

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION
and
MILWAUKEE COUNTY

Case ID: 161.0030
Case Type: MA
(Bruno)

AWARD NO. 7946

Appearances:

Graham Weimer, MacGillis Wiemer, LLC, 11040 W. Bluemound Road, Suite 100, Wauwatosa, Wisconsin, 53226, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

James M. Carroll, Milwaukee County Office of Corporation Counsel, 901 N. 9th Street, Room 303, Milwaukee, Wisconsin, 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association ("Association") and Milwaukee County ("County") are parties to a collective bargaining agreement ("Agreement") in effect at times relevant to this dispute. The Agreement provides for final and binding arbitration of disputes arising thereunder. On February 6, 2017, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning Grievance No. 61893, relating to a flexible spending account reimbursement for Milwaukee County Deputy Carlos Bruno. The filing requested that the Commission appoint a commissioner or staff member to serve as arbitrator, and the undersigned was so appointed. A hearing, which was not transcribed, was held in Milwaukee, Wisconsin, on May 5, 2017. Subsequently, the parties each filed initial and responsive written arguments. The last brief was received on August 4, 2017, on which date the record in this matter was closed.

Now, being fully advised in the premises, the undersigned makes and issues the following Award.

BACKGROUND

As a benefit of employment, each Milwaukee County employee has access to a flexible spending account (“FSA”) that allows the employee to set aside and utilize pre-tax funds for eligible medical expenses. Employees who elect to contribute their own funds into an FSA receive a matching contribution from the County, up to an established maximum. In 2016, which is the benefit year relevant to this dispute, the maximum matching contribution was \$2,000. County FSAs are managed by Employee Benefits Corporation (“EBC”), a third-party administrator.

Carlos Bruno is employed by the County as a Deputy Sheriff. For the 2016 spending year, Bruno contributed an amount to his FSA that made him eligible for a \$2,000 County contribution, and he therefore had \$4,000 in available funds. FSA funds are accessed through a “Benny Benefits” card, which account holders use like a debit card to pay for eligible expenses. In May of 2016, Bruno had \$1,472.87 remaining in his FSA. Bruno and his wife, who was undergoing *in vitro* fertilization (“IVF”) treatments, attempted to use his Benny Benefits card to cover part of the cost of certain IVF prescription medications. The purchase was declined as one that was ineligible for FSA coverage.

To address the short-term problem related to the time-sensitive need for the IVF medications, Bruno and his wife took out a loan to cover the cost. Subsequently, Bruno continued to pursue the question of whether he should have been able to use his FSA funds to cover the prescription. He tried to get an answer to his question using a telephone number for EBC provided on the back of his Benny Benefits card. He testified at hearing that in the months following the May, 2016 denial of coverage, he contacted EBC several times to determine why the expense had been rejected. Ultimately, on October 5, 2016, he spoke to an EBC representative who reported to Bruno that the medications should have been covered after all. He also was told, however, that EBC could not reimburse him the amount that had been available the prior May in his FSA, because at that point (in October) his FSA only had \$44.01 remaining. Indeed, during the period from May to October when Bruno was challenging the denial of coverage, he had continued to use funds from his FSA account to cover other eligible expenses.

After delivering this new information and determination to Bruno in October of 2016, EBC advised Bruno to contact the County regarding his quest for reimbursement. The record shows that the County has the ability to overturn decisions by EBC. Bruno contacted County employee Matthew Hanchek. Hanchek is the County’s Director of Total Rewards, and as such he has administrative responsibilities related to the County’s FSA benefit. Hanchek told Bruno that he would investigate the matter and get back to him. Soon thereafter, Hanchek reported to Bruno that he could not be reimbursed because at that time Bruno only had \$14.10 remaining in his FSA. On November 30, 2016, Bruno filed the grievance that led to the present case.

RELEVANT CONTRACTUAL PROVISIONS

3.11 EMPLOYER HEALTH AND DENTAL BENEFITS

- (1) All employees will be covered by the Milwaukee County Health Insurance Plan, as outlined by the Employee Benefits Division of Department of Human Resources, consistent with the annual adopted Milwaukee County Budget and Chapter 17 of the General Ordinances of the County of Milwaukee.

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5.01 GRIEVANCE PROCEDURE

- (1) APPLICATION: The grievance procedure shall not be used to change existing wage scheduled, hours of work, working conditions, fringe benefits, and position classifications established by ordinances and rules which are matters processed under other existing procedures. Any disputes that arise between the Association and the County including employee grievances shall be resolved under this section. Only matters involving the interpretation, application or enforcement of rules, regulations or the terms of this Agreement shall constitute a grievance.

...

- (9) No grievance shall be initiated after the expiration of (60) calendar days from the date of the grievable event, or the date on which the employee becomes aware, or should have become aware, that a grievable event occurred, whichever is later. ...

...

5.02 SELECTION OF ARBITRATOR

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- (4) ARBITRATOR'S AUTHORITY
The Arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of

Supervisors, nor revise any language of this Agreement. The Arbitrator shall confine himself to the precise issue submitted.

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6.01 ENTIRE AGREEMENT

The foregoing constitutes the entire Agreement between the parties by which the parties intended to be bound and no verbal statement shall supersede any of its provisions. All existing ordinances and resolutions of the Milwaukee County Board of Supervisors affecting wages, hours and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth. To the extent that the provisions of this Agreement are in conflict with existing ordinances or resolutions, such ordinances and resolutions shall be notified to reflect the agreements herein contained.

ISSUE FOR HEARING

Each party proposed a formulation of the statement of the issue for hearing. The following is the Association's proposed statement:

Did Milwaukee County violate Section 3.11 of the Collective Bargaining Agreement when it did not allow Deputy Bruno to use funds from his FSA [] for the reimbursement of his wife's IVF treatment.

The County proposed the following:

1. Is this dispute over the grievant's flexible spending account subject to the grievance process under the relevant collective bargaining agreement?
2. Even if this matter is properly addressed via the grievance process, was the grievance timely filed as required by the collective bargaining agreement?
3. Even if the matter is grievable and was timely filed, is the grievant entitled to the relief he seeks; namely, the reimbursement of out-of-pocket payments that allegedly should have been covered by the flexible spending account?

Having considered the proposals of the parties, the undersigned adopts the County's statement of the issue.

DISCUSSION

Subject Matter Jurisdiction

As a threshold matter, the County takes the position that Bruno's grievance raises an issue that is not arbitrable under the Agreement. The County's argument is premised on the theory that the FSA benefit that is the focus of the grievance is a product of County ordinance, rather than the Agreement between the parties. Indeed, it is a provision at Chapter 17 of the Milwaukee County General Ordinances that establishes the FSA benefit:

(16) The County shall implement a Section 125 plan to deduct an employe's monthly contributions for medical and dental coverage on a pre-tax basis. The terms and conditions of said plan shall be in accordance with a plan document which shall be approved by the county. Effective July 1, 2001, after the adoption of the Section 125 plan document, the county shall establish and administer flexible spending accounts for those employes who desire to pre-fund their health insurance costs and other expenses as governed by Internal Revenue Service regulations.

MCGO 17.14(16).

To support its claim of a contractual violation, the Association has relied on the employee health and dental provisions at Section 3.11 of the Agreement. The most pertinent portion of that section reads as follows:

(1) All employees will be covered by the Milwaukee County Health Insurance Plan, as outlined by the Employee Benefits Division of Department of Human Resources, consistent with the annual adopted Milwaukee County Budget and Chapter 17 of the General Ordinances of the County of Milwaukee.

This provision does not refer anywhere to an FSA benefit. Also, while Section 3.11 references Chapter 17 of the Milwaukee County General Ordinances, which contains the FSA provision set forth above, the reference appears to be limited only to those portions of Chapter 17 that relate to insurance. The record establishes that the FSA benefit is entirely separate. Furthermore, while Section 3.11 purports to set forth a benefit that is "consistent with" MCGO Chapter 17, it does not expressly incorporate any part of the ordinance into the Agreement.

Looking beyond Section 3.11, an examination of the entire Agreement reveals that the FSA benefit is not specifically mentioned anywhere. The County's position with regard to the substantive arbitrability issue, however, is nevertheless undermined by Section 6.01 of the Agreement, which provides the following:

All existing ordinances and resolutions of the Milwaukee County Board of Supervisors affecting wages, hours and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth.

The FSA benefit ordinance is one that affects wages, hours, and conditions of employment, and there is no evidence indicating that it is inconsistent with any other provision of the Agreement. That being the case, it is fair to conclude that the benefit is "incorporated" into the Agreement "by reference as though fully set forth".

Although the County points to Section 5.01 of the Agreement as providing that "the grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, *fringe benefits*, and position classifications established by ordinances and rules which are matters processed under other existing procedures"—the italicized emphasis is set forth in the County's written argument—this angle misses the mark. The grievance certainly addresses a "fringe benefit", but the County has not shown that the Association seeks to "change" it, which is the action that is prohibited by this provision.

Procedural Jurisdiction

The County further argues that Bruno's grievance should be dismissed as untimely. The Agreement provides that grievances are to be initiated within 60 calendar days of the date of the grievable event or the date on which the employee became aware or should have become aware that a grievable event occurred, whichever is later. EBC denied coverage of the IVF medications in May of 2016, but Bruno did not file his written grievance until six months later, in November of 2016.

What the record shows is that Bruno did as instructed and attempted to have his problem resolved using the telephone number on the back of his Benny Benefits card. Through this number, until October of 2016, Bruno was being consistently told that his wife's IVF medications were not eligible for coverage with FSA funds. Then, in October, three critical events occurred: EBC reported to Bruno the opposite of what he previously had been told; EBC told Bruno that reimbursement, however, was not an option because his FSA no longer held sufficient funds; and EBC advised Bruno to consult with the County regarding reimbursement. With regard to the third item, the record shows that the County has the ability to override EBC decisions.

The information Bruno received in October of 2016 allowed him to finally understand that coverage of the medications had been improperly denied. It also allowed him to understand that it was the County, not the EBC representative reached through the phone number on the

back of the Benny Benefits card, that had the ability to address the reimbursement issue. This information was a sufficient basis for Bruno to develop an understanding that a grievable event had occurred, and he filed the grievance within 60 days of this event. Hence, the grievance was timely.

Merits

The County does not dispute that the IVF medications at issue here were eligible for FSA coverage. It is for this reason that, after dealing with the threshold issues, the third part of the County's proposed and adopted statement of the issue focuses exclusively on the question of remedy:

3. Even if the matter is grievable and was timely filed, is the grievant entitled to the relief he seeks; namely, the reimbursement of out-of-pocket payments that allegedly should have been covered by the flexible spending account?

The County points out that if it is now required to reimburse Bruno the \$1,472.87 he should have been able to use to cover expenses in May of 2016, it will be paying more into Bruno's 2016 benefit than the maximum allowable matching contribution. To be consistent with the above analysis, it is fair to note that this cap should be considered incorporated into the Agreement along with the other features of the FSA benefit.

On the other hand, if the County is not required to reimburse Bruno, he will suffer the permanent loss of the opportunity to use a benefit to which he was entitled and at least 50 percent of which he had funded with his own wages. The County advocates for the conclusion that Bruno lost nothing, because he was able to use his FSA funds to cover other expenses. While it is true that in the remaining benefit period after the denial Bruno spent his funds on other eligible expenses, the evidence indicates that he did not make this choice willingly. Bruno testified that he funded his FSA account in 2016 in anticipation of having to purchase the expensive IVF medications, and he clearly attempted to use at least the remaining \$1,472.87 of the funds precisely in that way.

The County contends that Bruno had through March of 2017 to submit 2016 expenses, and he should have held off on spending his FSA funds in anticipation of the dispute being resolved. There are multiple problems with this assertion, however, including the fact that there would have been very little room for such optimism, when Bruno was repeatedly being told by EBC that the medications were not covered. Also, Bruno knew he was operating under the annual use-it-or-lose-it condition of the County's FSA benefit. He could have incurred additional medical expenses along the way, only seeking reimbursement at the end; or he could have waited until the very end of the benefit period to spend the money. All of these scenarios, however, have Bruno making additional sacrifice or taking on additional risk to accommodate the improper denial of his benefit by the County's third-party administrator.

While an award must draw its essence from an agreement, an arbitrator has necessary flexibility in crafting its remedy. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960). It is for this reason that arbitrators are regarded as having broad, albeit circumscribed, remedial authority. Elkouri & Elkouri, *How Arbitration Works*, 6th Edition at 1189. The most effective way to achieve equity in this case is to award Bruno the \$1,472.87 to which he should have had access. Such an award does not modify the Agreement, because it does not alter the County's ongoing obligation to employees with respect to the FSA (or any other) benefit. Rather, it is a damage award that corresponds with the loss Bruno suffered when use of his benefit was improperly, repeatedly denied; and because of the loss it is an award that is appropriate notwithstanding Bruno's subsequent expenditures, which were reasonable in light of the circumstances and which cannot now be undone.

AWARD

The grievance is sustained. Carlos Bruno shall be reimbursed in the amount of \$1,472.87 within 30 days of the date of this Award.

Signed at the City of Madison, Wisconsin, this 20th day of November, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne, Arbitrator