Schneider #9

AMERICAN ARBITRATION ASSOCIATION

IN THEMATTER OF THE LABOR ARBITRATION BETWEEN:

Employer,

-and-

Union.

Grievance/Employee Benefits

ARBITRATOR'S OPINION AND AWARD

BEFORE:	Karen Bush Schneider,
DATE OF HEARING:	August 12, 2004
HEARING LOCATION:	City Some Road City, Michigan

RELEVANT CONTRACT PROVISIONS: Agreement between the Employer and Union and its Employer Local No. 2720, January 1, 2002 through December 31, 2002, and January 1, 2003 through December 31, 2005, Articles 9.1 and 10.3(g).

TYPE OF GRIEVANCE: Contract

AWARD

The grievance is denied.

Dated: October 19, 2004

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Karen Bush Schneider, Esq., Arbitrator

INTRODUCTION

This matter involves a claim by Union (hereinafter referred to as the "Union") that the Employer (hereinafter referred to as the "Employer") deducted amounts from bargaining unit members' paychecks for health insurance in violation of the parties' agreement as set forth in Article 9.1 of the collective bargaining agreement. *(See* Joint Exhibits "1," and "2.") The dispute centers on whether the negotiated employee premium sharing should be calculated based upon a maximum 3% of the health insurance premium versus a maximum 3% health insurance premium increase in any given year.

The Union filed the instant grievance on or about July 10, 2003, when the Employer notified the Union that it had erred in its calculation of employee premium sharing and that it would be prospectively modifying the insurance deduction by altering the calculation from 3% of premium increase to a maximum of 3% of premium. (Joint Exhibit "4.") The Union's grievance cited a violation of Article 9.1 of the collective bargaining agreement and requested that the Employer adhere to the collective bargaining agreement requirement that the deduction be no more than 3% of the health care premium increase. The grievance further requested that the Employer make all employees whole and cease and desist from its current methodology in calculating the employees' premium sharing.

Arbitrator Karen Bush Schneider, Esq., was appointed by the American Arbitration Association as the neutral in this matter. A hearing was convened on August 12, 2004, at the offices of the Employer. Both the Union and Employer, through its representatives and witnesses, participated fully in the evidentiary hearing.

Following the hearing, the parties submitted post-hearing briefs to the American Arbitration Association on or about September 17, 2004. The American Arbitration

Association declared the record closed and the deadline for issuance of the Arbitration Award to be October 20, 2004.

This Award is issued pursuant to the foregoing grievance history.

ISSUES

Did the Employer violate the terms and conditions of the collective bargaining agreement, specifically Article 9.1, by altering employee deductions for health insurance premiums?

The Union submits the answer to be, "Yes." The

Employer submits the answer to be, "No." **If so,**

what is the appropriate remedy?

The Union requests that the grievance be granted; that the employees' co-payments be adjusted and applied to the percentage of increase as negotiated; that the employees be made whole for any deducted payment overages; and that the Arbitrator retain jurisdiction relative to any dispute over implementation of the remedy.

The Employer requests that the grievance be denied.

RELEVANT CONTRACT PROVISIONS

ARTICLE IX. HEALTH, LIFE, DISABIILTY AND PENSION BENEFITS

Section 9.1 Hospitalization

The Employer will provide health and accident insurance coverage to an Employee who is described in Sections 1.1 and 1.2 pursuant to the Michigan Blue Cross Preferred Providers Organization Option 1 with a $10 co-pay and$10.00 Drug Card, it being understood that such Plan will provide coverage for any Employee who retires under the Retirement Plan at or after age 55, after completing at least ten (10) years of employment with the Employer. Such coverage shall be provided until the retired Employee attains age 65 or until he becomes eligible for Medicare under the Federal Social Security Program, whichever occurs first. In addition to this, the City will contribute $125.00 per employee and per spouse each month toward the supplemental coverage cost for retired employees who have become eligible for Medicare. The Employer's cost for coverage for a

retired Employee shall be limited to the required premium for such retired Employee and his spouse, if any.

Employees and retirees between the ages of 55 and 65 who are receiving the City-provided health insurance coverage as set forth above will be required to pay one-half (1/2) of any premium increases in each of the calendar years (2003, 2004 & 2005) but, no more than three percent (3%) each year (i.e. BCBS increases the premium by 10% in calendar year, employees will be required to contribute 3% of the increase. BCBS increases the premium by 4% in calendar year, employees will be required to contribute 2% of the increase for a total of 5% over the two years). Required employee contributions shall be made by payroll deductions as a condition to the receipt of health insurance benefits as set forth above.

Employees who opt out of hospitalization insurance coverage through the City shall be paid an annual stipend of $2000.00. Effective January 1, 2003, this amount shall increase in proportion to the City's total increase in health care premiums. For example, a ten (10%) percent overall increase in the health care premiums paid by the City would result in a payment of $2,200.00 The opt-out payments shall be made on June 15th for each calendar year the employee is not covered.

ARTICLE X. GRIEVANCES

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Section 10.3 Problem Adjustments

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g. Limitations on Arbitrator's Authority

The arbitrator will have no authority to (a) add to, subtract from or in any way modify this Agreement, (b) substitute his discretion or judgment for the Employer's discretion or judgment with respect to any matter this Agreement assigns or reserves to the Employer's discretion or judgment, (c) interpret any policy, practice or rule, except as necessary in interpreting or applying this Agreement, (d) formulate or add any new policy or rule, (e) establish or change any wage or classification of any Employee. (Emphasis added.)

STATEMENT OF FACTS

The facts in this matter are not substantially in dispute and may be summarized as follows:

The Employer is a municipality located in the county of County, State of Michigan. There are approximately 2,300 residents who reside in the community. The Employer is governed by an elected City Council and a Mayor. It employs approximately 15 employees. A number of those employees are represented by two labor unions, the Union 2, which represents the City's police officers, and Union Council 25, Local 2720, which represents the public works and clerical employees.

Resolution of the instant grievance requires an examination of the negotiations which produced the parties' 2000-2002 collective bargaining agreement. The City's bargaining team consisted of the City's Major, Major 1, and City Council members, Council Member 1 and Council Member 2. The City's Clerk, Ms. Clerk 1, did not attend the negotiation sessions, but prepared notes based upon the team's record of the sessions. The Union's bargaining team included Mr. Union Member 1 and Ms. Union Member 2.

At the outset of the negotiations, the Union presented a list of demands which included enhancements to the funeral leave provision, sick leave accrual, health insurance opt-out, wages, pension, and a "me too" provision which would guarantee bargaining unit members any additional benefits provided by the Employer to other City employees. From the Employer's end, it was willing to agree to a wage increase of no more than 3% in each year of the successor contract, as well as agree to a modest increase to the health insurance opt-out provision, but was not willing to accede to any other of the Union's proposals. The Employer's goal was to keep the overall cost of the new collective bargaining agreement to 3% per year.

At some point, the parties delayed negotiations while the Employer negotiated with the Union 2. In those negotiations, the City proposed an unlimited 50/50 cost sharing for health insurance premium increases. Although the Union 2 was unwilling to agree to an unlimited 50/50 cost sharing for health insurance premium increases, it did accept the concept of a cap on premium sharing, up to a maximum of 3% over the prior year's premium. By way of example, if health insurance went up 4% in a given year, the City would absorb 50% of the 4% increase 2%) and while the employees would absorb 50% of the 4% of the increase (2%). By contrast, if health insurance premiums increased by 10%, the City would absorb 70% of that increase (7%), while the bargaining unit would absorb 30% of the increase (3%). This understanding was memorialized in contract language through the draftsmanship of the UNION 2. One of the trade-offs for the Union 2 accepting premium sharing was a substantial enhancement to the unit's retirement benefit.

Following the conclusion of the Union 2 negotiations, the Union reached an accord with the Employer, which included almost an identical agreement regarding health care premium sharing. It also included a 5% wage increase in the first year of the agreement, a signing bonus of $1,500.00, an increase in sick leave accrual, and an increase in the insurance opt-out payment.

Following ratification of the agreement, the Employer, through its Clerk, implemented the health insurance premium sharing. Insurance premiums had increased approximately 8.2% from calendar year 2000 to 2001. One-half of that premium increase would have been approximately 4.1%. Because 4.1% exceeded the 3% cap, Ms. Clerk 1 calculated the deductions based upon the 3% amount. That resulted in a single subscriber deduction of $9.48 monthly, a double subscriber deduction of $19.92 monthly, and a family subscriber deduction of

$22.29 monthly in implementing the deductions, Clerk 1 did not consider the fact that employees are paid twice a month, instead of once a month. Thus, for approximately ten and one-half months during calendar year 2001, the employees had the foregoing deductions made from their paychecks twice each month. In the case of a single subscriber, the amount deducted was $18.96, rather than $9.48. In the case of a double subscriber, the amount withheld was $39.84, as opposed to $19.92. In the case of a family subscriber, the amount withheld was $44.58, as opposed to $22.29.

It was not until October, 2001, that Ms. Clerk 1 was approached by an employee who questioned the amount of the deduction. At that point, Clerk 1 discovered that she had been making the full deduction twice a month, rather than only once a month (or, in other words, twice the amount required by the contract). To rectify the error, Clerk 1 reimbursed bargaining unit members anywhere from $401.10 for $448.88, in November of 2001. See Employer Exhibit "7." Clerk 1 did not consult with either the Mayor or City Council members in making the correction.

Clerk 1 then, in the opinion of the Employer, made a second good faith error. In recalculating the employee contributions, she determined the amount of the revised contribution based not on a maximum of 3% of the prior year's premium, but based upon 3% of the premium increase only. That resulted in monthly deductions of anywhere from 780 per month to $1.83 per month, per bargaining unit member.

Deductions based on that method of calculation continued until July of 2003. At that time, the Employer was in negotiations for a new police officers contract. During preparations for those negotiations, City negotiators discovered that the Employer was calculating the amount of health insurance premium sharing based upon a maximum of 3% of

the premium increase, not a maximum of 3% of the prior year's premium. The Employer determined to immediately rectify the error and issued a memorandum to all employees covered by Employer's health insurance (Joint Exhibit "4"), which stated in pertinent part as follows:

> The intent of this language was that employees would pay half of the *dollar increase in premium,* year to year, but capped at 3% of the old premium.
> Putting it another way, employees would absorb a share of the cost increase that did not exceed 3% of the old premium.
>
> * * *
>
> Through a misinterpretation of the contract language, relying on the words "3% of the increase," the City deducted an incorrect amount. Instead of calculating 3% of the old premium, it calculated 3% of the dollar increase. The City's incorrect calculation, applied to the above examples, makes the co-pay only $1.50 – 3% of $50 rather than 3% of $500.
>
> * * *
>
> We do not expect to collect retroactively for our error, although employees have saved considerable amounts in this period.
>
> In July we will return to the proper method. This involves recalculating prior years to bring the co-pay to the level that it would have reached if this error had not occurred. A calculation is attached. We regret the mistake. (Emphasis supplied.)

Both the Union and the Union 2 filed grievances over the Employer's prospective adjustment to the health premium deduction. The UNION 2's grievance was arbitrated in February of 2004. Arbitrator Benjamin A. Kerner issued an Award on or about April 7, 2004, denying the Union 2's grievance and reasoning in pertinent part as follows:

> Now we face the language of the example, shown in parenthesis in the contract. This language does, according to its literal terms, indicate that an employee could be required to contribute "3% of the increase" in the case of a 10% premium

> increase. Taking this language in context, however, with the immediately preceding clause "BCBS increases the premium by 10% in calendar year 2001" it is clear that the parties meant that if BCBS imposed a rate increase of 10%, then 7% would be borne by the employer, and 3% would be borne by the employees. The figures 10%, 7%, and 3% are increases in premium over the previous year's premium. The cap on employee contribution would uniformly be computed on the basis of the previous year's premium. There is no other reading of the language which gives full effect to the first sentence. There is no other reading of the language that is consistent with the bargaining history revealed in the case.
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> * * *
>
> For these reasons, I must find that the grievance does not have merit.

UNION'S POSITION

The Union asserts that the language of Article 9.1 of the collective bargaining agreement is clear and that it permits only a maximum employee health contribution of 3% of the premium increase in any given year. In support of its position, the Union argues that its bargaining team was never provided with an explanation of the calculation now advanced by the Employer. No examples with actual numbers were presented by the Employer during negotiations. The Employer only said that the deductions would be minimal. Further, there is now a past practice on the part of Employer interpreting Article 9.1 in accordance with the Union's interpretation. Article 9.1 expressly refers to 3% of premium increases, not 3% of the prior year's premium.

The Union also argues that the bargaining history does not support the Employer's interpretation of the contract. A review of the gains made in the 2000-2002 negotiations does not reveal benefits so significant to have justified the Union's acceptance of the health insurance premium sharing provision. While bargaining unit members did receive a substantial increase to the health insurance opt-out bonus, only one bargaining unit member actually takes

advantage of the opt-out. Further, if the Employer's interpretation of the health insurance premium sharing is accepted, employee compensation increases will soon be outpaced by the cost of health insurance deductions.

The Union asserts that the Arbitrator is constrained to follow the express language of the collective bargaining agreement. *See* Article 10, Section 3 of the collective bargaining agreement, which states that, "The arbitrator will have no authority to (a) add to, subtract from or in any way modify this Agreement, . . ." The Union asserts that Arbitrator Kerner's decision strayed from the strict construction of the contract language despite longstanding rules of contract interpretation which admonish arbitrators to enforce the clear and unambiguous language of collective bargaining agreements and to construe ambiguous language against the party who proposed or drafted it, in this case the Employer. While the police officers may have received a substantial pension benefit as an inducement to accept to pricey insurance premium sharing provision, the members of this bargaining unit did not. The Employer seeks, through unilateral action, inconsistent with its prior practice, to belatedly implement an interpretation of the language which was never negotiated nor presented to the bargaining unit or its negotiations team. The language in the contract is clear and unambiguous, it limits the 3% cap to the percentage "of the increase," not to the prior premium.

EMPLOYER'S POSITION

The Employer argues that the grievance should be denied in its entirety. In support of its position, it offers the following arguments:

The contract provision in question, Article 9.1, is clear on its face. The contract expressly states that, "[e]mployees and retirees between the ages of 55 and 65 who are receiving City-provided health insurance coverage will be required to pay one-half of any premium

increases, but no more than 3% each year. . ." The 3% was intended as a cap. Thus, in evaluating the employees' contribution, the lesser of a 50/50 split versus a maximum 3% of the prior year's premium was intended by the parties in agreeing to the foregoing language. Such was the conclusion of Arbitrator Kerner in his April 7, 2004 Award on virtually the same contract language found in the Union 2 contract.

By contrast, the Union's interpretation would nullify the language in Article 9.1 which requires employees to pay one-half (1/2) of any premium increases. If the parties merely intended that a maximum 3% of any premium increase be paid by the employees each year, the reference to employees paying 50% would have been unnecessary. The Employer's interpretation is consistent with well-settled rules of contract interpretation which require arbitrators to consider the contract as a whole in resolving disputes. When faced with two interpretations, the one which would give effect and harmony to all words and phrases is the one which arbitrators must favor. Since the arbitrator cannot "subtract from" the agreement, the Employer's interpretation must prevail.

Second, the Employer's position is supported by the parties bargaining history. The Employer asserts that the bargaining unit members received substantial benefits in the 2000-2002 collective bargaining agreement in return for their concession on health insurance premium sharing. Under the Union's position, the 2001 contributions per month would have been as little as 78¢ or as high as $1.64 per employee. Such a contribution would not be a fair trade for a 5% wage increase plus a signing bonus, as well as the other enhancements to the collective bargaining agreement. The Union never questioned the actual dollar contributions or requested any examples at the bargaining table, nor in the ratification process. Thus, the bargaining unit members cannot claim now to have not

understood the practical dollar implication of the Employer's proposal. Nor can the employees disavow their agreement to pay one-half of the premium increases. The 3% cap was intended to minimize the actual dollar impact in years where health insurance increases topped 6%.

Third, the Employer's position is supported by the parties' immediate past practice. For a ten and one-half month period following contract ratification in 2000, the Employer implemented its interpretation of the collective bargaining agreement, albeit charging employees double the amount per formula. If the employees had not thought that the insurance deduction would be so high, they would have complained almost immediately. However, it was not until an employee questioned the amount that he was being charged that the issue was brought to the City Clerk's attention. The Clerk's error in recalculating the premium sharing as only 3% of the premium increase, was not binding on the Employer, since the language in the collective bargaining agreement is contrary and City officials were not aware of the Clerk's "mistake."

Lastly, the Employer argues that the mere fact that the premium sharing of some employees equals or exceeds their wage increases in a given year is not grounds for the Arbitrator to ignore the parties' agreement or the express language of the collective bargaining agreement. Nor can the Arbitrator construe Article 9.1 strictly against the Employer, as the purported author, since the contract language itself is clear and unambiguous.

The bargaining unit members have not sustained a loss. Indeed, in this case, for more than two years they enjoyed a windfall which the Employer has not sought to recover. The employees cannot benefit, in perpetuity, from the Employer's good faith mistake and the Employer is entitled to enforce the contract as written.

OPINION AND AWARD

After considering the testimony of the witnesses, the arguments of the parties, and having reviewed the exhibits and the arbitration precedent, the Arbitrator concludes that the grievance should be denied. The Arbitrator accepts the Employer's interpretation of Article 9.1 as embodying the agreement of the parties.

Article 9.1 states in pertinent part as follows:

> Employees and retirees between the ages of 55 and 65 who are receiving the City-provided health insurance coverage as set forth above will be required to pay one-half (1/2) of any premium increases in each of the calendar years (2003, 2004 & 2005) but, no more than three percent (3%) each year (i.e. BCBS increases the premium by 10% in calendar year. . .).

In the 2000-2002 negotiations which produced the predecessor to the language above, the Employer was seeking a 50/50 split of health care premium increases with its bargaining units. This was clear from the testimony of the parties, as well as the first part of the language quoted above. Nonetheless, given opposition largely by the Union 2 to the Employer's proposal, the Employer agreed to a compromise. The 50/50 split of the health insurance increase would be shared by the Employer and the bargaining unit members, as long as that premium increase was not higher than 6%. In other words, the Employer agreed to a cap on premium sharing at 3%. Confusion arose, however, because the example which follows the cited contract language speaks in terms of the 3% cap being applied to "the increase," rather than the prior year's premium. Thus, the parties now quarrel whether the 3% cap was intended to apply to the increase or to the prior year's premium.

This Arbitrator agrees with the analysis of Arbitrator Kerner in his Opinion and Award issued on or about February 12, 2004, regarding similar language found in the Union 2 collective bargaining agreement. Arbitrator Kerner aptly recognizes that arbitrators are

constrained in their role to interpret the actual language of the collective bargaining agreement and not to add to, subtract from or modify it. In making the interpretation, the Arbitrator must look to the agreement as a whole, which means she cannot ignore language .which exists in the agreement. She must harmonize all language to the extent possible.

In this case, if the Union's interpretation of Article 9.1 were to be accepted, it would render the 50/50 split language meaningless. Instead of the collective bargaining agreement containing the 50/50 language with a 3% cap, as well as two illustrations of how the premium sharing would work, the agreement simply would have stated that employees in any given year will pay no more than 3% of the increase in health premium for that year. However, the existence of the promise on the part of the bargaining unit members to pay one-half of any premium increase, but not more than 3% each year, is fatal to the Union's argument. If that language were not intended to operate as the Employer suggests, it simply would not have appeared in the collective bargaining agreement.

Arbitrator Kerner on page 11 of his Opinion and Award offers the following analysis of the examples contained in Article 9.1:

> Now we face the language of the example, shown in parenthesis in the contract. This language does, according to its literal terms, indicate that an employee could be required to contribute "3% of the increase" in the case of a 10% premium increase. Taking this language in context, however, with the immediately preceding clause "BCBS increases the premium by 10% in calendar year 2001" it is clear that the parties meant that if BCBS imposed a rate increase of 10%, then 7% **(actually 70% of the increase)** would be borne by the employer, and 3% **(actually 30% of the increase)** would be borne by the employees. The figures 10%, 7%, and 3% are increases in premium over the previous year's premium. The cap on employee contribution would uniformly be computed on the basis of the previous year's premium. There is no other reading of the language which gives full effect to the first sentence. There is no other reading of the language that is consistent with the bargaining

history revealed in the case.
(Emphasis supplied.)

Contrary to the Union's assertion, Kerner's interpretation does not ignore the literal language found in Article 9.1 of the Agreement, but harmonizes all of the language. While the concept of the cap is easy to understand, it is clearly difficult to articulate as can be seen by the wording of Article 9.1, as well as by the difficulty Arbitrator Kerner had in attempting to explain its application, as quoted above. The 3% cap, when taken in reference to the 50/50 split can mean nothing other than its application to an overall percentage increase against the prior year's premium. It does not simply mean a scant percent of the dollar increase in any given year.

This Arbitrator is also convinced that the bargaining history of the parties supports the Employer's interpretation of Article 9.1 of the collective bargaining agreement. It was not disputed that the Employer wanted to limit any enhancements to the 2000-2002 collective bargaining agreement to 3% each year. That was its bargaining position, not only with the Union 2, but with the instant labor representative. Nonetheless, in negotiating the health insurance premium sharing, it was able to re-channel its cost savings into a retirement enhancement for the Union 2 and a 5% wage increase and signing bonus for the public works and clerical employees. The wage increase had roll up implications for overtime payments and longevity calculations. It cannot be considered as anything other than a valuable trade off for the health insurance premium sharing provision. The signing bonus was an additional generous trade off.

Finally, this Arbitrator does not believe that the Employer was precluded from making an adjustment to the calculation of health insurance premium sharing deductions, even

after having misinterpreted its own contract language for a three year period. The mistakes in deductions came about through honest error. If the parties themselves can disagree so cogently over the interpretation of the language, it is not surprising that Clerk 1 could have been mistaken in how language should be applied. However, once the Employer discovered its mistake(s), it took prompt action to rectify the situation. Despite its out-of-pocket loss, the Employer did not seek to recoup from the bargaining unit members the amounts it could have, and should have, been collecting from them over a two to three year period. Thus, even from an equitable standpoint, the Employer acted responsibly in correcting its good faith error. It was in a better position to absorb the loss at that point than the employees.

In conclusion, the Arbitrator finds that the Employer did not violate Article 9.1 in making prospective adjustments to the health insurance premium sharing deductions. The Employer is entitled to enforce Article 9.1 as negotiated, despite its misapplication in the employees' favor for a period of approximately three years. The Employer's adjustment was made prospectively and it is not claiming back amounts (under-withheld deductions) from the employees.

AWARD

The grievance is denied.

Dated: October 19, 2004

Karen Bush Schneider, Esq.
Arbitrator