AMERICAN ARBITRATION ASSOCIATION

Case No. 14 390 01530 12
Ralph H. Colflesh, Jr., Esq.
Arbitrator

CITY OF READING
and
READING FRATERNAL ORDER OF POLICE,
LODGE No. 9
(Retiree Health Insurance Grievance)

Appearances
For the City:
Scott Cooper, Esq.
and with him on the brief
Rose Isard, Esq.
Blank Rome, LLP
Philadelphia, Pennsylvania
For the FOP:
Sean T. Welby, Esq.
Lightman, Welby & Stoltenberg
Harrisburg, Pennsylvania

DECISION AND AWARD

Pursuant to the terms of a Collective Bargaining Agreement (JX 1)[1] [2] by and between the parties hereto, the City of Reading ("the City") and Fraternal Order of Police, Lodge, No. 9 ("the FOP"), and the Labor Arbitration Rules of the American Arbitration Association ("the AAA"), the above named arbitrator was appointed to hear and determine the dispute described below. Upon due notice an arbitration hearing was convened on March 26, 2013 at 10:00 a.m. in City

[1] Exhibits admitted at the hearing and referenced herein are designated "JX_____" for Joint Exhibits; "CX_____" for City Exhibits; and, "UX_____" for FOP (Union) Exhibits.

[2] The Agreement referred to herein ended by its terms on December 31, 2011 and has been modified by an Interest Arbitration Award for 2012-2016, pursuant to Act 111, 43 P. S. 217.1 *et seq.* That Award did not modify the contractual provision at issue here, Article XV, Section 4, Subsection c and instead stated: "All current retired who are currently eligible for post-retirement health benefits shall continue to be entitled to the post-retirement health benefits pursuant to the terms and conditions governing their receipt of such benefits that were in existence on the date of their retirement." (CX 1).

Hall, Reading, Pennsylvania. At that time and place both parties had an opportunity to call and confront witnesses, introduce documentary and all other forms of non-testimonial evidence, and present arguments in support of their respective positions. At the conclusion of the hearing the parties elected to submit post-hearing briefs in lieu of summarizing their cases orally, and the record closed. As there are no issues of arbitrability, this matter is now ready for adjudication on its merits.

Background:

The City provides public safety through its Police Department which is staffed by sworn officers collectively represented by the FOP. Terms and conditions of employment for those officers are set forth in the Agreement which, among other provisions, contains a grievance procedure for the resolution of "any complaint by an employee or the [FOP] over the interpretation, application or alleged violation of [the] agreement..." (JX 1, p. 12). Those grievances that cannot be otherwise resolved may be submitted to "final and binding" arbitration by the FOP. (JX 1, pp. 12, 13).

On or about October 3, 2012, the FOP filed a grievance alleging a violation of Article XV Section 4, Subsection c ("Subsection c") of the Agreement. Article XV, Section 4, Subsection c obligates the City to "provide and pay for the same health insurance [to retirees] as those [*sic]* provided for active employees, subject to the following conditions:

.....

c. The benefits shall not be provided for employees who are eligible for coverage under the group medical insurance plan of another employer or a spouse's employer.

The record indicates that Subsection c as now written in the Agreement was first imported by an April 27, 1987 Interest Arbitration Award in AAA Case. No. 14 390 2198 86 A (JX 3, p. 4) and first appeared in contractual form in the resulting 1987-1988 contract. (JX 4, p. 23). In all three documents, including the present Agreement, Subsection c is identically expressed.

The FOP's grievance complained that in September 2012 the City distributed a questionnaire to retirees in order to check eligibility for health coverage. The questionnaire asked retirees to verify that they had no other coverage whatsoever from any other source. The City's questionnaire, which was accompanied by an affidavit attesting to the truth of each respondent's answers (JX 5, p. 2), demanded that retirees complete and return the form to the City's Human Resources Department by October 15, 2012 in order to remain covered under the City's medical plan in 2013. (JX 5). The FOP specifically contested the following explanation of eligibility as stated on the questionnaire:

> The City plan covers you and your eligible dependents until: (a) you are eligible for coverage under the group medical insurance plan of another employer or (b) spouse's employer or (c) you have qualified for Medicare and/or Medicaid eligibility. (JX 5, p. 1).

The grievance further asserted::

> Retirees have continually maintained post-retirement medical benefits with the City...after retirement from the City and gaining employment with another employer that offers coverage under a group medical insurance plan *so long as that coverage was not comparable to that offered by the City...* (Emphasis supplied). (JX 2).

The FOP also claimed:

> This matter has been explored and discussed and fully understood between the parties since James Pfleger served as Director of Personnel....This well-established, explicit and mutual interpretation has been in place dating back to 1988. (JX 2).

Simply put, the FOP contended the City was changing the way Subsection c was applied by now considering retirees to be ineligible for coverage if they or their spouses had *any* form of coverage with another employer, even where that employer's coverage was not

"comparable" with the City's plan or where the coverage was only available for a contribution greater than the contribution required under the City's plan.[3]

When the City failed to agree with the FOP's view of how Subsection c should be applied, it denied the grievance, and the FOP made a demand for this arbitration.

Issue to be Determined:

As is clear from the foregoing, the issue to be determined in this case is the following:

Did the City violate the Agreement when it announced retirees would be ineligible for post-retirement medical benefits if they or their spouses were eligible for *any* form of coverage, including coverage under a contributory plan, from the employer of the retiree or the retiree's spouse? If so, what shall the remedy be?

Contentions of the FOP:

The FOP presented testimony from Lionel B. Carter, past president of Lodge No. 9. He testified without contradiction that in the spring of 1998 he attended a City of Reading Police Pension Board meeting in which he and others, including Jim Pfleger, then the City's Personnel Director, discussed the meaning of the phrase "eligible for coverage" as used in the 1987 Interest Arbitration Award and the ensuing 1987-1988 collective bargaining agreement. (JX 4). Mr. Carter said that he and Mr. Pfleger came to an agreement that the phrase referred to coverage that was at least equal or to or better than that provided by the City.

[3] Under the Agreement employee contributions were required in the amount of $36 per month for single coverage or $62 per month for family coverage. (JX 1, p. 24). Under the 2012 Interest Arbitration Award the contribution is a percent of premium in the amount of 5% for the City's Premier Plan, 10% for the City's Preferred Plan, and 15% for the City's Preferred Provider Organization Plan. (CX 1, p. 9). However, the FOP's grievance implies that retirees—at least some of them—were entitled to noncontributory coverage, a privilege that may have applied to officers who retired before the current Agreement. (JX 2).

Don Hillbish, another past-president of Lodge No. 9 testified about a Memorandum of Agreement ("MOA") executed in April 2000 between the City and FOP that appears to have memorialized the concept that it is for a retiree to determine whether another employer's plan is equal or better than the City's plan. Specifically, that MOA states: "The choice of *Equal to or Better* would be that of the employee or retiree, not the City. Any employee or retiree who found an alternative plan to be more costly could revert back to the original coverage, at no cost, as it always was." (Emphasis in the original). (UX 2).

Mr. Hillbish explained the MOA was reached after the City told active and retired management police employees they would have to accept a new medical plan that the City considered equal to or better than the City's then extant plan. (UX 2).

Other FOP witnesses, including Sandy Hummel—who was a former assistant to Mr. Pfleger in the City's Personnel Department— and George Lessig—who was a former police representative on the Police pension Board, said that an equivalent plan was one that was "comparable" to or better than the City's plan and presented no additional cost to a retiree. According to Ms Hummel, this standard was used in 2001 when the City simply asked all retirees to certify their continued eligibility for City coverage.

Ms. Hummel's testimony was essentially corroborated by her one-time assistant Christine Pena. It was Ms. Pena's testimony that the City's standard for eligibility under its plan was a "comparable or better" criterion, by which a retiree could have City coverage if he or she certified "comparable or better" coverage was not available from the retiree's employer or spouse's employer. Ms. Pena said the City did not check the claims of retirees on this point.

Similarly, David Cituk, the City's auditor, testified that retirees who were believed not to have "equal or better" coverage" from their or their spouses' employers were eligible for coverage with the City. Mr. Cituk said this was based on his understanding, but he could present no document to support the principle. Justin Uczynski, a current officer and FOP president since 2010 said that during bargaining in 2011 for a new labor contract the FOP did not seek formal language memorializing the "equal to or better" standard because he believed that standard had already been adopted by the parties.

Finally, Bill Ulrich, a retired member of the FOP testified that he actually took what he considered to be better coverage from an employer after he retired in 2000 and notified the City which ended his coverage under the City plan. When he lost the ability to continue in that better plan, he was permitted to resume coverage under the City's plan.

In its argument, the FOP stresses that in this case the City seeks to the right to cancel retiree coverage if the retiree is merely eligible for another plan offered by the retiree's employer or his or her spouse's employer. The FOP maintains that the City's attempt to disqualify retirees even without a comparison of the plant is a violation of the Agreement.

Arguing that neither the 1987 Interest Arbitration Award nor the Agreement reveal the actual intent of the parties, the FOP urges that the undersigned consider how the parties subsequently have read the Award. That mutual reading, the FOP says, resulted in the conclusion that the phrase "eligible for coverage" meant eligible for a non-contributory plan that was, in the employee's judgment, as good or better than the City's. The parties operated under that theorem, thus creating a past practice , which may be used to resolve contract disputes where an issue is not addressed or is ambiguously addressed in a collective bargaining agreement. *Danville Area School district v. Danville Area Education Association,* 562 Pa. 238, 754 A.2d 1255 (2000).

For a tribunal to invoke past practice, the FOP says, the practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time so that it demonstrates an agreement by the parties as to how an issue should be addressed. *City of Latrobe and Latrobe Police Department,* AAA Case No. 55 390 00319 99 W (Talarico 2000).

The FOP argues that the testimonial evidence, the 2000 MOA, and most importantly the practice of the parties demonstrate that the phrase "eligible for coverage" means coverage that is as good or better than the City's coverage, including consideration of plan design and cost to the insured. The FOP says that practice gives the lie to the City's claim that it can eliminate coverage for anyone who is merely eligible for other coverage. Ironically, the FOP says, instead of saving money, as the City—which is distressed and under an Act 22 recovery plan—the City's

position would actually cost money because retirees would simply never make themselves eligible for coverage from another employer in the first place and thus eliminate the possibility of losing coverage offered by the City.

Contentions of the City:

The City's chief argument rests on the language of Subsection c, which contains no reference to any plan standards or costs to individual retirees. The City hails this "plain language," and believes that an admitted improper policing of it is currently costing the City $1.5 million dollars a year for premiums for retirees who are actually ineligible for coverage. (CX 16). Under the City's accounting nearly half of the 150 FOP retirees receiving medical coverage from the City are ineligible. (*Id.*).

Countering the FOP's argument as to past practice, the City looks to language in other labor contracts that actually express the standard the FOP attempts to enforce here. (CX 23, p. 21). Additionally, the City contends that the FOP has unsuccessfully proposed to change Subsection c, which the City says is proof the FOP did not believe it had a contractual right to such a standard. The City claims that even were the undersigned to find "equal to or better" is an implicit element of Subsection c—which the City strenuously argues he should not—the undersigned should direct negotiations toward an agreed upon measure of comparability between City coverage and that offered by a retiree's employer or that of his or her or spouse. Any cases unresolved by such a measure submitted to a standing arbitrator.

The City criticizes testimony from Mr. Carter and Mr. Lessig regarding the alleged 1988 statement of former Personnel Director Jim Pfleger as an attempt to explain why the FOP did not propose "equal to or better" language after the 1988-1989 contract. Although Mr. Carter and Lessig claimed Mr. Pfleger told them the City considered "coverage" from other employment to be only that coverage that was "equal to or better" than coverage from the City, the FOP produced no documents supporting that claim. Moreover, the FOP's witnesses differed as to who attended the meeting at which Mr. Pfleger supposedly made the statement. And, the City says, Mr. Pfleger's statement was supposedly made at a Police Pension Board

meeting, but the Pension Board has no bargaining authority and therefore no jurisdiction to amend existing contract language. Finally, the City emphasizes, even FOP witness Carter conceded that the City refused to put the "equal to or better" standard in contractual form.

The City also questions the FOP's key contention that the City actually applied the "equal to or better" language consistently from 1988 until 2012. The City cites testimony from FOP witness Christine Pena that she believed the standard was "comparable to" rather than "equal to" when she worked in the City's employee benefit area. The City also focuses on Ms. Hummel's testimony that, although she understood the standard to be "equal to or better" she never attended a meeting where the City and/or the FOP articulated that standard, nor could she specifically identify any circumstances under which such a standard was actually implemented. The City similarly criticizes the testimony of Mr. Cituk and retiree Ed Kosmerl, who also testified for the FOP, as not proving the City every agreed to an "equal to or better" standard.

Lastly, the City cites its contracts with AFSCME Local 2763, IAFF Local 1803, and an "understanding" with AFSCME Local 3799. Under those, the City agreed to provide coverage to current and/or retired employees that is "substantially similar" or "'substantially equivalent" to the City's existing plans.[4] (CX 22, 23, 27). In this vein, the City critiques the MOA of April 2000 signed by Mr. Hillbish for the FOP and then-Mayor Joseph D. Eppihmer, in evidence as UX 2 and CX 21). The City highlights that, as the testimony surrounding the document indicated, the MOA was negotiated in the context of what is known in Pennsylvania as "The Chiefs' Act" and had nothing to do with the FOP rank-and-file bargaining unit involved in this case.

In its argument, the City denies that there was a clear and consistent past practice of using any standard of comparison nor any waiver of the literal Subsection c language. *County of Allegheny v. Allegheny County Prison Employees independent Union,* 476 Pa. 27, 34 (1977); *Ellwood City Police Wage and Policy Unit v. Ellwood City*, 29 PPER 29214 (Final Order, 1998), *aff'd,* 731 A.2d 670 (Pa. Cmwlth. 1999); *Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-*

[4] The Local 3799 "Recommendation" provided a "substantially similar" criterion for both active and retired employees (CX 22), the Local 2764 contract provided the same standard for retirees (CX 23), and the Local 1803 contract provided a "substantially equivalent" standard for active employees (CVX 27). In each case the comparator appears to be the City's current plan.

Barre, 33 PPER 33087 (Final Order, 2002). The most the FOP has been able to show, the City posits, is a lax and inconsistent enforcement by the City of the Subsection. The City says the FOP cannot use past practice because the existing language is not ambiguous, no term of the contract is missing, and the City officially has not acknowledged the practice. *County of Allegheny, supra.*

In summary, the City holds that Subsection c contains plain language which the City can enforce and which an arbitrator has no right to modify. *Greater Nanticoke Area School District v. Greater Nanticoke Area Education Association,* 760 A.2d 1214, 1220 (Pa. Cmwlth. 2000). The effect such language should be given, the City says, is reflected by the lack of any written declaration modifying it as well as the distinctly different language negotiated with other employee groups. The reason for the difference between the FOP language and that adopted for other groups is easy to discern: those groups do not have retirement privileges until workers are considerably older than potential retirees from the FOP unit. The latter can retire after as little as 15 years of service if they buy back military service time, or 20 years without such time.

Opinion:

The City correctly infers that the first rule of contract construction is what is known as the "plain language" test. Under that approach, the words of a contested phrase or provision are given the meaning they have in ordinary discourse, allowing for any argot of the parties' field of specialization. Applied as the City wishes, a "plain language" reading of Subsection c would admit no ambiguity into the term "coverage." The word would simply mean any medical insurance provided by an employer of a retiree or retiree's spouse, and the phrase "who are eligible for coverage under the group insurance plan of another employer or a spouse's employer" would render an affected retiree ineligible for coverage under the City's plan. Such an approach would preempt utilization of the past practice doctrine which, as the City correctly argues, can only be applied where there is an ambiguity or where an essential provision is missing.

The difficulty with that analysis is another principle of contract construction. Contractual provisions are not to be construed in a way that would render them irrational. Application of the plain language test would result exactly in that condition. If Subsection c is literally applied, a police retiree could not be covered under the City's plan if *any* health insurance coverage were provided under the sponsorship of a subsequent employer. That is, even a fully contributory plan costing over a thousand dollars a month, or a plan with thousands of dollars in deductibles and hundreds of dollars in copayments, or a plan that (before the Affordable Care Act) did not cover pre-existing conditions—if offered by the employer of a retiree or the retiree's spouse and extendable to the retiree—would prevent the retiree from enjoying benefits under the City plan. That result is untenable, and surely was not the interpretation embraced by the City or the FOP up to the time the current dispute arose.

If Subsection c and specifically the word "coverage" cannot be applied as the literal language would direct, there is an ambiguity *ipso facto*. It follows that the past practice doctrine must be considered unless there is some bargaining history or other indicators of the parties' true intent in crafting and adopting the language.

The City has persuasively argued that there is no true bargaining history relevant to this matter, other than the fact the FOP did not propose a change in the language. The document most heavily relied upon by the FOP, the MOA from April 2000, certainly is not compelling. As the City points out, the MOA only applies to police management employees, which would include the Chief of Police, and not the bargaining unit represented by the FOP. As both a fraternal and labor organization, the FOP routinely champions the causes of both bargaining unit members and brother or sister officers who are not represented in a bargaining unit. Such appears to the case here, and therefore the MOA sheds little light on the proper interpretation of Subsection c, which, it should be noted, is only obliquely referenced in the MOA.

Other indicators of intent, of course, are the parties' actions over the nearly quarter of century the benefit has been in the Agreement. Having occurred with many retirees—about 150 by the City's count—the parties' actions constitute a practice. Because it was frequent, known, and implicitly acknowledged as a rule of the contract, the parties' "action" arises to a past practice and becomes an enforceable part of the Agreement.

What was that practice? Although the FOP has produced a modicum of testimony that retirees themselves were permitted to subjectively decide whether their new employer's or the City's plan was the better for them, the overwhelming volume of testimony was that when a question about coverage arose an objective standard was used to determine whether the coverage extended by another employer amounted to "coverage" within the meaning of Subsection c. According to the preponderance of the testimony—elicited from both former bargaining unit members as well as former administrators for the City—that standard was an "equal to or better" metric or some synonymous formulation. That is, where a retiree had an opportunity to be insured under another employer's plan, the question of whether he or she remained eligible for City coverage—if raised—would be answered by a determination of whether the alternative coverage was "equal to or better," or "substantially similar to or better" or "comparable to or better" than the City coverage.

Understandably, no two health plans are exactly equal, so an "equal to" standard is functionally meaningless. I believe Ms. Hummel expressed the standard best when she explained the operating standard was actually "comparable to or better,' meaning that the new employer's plan would have to be roughly similar to or better than the relevant City plan.[5]

Implied in that analysis was the subject of contributions toward premiums, as well as plan design, , *i.e.,* those procedures, items, and services covered, deductibles, co-payments, provider and network accessibility, life-time maximums (now eliminated by the Affordable Care Act), waiting periods and/or coverage for pre-existing conditions (also now eliminated by the Affordable Care Act), and other pertinent considerations. The record is unclear as to whether plan design was supposed to be considered in general or as it affected an individual retiree. This hole in the record is not surprising, given that there was little or no analysis actually performed by the City, a lapse the City itself acknowledges.

Taking the evidence presented, I am convinced that Subsection c disqualifies a retiree from City coverage if the coverage available to him or her from the retiree's or retiree's spouse's employer is comparable to or better than the City plan. Section c requires that that judgment be made not by the retiree but by an objective review. Such a review must not only

[5] Under the Agreement, the relevant City plan for any retiree is "the same health insurance as those [*sic*] provided for active employees." (JX 1, p. 25).

consider the plans in general for comparability as to coverages, deductibles, co-payments and other factors but also make allowances for the current health status of the retiree and spouse in regard to costs, services, procedures, devices, and drugs provided under each. The review must also take into consideration premium contributions. I agree with the City's proposal that a standing arbitrator should be appointed to make such judgments.

That having been said and based on the reasoning set forth above, I will sustain the FOP's grievance to the extent the City violates the Agreement if it disqualifies retirees from City plan coverage simply because their employers or spouses' employers offer health care plans. Rather, where a post-retirement employer's plan is available, an objective judgment must be made as to whether the offered plan is comparable to or better than the City's plan, taking into account the plan design factors set forth above as they may affect the individual retiree or spouse, given their medical condition as of the date of the comparison. To resolve disputes that may arise in the comparison, the parties shall appoint a permanent arbitrator who shall serve for a period of at least two years following appointment and who after that period may be mutually renewed for an additional term of two years or replaced at the desire of either of the parties.

Award:

For the reasons set forth above, the FOP's grievance is sustained to the extent the City cannot disqualify retirees from City plan coverage simply because their employers or spouses' employers offer health care plans. Rather, where a post-retirement employer's plan is available, an objective judgment must be made as to whether the offered plan is comparable to or better than the City's plan, taking into account the factors set forth above as they may affect the individual retiree or spouse, given their medical condition as of the date of the comparison. To resolve disputes that may arise in the comparison, the parties shall appoint a permanent arbitrator who shall be appointed within 30 days of the date of this Decision and Award and who shall serve for a period of at least two years following appointment and who after that period year may be mutually renewed for an additional two- year term or replaced at the desire of either of the parties.

Any employee who has been denied admission or continuation in the City's health care plan within 10 days before or any time since the filing of the grievance in this case , shall have his or her case expedited for comparison under the above criteria. If the parties cannot agree on eligibility for coverage under the City's plan, the employee's case shall be immediately referred to the standing arbitrator.

6/4/13

Date

Ralph H. Colflesh, Jr., Esq. / Arbitrator