

Case: Borushko #1

In the Matter of Arbitration Between:

Union

and

Employer

Arbitration Award

INTRODUCTION

This grievance was filed by the City bargaining units represented by the Union. In the grievance, filed August 31, 2005, the Union argues that the City misapplied contract language in determining the amount of refund due to the local as a result of switching to less expensive health care plans. The grievance was properly answered and subsequently appealed to arbitration. On January 11, 2006 the case was assigned to this arbitrator for hearing and resolution. The hearing was conducted on May 2, 2006 at the offices of the Employer.

THE FACTS

In the course of negotiating the 2002-05 labor agreement, the parties earnestly discussed the issue of health care. As a means of possible savings, the Union proposed to the City the Coalition of Public Safety Health Trust, more commonly known as COPS Trust. The COPS

Trust plan was to replace the existing health care coverage administered by Blue Cross/Blue Shield. The parties worked out a formula to share savings, if realized by utilizing the COPS Trust plan. Language reflecting this understanding was placed in the labor agreement at section 30.1(k) which reads as follows:

k. Cost difference in COPS Trust costs to BC/BS subtracting actual costs minus \$780.00 contribution-will be shared with the unit of a 60/40 Basis (60% City, 40%Union).

Example:	Yearly Cost of COPS Trust	\$163,370.00
	Minus yearly cost of insurance as if	
	Unit was in same BCBS plan as	
	Other Employees	\$197,308.00
	Gross Savings	\$ 33,938.00
	Minus \$780.00 X 17 Members	(13,260.00)
	Amount Available for Sharing	\$ 20,678.00 \$
	Union Share 40%	8,271.20

In 2004, this arrangement was in place and the sharing formula resulted in payment to the POLC of \$15,763.54. (Union Exhibit 1) In 2005, Mr. Tim Deer, City Manager, retired from his post and was replaced by Mr. Mike Ball. Mr. Ball reviewed the applicable language and informed the Labor Union that, in his opinion, it had not been properly applied in the previous year. On August 31, 2005 the local representatives on the Union filed this grievance, POLC number 05-189. The issue in dispute is the meaning of "actual cost" as referred to in Section 30.1(k).

POSITIONS OF THE PARTIES

The City, at the hearing and in its brief, argues that the meaning of section 30.1(k) is clear on its face, and therefore is not subject to interpretation. According to the City, actual cost can only mean the cost of the health care plan after all adjustments have been made by Blue Cross/Blue Shield. These adjustments do not occur until after the contract year has concluded, and all the bills are in for the services rendered. The City also argues that any different interpretation of the language is unreasonable and could result in an absurd result, when utilizing a projected number.

The Union meanwhile, argues that the language says the same thing it said in the previous year when reimbursement to the Union was made prior to the final accounting by Blue Cross/Blue Shield. Their position is that the parties who negotiated the contract language are in complete agreement as to its meaning, even though the words expressed in the agreement may not reflect that understanding.

DISCUSSION

Complicating the issue in this case is that the health insurance plans that are at issue are of a different nature. The Blue Cross/Blue Shield plan which covers the bulk of City employees is an experience rated health care plan. That is to say that the Employer's cost for the coverage is directly related to the health care usage of the employees in the group involved. Blue Cross provides to the City at the start of each year a projected cost of

coverage so that the City may budget for that expected cost of coverage. During the year, as I understand what was presented at the hearing, Blue Cross provides to the City an interim accounting of the experience for the year; this may reflect a projected surplus or underpayment. Subsequent to the close of the year Blue Cross provides a final accounting to the City, which may result in either a refund of premium or a further contribution by the Employer to cover unanticipated expenses.

The COPS Trust health plan is a premium based plan. That means that the premium is determined by the carrier at the beginning of each contract year and does not fluctuate based on the experiences of the group covered. Simply put, it is what it is, which makes it easier for a municipality to budget for. With these differences in mind, we seek to determine what "actual cost" is as set forth in the labor agreement.

In Elkhouri & Elkouri, page 430, it states "the interpretation of an agreement, or a term thereof, is the ascertainment of its meaning." Further, "The rules, standards, and principles utilized by arbitrators to interpret collective bargaining agreements and ascertain their meaning have been borrowed from the jurisprudence developed by the courts to resolve disputes over the meaning of terms contained in ordinary commercial and other nonlabor relations contracts. That jurisprudence embodies two opposing theories of interpretation."

Those two opposing theories are that of the "objective" approach and the "subjective" approach. In the first theory, or the objective approach, the language which is in dispute stands for itself and the meaning which the parties may themselves have attached to that language is not determinative. In effect, the words say what a reasonable person would interpret them to say.

In the subjective approach, the interpretation of the language relies upon the ascertainment of the meaning of the language by at least one party. However, the

intention of the party must have been clearly manifested rather than undisclosed. (Elkouri, p.432).

If I apply these theories to the language in question, I will arrive at two different results. Utilizing the objective approach, actual cost can only mean one thing. Using the definition contained in Webster's for actual, which is, "existing in fact; real", I could reasonably conclude that the actual cost does not exist in fact until the final accounting is given to the employer by Blue Cross Blue Shield. But, I suppose the interim numbers given by BlueCross/BlueShield are "real" numbers also, but based on projections; a semantic difference that would make this even harder to decide.

If I utilize the subjective approach, and attempt to ascertain the intent of the parties who negotiated the language I will arrive at quite another conclusion. The two individuals who represented the parties in the 2002 negotiations both testified at the hearing. In yet another unusual aspect to this case, they both testified on behalf of the Labor Union. It was their collective testimony that the intent of the parties at the time of execution of the agreement was reflected in the calculations which resulted in a payment to the Union in 2004.

I cannot agree with the city that the language at issue is so clear as not to be subject to interpretation. The parties' application of the language in the first contract year clearly opens up the question of interpretation. If it was so clear, why the 2004 result? The testimony of Mr. Deer is of paramount importance in this case. He clearly stated that the intent of the City was to use the Blue Cross/Blue Shield figures provided at the start of each year as the basis for the calculations. He also indicated that if there were a refund of sorts issued from Blue Cross/Blue Shield, it would likely be placed in another fund, and not distributed. If I recall the testimony correctly, this agreement was entered into in February of 2002, and no other figures were available from Blue Cross/Blue Shield at that time. I believe it is also reasonable to assume the formula in the agreement reflected the numbers on hand at that time, though the parties could not answer my question concerning that at the hearing. The City had the opportunity to question Mr.

Deer on cross examination and did not make an effort to impeach him as a witness, or impugn his testimony in any way. There is no question in this Arbitrator's mind that Mr. Deer had the authority to enter into this agreement on behalf of the City, which was subsequently ratified by the City Council.

Further, after some consideration, it seems to me the interpretation placed upon the language by the negotiators prevents an even more absurd result than that referred to by the City in its brief. The estimated costs provided by Blue Cross/Blue Shield are based upon their vast history of working with units of similar age, size, etc. They are actuarial formulas that are not likely to produce results that vary greatly from their projections. In fact, as indicated at the hearing, the final accounting, as I recall, placed the formula results much closer to the projections than first anticipated. I would expect that to be the result on most occasions. If Blue Cross/Blue Shield overestimates costs, then more employer's funds are committed than necessary. In these days of shrinking funds, that is clearly not acceptable. If Blue Cross/Blue Shield underestimates costs, then unexpected payments must be made at the end of a year, an even more undesirable occurrence.

I think this underestimation is the most likely event to occur, and if it does, I would expect the City would not be happy with the possible result. If, in the general unit there were two or more major unanticipated health events, it would drive up the final numbers quite significantly. If we presume that occurs (and we certainly hope not) it is possible that the city would receive a statement reflecting a large amount due. If that amount was \$200,000 (which is not a large sum, given current medical costs) it would mean that it would be added to the actual cost (as argued by the City) and result in 40% of that being paid to the Union according to the formula. Is that what is intended here? A windfall to either side was clearly not what the parties were intending when they formulated the language.

The fact is that the two parties to this contract, the City, and the Union, by their respective representatives, did agree to certain contract provisions and their meaning. This finding is supported by the payment to the Union of

moneys derived from the formula as interpreted by their representatives at the time of agreement. A change in either party's representative does not relieve the other of the obligation to follow the contract as intended. Interpretive issues and language changes, which may result from such change of representatives, should be brought to the next bargaining table. In all probability, this case would likely have had a different result if the writers of the language at issue were not in agreement as to the meaning of their written words. As an arbitrator, if I attach any other meaning to language other than what both parties have indicated was their intent, I am clearly overstepping my authority. I cannot do that.

AWARD

The term "actual cost" is interpreted to mean exactly what the parties thought it meant when they negotiated the contract in 2002. This formula contained in section 30.1(k) should be applied in the same manner as in 2004 throughout the remaining years of the contract.

The grievance is granted.

William P. Borushko
Arbitrator

Date