STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Arbitration Between

CITY OF ALBANY,

Employer,

and

ALBANY PERMANENT PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 2007, IAFF, AFL-CIO,

Union,

Re: Health Insurance – Medicare Part B.

PERB Case No. A2010-498

OPINION AND AWARD

Before SHEILA S. COLE, Impartial Arbitrator

Appearances:

ROEMER WALLENS GOLD & MINEAUX DIONNE A. WHEATLEY, ESQ.	For the Employer Of Counsel
THOMAS J. JORDAN, ESQ.	For the Union

OPINION

In accordance with my authority under the parties' collective bargaining agreement (Joint Exhibit 2) and a prior arbitration award issued by this arbitrator (Joint Exhibit 1)[1], I conducted a hearing in this matter on September 26, 2011, in Albany, New York. Both parties appeared by attorney and were afforded full opportunity to adduce

[1] Although the Union's Demand for Arbitration identifies the Employee Organization to include Locals 2007 and 2007-A (Joint Exhibit 1), the New York State Public Employment Relations Board's February 5, 2001designation of Paul C. Doyle as arbitrator in this matter and its subsequent designation of Sheila S. Cole as arbitrator in this matter on June 7, 2011, identify only the Albany Permanent Professional Firefighters Association, Local 2007 as the Employee Organization.

evidence, cross-examine witnesses, and make argument in support of their respective positions. Each party submitted a post-hearing brief. Neither party has raised objection to the fairness of these proceedings.

This dispute arises under §27.1 of the parties' Agreement, which provides as follows:

> Health Insurance. If the City wishes to change the existing health insurance plan, the City shall present proposals to the Union for discussion and possible agreement on these proposals. If no proposal is agreed upon, then an expedited arbitration will commence with an arbitrator to be chosen from the list of disciplinary arbitrators. The issue of the arbitration will be whether the new City proposal grants substantially equivalent coverage to members of the bargaining unit. The arbitrator's decision will control as to whether the City has the right to make any such change.
>
> [Joint Exhibit 2.]

In a prior arbitration proceeding, by Award issued December 15, 2010, this arbitrator found that the City violated §27.1 of the collective bargaining agreement by unilaterally discontinuing Medicare Part B premium reimbursements for Union members who become Medicare-eligible on or after January 1, 2010. PERB Case No. A2009-485 (2009.) The award directed the Employer "to participate in expedited arbitration pursuant to Section 27.1 of the parties' collective bargaining agreement, upon the Union's demand for that arbitration." Thereafter, the Union demanded arbitration of the current dispute.

Unable to agree on a statement of an issue for resolution, the parties submitted the following proposed issues:

City Proposed Issue

1. Whether the City's health insurance plan offered on January 1, 2010, eliminating the Medicare Part B reimbursement, grants substantially equivalent coverage to members of the bargaining unit?
2. If not, what shall the remedy be?

Union Proposed Issue

1. Is the City's health insurance plan with Medicare Part B reimbursement substantially equivalent to the City's health plan without Medicare Part B reimbursement?
2. If not, what shall the remedy be?

After consideration of the parties' submissions, I adopt, with slight modification, the City's statement of the issue because it reflects the language of Article 27.1 of the Agreement.

On October 30, 2009, the City issued a memorandum to "Retirees and Participants Who Have City of Albany Health Insurance (non-active employees)." Union Exhibit 1. The subject matter of the memorandum was the November open enrollment period for health insurance. It indicated, among other things, that as of December 31, 2009, "the City will no longer reimburse individuals for the Medicare Part B premium whose effective date for Part B is January 1, 2010 and later." Id. The memo indicated that the City would continue to reimburse the Medicare Part B premium to individuals who were then receiving it. The memo also stated that, regardless of eligibility for the premium refund, it is mandatory that individuals elect Medicare Part B coverage when they become Medicare-eligible. That requirement is imposed by the City, not by the Medicare program. Joint Exhibit 3. The basic Medicare Part B premium for 2011 is $115.40 per month. The basic monthly premium has increased in all but one year since 2005, when it was $78.20. Union Exhibit 2. The City did not inform active employees that it planned to discontinue the Medicare Part B premium reimbursement.

The health insurance plans now offered to Albany Fire Department employees include Blue Cross Extended Benefits, Blue Cross Wraparound Plan, Capital District Physicians Health Plan (CDPHP), and Blue Cross PPO. The health insurance plans offered to Medicare-eligible individuals include Blue Cross Medicare Advantage and CDPHP Medicare Advantage.

Prior to January 1, 2009, a Medicare-eligible retiree's primary health insurance was provided by Medicare and the City's health insurance plan provided secondary coverage. Since January 1, 2009, any retiree who is Medicare-eligible must enroll in one of the two Medicare Advantage Plans offered by the City and must also enroll in Medicare Part B. The Medicare Advantage Plan replaces the coverage provided the City's health insurance plan and Medicare Part B.

Sam Fresina was employed as a City of Albany firefighter from 1990 until he retired in September 2010. He served as president of the Union from 1997 until his retirement. Mr. Fresina will be eligible for Medicare in approximately twenty years. He testified that, when he made his decision to retire, he did not think he would be responsible for the Medicare Part B premium as a retiree. He also testified that the change in reimbursement is going to affect every active bargaining unit member.

Andrew Hirsch, the current Union President, has been a City of Albany firefighter thirty-eight years. He is sixty-two years old and will be eligible for Medicare in less than three years. Mr. Hirsch testified that he is aware of one active firefighter who may be Medicare-eligible. Seven active unit members are over age sixty.

Joseph Monahan, M.D., Regional Director of Sales for EBS-RMSCO, a third party administrator, appeared as a witness for the Union as an expert in health insurance. Dr. Monahan explained that, in order to assess whether one health insurance plan is substantially equivalent to another, factors that must be considered include out-of-pocket costs to participants as well as the level of services provided. Dr. Monahan opined that the health insurance plan the City offers to Medicare-eligible retirees is not substantially equivalent to the plan it offered prior to January 1, 2010, because the individual is responsible for the Medicare Part B premium, which is currently $1,380 per year and expected to increase between four and five percent each year.

The City's GASB (Government Accounting Standards Board) 43 and 45 Report for fiscal 2010, which is an analysis of estimated costs for post-employment benefits

valuation, indicates that, if the City eliminated Medicare Part B reimbursement for future retirees and their dependents, it would reduce its unfunded accrued liability (UAL) by $18.6 million. Union Exhibit 1. Firefighters comprise between twenty and twenty-five percent of the City's employees. Dr. Monahan estimated that elimination of the Medicare Part B benefit for retired firefighters would result in long-term savings to the City of between $4 million and $5 million. Elizabeth Lyons, the City's personnel director, testified that the City eliminated the Medicare Part B reimbursement to save money and maintain an excellent level of benefits under the contract.

Dr. Monahan testified that the Medicare Advantage program provides much better coverage than Medicare Part B alone, because Medicare Part B provides 80/20 coinsurance, whereas Medicare Advantage provides a co-payment plan similar to that enjoyed by active members. While co-pays for active employees increased, co-pays for Medicare-eligible retirees remained the same. Dr. Monahan testified that the change to Medicare Advantage did not have a substantial impact on Medicare-eligible employees, but the 2010 requirement that Medicare-eligible employees would not be reimbursed for the Medicare Part B premium was a significant change.

On these facts, the Union argues that elimination of Medicare Part B premium reimbursement changed the City health plan so that it does not grant substantially equivalent coverage because the change dramatically increases the participants' out-of-pocket expenses. The Union argues that, if the City's position were to be taken to its logical extreme, the entire cost of health insurance could be passed on to the firefighters so long as the level of services remained substantially equivalent.

The Union requests that the City continue to reimburse firefighters for Medicare Part B premiums unless and until the parties negotiate a change in the level of reimbursement.

The Union contends that Arbitrator Doyle's recent arbitration award concerning a $5 increase in co-pay for the CDPHP health insurance plan is clearly distinguishable and

should not control the result in this case. The Union insists that, even though elimination of Medicare Part B premium reimbursement represents a future cost for bargaining unit members, its impact is greater than a $5 co-pay increase for participants of one of the health insurance plans available to employees. As Arbitrator Doyle noted, the higher co-pay applies only to the minority of bargaining unit members who are enrolled in that plan, the increased cost for most members amounts to only a few dollars a week, and that cost can be reimbursed by the Health and Welfare Fund. In contrast, all APPFA members will be affected by elimination of Medicare Part B premium reimbursement. Unlike participants in CDPHP who have the option to enroll in a different health care plan, all Medicare-eligible individuals covered by the City's health insurance plans must enroll in Medicare Part B. Moreover, reimbursement of the Medicare Part B premium from the Health and Welfare Fund is not available to retirees.

The Employer, on the other hand, argues that the Association failed to prove that the City's health insurance plan without the Medicare Part B reimbursement does not provide substantially equivalent coverage.

The burden of proof in this case rests with the Union. Former Association President Fesina, who retired in 2010 after twenty years as a firefighter, testified that the language in dispute was "in the contract long before me." The City asserts that the Union failed to present any evidence of the meaning intended by the parties when they negotiated the language, "substantially equivalent coverage." The City submits that Dr. Monahan's opinion is not entitled to any weight because he ignored the contract language, "substantially equivalent coverage" when he stated that elimination of Medicare Part B reimbursement "is a significant change." The Employer avers that this case is about contract interpretation, not personal opinion.

The arbitrator is charged with interpreting the contract language. The City submits that the plain meaning of the phrase "substantially equivalent coverage" as it relates to health insurance should be considered by the arbitrator. Clearly, the contract does not require the City to provide a plan in 2010 that is equal to the plan it provided in

2009. Instead, the contract requires the Employer to provide a plan that is almost equal or close in coverage to the plan it provided in 2009. Dr. Monahan stated that the Medicare Advantage Plan offered by the City is better than Medicare Part B because it has a co-payment plan similar to that offered to active members rather than the 80/20 coinsurance of Medicare Part B. The City maintains that, even with elimination of the Medicare Part B reimbursement, it provides equivalent or better health insurance coverage under the 2010 health insurance plan.

The City argues that its contractual obligation to pay either a percentage or the full amount of health insurance premiums is limited by Article 27.2 to the plans for which the City contracts with a provider and makes available to City employees and retirees. The Employer avers that the parties did not bargain for payments of additional premiums or reimbursements. The City submits that, when the language of Article 27.1 and 27.2 are read together, it is clear that the contract establishes no guarantee, either express or implied, concerning reimbursement of Medicare Part B premiums. In *PBA and Village of Saugerties* (June 2006), this arbitrator found that "the Union did not bargain to contain members' expenses for both the premium costs and co-pay associated with health insurance coverage." The City contends that here, the Association did not bargain to have the City reimburse the cost of Medicare Part B coverage after an employee retires, reaches age 65 and becomes Medicare-eligible. In fact, Article 27 includes no language that guarantees retiree health insurance. The City insists that its prior practice of reimbursing Medicare Part B premiums does not preclude the City from discontinuing that payment. In fact, the record demonstrates that the City has never paid the penalty imposed on individuals who enroll in Medicare Part B late. Thus, some retirees had to pay part of their Medicare Part B premium prior to the City's decision to discontinue the reimbursement.

The City asserts that equity and fairness require denial of the Association's grievance. Fresina and Hirsch testified that they did not contemplate having to pay the Medicare Part B reimbursement when they thought about retiring and it will now be a cost to them. The City argues that failing to contemplate paying for a federal government

health insurance plan is not grounds for awarding a remedy. In addition, Ms. Lyons testified that, "honestly, most people don't know about Medicare Part B and so probably would not anticipate it." It is the City's view, therefore, that whether a firefighter contemplated the cost of Medicare Part B premium reimbursement at retirement is not dispositive of the issue before the arbitrator.

Here, as in the *Saugerties* case, "[t]he Employer's obligation to provide health insurance coverage at no cost to unit members comes at an increasing cost to the [employer.]" The testimony of Ms. Lyons establishes that the City has expended every effort to provide the best affordable health care coverage for its employees and retirees. The City can no longer afford to sustain the increased cost of health insurance by itself. The City states that, "[I]t is time for the Association to recognize that demanding the Medicare Part B reimbursement may adversely impact the City's ability to maintain the level of benefits and coverage that most Association members have enjoyed without cost for most of their careers."

On the entire record before me, the Union's grievance is sustained.

The *Saugerties* case sheds no light on the dispute before me. In *Saugerties* the parties had negotiated a health insurance benefit that provided a plan of the employer's choosing at no cost to employees. The parties did not agree to a particular plan or level of benefits. In contrast, the parties here negotiated a health insurance provision that requires the City to bargain with the Union if it wishes to change the existing health insurance plan. The City may change the existing health insurance plan only if the Union agrees to the change or if an arbitrator determines that the change proposed by the City grants substantially equivalent coverage to bargaining unit members.

In addition, the dispute between the parties to this Agreement decided by Arbitrator Doyle does not control the outcome of this case. Arbitrator Doyle found that a $5 co-pay increase for enrollees in one of the health insurance plans available to employees did not amount to a substantial change in coverage afforded to bargaining unit

members. A minority of employees were enrolled in the plan that was subject to increased co-pays. In addition, the record demonstrated that the increased co-pays resulted in minimal expense to individual employees. That few employees sought reimbursement of that out-of-pocket expense from the Welfare Fund supports the City's contention that the added cost was not significant.

The case before me today must be decided on the language of the contract negotiated by the parties and on its own facts.

I find no merit to the City's argument that, prior to elimination of the benefit, the Agreement did not require the City to reimburse Medicare Part B premiums. Similarly without merit is the City's argument that fairness and equity require denial of the grievance, at least in part, because most people don't know about Medicare Part B, and presumably, would not expect to be reimbursed for that expense[2]. Those questions were decided against the City in part I of Article 27's two-pronged procedure for addressing contested unilaterally imposed or proposed changes to the existing health insurance plan offered to unit members. Having previously found that the City violated the contract by unilaterally discontinuing reimbursement of the Medicare Part B premium, the question before me today is limited to whether, with or without the Medicare Part B premium reimbursement, the City is providing substantially equivalent coverage to members of the bargaining unit.

The Union's case does not fail because it was unable to produce a witness who had participated in negotiation of the language in dispute. Although "substantially equivalent coverage" is a subjective standard, its meaning is not ambiguous. Bargaining history is not necessary to understand the plain meaning of that phrase. The City expressly acknowledged this by urging the arbitrator to consider "the plain meaning of the phrase 'substantially equivalent coverage' as it relates to health insurance …" City Brief, pp. 4-5.

[2] Ms. Lyons's conclusory statement to that effect is not supported by any evidence and, in the previously decided companion case, PERB Case No. A2009-485, was contradicted, at least by the testimony of two credible witnesses concerning their own knowledge.

Dr. Monahan testified[3], and it was determined by this arbitrator in the earlier related case, that Medicare Part B premium reimbursement "is a component of the employee's overall health insurance plan."

The Employer argues that Dr. Monahan's statement that the Medicare Advantage plans the City offers are "better than Medicare Part B" because they are co-payment plans similar to those enjoyed by active employees rather than co-insurance, which could expose members to greater costs, indicates that, even without Medicare Part B premium reimbursement, it provides equivalent or better health insurance coverage under the 2010 health insurance plan. Dr. Monahan's statement compares costs under the Medicare Advantage plans and Medicare Part B. But Medicare-eligible retirees did not rely on Medicare alone for health insurance. Prior to offering the Advantage Plans, Medicare-eligible retired firefighters received the benefits of Medicare as well as secondary coverage provided by the City's health insurance plans then in effect. Further, The City implemented Medicare Advantage plans as of January 1, 2009. Joint Exhibit 3. The only change in health insurance coverage for Medicare-eligible retirees commencing January 1, 2010, therefore, is elimination of the Medicare Part B premium reimbursement.

Elimination of Medicare Part B premium reimbursement is a significant diminution of the benefit offered to bargaining unit members. The benefit is worth more than $1,300 per year now, and will undoubtedly increase in value as time goes by. The monthly premium reimbursement is a form of deferred compensation that can be enjoyed by all bargaining unit members, in some cases for decades. Elimination of that benefit is a significant loss to bargaining unit members. Whether an individual firefighter was aware that the City would reimburse the Medicare Part B premium in retirement, or simply knew that he or she would not have to pay for health insurance in retirement, or was not at all familiar with the retiree health insurance benefit, elimination of the

[3] Dr. Monahan's testimony that elimination of Medicare Part B reimbursement was a "significant change" did not ignore the contract language. Rather, the "significant change" factored into his conclusion that the coverage provided by the City after it eliminated the reimbursement is not substantially equivalent to the coverage it provided before it eliminated the Medicare Part B premium reimbursement.

Medicare Part B premium reimbursement results in coverage to members of the bargaining unit that is not substantially equivalent to the coverage previously provided by the City.

The Employer is correct that increasing fiscal constraints and the increasing cost of the Medicare Part B premium may affect the City's ability to pay for high quality health care coverage. Those important issues, however, are not appropriately addressed in this arbitration. Rather, the parties' Agreement requires negotiation of proposed changes to an existing health insurance plan. Here, the City violated the Agreement by unilaterally implementing a change in the existing health insurance plan that failed to grant substantially equivalent coverage to members of the bargaining unit.

By reason of the foregoing, I issue the following

AWARD

1. The City's health insurance plan offered on January 1, 2010, eliminating the Medicare Part B reimbursement, does not grant substantially equivalent coverage to members of the bargaining unit as it offered prior to that date.
2. The City shall forthwith reimburse all individuals affected by elimination of the Medicare Part B reimbursement any amounts they would have been reimbursed had the City not eliminated the Medicare Part B reimbursement.
3. The arbitrator retains jurisdiction of this matter for the sole purpose of resolving any dispute or disputes that may arise as a result of the remedial portion of the Award, for a period of six months from the date of this Award.

Dated: February 15, 2012
Delmar, New York

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SHEILA S. COLE, Impartial Arbitrator

AFFIRMATION

STATE OF NEW YORK}
}ss.:
COUNTY OF ALBANY }

I, SHEILA S. COLE, hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.

Dated: February 15, 2012
Delmar, New York

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SHEILA S. COLE