

IN THE MATTER OF THE ARBITRATION BETWEEN

**TEAMSTERS LOCAL No. 320,
UNION,**

**DECISION AND AWARD
BMS CASE NO10-PA-1392**

- and -

**CITY OF WAITE PARK, MINNESOTA,
EMPLOYER**

ARBITRATOR

William E. Martin
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APPEARANCES

On behalf of Local 320

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On behalf of the City:

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PROCEEDINGS

This grievance arbitration was heard by Arbitrator William E. Martin at 9:00 a.m. on October 29, 2010 at the city council chambers of the City of Waite Park, MN. At the hearing, the Union presented the testimony of Michael J. O'Donnell, a Local 320 Business Agent, and Jud Zellner, a senior maintenance worker and union steward of this bargaining unit. The City

presented the testimony of Shauna Johnson, the City Administrator and Rick Miller, Mayor of Waite Park.

The parties submitted numerous exhibits listed in Appendix A attached hereto all of which were received in evidence. At the close of the evidence the parties agreed to submit written briefs simultaneously on November 12, 2010. The briefs were submitted and subsequently the parties agreed to extend the time for the filing of the Arbitrator's Decision and Award to February 15, 2011.

Based upon the testimony, the exhibits and oral and written arguments, I hereby make the following Decision and Award.

DECISION AND AWARD

I. THE GRIEVANCE IN FACTUAL CONTEXT

The grievance here was filed by the Union Business Agent, signed by 9 of 10 Unit members on January 7, 2010. The grievance alleged a violation of the Collective Bargaining Agreement, (CBA) when the Employer began deducting 2010 health insurance premium increases from employee pay checks rather than paying 97% of the increase on the employees behalf. The Union argued that this was a breach because the CBA required the Employer to pay 97% of health insurance premiums on the employees behalf and requested reimbursement of the allegedly excessive deductions from each 2010 pay check.

The Union here is the exclusive representative of the maintenance workers of the City of Waite Park (the Employer) and has been since 1992. The most recent CBA was signed in July of 2008 effective back to January 1, 2008. The CBA expired on December 31, 2009.

The CBA contains the following provision on health insurance benefits:

Article 18 . Heath Insurance Benefits\

18.1 The Employer shall pay 97% of the Employee and Employee's dependants premium for health insurance for 2008 and 2009.

The premiums are for a health insurance plan obtained by the City for all of it's employees from Blue Cross Blue Shield called the Double Gold Health Care Plan. Each year the plan is subject to premium increase by the insurer and as has occurred nationwide, the premiums lately have increased each year.

As is the case with many Employers, the City has grappled with premium increases. Indeed, with general budget difficulties in Minnesota the past two years, public employers have had great difficulties with these rising health care costs.

To deal with these rising costs, the Employer decided among other steps, to attempt to limit its contributions to premiums. It's first attempt was modest when the parties negotiated the 2006/2007 CBA. In all of its negotiations with its three bargaining units it successfully reduced its contributions from 100% by negotiating the following language for 2007: "the City shall pay 97% of the employee and employee's dependant's premiums for health insurance for 2007." The contracts also stated: "the employees will be responsible for 3% of the single and family amended premiums for 2007."

When the parties negotiated their next two year CBA for 2008/2009, they repeated the 97% premium contribution language. This CBA was signed on July 7, 2008 although it was effective retroactive to January 1, 2008. During the time they negotiated after the expiration date of the old CBA, the City paid 97% of the increased 2008 premium and the new CBA later agreed to a 97% contribution of the 2008 and 2009 premiums, both of which were increased by

the insurance company in those years.

In 2009, the City resolved to deal somehow with increasing premiums as it faced further budget problems. In 2008, it had established an Employee Health Committee to discuss costs and early in 2009 the City began announcing through the committee that it intended after 2009 that it would pay only an amount equivalent to 97% of the 2009 premium. In other words it signaled that it no longer would pay the full 97% of new premium increases. Indeed on September 22, 2009, the City announced the 2010 premium increase and signaled the City's intention to pay no more in 2010 than 97% of the amount of the 2009 premium. Of course, this was the amount it had been paying under the then current CBA. From late September until late October the parties met four times in negotiations. They negotiated several items but in each session the City proposed that it would pay no more for health insurance than it was paying in 2009. On October 28, 2009 the Union made its first written proposal. The Union proposed that the City pay 97% of insurance premiums with no specification of a particular year.

At the fifth meeting, on November 16, the City again proposed a flat rate premium contribution by the employer, but the dollar amount was increased from that of the no increase proposal offered in prior sessions. The increase was said to equate with 97% of the 2010 premium.

On December 2, the parties had not reached agreement, and the Union requested mediation. Since the contract was set to expire on December 31, 2009, the City notified the Union on December 10 that beyond Dec. 31, it would continue, until a new agreement was reached, to pay the same amount it had paid under the old CBA, 97% of the 2009 premium.

Meanwhile, on December 14, the City settled two other agreements in which the City

agreed to pay flat rates equal in amount to 97% of the health plan premiums for 2010. However, the 97% language was removed from these CBA's. The same day it made an identical proposal to the Union herein for this unit.

In response to the City's December 10 notice, the Union stated on December 14, that it believed the City was legally obligated "under the aggregate value statute" to pay 97% of the new 2010 premium while negotiations continued. The parties failed to agree to a new CBA, and have not settled to date. The City has since January 2010 paid the insurance premium at the same rate it paid under the expired agreement, 97% of the amount of the 2009 premium amount.

The grievance herein was submitted alleging it was a contract violation to continue paying premiums at the 2009 rate. According to the Union, while negotiations and mediations herein continued the City should have paid 97% of the 2010 premium.

After the CBA expired, and the City limited its premium payouts to an amount equal to 97% of the 2009 premiums, the amount it had been paying all along. The parties met on January 6 to discuss the City's proposals. Two days later the Union delivered its grievance. The grievance, as stated above, alleged breach of the CBA. It also alleged breach of state law, Minn. Statute 471.61, PELRA179A20 Subd. 6. This primarily invokes the PELRA provision that states:

During the period after contract expiration and prior to the date when the right to strike matures, and for additional time if the parties agree, the terms of an existing contract shall continue in effect and shall be enforceable on both parties.

Thus, the Union argued the expired CBA has continued, including the health insurance benefit of Article 18. Further, the Union interprets the provision to require that 97% of the new

2010 premium to be paid under the provision of the expired contract which expressly only covers 2008 and 2009. Before the City responded to the grievance, the Union appealed to step 3 attempting to go to mediation. The City refused step 3 and requested a step 2 meeting. The parties attempted to schedule a step 2 meeting and met on February 3, 2010. On February 4, 2011 the City denied the grievance on the merits and additionally denied that the matter was either grievable or arbitrable. The City agreed however to mediation, reserving its objection to the procedural and substantive grievability or arbitrability of the Union's claim. The parties continued to mediate the contract negotiations and in April they mediated their "separate" grievance claim.¹ On April 23, 2010 the Union requested grievance arbitration and four months after the BMS submitted a list of arbitrators the Union requested a meeting to strike names and select an arbitrator. On August 2, the Union requested a new list of names and an arbitrator was formally selected on September 10.

II. **ISSUES**

The parties agree that the following issues have been submitted for decision herein:

1. Is the grievance herein substantially and procedurally arbitrable?
2. Did the City violate Article 18 of the 2008-2009 CBA by limiting its contribution to health care premiums following the expiration date of the CBA?
3. If the grievance is arbitrable and the City breached the CBA, what is the appropriate remedy?

III. **ARGUMENT, DISCUSSION AND CONCLUSIONS**

¹The City argues of course that the Union seeks in arbitration what it has thus far failed to achieve in contract negotiation for a new CBA.

A. **ARGUMENTS OF THE PARTIES**

1. **Union Arguments**

a. **Contract Continuation and Substantive Arbitrability**

The Union's case is premised upon two major claims. First, the Union argues that the 2008/2009 CBA remains in effect under PELRA even though it has ended by its own terms. Second, it argues that the health insurance premium payment required by the 2008/2009 agreement is 97% of the full premium actually charged by the insurer at any time. The conclusion is that for 2010, the extended agreement calls for the City to pay 97% of the 2010 premiums.

Subarguments, then, require the Union to explain why PELRA should be read to extend the CBA here. The argument is not complex as the statute on this issue is short and clear. The expired CBA stays in force until the right to strike matures, or for as long as the parties agree (inapplicable here). Further, the Union argues the right to strike has not matured because the Union has not filed its written notice of intent to strike. The Union "deduces" the definition of when the right to strike matures from the "plain language of the statute."

Beyond the PELRA contract continuation provision, the Union contends that under general contract law there is an implied continuing contract here beyond the contract expiration date. There are at least two theories as to how, as a technical matter, an expired contract remains alive. One is that an implication is based upon the actions of the parties in their continued performance of the old contract according to its old terms, e.g., the City continues to pay at the same rate and so forth. The second theory is that the customs and practices under public sector CBA's implies a continuance of expired CBA's at least until changes in terms are

legally made after impasse in bargaining. As to the public sector labor law customs, it is probable that the PELRA continuation provision is premised upon this custom or that the provision has enhanced and informed this custom.

We will return to the question of continuation of the CBA as it is integral to the merits of the breach issue as well as to the procedural arbitrability issues. With regard to the substantive arbitrability issue, the Union is forced to deal with the City's defense here that the grievance is not substantively arbitrable because this arbitration clause, with the rest of the CBA, has terminated. Thus under familiar law, making arbitration consensual, the duty to arbitrate no longer exists except perhaps under the complex and limited terms of the line of federal labor cases ending with Litton Financial Printing Div. V. NLRB, 501 U.S. 190 (1991). The City, of course, argues that the case is not arbitrable under that law. The Union's response is brief. It avoids the argument by in effect, reflecting back to their PELRA contract continuation argument. In essence, the Union's point is that under PELRA the whole contract continues, including the arbitration provision, under which this claim is substantially arbitrable.²

b. Procedural Arbitrability

In response to Employer objections to procedural arbitrability. The Union argues that the grievance was timely since it was not premature or late. It was not premature because there is nothing in the contract preventing a grievance based upon the City's announcement of a action which violates the CBA. The Union refers here to language in the grievance procedure allowing that the grievance merely be based upon a "dispute or disagreement as to the interpretation" of the agreement which clearly can precede the actual violation. In essence, it argues an

²The City's argument on the PELRA provision is set forth below.

anticipatory repudiation. Here the City's announcement was in December and its first deduction was in the last pay check in December 2009. Thus, the grievance on January 7, 2010 was properly within 15 days of the City's first deduction.

After concluding the grievance was timely, the Union defends the filing of this grievance on behalf of all ten unit workers. The Union's argument is that a class action grievance would be acceptable, but that, in any event, this grievance is merely a consolidation of ten individual, identical grievances.

C. The Merits Of The Union's Claim

The Union's arguments on the merits proceed from the above summarized claim that PELRA continues the CBA in effect. Beyond that claim, of course, the Union argues that the employer has unilaterally changed, or breached, the insurance benefit provided under the 2008/2009 CBA. Of course, if the CBA continued in force and the City changed it, that would be a breach. Leaving aside for the moment the PELRA legal question, the heart of the matter for the Arbitrator is the contract interpretation question.

The Union's first argument on this issue conflates the contract interpretation problem with the continuation issue. The Union claims that if the City's interpretation is used that would violate PELRA because that interpretation would render Article 18 a nullity in this year of extension because it would permit the City to unilaterally change any part of the CBA fixed to the specific year in which the CBA expires.

As to the interpretation problem, the Union ultimately argues that extension of the 2009 CBA into 2010 reveals a latent ambiguity. The issue here is intent of the parties and the question becomes whether the parties intended 97% to be the substantive heart of Article 18 of

the CBA, or whether they intended the amount paid as expressed by the formula 97% of the premium in 2009 to be the obligation. The Union argues for the former contending that there is no plain meaning now that we are extending the CBA into 2010. To establish this "meaning" the Union refers to the negotiation of the 2008/09 CBA in which the City's memorandum of understanding referred to Article 18 as follows:

No changes in health insurance contribution. The City will continue to pay 97% of the employee and the employee's dependants premium for health insurance for 2008 and 2009.

The Union's argument concludes that since the City knew the dollar amounts would go up in 2009 that "no changes in health insurance contribution" can only mean that the active principle of the section was the 97% referred to, not the dollar amount. Thus 97% of premiums must be the status quo for 2010 continuation of the CBA under PELRA. And, if the CBA is thusly interpreted, the City has breached that provision and should be required to reimburse the employees to an amount calculated on the basis of the 97% formula for the 2010 premium.

2. **CITY ARGUMENTS**

a. **Substantive Arbitrability - Statutory Continuation of the CBA**

The City argues that this grievance is not arbitrable because the contract within which the arbitration provision resides has expired and this is not a permissible post expiration grievance under the Litton Financial Printing case. A permissible post expiration grievance under that case is limited to one accruing before the contract expired, whereas this grievance necessarily involves only premiums to be paid after termination.

Expanding this argument the City responded to the Unions claim that under PELRA the

whole CBA, including the arbitration clause, continues beyond expiration at least until the right to strike matures. On this claim, at least as it relates to the substantive arbitrability issue, the City argues the PELRA claim is a legal argument not a contract interpretation issue. This legal issue according to the City is for the courts and outside the arbitrators jurisdiction. And even if the arbitrator could consider the PELRA continuation claims, the City contends that the provision does not continue the CBA in force because the right to strike matured here on January 16, 2010, the 45th day after BMS received the Unions request for mediation. And, of course, the City provides supporting argument for its reading of PELRA.

b. Procedural Arbitrability

The City argues that this grievance is procedurally improper because the City had not yet paid 2010 premiums at the time that the grievance was submitted and thus was premature. Second, the City argues that as a class action grievance filed by the Union the grievance is improper since the grievance procedure requires a grievance to be failed by "an employee". Third, the City argues the grievance procedure requires a grievance be filed within 15 days "after such violation has occurred." The Union, herein, filed before any violation and never 15 days after any violation occurred. Therefore, the City contends that any alleged violations have been waived.

c. Merits of the Union's Breach Claim

The City, stressing the Union=s burden of proof, argues that the CBA unambiguously permits the City to follow the course it chose on contributions for insurance premiums in 2010. First, the City revisits the CBA termination provision arguing the language of the CBA clearly terminates the contract as of December 31, 2009. Thus, according to the City there can be no

contract violation with regard to the City's 2010 insurance contributions.

Second, the City argues that even if extended under PELRA the old CBA, not changes thereto, must be extended. The provision the Union seeks to apply here says literally the City must pay 97% of the 2009 premiums in 2009. If that provision is extended into 2010, it presumably requires the employer to pay the same amount in 2010 as it had in 2009. And that is what the City did. If otherwise the City would be increasing this benefit to that being proposed by the Union in Collective Bargaining.

To expand its argument beyond the asserted plain meaning of the provision alleged as the basis of the grievance, the City also argued that evidence of bargaining supports its interpretation.

The history showed that the City provided memoranda to the Union stressing its year specific approach. Thus the Union knew what the City meant and there was no evidence that the City knew of a different meaning attached by the Union.

d. Remedy Should Be Limited

In addition to its arbitrability and its merits arguments based upon the expiration of the CBA, the City also argues that the remedy should be limited to a date certain for the same reasons. First, it argues that any remedy for events in 2010 would exceed the arbitrators authority under the CBA. And even if the arbitrator believes some remedy is warranted the City argues it should be limited to December 31, 2009, the end of the CBA, or January 8, 2010 (the grievance date) because no grievance was filed within 15 days of any premium payment. Thus each time no grievance was filed timely it was a waiver of each alleged violation. Third, the City argues a limit to January 16, 2010 because even if the contract continued under PELRA, that extension had ended by January 16, when the City claims the right to strike had matured. And

finally it argues no remedy should extend beyond April 23, 2010 after which the Union allegedly delayed in striking arbitrators to expedite this hearing.

At each level of argument then the City argues that contract expiration and the Union's attempt to obtain in a grievance arbitration what it should only achieve in negotiations requires a conclusion that the case is beyond arbitral jurisdiction, and demands a finding against the Union on the merits.

B. DISCUSSION AND CONCLUSIONS

1. Contract Claims Under CBA

At the risk of over simplifying this case, I begin by discussing the contract interpretation question. Assuming without argument that this grievance is substantively and procedurally arbitrable, that PELRA continues the 2008/2009 CBA into 2010 following its expiration date, and also assuming the right to strike has not yet matured, the question at the heart of this case is what does Article 18 of the 2009 CBA mean as it is extended into 2010.

Article 18 says:

GROUP INSURANCE BENEFITS

18.1 The Employer shall pay 97% of the employee and the employee=s dependant=s premiums for health insurance for 2008 and 2009.

What does this mean if the benefit is continued under PELRA while the parties continue negotiations beyond 2009, into 2010.

The Union argues it means 97% of the 2010 premium. The employer argues it means 97% of the amount of the 2009 premium, the same dollar amount as the employer actually paid under the 2009 contract before it expired. Each party makes several attempts to explain why its

interpretation is correct and the attempts are all somewhat unconvincing. But the question is not what the language herein means in the abstract, but rather the question is what does it mean in the context of public sector labor relations as negotiated by these two parties.

Briefly revisiting the contract continuation debate, the Employer has persistently argued that clear expiration language shows that the parties did not intend the insurance benefit to extend beyond expiration, but even absent the PELRA provision, the actions of the parties since expiration reveals an intention to proceed much as before while they continued to negotiate. This idea was nicely started by Arbitrator Jacobs in SSD#1, Minneapolis Public Schools and IFT, BMS No. 10-PA-1133 (October 7, 2010) in which he said: "the fact that they continued to honor all the other provisions of the 2007-2009 labor agreement is strong evidence of a contractual intent to honor the provisions of the prior contract until a successor agreement has been reached."

But again, assuming continuation, the question is continuance of what. Article 18.1 is expressly time specific, but is the expression intended to apply only to the time of payment, or is it intended to limit also the amount of payment? The problem is that in the minds of the parties during negotiations these amount to the same thing. They were not thinking about rolling over the provision in the absence of agreement to a new contract. It remains the fact however that the extension or roll over during negotiations is a familiar situation. This is a period when both sides are seeking leverage in bargaining. Among the levers available to each, one available to the employer is the ability to withhold agreement to increased benefits. Of course to the employer increased benefits are increased costs or expenditures. To the employees, increased costs of the same benefits may not be seen as an increase. The Employees get the "gold plan". When premiums increase they get the same plan, but the employer pays more unless the premium

contribution is limited somehow. This employer strongly signaled its intent to limit its exposure to premium increases.

The Employer's reading of the CBA provision at issue here shows that its intent was to have a locked in premium amount from which to negotiate each year. It first did this by negotiating a percent of premium provision limited to specific years. Clearly this provision sets an amount of contribution that defines the benefit from the City's perspective. The amount paid in 2009 is the benefit extended that over into 2010. To do otherwise would give the Union, without agreement, the benefit it was seeking in negotiations. The history, although limited confirms the City's viewpoint.

The Employer argued repeatedly that the key to the contract interpretation question is the date specific nature of 18.1 and that the Union is seeking through a grievance what it should be seeking in negotiations. Frequently this sort of argument is made by employers as a make weight argument somewhat irrelevant in most cases. Here, however, the argument has force. It reminds us that this is a grievance arbitration under the 2009 contract not an interest arbitration to determine a 2010 agreement. It is clear here that the Union's position would amount to a benefit increase, while the Employer's performance under the 2009 agreement did extend the 2009 benefit beyond expiration. Assuming an obligation to extend, the Employer has done so and has not therefore breached the CBA.

Against this backdrop it is hard to credit an argument that continuing the status quo means that the employer must increase its payments on behalf of employees. I therefore conclude that the City did not breach Article 18.1 when it continued its payments to health insurance in 2010 in the

same amount as it had paid in 2009.³ Therefore, I conclude that the grievance must be dismissed.

IV. **AWARD**

Based upon the conclusions stated above, that the Employer did continue to apply the 2009 insurance benefit while negotiations continued, and that the 2009 specific benefit in Article 18.1 did not require an increased benefit based upon the 2010 premium in 2010, I find for the City and hereby dismiss the grievance herein.

Dated: February 15, 2011

William E. Martin
Arbitrator

³Having decided that the Employer's reading of the CBA is correct, it becomes unnecessary to decide whether the Employers arbitrability arguments are correct. While these issues are moot, I will state that had it been necessary to decide them I would have rejected the employer's arbitrability objections and found the grievance to be arbitrable.