

IN THE MATTER OF ARBITRATION BETWEEN

KANSAS CITY AREA TRANSPORTATION)	
AUTHORITY)	
)	
)	Employer,
)	
and)	Retiree Health Insurance
)	FMCS No. 02-11433-7
)	
AMALGAMATED TRANSIT UNION)	
LOCAL 1287)	
)	Union.

APPEARANCES

For the Employer: James R. Willard of Spencer, Fane, Britt & Browne, L.L.P. For the Union: Scott A. Raisher of Jolley, Walsh, Hurley & Raisher, P.C.

ISSUE

Is the Authority's failure to pay "personalized" health reimbursements to retirees under the age of 65 who waived insurance coverage in violation of the agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

Section 1.4. Past Practices

A past practice is an agreement either oral or written, to handle a particular factual situation in a given manner. In order for such past practice to exist it must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time.

All past practice agreements between the parties that have not been reduced to writing

and signed by the parties shall be considered void as of July 1, 1979.

No past practices may be established after the execution of this contract unless reduced to writing at the time of the establishment of the practice.

Section 1.22. Group Insurance - Welfare

(b) Basic Health Insurance - Active Employees.

The Authority shall provide one or more comprehensive hospital, medical and surgical health plan(s) with coordinated benefits to all employees upon hire, and their dependents after one (1) year of service. Effective January 1, 2001, the authority shall provide one or more comprehensive hospital, medical and surgical health plan(s) with coordinated benefits and dependent coverage to all full-time employees upon completion of the probationary period.

The authority's contribution for full-time employees shall equal eighty percent (80%) of the average of all plans at each level of coverage (i.e., employee only, employee and one dependent, and family). Employee contributions, if any, may be paid through a tax sheltered wage reduction account to the extent permitted by law, which account is to be established as soon as practicable after the ratification of this Agreement.

Full-time employees who elect to waive Authority offered insurance coverage may request reimbursement for the employee only, at the Authority's level of contribution. An employee receiving insurance coverage by a spouse, who is also employed by the Authority, will not be eligible for reimbursement. Employees who wish to purchase medical insurance outside the Authority, or who live outside the covered area, and who can show proof of purchase, may be eligible for reimbursement up to the amount of the authority's level of contribution. In the

event the outside premium is less than the Authority's level of coverage, the Authority will only pay the amount required to purchase coverage. In no event shall the Authority contribution exceed the actual premium.

e. Hospital and Medical Benefits for Retired Employees.

(1) Pensioners who have retired prior to age sixty-five (65) shall be entitled to family or individual coverage under the same terms as active employees. The authority shall pay ninety percent (90%) of the premium for the pensioner's own coverage until the pensioner has reached age sixty-five (65).

(2) Upon attainment of age sixty-five (65) or becoming eligible for Medicare benefits, the Authority shall pay twenty-one dollars and fifty cents (\$21.50) for Medicare B. Employees shall be required to apply for Medicare benefits when first eligible, regardless of age.

CONTENTIONS OF UNION

I. The Union submits that the Authority's intended refusal to pay monthly "personalized" health reimbursement payments to those retirees under the age of 65 who waive health insurance coverage is a clear violation of the agreement.

II. The Union believes that the clear and unambiguous language of Sections 1.22(b) and 1.22(e)(1) when read together provide that retirees who elect to waive Authority-offered insurance, like other "active employees" are entitled to receive reimbursement.

III. The undisputed evidence confirms a clear, continuous and consistent practice for well over six years during which the Authority has made reimbursement payments to eligible retirees.

CONTENTIONS OF AUTHORITY

I. Section 1.4 makes it clear that a practice cannot stand that is not based on the legitimate interpretation of the existing contract language and creating a right by practice is specifically prohibited by Section 1.4 of the contract.

II. The Authority is not required to pay the retiree's who are under the age of 65 "personalized" health reimbursement under the contract.

FACTS

The parties agree that the essential facts are not really in dispute. Robert Roach, the Union's Financial Secretary Treasurer, explained relevant aspects of the annual enrollment process and reviewed Authority documents confirming past reimbursement payments. His testimony was neither disputed, challenged nor contradicted by the Authority in any respect.

Roach testified that the Authority's annual open enrollment generally takes place in September or October every year. It is during the enrollment process that all Authority employees, including retirees, have the opportunity to review the Authority's health insurance program and available benefits and elect whether

to participate in the program. Those employees and retirees who choose to waive insurance must complete a waiver form (ATU Ex. 1) and have it approved by the HR Department. The form specifically provides that, with respect to a waiver:

-I must show proof of other medical coverage to receive the full cash amount;

-I will receive a monthly cash reimbursement at the lowest contribution of "employee only" coverage paid by the Authority;

In addition, the form provides for the employee's signature, the spouse's signature and, most important, approval by the HR Department.

Once completed, the waiver forms are reviewed and approved by HR if the employee or retiree is eligible to receive reimbursement. Based upon his knowledge and experience, Roach testified that those retirees currently receiving the personalized health payments would have been required to complete the waiver form and be approved by HR in order to receive payment.

As Roach explained, the personalized health payments received by those eligible retirees are included in the pension checks that they receive. Roach identified the documents that are prepared every month by the Authority in connection with the payment of the monthly reimbursement. These documents, ATU Exhibits 2 through 7, confirm, without question, that personalized health payments have been regularly and continuously made to those eligible retirees since at least 1998. More importantly, the documents confirm that, since at least 1998, these monthly payments have been either

approved by the HR Director or someone authorized to act on the Director's behalf. ATU Ex. 4 reflects that Ms. Porter herself authorized and approved payment since at least July 2000.

There are currently six retirees receiving personalized health reimbursement payments. Mr. Hildren Canady has been receiving these payments since March 1995. The current reimbursement payment is \$188.28. This amount represents the Authority's level of contribution for retirees (90%) as set out in Section 1.22(e)(1). Based upon the documents submitted, it appears that there has been, over the years, between six and ten retirees annually receiving reimbursement payments. As Mr. Roach testified, the reimbursement payments represent a significant portion of the total monthly retirement benefit received by these retirees, often averaging between 22% and 39% of the monthly benefit received.

Ms. Fern Kohler, the Authority's Deputy General Manager, testified that there are currently six retirees under the age of sixty-five (65) who are not receiving either Authority offered insurance or reimbursement payments. She readily acknowledged, however, that she knew nothing about the particular facts or circumstances regarding these employees. For example, she did not know whether these employees were aware of the benefits to which they were entitled; she did not know whether any of the employees were eligible to receive a cash reimbursement; she did not even know whether these employees had ever applied for either benefits or reimbursement. With respect to one retiree, Ed Barker, Ms.

Kohler "suspected" that he was not receiving the personalized health reimbursement because he was not eligible for it. As she explained, Section 1.22(b) provides that "an employee receiving insurance coverage by a spouse who is also employed by the Authority, will not be eligible for reimbursement". As Ms. Kohler explained, because Barker's wife was employed and covered by the authority, he would not have been eligible to receive reimbursement. It is interesting to note that, with respect to Barker, Ms. Kohler apparently had little difficulty in applying to him the restrictions set out in Section 1.22(b) that would preclude him from receiving reimbursement.

CONCLUSION

The arbitrator first will address the several paragraphs set out in Section 1.22. in attempting to determine what the Authority's obligation was insofar as payments to be made to retirees under the age of 65.

In the second paragraph of 1.22(b) it is noted that "the Authority's contribution for full-time employees shall equal 80% of the average of all plans at each level of coverage (i.e. employee only, employee and one dependent, and family)".

Dropping down to 1.22(e) we find that pensioners who have retired prior to age 65 shall be entitled to family or individual coverage under the same terms as active employees. The Authority shall pay 90% of the premium for the pensioner's own coverage until

the pensioner has reached age 65". Thus it appears that the Authority's obligation to the early retiree is the same as that of an active employee, except the Authority shall pay 90% of the premium. Currently, six retirees are receiving personalized health reimbursement payments which amount to \$188.28 a month and represents the Authority's level of contribution for retirees (90%) as set out in Section 1.22(e)(1).

Clearly, in the contract there is not language that directs the Authority to pay cash in lieu of insurance. However, as we follow the facts, we find that the Authority developed a pattern for some reason of making payments. These payments have been paid since March 1995. Apparently the Authority's person in charge of making these payments took it upon himself or herself to make the personalized health reimbursement and the arbitrator would assume that this was a matter of interpretation that the employee made. It went unnoticed for six years and now the Authority is attempting to correct the situation.

Addressing the issue of past practices and the contract language, it states in part:

" . . . In order for such past practice to exist, it must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time."

Further, past practices must be reduced to writing at the time of establishment of the practice.

The arbitrator has not encountered a provision in a contract that required past practices to be reduced to writing. This is a situation that has existed for some six years and the parties have seemed to accept the fact that the practice is (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time. The failure of the Authority to object or raise the question of making the payments as being contrary to the contract would appear to show that it acquiesced to the practice. The contract language as to the method of payment does not appear to be ambiguous, but through the action of the parties, they have in effect modified the agreement by past practice. The arbitrator Erwin Dean in *Associated Textiles Systems*, 86 LA 761, 765 (1985), found that language in the contract was ambiguous and said:

"Where the parties to an agreement have, through a consistent course of dealing over an extended period of time, ascribed a particular meaning to a term which might in general usage connote some other fact of meaning, the particular meaning developed by the parties should, it seems, be preferred over the meaning ascribed by general usage."

While the weight of authority and better rule are to the effect that unambiguous contract language will prevail over a contrary practice, occasionally arbitrators are persuaded that the parties' conduct is attended with sufficiently reliable indicia of an intent to amend the written provisions of the agreement. Reviewing courts also are sometimes persuaded to force an award that gives effect to a practice that is contrary to unambiguous

language. An arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent. *How Arbitration Works*, Elkouri 4th Ed. Supp. pg. 1 to 7.

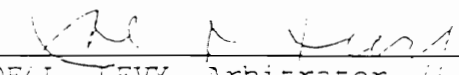
The other side of the coin with reference to the Authority's position, is that the past practice was not the result of a joint determination with the agency. It was mere happenstance. That is, a method that was developed without design or deliberation.

This is a case in which the retired employees involved have consistently received the cash payments, have relied upon them, and probably assumed that the Authority was aware of what it was doing. This was a unilateral move by the Authority. Other than the practice not being reduced to writing, it missed all of the prerequisites of the contract language. The Authority has declared it will address this issue in November with the agency with the intention of not continuing to make the cash payments, despite whatever the decision is in this case. Again, the contract language is probably not ambiguous. However, absent the past practice being reduced to writing, the two parties obviously thought that making the cash payments was within the purview of the contract or management's discretion. The arbitrator feels that under this set of facts that equity should prevail and the employees should not be punished for a practice that has been in existence for six years.

DECISION

The grievance filed by the Union is sustained.

DATED THIS 5th day of November, 2002.



JOE L. LEVY, Arbitrator

Approved _____

Disapproved _____

DATED _____, 2002

For the Authority

Approved _____

Disapproved _____

DATED _____, 2002

For the Agency