

IN THE MATTER OF ARBITRATION BETWEEN

CITY OF DULUTH, MINNESOTA  
(Employer)

and

INTERNATIONAL ASSOCIATION OF FIRE  
FIGHTERS, LOCAL NO. 101, AFL-CIO, CLC  
(Union)

DECISION  
(Contract Interpretation  
and Application)  
BMS Case No. 10-PA-1569

ARBITRATOR: Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: November 9, 2010 at the Duluth City Hall, Duluth,  
MN

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely briefs as of  
December 1, 2010.

APPEARANCES

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JURISDICTION

The Parties stipulated that this Arbitrator has been selected and appointed in accordance with the provisions of Article 36 of the applicable labor agreement and thereby possesses the authorities and responsibilities set forth therein to hear and resolve this dispute.

Prior to the opening of the Hearing in this matter, the Employer raised a question of Arbitrability. There ensued a subsequent discussion between the Parties as to whether the Arbitrability Issue should be heard in a separate, initial hearing session and bifurcated from the underlying grievance Issue. The Parties subsequently agreed to a single hearing and that they would upon opening, present their respective evidence and arguments with respect to the Arbitrability Issue. It was further agreed by the Parties that this Arbitrator would then issue an oral “bench” decision on the record with respect to the Arbitrability Issue. Depending upon that decision, the hearing would either close or proceed into the issue of the underlying grievance.

### THE ARBITRABILITY ISSUE

On the Employer’s Motion to dismiss. “Is the Union’s grievance, that seeks an interpretation of Articles 19.1 and 19.3 of the applicable labor agreement (2007-2009) to affirm that these provisions guarantee that bargaining unit employees who retire while this contract is in effect will receive hospital-medical plan coverage under Plan 3A, arbitrable?”

### THE GRIEVANCE ISSUE

The Parties stipulated that this Issue is; “Are the members of the Union, who retire while the 2007-2009 collective bargaining agreement (CBA, labor agreement or contract) is in effect, guaranteed a level of hospital-medical plan coverage under Plan 3A or may the City modify those retirees’ benefits whenever or however benefits for active employees are subsequently modified under Plan 3A?”

### THE EMPLOYER

The City of Duluth (Employer or City) is the fourth largest municipality in the State of Minnesota with a population of approximately 85,000. The City is located on Lake Superior, the largest of the Great Lakes, and the City’s port facilities host vessels plying trade both within the Great Lakes area and internationally. The City’s governance is via a Mayor and Council system.

The City currently employs some 800 people. A number of those employees are members of collective bargaining units represented by five (5) different unions and with whom the City maintains on-going contractual bargaining relationships.

### THE UNION

The International Association of Fire Fighters (IAFF) was organized as a labor organization in 1918 and is an affiliate of the AFL-CIO. The IAFF currently represents about 285,000 full-time fire fighters and related emergency medical responders through some 3200 local unions in the United States and Canada. IAFF, through its Local Union No. 101, currently represents about 124 employees working in the City of Duluth Fire Department.

## COLLECTIVE BARGAINING HISTORY

The Employer and Union have had a continuing and on-going collective bargaining relationship dating back to at least 1983 and this relationship has been reflected in a successive series of labor agreements during that period. The most recent labor agreement was effective January 1, 2007 and was scheduled to expire December 31, 2009 or until such time as it is replaced by a successor agreement. The Parties agree that this agreement currently remains in full force and effect and is applicable to this matter.

## THE ARBITRABILITY DECISION

As indicated previously, this Issue was heard in full at the outset of the hearing. Upon the close of the Parties' respective presentations with respect to that Issue, this Arbitrator announced his bench Decision. Specifically, for reasons orally set forth on the record, the Employer's motion to dismiss the matter as not arbitrable was denied and the Employer's specific arguments with respect to *stare decicis, res judicatta and collateral estoppel* were found to be neither relevant nor applicable. Accordingly, the Parties were instructed to proceed into the hearing on the merits of the primary grievance Issue. The bench decision of November 9, 2010 is hereby affirmed.

## BACKGROUND

The information and facts set forth herein as background are not in dispute and are meant to provide a frame of reference for the more detailed arguments, discussion and analysis to follow.

The scenario begins in about 1983 when the City and its five (5) unions, including IAFF Local 101, agreed to include the following language in their contracts covering Hospital-Medical plan benefits (a/k/a health care benefits) for retirees:

*"Any employee who retires from employment with the City, and is receiving, or has applied for and will, within sixty (60) days of retirement, receive pension benefits...after having been employed by the City for twenty years, shall receive hospital-medical insurance coverage to the same extent as active employees..."*  
(emphasis added)

Over the course of the next 20 or more years, the City interpreted that language to mean that a retiree was to be provided with the same level of health care coverage and benefits that s/he enjoyed as an active employee at the time of retirement. The City paid the entire premium for Self Only coverage for the retiree and, therefore, perspective retirees always elected to carry the City's premium health care option immediately prior to their retirement. The typical Open Enrollment period for active employees provided about five different Health Care program choices with various coverage, co-pays, deductibles and premium rates. Smart retirees, of course, elected

the health care plan with the broadest coverage and smallest deductibles and co-pays as their choice immediately prior to retirement. Why not, since the City would be covering 100% of the premium cost for Self-only in retirement, if they had at least 20 years of City service.

The contract language with respect to retiree health care, as set forth above, remained essentially unchanged over the course of the next 20 years or so, as did the City's interpretation and application of the program. More specifically, as the City carried out its functions with respect to the contract language, each retiree was provided with the same coverage and policy details as s/he enjoyed at the time of original retirement. The City also added any subsequent "positive" enhancements to the retirees, that accrued to active employees in their health care coverage options,

As we "fast forward" the retiree health care situation to about the year 2004, the City's Employee Benefits section is offering its current active employees five (5) different health care plans during Open Enrollment. However, the retirees do not have to make any elections during Open Enrollment, as they continue to enjoy the level of health care benefits that they originally enjoyed on the day they retired and with no premium cost, if they retired with at least 20 years of City service. As a result, the City is administering five (5) active health care plans for current active employees and about ninety (90) additional healthcare plans/groups covering the retirees. In some cases, a retiree's specific health care plan no longer exists and now the City has to "recreate" a plan/policy to insure that retiree receives the same level of benefits that existed on the date s/he retired. Obviously, the health care administration situation for the City, at that time, was an on-going chaotic nightmare.

And just when the thinking was "things can't get any worse, can they?" "Oh, yes!" Along comes the Governmental Accounting Standards Board (GASB). GASB is a private non-partisan, non-profit organization that was founded in 1984 and its mission is to establish and improve standards of state and local government accounting and financial reporting that result in useful information for users of financial reports and to guide and educate the public, including issuers, auditors and users of those reports.

In about June, 2004 GASB issued what is now known as Statements Nos. 43 and 45. The thrust of those Statements cover what is referred to as Other Post Employment Benefits (OPEB). GASB said that based on studies, many public bodies were not properly accounting for the costs or future costs, in their current financial statements, for OPEBs (health, dental and vision care, life insurance, legal services, etc.) for retirees and perspective retirees. Specifically, GASB pointed out that while many public bodies reported current payment outlays for OPEBs, virtually no one was reporting the actual cost of OPEBs earned by active duty employees.

For the City of Duluth, which is a "pay-as-you-go" and self-insured public entity with respect to OPEBs, the GASB rules meant that effective with its financial statements for fiscal year 2007 it had to account for the overall costs of its retiree OPEBs and the

potential costs of OPEBs for current employees. The first step toward accomplishing that goal was to determine what those “costs” actually were.

In about October, 2005 an independent actuarial firm concluded that the City’s total Accrued Actuarial Liability (AAL) for health benefit costs was somewhere in the neighborhood of **\$280 million**, of which over \$145 million was attributable to OPEB for retirees. Looking at the situation from another perspective; the \$280 million figure meant that the City would need to collect an additional \$3,300 from every man, woman and child in the City to cover its estimated AAL.

The actuarial report was a major financial body blow to a municipality already beset by other financial problems and issues. In order to get a handle on the nature and scope of the OPEB problem and to determine options for coping with the potential financial crisis, the City Council, in August 2005, appointed a Special Task Force.

On December 12, 2005 the Special Task Force issued a comprehensive written report fully analyzing the situation, exploring options and making specific recommendations. Among the specific recommendations;

- Cease the pay-as-you-go practice of covering annual City-borne health care coverage costs for active and retire employees. Instead, set up a Trust Fund to cover both current and expected future costs of employee health care coverage.
- Reorganize and streamline the City’s employee healthcare program by reducing the number of plans available to both active employees and retirees to one or two specific plans.
- The City should also negotiate with its five unions to eventually move employees from defined benefit health care programs to defined contribution programs.
- The Task Force noted that if retirees refused to cooperate in the overall program to reduce the Accrued Actuarial Liability (AAL) for the health care program, then the City should explore the possibility of seeking a Declaratory Judgment to obtain the authority to make the necessary changes in the retiree health care program.

On March 14, 2006, the principal Officers of the City’s five unions, including IAFF 101, sent a letter to the City committing themselves to Joint Negotiations with the City with respect to the employee health care coverage cost crisis. The Union Representatives assured the City that they had studied the Special Task Force Report of December, 2005 carefully and noted that their members/constituents supported the findings and recommendations of the Task Force. Accordingly, the Officers resolved that they would present suggested contract language to address the health care program situation with respect to both active employees and retirees.

During the course of subsequent negotiations between the City and its five unions, the Parties did reach agreement on a major overhaul of the hospital-medical care/health care program for both active employees and retirees.

With respect to the IAFF 101 labor agreement with the City for the period January 1, 2007 through December 31, 2009, the new language with respect to retiree health care coverage reads as follows:

*“Article 19.1 – Any employee who was hired on or before December 31, 2006, and who retires from employment with the City...shall receive hospital-medical benefit plan coverage to the same extent as active employees under Plan 3A...”* (emphasis added)

*“Article 19.3 – Any employee hired on or before December 31, 2006, who retires from employment with the City and who meets the requirements of Article 19.1 shall receive hospital-medical benefit plan coverage under plan 3A to same extent as active employees paid for by the Employer and the eligible retired employee, with or without dependents, in accordance with the following schedule...”*

The Parties acknowledge that the adoption of this new language in Article 19 of the IAFF 101 contract for 2007-2009 (and as adopted in the other four labor agreements) had the effect of placing all past retirees in the new City Health Care Plan known as “3A”; thereby eliminating the practice of some twenty plus years of maintaining individual retirees on the same health care plan that they had on the date they retired. Additionally, the new retiree health care program eliminated the need for the City to continue trying to administer some 90+ different health plans/groups. Now all retirees, together with active employees, would be under a single plan. This, of course, was one of the major recommendations from the Special Task Force Report. This single change in the City’s health care program reduced its estimated Accrued Actuarial Liability (ALL) by tens of millions of dollars.

Concurrent with all of the actions and events by the City, the unions and City employees in attempting to understand and cope with the health care cost situation, there was a group of retirees who contended that by changing its retiree health care system, the City was renegeing and abrogating a historical promise that it had made to retirees for the past twenty-some years. In about late 2007, members of this group formed an *ad hoc* committee to challenge the City’s planned changes in the retiree hospital-medical coverage program. The committee is known as The Ad Hoc Committee to keep our Health Care Benefits.

In about May, 2008 certain members of that committee filed suit in St. Louis County State District Court (Savela v. City of Duluth) seeking an injunction against the City to prevent it from changing or reducing the health care coverage program from that which had existed since 1983, i.e. individual retirees retained the same level of benefits that were in effect at the time they chose to retire. The Parties stipulated to Class Certification defining the class as all City of Duluth retirees who retired from January 1, 1983 through December 31, 2006 and their spouses and dependents. An initial Temporary Restraining Order (TRO) was issued against the City by the Court in about June, 2008, pending a full hearing on the case merits.

In October, 2009, the Honorable Kenneth A. Sandvik, Judge of the District Court, issued a decision granting the City's Motion for Summary Judgment holding that the language in the City's labor agreements with its five unions covering retiree health care benefits during the period 1983 through 2006 was not ambiguous and that the contract language should be given its "plain and ordinary" meaning. Accordingly, he held that the pertinent contract language required the City to provide the same health care benefit coverage to retirees that it provides to its current active employees and that the Plaintiff's rights were not fixed and governed by the health plan coverage in place on the dates of their retirement and were subject to changes or modifications that were operative for active employees. The Plaintiffs subsequently appealed the District Court Decision.

On September 21, 2010, in an unpublished opinion, the Minnesota Court of Appeals upheld Judge Sandvik's decision. Savela v. City of Duluth, 2010 WL 3632313 (MN Ct. App. 2010) The Court's analysis noted the Parties' agreement that the language in the relevant labor agreements in effect at the time of retirement controls the respective rights and obligations of the retirees and the City. The Court also noted that in interpreting a contract, the language is to be given its plain and ordinary meaning. The Court held that the phrase "...to the extent as active employees..." was unambiguous and meant currently active employees and that, therefore, the City could provide specific health care coverage to its retirees from the 1983-2006 period to the same extent as currently active employees and no longer had to maintain the coverage of those retirees at the same benefit levels that existed on the date that they actually retired. The Court also indicated that since it was satisfied that the contract language in question was, in its view, clear and unambiguous and could be given its plain and ordinary meaning; it would not look further at any extrinsic evidence. In doing so, the Court quoted from Housing and Redevelopment Authority of Chisholm v. Norman, 696 N.W. 2<sup>nd</sup> 329 (Minn. 2005) at 337, "...under a contract analysis, we first looked at the language of the contract and examined extrinsic evidence of intent only if the contract is ambiguous on its face...".

With the issuance of the Court of Appeals Decision, the City essentially declared "Victory" in its post-2006 efforts to change its interpretation and application of the language of the previous twenty plus years concerning health care coverage for its retirees.

### The Grievance

The grievance situation arose out an a written inquiry dated November 11, 2009 from Erik Simonson, the President of IAFF 101, to Kim Hall, the City's Human Resources Manager. In that letter, Simonson noted that he had recently been approached by three of his Union members; who were contemplating possible retirement during the term of the current labor agreement (2007-2009). He said that the members wanted to know, from the City, what their future health care benefits coverage would be, if they chose to currently retire? Simonson's letter concluded with the following request to Ms. Hall:

*“On or before November 30, 2009 please provide me written assurance that the City will provide these members and any other members who retire while the 2007-2009 CBA is in effect between Local 101 and the City retiree health insurance coverage under Plan 3A as it currently exists. The City’s written assurance must include the statement that the city will not modify members’ benefits even if in the future active employees’ benefits are modified or if Plan 3A is modified. If I do not receive the City’s written assurance by November 30, 2009 I will assume the City disagrees with the Union’s interpretation of Article 19 of the CBA.”*

Having received no response from Ms. Hall to his December 11 letter, on December 1, 2009 Simonson sent a letter to David Montgomery, the City’s Chief Administrative Officer. In his letter, Simonson recited his previous letter to Hall and noted that it was now past the response deadline of November 30 and, therefore, he was formally filing a grievance. He noted that according to section 2.17 of the current CBA, a *“grievance means a dispute or disagreement as to the interpretation or application of the terms of this agreement”*.

Simonson then proceeded to state the Grievance as follows:

*“On behalf of Lee Youngblom, Darrel Youngblom and Robert Thornton, I am filing a grievance based on a disagreement over the interpretation of Article 19 of the current CBA. As the end result of this grievance impacts important decisions regarding pending retirements, I am requesting that the City and the Union proceed immediately to arbitration. The first two steps of the grievance procedure as contained in Article 36.1 and 3.2 of the current CBA appear unlikely to alter the current position of either party to the CBA.”*

In a letter dated December 8, 2009, CAO Montgomery responded to Simonson’s grievance letter of 12/1. He noted that; 1) Simonson had apparently not served a copy of the grievance upon the Fire Chief, John Strongitharm, as required by the contract grievance procedure; 2) Montgomery noted that the Grievance Procedure stated that a grievance must be presented within 30 calendar days “after the first occurrence of the event giving rise to the grievance”. He further stated that *“An anticipated retirement of three of your members along with a hypothetical modification to Plan 3A health care coverage some time in the future is not a grievance and there has been no event. The City has not taken any action based on the present contract language which affects the grievants. Even if the City were to modify Plan 3A in the future, that action is in accordance with the collective bargaining agreement.”*

Montgomery went on to say, *“The City is presently in litigation over the meaning of the language ‘to the same extent as active employees’ under the retiree health care benefit. [note: the City had received Judge Stanvik’s October, 2009 Decision, as of the date of Montgomery’s letter] The Union’s position has been rejected by the Court. The Court has ruled as a matter of law that the contract language is unambiguous and requires the City to provide the same coverage to retirees that it provides to active*

*employees. The health care benefit is not fixed and governed by the plan in place on the date of retirement. The Court has found that the collective bargaining agreement in effect at retirement does not prohibit the City from changing or modifying the health care plan provided to a retiree. Enclosed is a copy of that order. For these reasons, the grievance is denied.”*

On December 23, 2009, Simonson sent a letter to Fire Chief Strongitharm informing him of the Youngblom, et. al. grievance and also included the previous correspondence with Hall and Montgomery.

Over the subsequent months, the Union sought to move the grievance to arbitration, but the City refused. The City continued to argue that 1) there was no grievance because no “event” had occurred with respect to the perspective retirees to trigger a grievance and 2) the question of what level of health care benefits a retiree was entitled to post-retirement had already been addressed by the Court in Savela v. City of Duluth.

The situation ultimately ended up in District Court and in June, 2010 the Court instructed the Parties to arbitrate the grievance.

#### Relevant Contract Language

The following excerpts from Article 19 – HOSPITAL-MEDICAL INSURANCE – RETIRED EMPLOYEES and Article 36 – GREIVANCE PROCEDURE of the applicable labor agreement are worthy of note:

*19.1 Any employee who was hired on or before December 31, 2006, and who retires from employment with the City...shall receive hospital-medical benefit plan coverage to the same extent as active employees under Plan 3A...*

*19.2 Any employee hired on or before December 31, 2006, who retires from employment with the City and who meets the qualifications of Article 19.1 shall receive hospital-medical benefit plan coverage under Plan 3A to the same extent as active employees paid for by the Employer and the eligible retired employee, with or without dependents, in accordance with the following schedule: [note: the schedule outlines the share of premium contributions by the Employer and employee, based on years of service]*

#### Article 36 – GRIEVANCE PROCEDURE

*36.4 The arbitrator shall have no right to amend, modify, nullify, ignore, add to, of subtract from the provisions of this agreement. He/she shall consider and decide only the specific issue(s) submitted to him/her in writing by the parties, and shall have no authority to make a decision on any other issue not so submitted to him/her. More than one (1) grievance may be heard by the same arbitrator by*

*mutual written agreement of the parties. Either party, may, if it desires, submit a brief to the arbitrator setting forth its position with respect to the issue(s) involved in a grievance. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws and rules and regulations having the force and effect of law. The arbitrator shall submit is/her decision in writing to the parties and shall file a copy of such decision with the Bureau of Mediation Services of the State of Minnesota. The decision shall be based solely upon his/her interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented. (emphasis added)*

### Summary of Positions and Major Arguments of the Parties

#### The Union:

The Union doesn't challenge the Court of Appeals ruling in Savela v. City of Duluth as it anticipated that the final outcome of that matter would be that the retirees from 1983 through 2006 would have their post-retirement health benefits subject to change, as the benefits of current active employees change as a result of successive changes in subsequent labor agreements.

The Union, together with the four other unions representing City employees and retirees in the negotiations that resulted in the current 2007-2009 CBAs, made major concessions to the City in order to obtain a guarantee the retirees, who retired under the 2007-2009 CBA, would have the hospital-medical level of coverage known as Plan 3A and that coverage for those retirees would not be subject to change in subsequent CBAs.

The three fire fighters, named in this grievance, were well aware that they would each be eligible for retirement during the term of the current labor agreement and, prior to the issuance of the District Court Decision in the Savela v. City of Duluth case in October, 2009, were confident that their level of health care benefits would remain at the current Plan 3A levels throughout the remainder of their retirement. However, as they became aware of the Court's Savela Decision, they approached Union President Simonson and asked him to confirm with the City that their potential retirement during the 2007-2009 CBA term would assure them of that their Plan 3A coverage and benefits would not be subject to change or modification in the future.

Union President Simonson credibly testified that in about August or September, 2006, during the course of negotiations with the City for the 2007-2009 CBA specifically addressed the issue of retiree health care benefits in the new agreement with John Hall, the City Administrator and chief negotiator. Simonson told Hall that he could not get an affirmative membership ratification vote for any proposed new contract unless it specifically stated that members who retire during that contract term would be guaranteed the level of benefits in Plan 3A that they had on the date they retired and

that the level of those benefits would not be subject to substantive reduction in subsequent contracts. Simonson noted that per tentative agreement thus far for the 2007-2009 CBA, it was clear that “new hires” in the Fire Department would not have retiree health care benefits and, thus, when these “new hires” attained a majority in the Union’s membership they would not have much of an incentive to protect the old line retirees’ health benefits from changes or reductions, particularly if reducing the retiree health benefit program would garner greater wage increases. According to Simonson, Hall responded by stating that IAFF 101 members who retired during the term of the 2007 – 2009 CBA were specifically guaranteed by the City’s proposal that they would receive the level of benefits set forth in Plan 3A.

The Special Task Force noted the fact that the City was administering about 100 different health plans/groups for the 1983-2006 retirees at an inordinate cost and recommended that ultimately the City should reduce the number of available health plans for both active employees and retirees down to one ASAP. All of the unions fully supported that Task Force recommendation. In the negotiations for the 2007-2009 contract, the number of health plans for active employees had been reduced from four to one and it was agreed that future retirees would all be under Plan 3A.

The Union does not believe that an arbitration ruling in its favor will lead to a runaway increase in the number of different health plans to be administered. While it is true that if the City makes substantial changes in the level of benefits under Plan 3A in future CBAs and the future level of benefits for retirees under the 2007-2009 CBA are frozen by the arbitrator’s ruling, there would be a minor increase in administrative costs, however, this minor additional cost does not approach the cost of attempting to administer a hundred different group plans.

The Minnesota Supreme Court, in Housing and Redevelopment Authority of Chisholm v. Norman, 696 N.W.2d 329 (Minn 2005), held that promises made in a labor agreement that was in effect when an employee retires are enforceable. IAFF 101 filed this grievance to obtain a binding “...interpretation of the meaning...of the express terms of this Agreement...” by the arbitrator chosen pursuant to Article 36.3. The arbitrator’s decision will determine what promise was made to Local 101’s members who chose to retire while the 2007-2009 CBA is in effect, with respect to their retiree health benefits. An affirmative answer by the arbitrator to the stipulated Issue will accomplish this purpose.

This is an issue that affects the interest of all members of IAFF 101. As stated in Elkouri and Elkouri, How Arbitration Works, 6<sup>th</sup> Ed. 2003 at p. 209:

*In contrast, controversies over the benefits that the employee will receive when they retire is an arbitrable matter because it affects the interests of employees presently in the unit.*

IAFF 101 believes that the specific promise in Article 19.3 of the applicable CBA that retirees “...shall receive hospital-medical benefit plan coverage under Plan 3A...”

plainly and unmistakably requires an affirmative answer to the stipulated Issue. The meaning of this language becomes even clearer when the arbitrator takes into account all the circumstances related to the changes in both active and retiree health care in the 2007-2009 labor agreement and the discussion of this specific issue during negotiations between Erik Simonson, the IAFF 101 President, and John Hall, the City's Chief Administrative Officer/chief negotiator.

### The Employer:

In this grievance situation, the Union claims that the language in Articles 19.1 and 19.3 of the applicable labor agreement; "*to the same extent as active employees*" forever locks in the level of coverage under the City's current health care Plan 3A at the time of retirement and prohibits the City from subsequently modifying an individual's health care benefit levels under Plan 3A, once the individual retires.

The City does not dispute that, pursuant to Article 19 of the current 2007-2009 labor agreement, it is obligated to provide Plan 3A to the retiree, but it maintains that the language "*to the same extent as active employees*" permits it to subsequently modify the level of health insurance coverage provided to retirees under Plan 3A, to the same extent that benefits for current active employees may be modified in the future for Plan 3A.

It is undisputed that in 1983 the City and its five unions agreed to common contract language that established a defined retiree health care benefit. The benefit provided for health insurance for the life of the retiree and at no cost to the retiree.

Although the number and type of health care plans available to active employees varied and changed over the years through 2006, that benefit was administered inconsistently by the City. Despite the contract language, the benefit was administered by the City in a manner that kept retirees, over the subsequent years, at same level of benefit coverage that was in effect on the day that they retired. For example, retirees kept the same prescription drug co-pay structure that they originally retired under, i.e., for some retirees their drug co-pay was as little as 50 cents. The ultimate result, over the course of more than twenty years, anytime any of the five unions changed or added a health care benefit to their unit members, it added to the number of agreements or health care policies that existed and had to be administered by the City. By about 2006, the City was administering about 100 different health care benefit plans/groups, with all but a handful covering retirees only. This situation, of course, significantly increased the City's administrative costs for the health care benefit program and made competitive bidding nearly impossible. Note that the City is self-insured for health care benefits.

In 2004, as we are all now well aware, the GASB issued the now infamous Statement #45; which prescribed new accounting and financial reporting requirements by public employers for Other Post-Employment Benefits (OEPB).

The City was subsequently shocked to learn that its Accrued Actuarial Liability (AAL) for the health care benefit program totaled nearly \$280 million!

In response to the AAL news, the City commissioned the Special Task Force to study the OPEB and AAL situation and make recommendations as to actions to cope with the situation. Among the Task Force's recommendations;

1. Reduce the 100 or so current health care benefit plans/groups down to one, thereby significantly reducing the cost of administration of the health care program and also, finally enabling the City to seek competitive bids from outside carriers.

Consistent with that recommendation, the Task Force urged the City and its unions to modify the retiree health care benefit so that it changed as the benefit was modified for active employees. This was also viewed as a necessary action to encourage competitive bidding from outside providers

2. Finally, it was recommended that the City negotiate with its unions "to deal with the skyrocketing liabilities under the current defined benefit health care plans and implement actions that move toward a more affordable defined contribution plan". The Task Force further noted, "Somehow, long term solutions must be found that puts this huge financial gorilla into a cage."

In late 2005, the City commenced negotiations with its five unions for the 2007-2009 labor agreements. The unions said they desired to achieve universal contract language specific to both the active and retiree hospital-medical insurance program situation. The unions further resolved to "develop and present a proposal that would achieve the necessary results as determined by the Post Employment Health Care Benefits Task Force".

On June 8, 2006 a comparison of the IAFF 101 and City proposals indicated that under either proposal, both Parties wanted Plan 3 for all employees, whether active or retired.

Three months later, Local 101 reiterated its intent to achieve "one simplified plan". In its proposal of September 15, 2006, the available health care plans would be reduced to Plan 3A only and that plan would be the sole choice for both active employees and retirees.

On October 13, 2006, the Union again offered to retain Plan 3 as the only option for active employees and the only option for the retirees. As part of its proposal, the Union stated that it was committed to doing its part, noting the Task Force's request "for good faith, cooperation and shared sacrifice from all interested parties in order to solve this issue and take action to create a sustainable benefit plan for years to come".

The Parties subsequently reached agreement on the language changes in Article 19, with the major change in Article 19.1 being the new, "...to the same extent as active employees under Plan 3A"; rather than the previous language in the 2004-2006

contract which simply stated, “to the same extent as active employees...”, with no reference to a particular Plan.

As a result of the hearing record evidence and testimony, the arbitrator is, of course now familiar with the details and Court decisions that resulted from the litigation between certain of the retirees and the City in what has been referred to as Savela v. City of Duluth. As noted, the most recent decision in that matter came from the Minnesota Court of Appeals in an unpublished decision issued on September 21, 2010, in which the that Court upheld a previous District Court decision in the City’s favor. To wit:

*...According to the plain and ordinary meaning of the phrase “to the same extent as active employees,” the city may modify the level of health insurance coverage provided to retirees to the same extent that it modifies the level of coverage provided to active employees.*

It should be noted that during the course of negotiations for a new 2010 labor agreement, on July 15, 2009, the Union submitted a proposal to the City for language modifications and changes to Article 19.1. The proposed changes are as follows:

*“Any employee who was hired on or before December 31, 2006 and who retires from employment with the City...shall receive at least the same hospital-medical benefit plan coverage that is provided to active employees at the time of their retirement, as contained in Appendix B of this Agreement ~~to the same extent as active employees under Plan 3A,~~ subject to the following conditions and exceptions...”*

The City rejected this proposal.

Obviously, this grievance involves the interpretation of certain language in the applicable labor agreement. The Union’s interpretation and application of the language is unsupported by the record evidence. The City is interpreting the language properly and, there fore the Union’s grievance must be denied.

- A. The Union’s interpretation fails under the ordinary meaning of the language. As noted, the Minnesota Court of Appeals considered the phrase, “to the same extent as active employees”, as set forth in the labor agreements from 1983 through 2006. The Court followed the standard principles of contract interpretation in ruling in favor of the City in Savela. “In interpreting a contract, the language is to be given its plain and ordinary meaning. This standard has been adopted by arbitrators when resolving disputes over the meaning of language in labor agreements.

The Union urges the arbitrator to distinguish the decision of the Court of Appeals from the present case and to find the language, “to the extent as active

employees” now means something entirely different. The Court applied the “plain meaning rule” to the language and determined what that language meant.

The fact that the language in Article 19.1 of the 2007-2009 CBA now has that phrase followed by “*Plan 3A*” does not change the meaning because the City does not dispute that it is obligated to provide Plan 3A to retirees. However, the level of coverage under Plan 3A remains clearly tied to the benefit active employees receive. There is no interpretation question over the meaning of the phrase, “*to the same extent as active employees*”, as the Court found that the plain and ordinary meaning of “*active employees*” are employees who are currently working. Therefore, as the Court has indicated, the City may modify the level of health insurance coverage provided to retirees under Plan 3A to the same extent that it modifies the level of coverage provided to active employees under Plan 3A.

- B. The Union’s interpretation is contrary to the Special Task Force Recommendations.

Even if the arbitrator finds that the language is ambiguous, the Union’s grievance fails because the Union’s interpretation conflicts with the Task Force report that it and the other unions endorsed.

The goal of the Task Force recommendations was to ensure the viability and Sustainability of the City’s health care benefit program. The administrative costs related to the program had to be reduced by moving to a single health care plan and the retirees’ benefit needed to be consistent with the active employees’ benefit.

In the hearing, Union President Simonson acknowledged that the Union had accepted the Task Force recommendations “in their entirety”. The Union’s grievance position is now contrary to its previous endorsement and would return the City’s health care benefit program to its previous unsustainable position.

- C. The Union’s interpretation is contrary to its actions during negotiations for the 2007-2009 CBA.

Don Douglas, a member of the City’s Negotiating Team for the 2007-2009 contract negotiations with the Union credibly testified that on during the course of the negotiations he had occasion to prepare a summary of the Parties’ health care discussions that occurred on June 8, 2006 and that a copy of the summary was provided to the Union. In the document, he noted that the proposal by both Parties for active and retired employees was “Plan 3-for all employees”. He further testified that the City’s goal in those negotiations was “to get to Plan 3” and that the City’s intent was to have “one universal plan for actives and retirees”. He stated, “The idea was to keep actives and retirees on the same plan for ease of administration”.

Contrary to the Union's current position, it consistently represented at the bargaining table that there would be one health plan.

Also, during the hearing, the Arbitrator asked Mr. Simonson whether the Union had informed the City of its belief that the language in Article 19.1 was intended to lock in the level of coverage/benefits under Plan 3A in place at the time of retirement? Initially, Simonson responded "The City said they understood". When the arbitrator noted that "You didn't answer the question". Simonson then claimed that he told John Hall, the City's chief negotiator, that "Can't get this ratified without level of assurance that they will be protected". He claimed that Mr. Hall responded "We are giving you Plan 3 for your retirees". Mr. Hall was not called as a witness at the hearing. However, even if this is an accurate portrayal of the Parties exchange, it utterly fails to establish that the Union conveyed to the City its intent that under the contract language, the City was prohibited from modifying the retirees' benefit under Plan 3, even if Plan 3 was subsequently modified for active employees.

D. The City promised other benefits in the 2007-2009 labor agreement.

The Union argues that the concessions that it made at the bargaining table in the negotiations for the 2007-2009 contract support its interpretation of the contract language. The Union's argument fails.

The City does not dispute that the elimination of other healthcare plans and the defined contribution retiree health care benefit for new hires were important components toward achieving a mutual goal of a sustainable health care benefit program. However, the City made substantial contributions in recognition of the agreement with the Union. To wit:

- The City continued the negotiated plan design under Plan 3 with the City continuing to pay 100% of the premium cost for single coverage and 80% for family coverage. Deductibles and out-of-pocket maximums remained unchanged.
- The City increased its contribution into a single employee's flexible spending account and employees were given the option of placing some or all of the contribution into the City's deferred compensation plan.
- The City also created a new benefit. Effective January 1, 2008 all full-time employees received the equivalent of 1% of their base salary deposited into a health care savings plan account. These monies earn interest over time and are available to cover the employee's health care costs at the time of retirement.
- The 2004-2006 contract provided for forfeiture of accrued vacation hours, in excess of a specified maximum. In the 2007-2009 contract the City agreed to allow employees facing forfeiture of accrued vacation hours to convert those hours into cash and deposit those monies into the employee's health care savings plan account.

- Recognizing that co-pays and deductibles under Plan 3 were a change for employees near retirement, the City also agreed to deposit the sum of \$6000 into a health care savings plan account for qualified employees who retired between January 1, 2007 and December 31, 2009. Again, these monies were made available to cover health care costs at retirement. The health care savings account benefit of \$6000 was also made available to new hires, that successfully completed probation.

E. The Union's interpretation is contrary to the subsequent actions of the Union President.

As testified in the hearing, after the Union ratified the 2007-2009 labor agreement, Erik Simonson, the Union President, began working in the City's Human Resource Office on special assignments related to the health insurance program.

One of his assignments was acting as Project Manager responsible for realizing the carving out of prescription drugs and the utilization of a Pharmacy Benefit Manager (PBM) (ClearScript) for prescription drug administration.

On August 7, 2007, Simonson drafted a letter for City Administration to be distributed to all active and retired employees in connection with the prescription drug benefit program. The purpose of the letter was to inform everyone of the new PBM. The draft letter that Simonson prepared, stated that "Active bargaining units have either agreed to or are in the process of approving supplemental contract changes that will put everyone on the exact same prescription drug plan and co-pay structure." The letter further stated that effective October 1, 2007; everyone would receive the \$0 co-pay structure for generic drugs.

Mr. Simonson admitted under cross-examination that his draft letter of August 7, 2006 was directly contrary to the language in the CBA; which under the Union's interpretation of the retiree health care benefit, only permitted a retiree to receive the \$0 generic prescription drug co-pay structure, if retirement occurred when the supplemental agreement was in effect.

Two weeks later, Simonson met with representatives of the AFSCME Local Union trying to get them to adopt the supplemental agreement to cover the \$0 generic prescription co-pay structure. In an email to ClearScript, the PBM, he admitted that if the AFSCME Local did not agree to the contract supplement, the administration of the prescription drug benefit program was more complicated because he then needed to create an alternative plan design that incorporated the different prescription drug benefits. This meant attaching an "identifier" to the membership file for ClearScript so that they knew who was entitled to what benefit. He admitted "that this hampers our ability to capture significant, if any

savings...” In describing those changes to the retiree health benefit, he took a position contrary to the position advocate by the Union today.

In the draft letter he noted that all retirees would be moved to Plan 3A, as provided to active employees, effective February 28, 2008, and that they would receive the \$0 co-pay generic prescription drug benefit available to active employees. This was regardless of when the employee actually retired. Simonson wrote this information in the draft letter for the City, even though the Union’s labor contract was effective January 1, 2007 and the supplemental agreement for the \$0 co-pay generic prescription drug benefit did not take effect until October 1, 2007.

Under cross-examination, Simonson claimed that no fire fighters had retired prior to the supplemental agreement concerning generic prescription drug co-pays; inferring that what he wrote in the draft letter wasn’t really inconsistent with the Union’s position. When pressed, he admitted that an employee who retired before the effective date of the supplemental agreement would not have received the \$0 generic prescription drug co-pay benefit, under the Union’s interpretation.

In the second paragraph of the draft letter Simonson wrote;

*“With the final approval of the AFSCME labor agreement on December 13<sup>th</sup>, 2007, (sic) the City of Duluth has reduced its hospital-medical insurance plans for active employees to a single option, Plan 3A. The City is obligated to provide health care coverage to all eligible retirees and/or their dependents to the same extent as active employees. Effective February 1<sup>st</sup>, 2008, (sic) all eligible retirees and/or their dependents will be enrolled in Plan 3A and other previously existing plan variations will cease to exist; consistent with the current labor agreements. In addition, all eligible retirees and/or their dependents will be enrolled in the prescription drug benefit plan known as NPSCDPI, which is the only prescription drug plan available for active employees.”*

Simonson’s wording in the draft letter makes it clear that, with respect to the 2007-2009 contract, all retirees would now be covered by Plan 3A and that their previous plans and coverage would cease to exist. His wording also indicates that the level of coverage under Plan 3A will change, as Plan 3A may be modified in the future for active employees. This is apparent by his administration of the prescription drug benefit where regardless of an individual’s retirement date, he writes that the retiree receives the prescription drug plan available to active employees. Simonson did not dispute or disagree with the content of the daft letter. Accordingly, the Union’s application of the language is defeated by the actions of its President, with respect to the letter that he drafted.

A year later, in June, 2008, the City's Benefits Team met with Simonson to discuss some benefit design enhancements that were under consideration and could save some money. Simonson was still involved with that Team.

Immediately following that meeting, Cookie Gilmore, a member of the Team sent an email out to the Team, including Simonson, informing them that the Court had just issued a TRO against the City. The TRO was an initial action in the Savela litigation scenario and prohibited the City from making any benefit design changes to retirees' health care plans. In her email, Gilmore noted that if the City was "required to safeguard the retiree health plan designs that they had originally retired under, then the City would have to make up new health group numbers every time it made improvements to the active employee health care plan design.

Mr. Simonson responded to Gilmore's email and other Team member comments about 45 minutes later and said, "I will NOT support expansion of group numbers again-that is certain." Simonson, under redirect, admitted that group numbers are assigned, based on plan variations and that the number of group numbers previously was why we're in this."

Now, despite its endorsement of the Task Force recommendations and despite the actions of the Union and its President, the Union maintains that the Parties really intended along to lock in the level of coverage in place under Plan 3A for the retirees, as of the time of their retirement. Application of the Union's interpretation utterly disregards the Task Force recommendations and results in plan variations, expansion of group numbers and increased administrative cost to the detriment of the City. The Union's own actions contradict its application of the language. The Union's position is inherently unworthy of belief and the grievance must be denied.

- F. The Union's interpretation is contrary to other provisions of the 2007-2009 labor Agreement.

Other changes to the labor agreement demonstrate that there is no merit to the Union's grievance. For instance Article 18 – Hospital-Medical Insurance, was significantly modified by the Parties to adapt to the transition to a single health care plan offering for all active employees; the creation of a new joint Labor-Management committee to oversee and manage the City's health care benefit program and other changes in the administration of the health care benefit program. Of note in 18.11 the obligation of the City to conduct an actuarial review was changed from "All plans" to "The plan".

Under the Union's interpretation of 19.1 and 19.3 whereby a retiree's health care coverage and level of benefits under Plan 3A would be "locked in" as of the date of retirement; thereafter, any subsequent changes in Plan 3A for active employees would cause a variation and a new group number for the retiree(s).

That would obviously conflict with the changes that the Parties agreed to in Article 18.

G. The Union never objected to the City's interpretation.

The City publicly recognized the Union's leadership role in making the change from a myriad of health care plans covering the active employees and the retirees to just one plan. On October 13, 2009, Mayor Don Ness issued an email to all employees informing them of the District Court decision in the Savelle case. As part of that communication, he noted the tremendous cost and administrative burden associated with around 100 different variations of retiree health care benefits. He recognized that "the move to a single plan was vital" to the City's efforts concerning its retirees and ultimately to the long term goal of financial stability.

Clearly, the City understood the contract language to mean that the health care benefit under Plan 3A would change for retired employees as it did for active employees. The Union acknowledges that it was aware of that communication. The Union offered no evidence that it objected to the accuracy of the content of that email or that it informed the City of its belief that the City's interpretation of Plan 3A was incorrect.

Kim Hall, the City's Human Resources Manager, issued a letter on December 3, 2009 wherein she informed all retirees that regardless of their retirement date, they would all be provided with the same health and prescription drug benefits as active employees. She testified that none of the City's five unions objected to that communication and, in fact, supported it. The Union did not dispute her testimony.

Earlier this year, 2010, the City issued a press release where it again noted the significant cost savings associated with moving employees to Plan 3A and moving all retirees to that same Plan, effective January 1, 2011. The Union offered no evidence that it had objected to the press release or that it informed the City of the Union's interpretation that the contract language prohibited the City from placing a retiree under the same level of Plan 3 coverage as active employees.

H. The Union is attempting to obtain through arbitration an agreement it cannot obtain at the bargaining table.

Nowhere in any of the Union's proposals for the 2007-2009 collective bargaining agreement did the Union indicate that as part of its proposal that even if the City changed the benefit design for active employees under Plan 3A, that the City was prohibited from changing the benefit design once an employee retired. Nowhere in the Union's proposals did the Union communicate that by agreeing to Plan 3A, the employee was guaranteed a level of coverage under

Plan 3A, which existed at the time of retirement. If the Union wanted that type of guarantee, it should have proposed language to achieve that result, which is exactly what it did during negotiations for the 2010 collective bargaining agreement.

It is axiomatic that the arbitrator has no authority to rewrite the Parties' labor agreement or to insert terms into that agreement. Yet that is exactly what the Union is trying to accomplish with this grievance. Kim Hall, the HR Manager, was a member of the City's negotiation team during the negotiations with the Union for the 2010 contract. She testified that on July 15, 2009, the Union proposed certain language changes to Article 19, the retiree health care benefit provision.

Under its proposal, the Union sought a language change which would incorporate the specific levels of coverage under Plan 3A and guaranteed at least that same level of coverage upon an employee's retirement. The proposal included the deletion of the phrase "*to the same extent as active employees under Plan 3A*". By its proposal, the Union was attempting to obtain that which it didn't have – a guaranteed level of health care coverage at the time of an employee's retirement. Yet today, the Union maintains that the current language locks in the level of coverage the employee has upon retirement. If that is true, then why propose the language changes of July 15<sup>th</sup>, 2009? By the Union's action, it shows the City's interpretation is correct.

Conclusion: The City cannot be returned to the "nightmare" that was once retiree health care. The plain meaning of the language controls, which means that the City may modify the level of coverage under Plan 3A for retirees to the same extent it modifies the active employees' benefit under Plan 3A. The Union's interpretation of the language is contrary to the Court of Appeals decision, contrary to the Special Task Force recommendations and contrary to its own actions over a four-year period. Also, none of the other four unions testified in support of the Union's position. For these reasons, the City requests that the Union's grievance be denied.

## ANALYSIS, DISCUSSION AND FINDINGS

From an arbitral point of view, cases involving the interpretation and application of contract terms are among the most interesting and challenging cases handled by arbitrators.

By their nature, collective bargaining agreements are dynamic and evolutionary as they are frequently just one in an ongoing series of such agreements between the same two parties or entities, one being an employer and the other a labor organization representing certain of the employer's employees. Typically by both law and custom, labor agreements cover employees' wages, hours, fringe benefits and other terms and

conditions of employment and specify the respective rights and obligations of all those entities and individuals covered by the agreement.

By referring to labor agreements as dynamic and evolutionary, I mean that they are ever changing, just as the parties who wrote and agreed to their provisions are in a constant state of change as they attempt to adapt and cope with the on-going changes in their respective environments. Inevitably, during the term of a typical agreement questions, problems and disputes will arise between the parties as to how the existing contract language applies to a current or new set of circumstances. Those situations are typically processed and resolved informally by the parties or, alternatively, are processed through a contractual mechanism known as the Grievance Procedure. Over the term of an agreement, the meaning, intent and/or application of the existing contract language may be altered by the effect of mutual grievance settlements, arbitration decisions or, in some rare cases, by a mutual revision of the relevant contract language.

Because the labor agreement is dynamic and constantly evolving, a casual outside observer who attempts to discern the current meaning and application of specific language in the contract from merely reading the words of the document will not have a true or correct perception of the meanings, intentions or applications that the parties, themselves, currently apply to the words.

Arbitrator Maurice H. Merrill summarized the situation quite aptly; *“A union-management contract is far more than words on paper. It is also all the oral understandings, interpretations and mutually acceptable habits of action which have grown up around it over the course of time. Stable and peaceful relations between the parties depend upon the development of a mutually satisfactory superstructure of understanding which give operating significance and practicality to the purely legal wording of the written contract. Peaceful relations depend, further, upon both parties faithfully living up to their mutual commitments as embodied not only in the actual contract itself, but also in the modes of action which have become an integral part of it.”* Phillips Petroleum Co., 24 LA 191, 194-195 (Merrill, arb. 1955)

In this instance, we have a collective bargaining relationship between the City of Duluth and the International Association of Fire Fighters, Local 101; representing the City’s fire fighters. That bargaining relationship dates back to at least 1983 or some 27+ years. During that period, the Parties have probably negotiated at least a dozen or so labor agreements.

The current contract was effective January 1, 2007 and was scheduled to expire December 31, 2009 or whenever, as required by law, it is superseded by a new agreement. The Parties agree that this contract is the applicable agreement in connection with this matter.

As indicated by the Issue Statement, this matter concerns the health care benefits coverage for fire fighters who retire during the term of this current, applicable agreement.

As previously indicated, the Union's position is that the current contract language in Article 19.1 and 19.3 requires the City to continue and maintain the same level of coverage and benefits under health care Plan 3A for firefighters who chose to retire during the term of this agreement into their retirement, without change or modification into the indefinite future.

The City, however, contends that those same contract language articles gives it authority to modify those retiree health care benefits under the current Plan 3A, as the coverage and levels of benefits may be modified for active employees in the future.

To put it another way, the Union says the language in those Articles "freeze" the current coverage and levels of benefits under the current Plan 3A into the indefinite future for those employees who retire under this agreement. The City says, "No", the contract language clearly ties future retiree health care coverage and levels under Plan 3A to any future changes or modifications that affect active employees.

In order to discern the meaning and application of the language in the current contract, we need to look at the retiree health care benefit language over the course of the bargaining history of these Parties.

The record evidence on that history is clear and undisputed. To wit:

In 1983, the City and the five (5) unions (including this Union) reached a mutual agreement to include in all five labor agreements a provision for health care coverage and benefits for all retirees from City employment. That language for that provision appears above in the third paragraph under Background.

That exact language continued, unchanged or modified through successive labor agreements until the expiration of the 2006 agreements.

During the course of the twenty-three years that the retiree health care benefit language was in place, the meaning and application of the language was mutually clear and obvious to all Parties. The City, for its part, understood the language to mean that any employee who retired from its service was entitled to maintain the same health care coverage and level of benefits that s/he enjoyed on the date that s/he retired from active duty. That meaning and application was obviously also mutually acceptable to the five unions. As a result, for those twenty-three years, there were no significant disagreements or disputes between the Parties over the meaning, interpretation, application or administration of the retiree health care benefit program. The Parties were fully satisfied with the system and, of course, the retirees were also very pleased.

So what happened to cause this apparent idyllic system and relationship with respect to retiree health care benefits to fall apart and break down? The obvious answer is the Governmental Accounting Standards Board (GASB) and its now infamous Statement #45 concerning the reporting of Other Post-Employment Benefits (OPEBs).

As noted previously, Statement #45 forced the City, for the first time, to face and publicly report its Accrued Actuarial Liability (AAL) for its OPEBs. The subsequent Actuarial Report estimating the City's ALL at some \$280 million was a total shock and major financial body blow.

The City administrators and politicians subsequently created the Special Task Force to study the problem and, hopefully, come up with some viable solutions. When the Task Force began studying the existing system for retiree health benefits, it couldn't believe what the City had been doing for the preceding twenty-some years! It, of course, found that because of the City's on-going application of the retiree health benefit contract language, the number of different retiree health plans and /or groups being administered by the City now numbered about 100. Additionally, the City was routinely offering and administering some 4-5 different health plans to active duty employees.

When the Special Task Force issued its Final Report on December 12, 2005, it was immediately studied carefully by everyone even remotely related to the City, including the City's five unions and the City's retirees. In the wake of learning about the \$280 million AAL, everyone subsequently cheered the work of the Task Force and solemnly pledged to support it (at the time there really weren't any other options available?).

For their part, in March, 2006, the five unions advised the City by letter that they had reviewed the Task Force Report and were prepared to enter into joint negotiations with the City for new universal contract language specific to both active employee and retiree health care benefits. However, the letter contained no hints or specifics as to what proposals the unions would be making to the City.

As noted previous herein, IAFF 101 and the City subsequently reached agreement on the 2007-2009 labor agreement and that agreement contained language changes in Articles 19.1 and 19.3, as noted previously.

The Parties essentially adopted the standard retiree health care benefit language from the previous 1983-2006 agreements with the addition of the specific reference to "Plan 3A", as the new health care plan for all retirees.

With that language change, it is clear that the Parties agreed that the new language would eliminate the problem of administering the previous 100 or so retiree health plans/groups and would place all the retirees in the single Plan 3A. The Parties concurrently agreed that all active employees would have only Plan 3A as their available health care choice.

The question now arises, but, what effect did the new language in Articles 19.1 and 19.3 in the 2007-2009 agreement have on the then existing practice of twenty-some years of “freezing” retiree health care benefits from future adverse changes or modifications? A review of the record evidence shows neither of the Parties proposing to end that practice or questioning the continuation of that practice. The closest thing we have is the testimony of Union President Simonson with respect to a conversation that he had with John Hall, the City’s chief negotiator, to the effect that during the course of negotiations for the 2007-2009 contract, he specifically told Hall that he would not be able to obtain ratification from his membership unless the contract guaranteed that fire fighters who retired during the term of the contract would subsequently continue to receive the level of benefits for Plan 3A in retirement. Simonson said he pointed out to Hall that per tentative agreement thus far for the 2007-2009 CBA, it was clear that “new hires” in the Fire Department would not have retiree health care benefits and, thus, when these “new hires” attained a majority in the Union’s membership they would not have much of an incentive to protect the old line retirees’ health benefits from changes or reductions, particularly if reducing the retiree health benefit program would garner greater wage increases. According to Simonson, Hall responded by stating that IAFF 101 members who retired during the term of the 2007 – 2009 CBA were specifically guaranteed by the City’s proposal that they would receive the level of benefits set forth in Plan 3A.

What the Simonson-Hall conversation shows is an elected Union Officer telling his management counterpart that he is unable to deliver all the “givebacks” that the City may wish, because the membership is reluctant to give up everything they have achieved over the years in one fell swoop. It also shows that regardless of his personal position with respect to the retiree health care benefit situation, as an elected Union Officer, his duty was to represent his members and carry out their wishes and goals.

I note that Mr. Hall did not testify in the hearing and the City did not otherwise challenge the content of Simonson’s testimony with respect to the conversation with Mr. Hall.

It is an axiom and basic principle of labor relations that if a Party to a contract decides that a change or modification is necessary in the language and operation of a particular provision of the agreement; that Party is obligated to inform the other Party of the proposed and desired change.

The record herein is devoid of any evidence that during the course of the negotiations for the 2007-2009 labor agreement, that the City advised the Union of its desire to change the retiree health benefit contract language to eliminate the post-retirement “freeze” on changes or modifications to retiree benefit levels and coverage and to tie their benefit levels to future changes occurring with the active employees.

Since the City failed to give notice to the Union of a possible change in its interpretation of the new language in Article 19.1 and 19.3 with respect to the issue of continuing or

eliminating the practice of freezing retiree health care benefits at the level the retiree enjoyed at the time of retirement; the Union appears to be justified in presuming that practice remained unchanged in the 2007-2009 agreement. From the Union's point of view, the new language in Article 19.1 and 19.3 did permit the City to eliminate all the previously existing 100 or so health care variations among the retirees and placed them all in Plan 3A; thereby significantly reducing the City's administrative costs, but the Union had no interest in offering any further cuts or changes in the existing retiree health care program. The consolidation of the available health plans was, of course, one of the major recommendations of the Task Force.

If the City had desired to change the operative effect and intent of the retiree health care contract provisions to clearly tie their benefit levels to those of current active employees, it was obligated to inform the Union of its proposal(s) for such change and propose new language to achieve that new objective. If negotiation failed to achieve a mutual agreement, the City also had the ability to seek the desired language changes through Interest Arbitration. At no time material herein has the City had the ability or authority to **unilaterally** change the operative practice of the past twenty-plus years with respect to the contractual retiree health benefit program.

I also note that the Union didn't seem to pay any attention to the freeze issue or practice or the meaning and application of Article 19.1 and 19.3 until the District Court issued its decision in the Savela case in October, 2009, but with the issuance of that decision, the Union immediately sought clarification and confirmation from the City as to its interpretation and application of the current contract language. When the City failed to respond to the Union's inquiry, it filed this grievance and the City's subsequent responses confirmed that there was an interpretation problem.

It appears that it was during the course of the Savela litigation that the City first articulated its position that, under the retiree health benefit contract language, as set forth in the 1983-2006 agreements, it had the authority and power to modify or adversely change retiree benefit levels to conform with any such changes made to the active employee health care benefit program. I would presume that if that was the City's position to the Court, it probably did not inform the Court that its actual position and practice over the past twenty-plus years was that it didn't have that authority or power via the contract(s).

With respect to the District Court and Minnesota Court of Appeals decisions in the Savela matter, I note the following:

- The Plaintiffs in that matter were City retirees and, of course, the City of Duluth was the Defendant. The retirees are and were covered by the various labor agreements from 1983-2006 with respect to healthcare benefits, but the unions, who represented those retirees and negotiated those contracts, were not parties to or otherwise involved in that litigation. That situation left the Courts in a position where they heard from only one of the contract parties.

- The Savela litigation involved the retiree health care benefit language in the 1983-2006 series of labor agreements, but did not involve the language in the 2007-2009 agreement, which is the applicable contract in this matter.
- As noted previously herein, the Parties to this 2007-2009 labor agreement have clearly delegated the authority to interpret the meaning and application of the express terms of the agreement to this arbitrator, per Article 36 of the contract.
- As a matter of public policy, see Minn. Stat. 179A.20-21, the State of Minnesota promotes and, in most instances, requires that all grievances and disputes arising out of labor agreements be resolved through binding arbitration.
- The Court of Appeals issued its Decision in the Savela matter as an unpublished opinion.
- My findings and conclusions with respect to the 1983-2006 contract provisions relating to the retiree health care benefit program and the behaviors of the Parties relative to those provisions are relevant only as background and history to the interpretation and application of the current applicable labor agreement in this matter.

### CONCLUSIONS

In view of my analysis, discussion and findings above, I conclude that the language in Article 19.1 and 19.3 continues to require that the City of Duluth, as it has in the past, maintain the same level of coverage and benefits under Plan 3A, without subsequent adverse change or modification, for retirees who have or will retire during the term of the 2007-2009 labor agreement with IAFF 101, until such time as the current language and practice may be lawfully changed. The City's refusal to acknowledge and/or comply with that requirement constitutes a violation of the current labor agreement.

### DECISION

Having concluded that the Employer – the City of Duluth did violate the applicable labor agreement, as alleged by the Union in its Grievance of December 1, 2009, that grievance is hereby sustained. The Employer shall immediately take all necessary actions, as may be required and appropriate, to fully comply with this Decision; including written notice to bargaining unit employees/retirees, as the Union may request.

Dated at Minneapolis, Minnesota, this 30th Day of December, 2010.

/s/ Frank E. Kapsch, Jr.  
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of 14 calendar days from the issuance of this Decision to address any questions or problems related thereto.