay additional out-of-pocket costs unless they are ratified by every City bargaining unit. However, the committee may decide to provide additional lump sum compensation to employees, reduce an out-of-pocket monthly expense or provide some other type of benefit without ratification by the bargaining units. No decision made by the committee or failure to make a decision shall be subject to any aspect of the various grievance procedures, complaint procedures, court action or any other type of dispute resolution mechanism.

The City shall develop a Request for Proposals (RFP) and solicit bids from third party vendors qualified to implement the Wellness and Prevention Program. Upon conclusion of the bidding process, the City shall meet with the unions to review the results of the RFP. The committee shall decide on the vendors giving due consideration to all City policies associated with the selection procedures. The City shall not spend more than two million dollars per year, including the cost of conducting the HRA, on the Wellness and Prevention Program.

All parties involved with the HRA shall abide by all laws governing the release of employee medical records.

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BACKGROUND AND FACTS

The Association and City are parties to a series of collective bargaining agreements including the 2007-2009 agreement which was executed on October 25, 2007. The 2007-2009 agreement created a Wellness and Prevention Program, a Wellness and Prevention Committee, and included health insurance premium reductions for bargaining unit members, retirees, and family members that engaged in behaviors which promoted wellness and prevention of disease and illness. The Association was the first of the City's 18 labor unions to agree to the concept of wellness and thereafter, identical language was negotiated and included in all of the other 17 bargaining unit agreements.

Implementation of the Wellness and Prevention Program began in 2010. MPA members completed the online written assessment questionnaire during the fall of 2010. At that time, Part 6 of the 12 section questionnaire read in part:

...

SMOKING STATUS

- never smoked
- quit smoking
- presently smoke

SECONDHAND SMOKE

Are you often exposed to other people's smoke at home or work?

- yes
- no

...

Following completion of the online assessment, bargaining unit members were required to submit to a blood draw. The blood draw identified individuals that were tobacco users which included smokers, as well as individuals that chewed tobacco and/or used a nicotine patch. The City communicated to those individuals that they were subject to the higher health insurance premium unless they completed a 90 minute educational program.

Later that fall, but earlier than September 10, 2010, the written assessment questionnaire was modified and a question was added asking whether the individual used tobacco products.

On September 10, 2010 the City's Wellness Committee met and discussed a variety of items including, "[a] question [that] was added to the Health Assessment regarding tobacco use in addition to the question about smoking." The Committee discussed tobacco use and smoking, but did not vote on the topic. The minutes indicate that the Committee recognized that a 90 minute tobacco education program was available to employees (and spouses) and that "[t]his process attempts to avoid future grievance procedure.

This grievance was filed on October 13, 2010 alleging as follows:

The Wellness Committee violated Article 21, Section 3.a.(3)(b) iii., when it based a reduction of medical premium on no "tobacco" usage, as opposed to the contractual language which bases that reduction on not "smoking." See Wellness Committee notes of 9-10-10 attached. This grievance is filed on behalf of the following member and all other members similarly situated.

Additional facts, as relevant, are contained in the DISCUSSION section below.

DISCUSSION

The issue in this case arises out of the City's decision to deny both tobacco users and smokers the reduced health insurance premium, rather than just those members who self-

identified as smokers in the questionnaire. The Association asserts that the contract language is clear and unambiguous and that only smokers are subject to the higher health insurance premium. The City takes the position that the language is not clear, that the parties' bargaining history must be considered, and that when it is, it is clear that the parties intended to utilize the objective blood draw to identify tobacco users who were then subject to the higher health insurance premium.

This is a contract interpretation case. The interpretative process involves ascertaining the parties' intended meaning of the terms and provisions of a collective bargaining agreement. A contract term is ambiguous if it is susceptible to more than one meaning. Elkouri & Elkouri, *How Arbitration Works*, 6th ed., p. 434 (2002). If the words are plain and clear and convey one distinct idea, then it is unnecessary to resort to interpretation or extrinsic evidence. *Id.* Alternately, if the language is ambiguous, then extrinsic evidence and the principles of contract and statutory interpretation serve as guides to determining the parties' intent. Relevant extrinsic evidence includes bargaining history, past practice and the parties' course of dealing. *Id.* At 438. See also St. Antoine, *Common Law of the Workplace*, p. 68 (1998).

Article 21, subsections 3.a.(1)(b)iii and 3.a.(3)(b)iii, contain comparable language which provides that employees "who participate fully in the HRA and who do not smoke (as determined by the HRA) ..." are entitled to the reduced employee health insurance contribution. I start with the clause "who do not smoke." The Association asserts that the plain meaning of this language dictates that only smokers are subject to the higher health insurance premium. This is the heart of the Association's argument, but it fails because the Association is ignoring the language that follows "who do not smoke". Immediately after the words "who do not smoke" is the parenthetical "(as determined by the HRA)". The parenthetical modifies "who do not smoke." Had the parties not included the modifier, the clause would have ended with the word "smoke". I would agree with the Association's reading of the language. But that is not the case. The parties elected to further define what "who do not smoke" means relying on the HRA results to "determine" which employees fully participated in the HRA and were eligible for the reduced insurance premium.

The parties defined full participation in the HRA in subsection 1.e.(6):

(6) An annual Health Risk Assessment (HRA), which shall include basic biometric, a written health risk assessment questionnaire and blood draw, shall be implemented as soon as practicable following execution of this Agreement

This language establishes that the parties agreed to three components to the HRA. The biometric is not at issue in this case, thus leaving the written health risk assessment questionnaire and the blood draw to "determine" who is a smoker. The labor agreement is silent as to the inter-relationship and import of the assessment questionnaire and blood draw. While it is possible that they are to be considered equally, it is also possible that the one has priority over the other. As such, the language is ambiguous and it is necessary to consider

extrinsic evidence, including bargaining history and the parties' manner of dealing, to discover the parties' intended meaning.

The bargaining history establishes that the language in dispute was created by the parties' primary negotiators while engaged in one-on-one conversations. The City's negotiator was Troy Hamblin and the Association's negotiator was then MPA President John Balcerzak. Balcerzak is no longer the MPA President and did not testify at hearing. Hamblin testified that he and Balcerzak considered using solely the assessment questionnaire to determine who was a smoker, but that Balcerzak pointed out that some employees would lie and therefore the parties needed to have an objective test - the blood draw - to test for the presence of nicotine. Hamblin further testified that he and Balcerzak initially discussed ending the clause in question without the parenthetical "(as determined by the HRA)," but concluded that that was too restrictive. Hamblin's testimony establishes that the parties understood that the blood draw would identify not only smokers, but anyone who used tobacco containing nicotine, and further that those individuals would be subject to the higher health insurance premium if they did not attend the 90 minute education program.

MPA Vice President Mark Beutow was a trustee of the MPA during the 2007-2009 negotiations and served on the Wellness Committee at the time that the HRA and wellness program were being implemented. Beutow testified at hearing that the parties only contemplated the identification of smokers when the labor agreement was negotiated. While I understand that that is what Beutow believed and possibly was told by Balcerzak, he was not present during the negotiations and therefore is not credible in this regard.

Moving to the parties' manner of dealing, the initial assessment questionnaire asked the employee whether they smoked, but the questionnaire was later modified to add a question asking whether the employee used tobacco products. The Association concludes that this is evidence that the City changed its intent and interpretation of the language. The record does not support this conclusion. First, Hamblin testified and Beutow acknowledged that the modification was at the request of the MPA. Second, the evidence indicates that Wellness Committee's September 2010 minutes utilized the terms "tobacco usage" and "tobacco education participation" rather than "smoker" or "smoking cessation education." Thus, as of the time of implementation, the parties understood that tobacco rather than solely smoking was the wellness concern. It is possible that in 2007, when the parties negotiated the language in question, that they didn't fully understand the implication of including "who do not smoke" in the labor agreement and accepting that that term was in-artful and deceptive, the bargaining history and the parties manner of dealing support the City's position.

As to the Association argument that the rule of *contra proferentem* applies in as much as the City proposed and drafted the language in dispute, the evidence does not support that conclusion. Hamblin testified that he may have created the first draft of the language, but thereafter he and Balcerzak exchanged drafts and made revisions.

Finally, the City characterizes the parties' selection of wording as designed to paint with the "broadest brush possible to avoid grievances." While I understand the City (and Association's) desire to avoid grievances, I concur with the Association that this makes no sense given the language chosen.

AWARD

1. No, the City did not violate Article 21 of the 2007-2009 collective bargaining agreement in the manner in which it determined the employee premium contributions for persons determined by the HRA to be smokers.
2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 18th day of January, 2013.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator