

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
WISCONSIN PROFESSIONAL POLICE ASSOCIATION
and
CITY OF MANITOWOC

Case ID: 285.0002
Case Type: MA

(Health Insurance Grievance)

AWARD NO. 7914

Appearances:

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

Kathleen McDaniel, City Attorney, City of Manitowoc, 900 Quay Street, Manitowoc, Wisconsin, appeared on behalf of the City.

ARBITRATION AWARD

The Wisconsin Professional Police Association, hereinafter referred to as WPPA or Association, and the City of Manitowoc, 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 instant grievance. A hearing on that grievance was held in Manitowoc, Wisconsin, on May 5, 2015. The hearing was transcribed. The parties filed briefs whereupon the record was closed on May 28, 2015. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Is the Employer's charging a premium surcharge for tobacco users in violation of either CBA? If so, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2013-2014 collective bargaining agreement (hereinafter CBA) contained the following pertinent provision:

ARTICLE XX INSURANCE

Section 1. Hospital and Surgical Insurance. The Employer agrees to pay -ninety percent (90%) of the insurance premium for employees having single plan coverage and ninety percent (90%) of the insurance premium for employees having family plan coverage. The Health Plan shall be as described in the Plan Document provided to the employees and the Union entitled "City of Manitowoc Health, Dental, Vision and Wellness Plan effective January 1, 2008" as amended. The eligibility and conditions for continuation of any employee enrolled in the Health Care Plan shall be as set forth in the City of Manitowoc Health, Dental, Vision and Wellness Plan.

* * *

The parties' 2015-2017 CBA contains the following pertinent provision:

ARTICLE XX INSURANCE

Section 1. Hospital and Surgical Insurance. Beginning in 2015, the Employer agrees to pay 87.5% of the insurance premium for employees having single plan coverage and 87.5% of the insurance premium for employees having family plan coverage the first pay period upon ratification. The Health Plan shall be as described in the Plan Document provided to the employees and the Union entitled "City of Manitowoc Health, Dental, Vision and Wellness Plan effective January 1, 2008" as amended. The eligibility and conditions for continuation of any employee enrolled in the Health Care Plan shall be as set forth in the City of Manitowoc Health, Dental, Vision and Wellness Plan.

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BACKGROUND

The following information is cited to give context to this contract interpretation dispute. In 2011, Wisconsin enacted Act 32. In pertinent part, Act 32 created a prohibited practice for public safety employees (who still retain bargaining rights as compared to general municipal employees) regarding the bargaining of certain health insurance matters. In 2013, Act 20 amended that language. As a result, § 111.70(4)(mc)6, Stats., now reads as follows:

(mc) *Prohibited subjects of bargaining; public safety employees.*
The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a public safety employee with respect to any of the following:

...

6. *Except for the employee premium contribution*, all costs and payments associated with health care coverage plans and the design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of such costs and payments and the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee.
(Emphasis added.)

The City and the Association have been parties to a series of collective bargaining agreements (hereinafter CBA) for the Police Department's law enforcement employees.

In Article XX, Section 1, of the parties' 2013 – 2014 CBA, the parties agreed on the amount of the premium contribution share for the employees in the bargaining unit. Specifically, they agreed that the Employer would pay 90 percent of the premium for health insurance and the employee would pay 10 percent. That same contract provision also said that the Employer's insurance plan shall be the "City of Manitowoc Health, Dental, Vision and Wellness Plan effective January 1, 2008' as amended" and that "[t]he eligibility and conditions for continuation of any employee enrolled in the Health Care Plan shall be as set forth in the ... Plan." The health insurance provision in the parties' 2015 – 2017 successor CBA sets the premium split at 87.5 percent Employer paid / 12.5 percent employee paid, but otherwise maintains the language regarding the plan.

FACTS

On October 22, 2014, the City's HR Director, Rochelle Blindauer, sent an email to all City employees – including police officers – about the upcoming annual open enrollment

period. That email included plan contribution information and enrollment instructions for the open enrollment process. It also specified that employees were required to complete the open enrollment online process by November 16, 2014. The email also provided thus:

NEW this year, the City is **requiring all insured employees** (excluding spouses who are not City employees) to complete a blood draw to determine nicotine use. All nicotine users and employees who choose not to take the nicotine test, will pay a surcharge in addition to their medical premium starting January 1, 2015. Nicotine testing will be done by Holy Family Memorial staff on site before and after all Open Enrollment Sessions. You are not *required* to attend an Open Enrollment Session but are highly encouraged to do so: these sessions are paid with supervisor approval to attend. The City must communicate to Holy Family Memorial employee names for the cotinine tests on each day to pre-print labels for the blood draws. Please email or call the HR Office (x6995) by October 27th what day you will be taking your cotinine test, or if you wish to travel to Work Health Options the week of Oct 27th or Nov 10th.

There were two attachments to that email; one was a two-page document containing open enrollment information and the other was a document titled "2015 Monthly Premiums." The latter document had three charts on it; one for the City's general employees, one for the police and one for the firefighters. All three charts are similar in format and include the numbers for 2015 monthly medical, dental and vision insurance premiums. Just the chart for police is applicable here. It provides thus:

2015 Monthly Premiums

Police				
Medical	Total	City	Non Tobacco User	Tobacco User w/ Surcharge
Single	\$544.00	\$489.60	\$54.40	\$154.40
Family	\$1,420.00	\$1,278.00	\$142.00	\$242.00
Prev Dental W/Med	Full	City	EE	EE
Single	\$15.18	\$13.66	\$1.52	\$1.52
Family	\$34.69	\$31.22	\$3.47	\$3.47
Enh Dental W/Med	Full	City	EE	EE
Single	\$45.54	\$40.99	\$4.55	\$4.55
Family	\$110.59	\$99.53	\$11.06	\$11.06
Vision	Full	City	EE	EE
Single	\$4.91	NA	\$4.91	\$4.91
EE +1	\$7.12	NA	\$7.12	\$7.12
Family	\$12.77	NA	\$12.77	\$12.77

A review of that chart shows that it lists the total premium cost, the amount paid by the City and the amount paid by the employee. The last category (i.e. the employee contribution) has

two columns: “Non Tobacco User” and “Tobacco User.” With regard to medical insurance, the amount paid by a tobacco user is \$100 a month higher for both single and family coverage than it is for a non-tobacco user. The chart characterizes this as the tobacco surcharge. Thus, the tobacco user surcharge for medical insurance is \$100 monthly. Said another way, any employee that is a tobacco user is charged a surcharge of \$100 monthly in order to get health insurance through the Employer.

All police officers took part in the nicotine testing which was “highly encouraged” by the City in HR Director Blindauer’s email. This nicotine test checks for the presence of cotinine, a nicotine metabolite. This testing was done by Holy Family Memorial staff onsite before and after all open enrollment sessions described in the Blindauer email, as well as by appointment for employees who were not able to attend those sessions.

Of the 44 officers in the bargaining unit, 37 have elected to take the Employer’s health coverage provided for in the CBA. All 37 participated in the cotinine test. Two officers tested positive for cotinine. Since January 2015, one of these officers has paid and currently is paying the amount shown on the chart referenced above under “Tobacco User w/ Surcharge.” If this officer successfully completes smoking cessation classes suggested by the Employer, s/he would not need to pay the surcharge and would be reimbursed for any surcharge paid prior to completion of the program. The other officer testing positive declined insurance and became a beneficiary on his/her spouse’s plan.

On January 1, 2015, the City implemented the tobacco surcharge referenced above. The \$100 monthly tobacco surcharge is paid as a line item deduction on the first paycheck of the month, which is the same procedure for the insurance premium. The \$100 monthly surcharge is withheld from an officer’s paycheck, and that money is held in the City’s line item for insurance, as the City is self-insured. Officers who test positive for cotinine are required to pay the surcharge at the same time as their monthly premium in order to remain insured by the City.

The Association grieved the City’s imposition of the tobacco surcharge. The City denied the grievance. The grievance was subsequently appealed to arbitration. Neither party brings any procedural or arbitrability objections in this case. The parties ask the arbitrator to decide the matter on the merits.

* * *

Neither the parties’ 2013 – 2014 CBA nor the parties’ 2015 – 2017 CBA makes a mention, in Article XX or anywhere else, of a tobacco surcharge.

DISCUSSION

This case involves a tobacco surcharge which the City imposed on all employees who elect to take the City's health insurance benefit. The City self-insures its health insurance plan. The chart referencing this tobacco surcharge is titled "2015 Monthly Premiums" and is referenced in the FACTS section. This chart shows that if the employee is a tobacco user, a surcharge of \$100 a month is added to the premium that they pay.

At issue is whether the tobacco surcharge that the City imposes on tobacco users violates the parties' CBA. It's the City's view that it does not, because the City contends the tobacco surcharge is not part of the premium (which it is required to bargain with the Association). As the City sees it, the tobacco surcharge is not a "price change in the premium," but is instead part of the health plan design (which is a prohibited subject of bargaining). The City characterizes the tobacco surcharge as a "true surcharge, and not a premium subject to bargaining." The Association disagrees with these contentions. Based on the following rationale, I concur with the Association, and find that the City's charging tobacco users in the police bargaining unit with a tobacco surcharge violates the parties' CBA.

* * *

My discussion begins with the following preliminary comments:

First, in the BACKGROUND section, I reference Act 32. The reason I did so is because part of the City's argument herein is that the tobacco surcharge (that it implemented herein) is part of the health plan design. Act 32 said that henceforth, municipal employers were prohibited from bargaining over certain health insurance matters. Specifically, municipal employers are precluded from bargaining over the health plan design. In this case, the City invokes the magic phrase "health plan design." By doing that (i.e. invoking that phrase), the Employer essentially contends that the subject matter of this grievance (i.e. a tobacco surcharge) is a prohibited subject of bargaining. However, in this case, I'm not acting as an examiner addressing the parties' statutory obligations under MERA, or addressing the scope of bargaining under that statute. Consequently, I'm not going to decide whether a tobacco surcharge is part of a health plan design within the meaning of § 111.70(4)(mc)6, Stats. Instead, I'm going to interpret a CBA and decide whether the City's (unilateral) implementation of that tobacco surcharge comports with the CBA or violates same.

Even if the tobacco surcharge does qualify as a health plan design which, in turn makes it a prohibited subject of bargaining, I'm still going to address the merits of this dispute. Here's why. At the hearing, the parties stipulated that "neither party brings any procedural or arbitrability objections in this case." Stipulation, ¶2. Given that stipulation, I find that the City has waived the ability to make that argument by processing the grievance, arbitrating it, and agreeing to this stipulation. Additionally, any consideration of what a "reasonable alternative standard" for the "wellness requirements" of the federal Affordable Care Act is beyond the stipulated issue presented to the arbitrator.

Second, as just noted, I view this as a contract interpretation case. Building on that premise, the outcome herein will be based on the applicable contract language. What oftentimes happens in contract interpretation cases is that the parties offer evidence external to the agreement to help the arbitrator interpret the applicable contract language. I am referring, of course, to the parties' past practice and bargaining history. That did not happen here. Specifically, no evidence was offered concerning either an alleged past practice or the parties' bargaining history. As a result, all I've got to work with here is the language itself.

Third, in a contract interpretation case, the arbitrator's task is to determine if the meaning of the applicable contract language is clear and unambiguous, or whether it is ambiguous. Language is usually considered clear and unambiguous when it is susceptible to but one plausible interpretation/meaning. Conversely, language is usually considered ambiguous when it is capable of being understood in two or more different senses, or where plausible arguments can be made for competing interpretations. If the language at issue here is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous, my job is to then interpret it to discern what the parties intended to mean, and then to apply that meaning to the facts.

* * *

Having made those preliminary comments, the focus now turns to the contract language.

The parties agree that the only contract provision applicable here is Article XX, Section 1. In that section, in both the previous and current CBA, the parties agreed on the amount of the premium contribution share for the employees in the bargaining unit. In the previous CBA, the Employer paid 90 percent of the premium and the employee paid 10 percent. Under the current CBA, those numbers were altered so that the Employer pays 87.5 percent of the premium and the employee pays 12.5 percent. Those percentages were/referenced in the following sentence: "The Employer agrees to pay [X] percent of the insurance premium for employees having single plan coverage and ... family plan coverage" In the context of this case, the focal point of this sentence is the phrase "for employees." The reason those two words are the focal point (of this contract language) is because it doesn't contain any exclusions or exceptions. For example, the sentence doesn't say that the Employer can change the amount it pays towards the health insurance premium if such and such occurs. Since the sentence doesn't say that any exclusions or exceptions are allowed, I'm going to give the phrase "for employees" its plain and conventional meaning, which – given the context of its usage herein – means all employees, not just certain employees. Thus the language provides that the Employer was to pay 90 percent of the premium until the end of 2014 and 87.5 percent of the premium starting in 2015 **for all employees in the bargaining unit**.

Beginning in 2015 though, what the City did here was charge tobacco users a higher percentage of the total premium than the rest of the bargaining unit. The following numbers

taken from the police chart show this. Let's look at the first line of the chart. It says that the total amount of the single premium is \$544/month. In the next column, it says that the City is going to pay \$489.60/month toward the premium. The next two columns deal with the amount paid by the employee. If the employee is a non-tobacco user, they pay \$54.40/month. If they are a tobacco user, then they have to pay \$154.40/month (instead of \$54.40/month which is the amount paid by the non-tobacco user). These numbers clearly establish that if the employee is a tobacco user, the City's portion of the premium paid is not \$489.60 as the chart says; rather, it is \$389.60. The latter number (\$389.60) is about 71 percent of the total premium listed on the far left of that line. The problem with that number (71 percent), of course, is that the City didn't commit itself to pay 71 percent of the total health insurance premium; instead it committed itself to pay 90 percent of the premium through 2014 and 87.5 percent of the premium in 2015. Subsumed into that commitment was the obligation to pay those amounts for all employees in the bargaining unit, not just non-tobacco users. The foregoing establishes that by adding the tobacco surcharge, the City has essentially increased the premium share that the tobacco user has to pay, and dropped the premium share that the City has to pay. That violates Article XX, Section 1, of both CBAs.

Next, it is noteworthy that the tobacco surcharge is paid as a line item deduction on the first paycheck of the month, which is the same procedure for the insurance premium. The tobacco surcharge is withheld from an employee's paycheck and that money is held in the City's line item for insurance. Those employees subject to the tobacco surcharge are required to pay it at the same time as their monthly premium in order to remain insured by the City. The reason the last line is important is because it establishes that the extra amount that tobacco users have to pay is part of the premium. As such, they have to pay this extra amount in order to remain insured. If they don't pay it, the employee would no longer have health insurance.

While the City believes it made the distinction between tobacco users and non-tobacco users for a very good reason, the City's good intentions don't determine the outcome here. As already noted, what determines the outcome is the contract language. Here, there is plain and unambiguous contract language that specifies that all bargaining unit employees will be treated equally insofar as the payment of health insurance premiums is concerned. What the City did, though, was create an exception on its own volition. The exception that it created applied to tobacco users. Specifically, it decided that tobacco users in the bargaining unit would have to pay \$100 per month more than non-tobacco users to keep their health insurance going. Once again, it would be one thing if the contract language just referenced said that the Employer could change the amount paid by employees (toward the insurance premium) if they engaged in certain proscribed behavior (such as using tobacco). However, the contract language doesn't say that. That being so, the City has no contractual basis for making that distinction. No provision in either CBA allows the City to treat employees differently vis-à-vis insurance premium payments. Additionally, no provision in either CBA allows the City to treat employees differently who have completed a smoking cessation program. Consequently, the City's promise of waiving the \$100 surcharge upon completion of a cessation program does not forgive or make up for the underlying violation of the CBA.

The grievance is therefore sustained. In order to remedy this contract violation, the City shall cease charging employees in the police bargaining unit a tobacco surcharge. Any employee in the police bargaining unit who has been charged a tobacco surcharge shall be made whole.

In light of the above, I issue the following:

AWARD

That the Employer's charging a premium surcharge for tobacco users violates the parties' CBA. In order to remedy this contract violation, the Employer shall cease charging employees in the police bargaining unit a tobacco surcharge. Any police bargaining unit employee who has been charged a tobacco surcharge shall be made whole.

Dated at the City of Madison, Wisconsin, this 18th day of August 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Arbitrator