BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (IAFF) LOCAL 316

and

CITY OF OSHKOSH

Case 392
No. 71848
MA-15219

(Health Risk Assessment Grievance)

Appearances:

Michael Wos, Secretary-Treasurer, IAFF Local 316, P.O. Box 1428, Oshkosh, Wisconsin 54903, appearing on behalf of the Union.

William Bracken, Labor Relations Coordinator, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City of Oshkosh.

ARBITRATION AWARD

The International Association of Fire Fighters (IAFF) Local 316, hereinafter referred to as the Union, and the City of Oshkosh, hereinafter referred to as the City or Employer, are parties to a collective bargaining agreement that provides for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the Health Risk Assessment grievance. A hearing was held in Oshkosh, Wisconsin on March 12, 2013. The hearing was transcribed. The parties filed briefs and reply briefs, whereupon the record was closed on May 10, 2013. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

> Did the City of Oshkosh violate the collective bargaining agreement between International Association of Fire Fighters Local 316 and the City of Oshkosh when it unilaterally implemented changes to the long standing Health Risk Assessment (HRA) Program employees must participate in order to receive a preferred premium contribution rate towards their health insurance? If so, what is the appropriate remedy?

The City framed the issue as follows:

> Did the City violate Article X, Section A of the 2012-14 Contract when it implemented the 2013 Health Risk Assessment (HRA) program? If so, what is the appropriate remedy?

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

> Did the City violate the collective bargaining agreement when it changed from using the fingerstick method to the venipuncture method for drawing blood for those employees that participate in the City's Health Risk Assessment (HRA) program? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2012-14 collective bargaining agreement contains the following pertinent provisions:

ARTICLE II

MANAGEMENT RIGHTS

> The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement.
>
> The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent or purposes of this agreement.

. . .

ARTICLE X

INSURANCE:

A. Medical Benefits Plans

The Employer shall provide health coverage.

Health Risk Assessment (HRA): Employee participation in the City's Health Risk Assessment (HRA) program is voluntary. To receive the preferred premium contribution rate, the employee must participate in the HRA. Participation by the employee's spouse in the HRA is encouraged but not required. Participation in the follow-up coaching program is recommended and is offered on a voluntary basis.

The City reserves the right to offer an HRA and select the HRA administrator in its sole discretion. The City shall pay for the costs to provide the HRA. In the event the City elects to discontinue the HRA program, employees shall contribute the preferred employee health insurance rates.

The City shall not be entitled to nor shall it receive individual participant HRA reports or information. The information received by the City concerning the HRA of participants shall be limited to an aggregate summary report which does not include individually identifiable information.

1. EMPLOYEE CONTRIBUTIONS WITH HEALTH RISK ASSESSMENT (HRA)

Effective January 1, 2011, employees will contribute up to 7% up to a maximum of $57 per month towards single; $104 per month towards dual and $144 towards the family premium equivalents.

Effective November 1, 2012, employees will contribute up to 11% up to a maximum of $76.10 per month towards single; $136.96 per month towards dual and $190.22 towards the family premium equivalents.

Effective January 1, 2013, employees will contribute up to 12% up to a maximum of $90.00 per month towards single; $161.00 per month towards dual and $224.00 towards the family premium equivalents.

Effective January 1, 2014, employees will contribute up to 12% up to a maximum of $97.00 per month towards single; $174.00 per month towards dual and $242.00 towards the family premium equivalents.

2. EMPLOYEE CONTRIBUTIONS WITHOUT HEALTH RISK ASSESSMENT (HRA)

Effective January 1, 2011, employees will contribute up to 10% up to a maximum of $82 per month towards single; $148 per month towards dual and $205 towards the family premium equivalents.

Effective November 1, 2012, employees will contribute up to 14% up to a maximum of $96.85 per month towards single; $174.32 per month towards dual and $242.10 towards the family premium equivalents.

Effective January 1, 2013, employees will contribute up to 15% up to a maximum of $112.00 per month towards single; $202.00 per month towards dual and $280.00 towards the family premium equivalents.

Effective January 1, 2014, employees will contribute up to 15% up to a maximum of $121.00 per month towards single; $218.00 per month towards dual and $302.00 towards the family premium equivalents.

. . .

ARTICLE XIV

RULES AND REGULATIONS

The Employer may adopt and publish rules which may be amended from time to time, provided, however, that such rules and regulations shall be first submitted to the Union for its information prior to the effective date.

This article in no way will affect the rules and regulations falling under the jurisdiction of the Police and Fire Commission as set forth in state statutes. The Employer agrees that any rules or regulations pertaining to wages, hours, and conditions of employment whether now in force or hereafter adopted shall be voided by this agreement.

ARTICLE XV

NEGOTIATIONS

Negotiations shall proceed in the following manner: the party requesting negotiations shall notify the other parties in writing of its request not earlier than the 1st day of May nor later than June 1st. An initial meeting of the parties shall be called by the 1st of August. The party upon whom such request is made shall

have the opportunity to study such request and make an offer or counter offer to the other party within fifteen (15) days thereafter.

. . .

ARTICLE XVII

PRESENT BENEFITS

The parties agree to maintain the present level of benefits and policies that primarily relate to mandatory subjects of bargaining, not specifically referred to in this agreement. This provision is expressly limited to mandatory subjects of bargaining.

. . .

ARTICLE XX

RETENTION OF RIGHTS

Each party to this agreement retains all rights possessed by it or them under Wisconsin or Federal Laws, regulations or statutes. In the event that any clause, provisions or portions of this agreement is held invalid or inoperative such invalidity or inoperativeness shall not affect other clauses, provisions or portions of this agreement. The parties hereby declare that their intent that all clauses, provisions and portions of this agreement are severable.

If said invalidity arises through conflict with a specific statute, then the statute shall govern that portion of the agreement which is in conflict, and negotiations shall be instituted to adjust the invalidated clause.

. . .

ARTICLE XXII

REOPENER

If, during the course of the contract year, any article of this agreement may be opened for negotiations by mutual consent of both parties to this agreement, negotiations under this article shall be restricted to that article in the request for discussion.

BACKGROUND

The City of Oshkosh operates a Fire Department. The Union is the exclusive collective bargaining representative for most of the employees in the Fire Department.

The parties reached a tentative agreement on a 2012-2014 collective bargaining agreement in August, 2012. The tentative agreement was subsequently ratified by both sides.

. . .

The City has a wellness program for employees. The mission of the Oshkosh Wellness Program is to promote and provide wellness education and programs to the City of Oshkosh employees, enabling healthy lifestyle choices and continuous quality improvement. A Wellness Committee, comprised of employees from different departments in the City, attempts to effectuate that mission/goal.

One part of the City's overall wellness program is the Health Risk Assessment (hereinafter HRA) program. The City has offered an HRA program to all City employees and their spouses since 2004. The program is designed to solicit information from employees and their spouses with respect to the status of their health through a questionnaire and blood analysis. Employees receive personal reports of the results. Specifically, they receive a report summarizing their results from their blood draw and an analysis of their health risks. The City receives an aggregate report summarizing the results from all City participants compared to the region and nation. There is no personally identifiable information contained in the aggregate report. The City's Wellness Committee then uses the information in the aggregate report to design programs to reduce health care costs for the employer and employees, while improving the health needs of the group. Some examples of the kinds of wellness programs offered to employees are Health Tips newsletters, weight watchers incentives, flu vaccines, smoking cessation clinics, walking and other exercise programs, promoting health awareness such as weight scales in city bathrooms, health fairs, informing employees via demonstrations such as food portion sizes, and stress/depression workshops. Employee participation in any of the health initiatives programming is voluntary. One goal of the HRA program is to identify potentially life-threatening illnesses far enough in advance so employees could take appropriate action.

Employees who voluntarily elect to participate in the HRA program select a convenient time during the work day, complete a health-related questionnaire, receive a brief counseling session and overview of the process, supply height, weight and other measurements and submit to a blood draw. Prior to 2013, blood was drawn via a finger puncture (known as a fingerstick).

Another goal of the HRA program (besides healthier employees) is also to save costs for both the City and employee. The City's health plan is self-funded, so any savings to the plan reduces costs to the City and, in turn, to employees who contribute a portion of the costs.

While participation in the HRA program is voluntary, employees who participate in the HRA program save three percent (3%) on their contribution towards the health insurance premium. Thus, the parties negotiated and agreed upon a 3% differential with respect to health insurance premiums as an incentive to participate in the HRA.

In 2013, the City changed one of the features of the HRA program. That change, which will be noted below, prompted the instant grievance.

FACTS

Prior to 2013, the administrator for the City's HRA program was Aurora Health Care. They have been the administrator for the City's HRA program since its inception in 2004.

In 2012, the City sought requests for proposals (RFPs) from a number of providers, including the HRA. Because of turnover in the City's Human Resources Department, the City did not even formally evaluate all of the RFPs received. Instead, the City remained with Aurora as the administrator of the City's HRA program.

Aurora's bid to provide HRA services included possible changes to how blood was drawn. As noted above, the existing method for drawing blood was the fingerstick method. Aurora's bid included another option known as the venipuncture method. Here are the pertinent details. The (existing) fingerstick blood draw option provided health information on seven health indicators at a cost of $40.00 per person. The Aurora bid included two venipuncture options whereby blood was drawn via a vein puncture. The venipuncture Option 1 test included the same seven health indicators as the fingerstick method at a cost of $33.00 per person. The venipuncture Option 2 tested for the same seven indicators, plus an additional 16 separate health indicators (for a total of 23 health indicators) at a cost of $38.46 per person. The reason for the slightly less cost using the venipuncture method is due to the technology involved. With the fingerstick method, Aurora processed a participant's blood onsite using a machine that analyzed the blood and provided instant results on the seven health indicators. With the venipuncture method, blood is processed through Aurora's lab at less cost.

The City decided to implement venipuncture Option 2 for the 2013 HRA program. It did so for these two reasons. First, there were slightly reduced costs to the City. Second, it generated additional health information that could possibly lead to better programming offerings to employees to improve their health.

This change from the fingerstick blood draw to the venipuncture blood draw affected all City employees that participate in the City's HRA program.

The aforementioned change was the first time that the City changed the method of drawing blood since the inception of the City's HRA program.

In the fall of 2012, the City notified employees of this change in a notice entitled "The City of Oshkosh Wellness Program". That document provided in pertinent part:

. . .

What's New!

- *New paper HRA Questionnaire*
    - This new convenient and confidential personal health assessment will provide you with much needed information so that you can manage your current health status and, more importantly, possibly prevent health problems before they occur.
- *Full venipuncture blood draw* ***(12 hour fast required)***
    - By having a blood draw you are able to have results for many more blood chemistries than you would with a fingerstick. We encourage you to share this important information with your doctor. The blood draw will include results on: Total Cholesterol, HDL, LDL, Glucose, Triglycerides, GGT (liver), Calcium, Uric Acid, Albumin, Cotinine (tobacco), and 10 other blood chemistries. Plus the vitals will be taken for height, weight, blood pressure, body fat %, and BMI.

. . .

The City currently has three bargaining units: police, firefighters and transit. Unions representing the police and transit employees did not grieve this change from using a fingerstick method to a venipuncture method for obtaining a blood sample from participants in the HRA program. The firefighters union did grieve this change. Their grievance was processed through the contractual grievance procedure and was appealed to arbitration.

Some additional facts will be referenced in the **DISCUSSION**.

POSITIONS OF THE PARTIES

Union

The Union's position is that the City violated the parties' collective bargaining agreement when it voluntarily implemented changes to the longstanding HRA program. In the Union's view, the unilateral changes which the City made to the HRA program are unreasonable, too invasive, not *de minimis*, not necessary, not justified and exceed the scope

of the agreed-upon HRA. Additionally, the Union avers that the City's evidence does not conclusively establish that the change in the method of drawing blood "saves money or produces results for better programming." It elaborates on these contentions as follows.

The Union begins by making the following arguments that it believes are necessary to put this dispute in an overall context. First, it notes that the HRA program is part of the City's wellness program. It characterizes the City's wellness program as follows: "don't drink, don't smoke, don't overeat, wear your seatbelt and exercise more." Having given that overview of the program, it opines that the HRA does not save the City money. It also maintains that the HRA results can be skewed. Second, it asserts that the HRA program is not truly voluntary, because "employees are essentially forced to participate in order to save money." Third, it notes that in mid-2012, the Union reached agreement with the City on a 2012-2014 collective bargaining agreement. According to the Union, it was a concessionary contract that was not an "easy sell" to the membership. The Union points out that within a few weeks of contract ratification, the City made a change in how the blood draw was taken for HRA participants. The Union avers that its members – who are paramedics – do not see this change as reasonable or beneficial. Fourth, the Union maintains that "whether the City likes it or not", even after the passage of Act 10 the Union still has collective bargaining rights and that insurance premium contributions are a mandatory subject of bargaining. Fifth, it avers that the City has an "agenda" of shifting health costs to employees and reducing total compensation. It notes in this regard that represented employees already contribute 1% more towards the health insurance premiums than non-represented city employees.

Next, in its initial brief, the Union disputes 29 matters that involve statements made at the hearing by the City's representative and/or its witness, or are simply things that the Union views as being factually disputed. Those matters are not identified here, but are found on pages 26-36 of the Union's initial brief.

Next, the Union argues that the new method of blood draw violates seven different provisions in the contract. First, it contends that it violates the Management Rights clause because the unilateral changes which the City made to the blood draw were done to "undermine the Union and evade the provisions of the collective bargaining agreement." Second, it avers that the Employer's actions violate Article X, Section A (the HRA provision). As the Union sees it, that article gives the City the following four rights: 1) to offer an HRA program; 2) to select the HRA administrator; 3) to discontinue the HRA program; and 4) to receive an aggregate summary report. The Union argues that those are the only four rights the City retained to itself concerning the HRA program. Building on that, it's the Union's view that the City does not have the right to make changes to the HRA program (since that is not one of the four rights expressly granted to the Employer). As part of its argument concerning this provision, the Union also contends that the quid pro quo for the preferred premium contribution was a "very specific HRA program" that "both parties agreed to." Thus, the Union maintains that the parties negotiated a "very specific HRA program" and/or collectively bargained the specific features of the HRA program. Third, it argues that the Employer's actions have violated the Rules and Regulations clause (Article XIV) because it did not submit

the proposed rule to the Union for its information prior to the effective date. Fourth, it asserts that the City's actions here violated the Negotiations clause (Article XV). Fifth, the Union contends that the Present Benefits clause (Article XVII) supports its case. According to the Union, that article locks the City into the present level of HRA benefits, and specifically the fingerstick method of drawing blood. Sixth, the Union argues that the City's actions violated the Retention of Rights clause (Article XX). Finally, the Union claims that the City's actions violated the Reopener clause (Article XXII).

Aside from the contract provisions just noted, the Union also sees this case as a past practice case. As a result, it makes the argument that there was a binding past practice which the Employer failed to follow. According to the Union, the (old) practice was to use the fingerstick method for blood draws under the HRA program. That's the way it's been done since the program started in 2004. The Union maintains that the City should have followed that past practice and kept using the fingerstick method for blood draws under the HRA program.

Finally, the Union argues that if the City wants to change the HRA program, and the practice that accompanies it concerning how blood is drawn, the parties should bargain it. The Union avers that the Employer should not be allowed to make unilateral changes to it.

The Union therefore asks the arbitrator to find in its favor and order a remedy. As part of the remedy, the Union asks that the arbitrator 1) order the City to bargain the impact of unilateral changes to the HRA or 2) reinstate the (old) practice and make whole all employees who were "negatively affected by the City's violation of the agreement."

City

It's the City's position that it did not violate Article X, Section A of the parties' collective bargaining agreement when it implemented the 2013 Health Risk Assessment (HRA) program. It elaborates as follows.

Before it addresses what it believes are the pertinent contract provisions involved, the City makes the following preliminary comments about the HRA program. In the City's view, it's obvious that the Union places very little or no value on the HRA program. The City sees that as unfortunate because, in its view, the HRA program is a valuable benefit.

The City also contends that many of the arguments advanced by the Union are not relevant to the consideration of whether the collective bargaining agreement has been violated. Specifically, the City asks the arbitrator to disregard the following Union arguments: 1) that the HRA program is not truly voluntary; 2) that premium contributions are a mandatory subject of bargaining; 3) that the change in the method of blood draw violates a work rule; 4) that the HRA program does not save money; 5) that the Union still has bargaining rights; 6) that represented employees contribute 1% more towards the health insurance premium than non-represented City employees; 7) that the Reopener and Retention of Rights clauses apply to

this case; 8) that the City has an "agenda" of reducing total compensation; 9) that the Union claims the City is attempting to intimidate employees by implementing drug testing; 10) that the City is shifting health costs to employees; 11) that the HRA results can be skewed; and 12) that the HRA program is used to set premiums for health insurance. The City avers that all of the above arguments of the Union are completely irrelevant to determining whether the City violated the terms of the collective bargaining agreement when it changed from the fingerstick to the venipuncture method of drawing blood for analysis under the HRA program. The City asks the arbitrator to confine his analysis to a much more limited scope than that sought by the Union.

Having made those preliminary comments, the City now turns its attention to those provisions in the collective bargaining agreement it believes are relevant.

First, the City relies on the Management Rights clause (Article II). According to the City, that clause clearly and unambiguously vests in it the authority to operate City government. It avers that subsumed into that is the authority to operate the HRA program and all of the details that are part and parcel of it. One of those details is the method of blood draw. The City submits that unless the Union can point to some provision of the collective bargaining agreement that expressly nullifies the City's right to operate the HRA program, the City has the authority to provide not only the HRA program itself, but also all of the various features and components that comprise it. Once again, that covers the method of blood draw. The City argues that nothing in the collective bargaining agreement expressly restricts the City's right to determine the components of the HRA program including the type of methodology used to draw blood for analysis. Specifically, there is nothing that states the City cannot change the blood draw from the fingerstick to the venipuncture method. Moreover, there is no bargaining history or past practice that would indicate this could not be done. Moreover, the Union presented no evidence that changing the method of blood draw undermines the Union, evades the provisions of the agreement or somehow interferes with the spirit, intent or purposes of the agreement.

Second, the City addresses Article X, Section A. It notes that that article only spells out the existence of the HRA in very general terms, and is silent with respect to the details of the HRA program. In other words, the features and components of the HRA are not referenced in that article. Building on that, the Union maintains that that means that the Union deferred the operation of the HRA program to the City pursuant to Articles II and X, Section A. It also means that the City reserved the right to make unilateral changes in the HRA program since there is no express contractual provision that prohibits the City's ability to determine the contents of the HRA program.

As part of its argument on this point, the City disputes the Union's assertion that the parties negotiated a specific HRA or collectively bargained the specific features of the HRA program. According to the City, that assertion simply is not true. It notes in this regard that the meeting that the Union referenced was an "informational meeting" to explain the HRA program and how it would work. This meeting was held when the HRA program was first

linked to a preferred health insurance rate. The City contends that an "informational meeting" is radically different than bargaining a specific component to the HRA program.

Next, the City argues that it articulated sound reasons for changing from the fingerstick to the venipuncture method of drawing blood from HRA participants (i.e. that the City and the employees obtain more health-related information at less cost). As the City sees it, both sides gain from this increased knowledge which is at a lower price. The City also characterizes this change as a *de minimis* change, since both involve a health care professional administering the blood draw. Building on the foregoing, the City asks the arbitrator to support the City's decision to move from the fingerstick to venipuncture method of blood draw because of its greater benefits at less cost and is a *de minimis* change.

Next, the City addresses the Union's reliance on Article XVII (the Present Benefits clause) to support its case. According to the City, that reliance is misplaced because that clause refers to benefits that are "not specifically referred to in this Agreement." The Employer points out that here, though, the HRA is specifically referred to in Article X, Section A of the agreement. The City contends that since the parties have bargained the HRA issue, that means that Article XVII does not apply to this case. Thus, the Union's argument that the City is somehow "locked into" the present level of HRA benefits pursuant to Article XVII, including the fingerstick method of drawing blood, is completely misplaced.

Finally, the Employer contends that the Union has failed to meet its burden of proof in this matter (i.e. to prove a contract violation of a specific contract provision) and is trying to obtain a result from the arbitrator that it should have bargained (i.e. restricting the City's ability to change the contents of the HRA program). The City therefore asks that the grievance be dismissed.

DISCUSSION

I'm going to start my discussion by trying to put this dispute in an overall context. The HRA program is part of the City's wellness program. The HRA program is voluntary. The program has the potential to improve participants' health via the health risk assessment and related activities. If an employee wants to participate, he/she can. If not, that is the employee's choice. The City pays the full cost of the program.

The HRA program has not been static over the years. Instead, it has undergone some changes. For example, the agency that prepares summary reports of surveys and data has changed. Also, the survey questions have changed. Soon the paper survey will transition to a computer version.

The reason the foregoing changes were noted is because this case involves a change in how blood is drawn for those employees that participate in the HRA program. Specifically, the City changed from the fingerstick method to the venipuncture method.

The Union objects to the new blood draw method and asks me to direct the City to return to the old method (i.e. the fingerstick method). The City contends that the new blood draw method is not prohibited by the Agreement, and consequently is allowed by the Management Rights clause.

I've decided to comment at the outset on the scope of my decision. In its initial brief, the Union disputes 29 matters that involve statements made at the hearing by the City's representative and/or its witness, or are simply things that the Union views as being factually disputed. In raising these matters, the Union obviously invites me to comment on each one. I decline to do so. I'll explain why later. Also, in its initial brief, the Union relies on seven contract provisions to support its case. In doing so, the Union obviously invites me to comment on each one of those contract provisions in my decision. Once again, I decline to do so. The reason I'm not going to address all of the foregoing can be simply put: I don't need to do so to decide this case. In my view, this case is not nearly as complicated – either factually or contractually – as the Union makes it out to be. I'm persuaded that the basic question to be answered is whether the City's switching from the fingerstick method to the venipuncture method of drawing blood for the HRA program violated the collective bargaining agreement. I can answer that question without reviewing all 29 disputed matters that the Union referenced in their initial brief. Additionally, I need not review all of the contract provisions cited by the Union. In my view, just two contract provisions are dispositive. I'll identify those two provisions in the discussion which follows.

Since this case involves the HRA program, the logical starting point – in terms of contract analysis – is to ask rhetorically whether there is a contract provision which deals with same. There is; it's Article X, Section A. Here's what it says:

> Health Risk Assessment (HRA): Employee participation in the City's Health Risk Assessment (HRA) program is voluntary. To receive the preferred premium contribution rate, the employee must participate in the HRA. Participation by the employee's spouse in the HRA is encouraged but not required. Participation in the follow-up coaching program is recommended and is offered on a voluntary basis.
>
> The City reserves the right to offer an HRA and select the HRA administrator in its sole discretion. The City shall pay for the costs to provide the HRA. In the event the City elects to discontinue the HRA program, employees shall contribute the preferred employee health insurance rates.
>
> The City shall not be entitled to nor shall it receive individual participant HRA reports or information. The information received by the City concerning the HRA of participants shall be limited to an aggregate summary report which does not include individually identifiable information.

While there really is no question about what any of the above means, I've decided to review the provision as part of my analysis. The first sentence in the first paragraph says that participation in the HRA is voluntary. The second sentence says that to get the "preferred premium contribution rate" (i.e. the 3% discount that is referenced in the next section) the employee has to participate in the HRA. The first sentence of the second paragraph says that the City gets to decide whether to offer an HRA and select the administrator for the program. The second sentence in that paragraph says that the City pays the full cost of the HRA program. The third paragraph says that the City will not get the reports or information dealing with individual participants (i.e. individual city employees). Instead, all the City gets is an aggregate summary report.

Having just reviewed what the language in that section says, what's involved herein is what is left unsaid. What is left unsaid is this: what are the details, features and components of the HRA program? The article does not say. Specifically, none of the details, features and components are referenced in that article.

It's the Union's view that since Article X, Section A does not say anything about the details, features and components of the HRA program, the City does not have the right to make changes to same. To support that premise, the Union asserted in its initial brief that the parties bargained a "very specific HRA program". The record does not support that assertion. As just noted, the contract language just reviewed certainly doesn't show that. Nor did the Union present any evidence of any bargaining history between the parties that showed both parties agreed to the specifics of the HRA program and only those specifics. As it relates to this case, there's no evidence to show that the City and Union voluntarily agreed to be "locked into" a fingerstick method of blood draw. The parties never bargained that degree of detail in the HRA program.

Next, since the question herein is whether the City can change the method of blood draw under the HRA program, and Article X, Section A doesn't specifically address that point or any of the other specifics of the HRA program, I'm going to look elsewhere in the collective bargaining agreement to see if another contract provision is applicable and provides any guidance to help me decide that question. There is; it's the Management Rights clause (Article II). That clause expressly gives the City "the sole right to operate City government and all management rights repose in it. . ." When that broad grant of authority is read in conjunction with the lack of detail in Article X, Section A, it's apparent that the City has retained the right to administer the HRA program. Subsumed into that right is the right to determine the details, features and components of the HRA program.

Not surprisingly, the City relies on the Management Rights clause to justify changing the method of blood draw under the HRA program. When an employer action is not contrary to an express provision of the collective bargaining agreement, and the employer relies on the Management Rights clause to justify that action, arbitrators often review that action via an arbitrary and capricious standard. I will do so here as well.

The focus now turns to the reasons proffered by the City for changing from the fingerstick method to the venipuncture method for drawing blood. The City asserts that it did so because it got more and better information at less cost. Those reasons are supported by the record. Here's why. The record shows that the venipuncture method is more efficient. Aurora is able to process more employees using their lab as opposed to the fingerstick method which uses a machine on-site. Also, Aurora is able to charge slightly less for the venipuncture method of drawing blood as opposed to the fingerstick method. By using a lab, that allows Aurora to test for more areas which can be beneficial, both to the City for programming purposes and to the employee for having a more complete record of health test results. The foregoing persuades me that the City's decision to change the method of blood draw was not arbitrary, capricious or an abuse of discretion. There is no objective basis in the record for me to find that the City's decision to make the change was for any reason other than what has already been identified. Additionally, there is no evidence in the record that proves that changing the method of blood draw undermines the Union, evades the provisions of the Agreement, or somehow interferes with the spirit, intent or purposes of the Agreement. As a result, I find that the City's decision to make that change passes muster under an arbitrary and capricious standard.

Given that finding, I could end my discussion right here. However, I've decided to address a couple of the Union's other arguments in order to complete the record.

First, I'm going to address the Union's past practice argument. According to the Union, there is a past practice surrounding the HRA program, namely that the Employer has always used the fingerstick method of drawing blood for the City's HRA program. Building on that, the Union argues that the City is essentially stuck with that practice (until it negotiates something different) and the practice is entitled to contractual enforcement. I find that this argument misses the mark for the following reason. The Union's underlying theory that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a past practice, particularly where the pattern of conduct results from management exercising its discretion under the contract. That is precisely what happened here. As was noted earlier in the discussion on Articles II and X, Section A, while the Employer historically used the fingerstick method of drawing blood, it did not do so because of a contractual obligation that it had to do that (i.e. use that particular method of drawing blood). Instead, management officials were simply exercising the discretion granted to them under Articles II and X, Section A. Thus, what happened previously relative to the drawing of blood was not a "practice"; rather, it was the product of management officials exercising their discretion under the contract.

Since what happened previously relative to drawing blood was the product of management officials exercising their discretion under Articles II and X, Section A, the Union had the burden of showing that the City knowingly waived its discretion in that regard. What I mean is this: by its conduct, did the City agree that in the future, it would always use the fingerstick method of drawing blood. All the evidence shows is that John Gee testified that many years ago, he attended a meeting wherein City representatives informed employees how

the HRA would be implemented and what tests would be done. Assuming for the sake of discussion that the fingerstick method of drawing blood was mentioned at that meeting, that didn't obligate the City to use that method indefinitely. The only way that could happen is if the parties expressly bargained that, and I've already found that they didn't. Since the parties never bargained a limitation on using only the fingerstick method, there's nothing in the parties' bargaining history that obligated the Employer to use the fingerstick method of drawing blood indefinitely. That being so, I find that the City did not waive its managerial discretion to change how it dealt with blood draws in the HRA program. It follows from that finding that the City could change from the fingerstick method to the venipuncture method for drawing blood for those employees who participate in the HRA program.

Next, the Union also claims that the City has an obligation to bargain any change in the HRA program with the Union. The problem with that theory is that the existing contract language gives the City the right to determine the components of the HRA program. Here's why. As already noted, the Management Rights clause vests in the City "the sole right to operate City government and all management rights repose in it. . ." In addition, Article X, Section A reserves to the City the right to offer an HRA program. The City pays the full cost of that program. That, in turn, lets the City determine its content. When these two provisions of the collective bargaining agreement are read together, they give the City the right to determine the content and components of the HRA program. Since the contract already gives the City the right to make changes to the HRA program, the City has no obligation to bargain the change in the HRA blood draw methodology with the Union.

In my view, this case can be summarized as follows. There is nothing in the contract that says that the City has to use the fingerstick method for drawing blood under the HRA program. While management historically used that method for drawing blood, that did not create a binding past practice that management was obligated to always use that method because of the discretion granted to management in Articles II and X, Section A. That discretion permitted the City to change to the venipuncture method of drawing blood under the HRA program. Thus, no contract violation occurred.

The Union arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

In light of the above, it is my

AWARD

That the City did not violate the collective bargaining agreement when it changed from using the fingerstick method to the venipuncture method for drawing blood for those employees that participate in the City's Health Risk Assessment (HRA) program. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 14th day of June, 2013.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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