BEFORE
EDWIN H. BENN
ARBITRATOR

In the Matter of the Arbitration

between

THE CITY OF CHICAGO, ILLINOIS

and

FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7

CASE NOS.: Grv. 129-05-024/403
Arb. Ref. 05.397
(Vision Benefit)

OPINION AND AWARD

APPEARANCES**:**

For the City:	James C. Franczek, Jr. David A. Johnson, Esq. Corinne S. O'Melia, Esq.
For the Lodge:	Joel A. D'Alba, Esq. Thomas J. Pleines, Esq. Ryan A. Hagerty, Esq.

Place of Hearing:	Chicago, Illinois
Dates of Hearing:	December 13, 2005; February 2, 2006
Dates Briefs Received:	April 12, 2006 (City); April 17, 2006 (Lodge)
Date of Award:	May 22, 2006

CONTENTS

I. ISSUE

Did the City violate the Agreement when it imposed the terms of the current Vision Plan? If so, what shall the remedy be?

II. FACTS

On February 28, 2005, I issued an interest arbitration award setting the terms of the parties' 2003-2007 Agreement. That award included a "Wellness Benefit" (Interest Award at 98):

HEALTH INSURANCE (SECTION 25.2) BENEFIT	Highlights of Health Insurance Plan, Continued		
	PPO*	PPO w/HRA*	HMO*
Wellness Benefit* (Section 25.7)	$600 per year (effective 1/1/06) Includes: Subject to further review and development, the Wellness Benefit will cover, outside of deductibles: (1) routine exams, (2) immunizations, (3) mammograms, and (4) vision exams, lenses, frames, and contacts. The Wellness Benefit will also provide on-site health assessments. Wellness Benefit Is Not Subject to Plan Annual Deductible		Available According to HMO Guidelines

This particular dispute concerns the City's implementation of a Vision Plan as part of the Wellness Benefit and the Lodge's objections to that action.

Much was presented at the hearing. However, the material facts are as follows:

After issuance of the Interest Award, the parties met on several occasions commencing September 9, 2005 concerning the vision portion of the Wellness Benefit. Stated simply, during these meetings, the parties had fundamental differences on several items concerning the vision benefit, including whether: (1) co-payments would be required; (2) the $600 Wellness Benefit could be fully expended for vision care to the

exclusion of other benefits under the Wellness Benefit; (3) any vision care vendor could be used other than the one utilized by the City (Davis Vision) and; (4) the use of Davis Vision as the provider.

As part of the series of meetings held between the parties, on September 20, 2005, the City submitted its proposed Vision Plan to the Lodge which it discussed with the Lodge on September 21, 2005.[1] At a meeting on October 13, 2005, the City gave the Lodge its Medical and Dental Plan Summary Guide which contained a summary of vision benefits — some of which were different from the previously submitted proposed Vision Plan.[2] On November 2, 2005, a meeting was also held with Davis Vision representatives present to explain the details of the Vision Plan.

The City then implemented the Medical and Dental Plan, which included the City's final version of the Vision Plan. The terms of the Vision Plan were implemented without agreement with the Lodge.[3]

A grievance was filed and this proceeding followed.[4]

III. DISCUSSION

A. What This Case Is Not About

This is a somewhat curious proceeding. My Interest Award established the contract language under which this dispute arises. The City correctly observes:[5]

> ... The parties thus present the Arbitrator with the facially anomalous task of interpreting the language of his own Interest Arbitration Award as part of this grievance arbitration. ...

Therefore, it must be clear that this proceeding is *not* a further proceeding under the prior interest arbitration process. This dispute concerns an alleged violation of the Agreement which came out of the interest arbitration proceedings. This is a grievance arbitration attempting to determine if the terms of the Agreement have been violated. This proceeding is *not* about establishing the terms of the Agreement as an interest arbitration.

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1 Lodge Exh. 5.

2 Lodge Exh. 2 at 3.

3 *See* City Brief at 22 ("With no hope of agreement and with the deadline fast approaching to implement the Award-mandated modifications to Medical Plan on *[footnote continued]*

[continuation of footnote]
a City-wide basis, the City had no alternative but to move forward with the implementation of the Vision Benefit.").

4 Joint Exh. 1.

5 City Brief at 20.

B. The Burden

This is a contract dispute. The burden is therefore on the Lodge to demonstrate a violation of the Agreement.[6]

C. The Lodge's Showing

The key language concerning the Wellness Benefit from the Interest Award (and now the Agreement) is "[s]ubject to further review and development, the Wellness Benefit will cover, outside of deductibles: ... (4) vision exams, lenses, frames, and contacts." The resolution of this dispute turns on what "[s]ubject to further review and development ..." means.

The Lodge argues the phrase "[s]ubject to further review and development ..." means that there is "... an obligation by the City to bargain with the Lodge over the vision component of the wellness benefit ...."[7] The City disputes that interpretation, arguing that "[t]he Lodge mistakenly equates the Arbitrator's Award with a mandate that the Lodge and the City bargain the Vision Benefit to a successful resolution ...."[8]

The language does not state "[s]ubject to further review and development *by the City* ..." or "[s]ubject to further review and development by the City *with input from the Lodge* ...." If such were the intent, that is what the language would have said. The language plainly and only states "[s]ubject to further review and development ...." Without a limitation as to how the vision benefit was to be reviewed and developed, the only conclusion is that the vision benefit was to be reviewed and developed on a mutual basis. That means a bargaining obligation *did* exist. *The parties* were "... to further review and develop ..." the terms and conditions of the vision benefit.

The City observes that "[a] review of the meetings in the fall of 2005 makes it abundantly clear that the parties had irreconcilable positions ... the parties' respective positions with respect to the Vision Benefit were so deep-seated, conceptual,

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6 *The Common Law of the Workplace* (BNA, 2nd ed.), 55 ("In a contract interpretation case, the union is ordinarily seeking to show that the employer violated the agreement by some action it took; the union then has the burden of proof"); *Tenneco Oil Co.*, 44 LA 1121, 1122 (Merrill, 1965) (in a contract case, "... [t]he Union has the burden of proof to establish the facts necessary to make out its claim.").

7 Lodge Brief at 19.

8 City Brief at 21.

and fundamental that they defied resolution."[9] That may be an accurate assessment of the conditions in the fall of 2005. However, with a bargaining obligation attached, the existence of such divergent positions did not permit the City to unilaterally implement the terms of the Vision Plan without first allowing completion of the bargaining process. But that is what happened. The Vision Plan was implemented before the bargaining process over its terms ran its course. The Lodge has therefore shown that the City violated the Agreement when it unilaterally implemented the terms of the Vision Plan.

The parties' positions on the substance of the benefits offered under the Vision Plan; the qualities and options of the Vision Plan; comparisons between the current and the prior plans; what may have been offered to, accepted or understood by other unions during the last round of bargaining; and reliance on other provisions of the Agreement are irrelevant for determining whether a contract violation has been demonstrated and therefore do not change the result.[10] As far as I am concerned, the language "[s]ubject to further review and development ..." is clear and contains a bargaining obligation — an obligation which did not play out. Because the language is clear, my inquiry can go no further than the plain language of the Agreement.[11]

I therefore find that the City's unilateral implementation of the terms of the Vision Plan violated the Agreement.

D. The Remedy

It is well-recognized that arbitrators have broad discretion in the formulation of remedies.[12] In the

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9 City Brief at 21-22.

10 City Brief at 23-28; Lodge Brief at 18-45.

11 *I-T-E Imperial Corp.*, 67 LA 354, 355 (Weiss, 1976) ("The threshold question in this case is whether the language of ... the collective bargaining agreement is so clear and unambiguous that I need go no further to resolve the issue herein").

12 *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960):

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

[footnote continued]

exercise of that discretion, the remedy in this case shall be as follows:

First, although the parties had divergent views on what the Vision Plan should contain, I am satisfied that prior to the City's unilateral interpretation of the Vision Plan, the parties did not fully bargain over its content. Because the language of the Agreement requires that the Vision Plan was to be "[s]ubject to further review and development ...", this matter is therefore remanded to the parties to attempt to formulate a remedy. Encompassed in that remand is the obligation that the parties not just talk about the Vision Plan, but *bargain* over the terms of the Vision Plan. Because this dispute is over whether there was an obligation to bargain — and because I have found that such an obligation existed — the remedy is simple: bargain.

Second, it must be understood what the obligation to "bargain" means. It has long been held that the obligation to bargain " ... does *not* require that the parties agree ...."[13] However, the obligation to bargain "... does require that they negotiate in good faith with the view of reaching an agreement."[14] Thus, the parties must bargain in good faith over the terms of the Vision Plan until they reach a bona fide impasse — *i.e.*, "... when, after negotiations have been carried on for a period of time, the positions of the parties become fairly fixed and talks reach the point of stalemate."[15]

Third, if impasse occurs, then the parties can return to me and I will formulate a more comprehensive remedy and consider the substantive terms of the Vision Plan. I caution the parties, however, about taking that route. Because of my broad discretion for formulating remedies, I can determine what I believe to be a fair remedy which may not be requested by either side. However, I also have the discretion to require that the parties present final offers on the remedy and I will

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[continuation of footnote]

See also, Local 369 Bakery and Confectionery Workers International Union of America v. Cotton Baking Company, Inc., 514 F.2d 1235, 1237, *reh. denied*, 520 F.2d 943 (5th Cir. 1975), *cert. denied*, 423 U.S. 1055 and cases cited therein:

> In view of the variety and novelty of many labor-management disputes, reviewing courts must not unduly restrain an arbitrator's flexibility.

[13] *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 637 (4th Cir., 1940) [emphasis added].

[14] *Id.*

[15] Morris, *The Developing Labor Law* (BNA, 2nd ed.), 634.

choose the one I feel is the more reasonable. Stated differently, what the parties can do through microscopic surgery to remedy this case, I may well choose to do with a sledge hammer. I strongly urge the parties choose the former.

Fourth, in accord with my discretion to formulate remedies, at this time I choose to impose no affirmative relief such as rescission of the current Vision Plan. The dispute arose in the fall of 2005. This case was heard in December 2005 and February 2006. Briefs were received in April 2006. Since the dispute arose and this proceeding followed, the terms of the City's version of the Vision Plan have swung into operation. If the City is correct that the implemented plan is "... head and shoulders above the old plan" and "... more generous than the old vision plan"[16], it may well be that a rescission of that plan and restoration of the *status quo ante* will have an adverse impact on bargaining unit members. Further, if the Vision Plan is rescinded, bargaining unit members may be required to repay the City for any added benefits not existing under the old plan which were used after the implementation of the new plan.[17] Also, given the time that has passed since its implementation, the Vision Plan may have operated to a more beneficial level than the Lodge expected in the fall of 2005. Additionally, the City represented in the interest arbitration proceedings before me that "... it will bid its health care plan" and again represents that it is "... bidding its PPO plan in 2007 ...."[18] All of these factors may prove to change the dynamics of this dispute since the time it first arose. Moreover, should

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[16] City Brief at 26.

[17] That is precisely what I had to order in *City of Springfield and IAFF Local 37* (2003) at 12 where retroactive increases in health insurance payments by employees and modified benefits were required [footnote omitted]:

> Because this award resolves a benefit for the 2000-2003 Agreement, retroactive effect must be given as requested by the City. If this dispute concerned a wage increase or other increases to the employees' benefit, the employees would have been entitled to retroactive application. There is no reason why the same should not apply to this insurance dispute which may require increased retroactive insurance premiums instituted by the City and readjudication of benefits.
>
> Therefore, as requested by the City, "employee payments for retroactive premium contributions and/or adjudication of benefits, may be by lump sum payment or through regular uniform payroll deduction."

[18] Interst Award at 64; City Brief at 26.

this matter be brought back to me and because I have the authority to use the sledge hammer approach and rescind the current plan (or not), withholding use of the exercise of that remedial authority at this time will not diminish the parties' ability to bargain in good faith from equal bargaining strengths.

Fifth, I will retain jurisdiction over disputes concerning the implementation of the remedy in this case. The parties shall report back on the status of their discussions no later than 30 days from the date of this award.

IV. CONCLUSION

The Wellness Benefit of the 2003-2007 Agreement required that its terms be "[s]ubject to further review and development ..." That language imposes a bargaining obligation. The City's unilateral implementation of the terms of the Vision Plan without first bargaining with the Lodge to impasse therefore violated the Agreement. As a remedy, the matter is remanded to the parties to follow the procedure set forth in III(D) of this opinion.

V. AWARD

The grievance is sustained.

Edwin H. Benn
Arbitrator

Dated: May 22, 2006