IN THE MATTER OF THE GRIEVANCE ARBITRATION BETWEEN

Local 101 International Association
of the Fire Fighters

and **BMS Case No. 15-PA-0491**

City of Duluth, Duluth MN

NAME OF ARBITRATOR: George Latimer
Assistant James St. Peter

DATE AND PLACE OF HEARING: February 26, 2015
Duluth, Minnesota

BRIEFS RECEIVED AND RECORD CLOSED: March 24, 2015

DATE OF AWARD: April 23, 2015

APPEARANCES

FOR THE UNION: Tim Andrew, Attorney
Peter Johnson, President of Local 101 IAFF
Deb Strohm, Employment Tech – COD, AFSCME Chair of Negotiations Team
Tom Maida, President of Police Union
Pete Stauber, President of Police Lts Union (LELS)

FOR THE EMPLOYER: Steve Hanke, Attorney
David Montgomery, Chief Administrator Officer
Theresa Severance, Manager, HR, Healthcare & Safety
Shannon Sweeney, Employee Benefits Administrator
Stina LaPaugh, Paralegal, City Attorney Office

INTRODUCTION

This matter is a grievance arbitration arising out of a unilateral change to the Employer's interpretation and application a section in the Collective Bargaining Agreement (CBA). The parties have agreed that the case is properly before the Arbitrator for determination. A hearing was held in Duluth, Minnesota, on February 26, 2015. Briefs were received on March 24, 2015, and the record was closed. Following the close of hearing, Employer submitted evidence of a contract settlement with another union not party to this case. The Union has objected to the admission of that evidence and the objection is affirmed.

STATEMENT OF THE ISSUES

The parties agree that the Employer unilaterally changed its interpretation and application of 17.1(a)(1) regarding deferred compensation contributions for employees beginning January 1, 2014. What is the appropriate remedy now?

RELEVANT CONTRACT PROVISIONS

The relevant contract provisions are from the Collective Bargaining Agreement between the parties effective January 1, 2012 to December 31, 2014. (Jt. Ex. 3).

ARTICLE 2 – DEFINITIONS

Article 2.14: Employee means a member of the formally recognized bargaining unit represented by the Union and defined as a public employee in Minnesota Statutes.

Article 2.17: Grievance means a dispute or disagreement as to the interpretation or application of the terms of this Agreement.

ARTICLE 17 – DEFERRED COMPENSATION

Article 17.1: For each eligible Employee who has been continuously employed by the Employer for sufficient time as to be eligible for the Employer's medical benefit plan, the Employer will facilitate contributions to a Section 457(b) deferred compensation program. Such contributions shall be made (1) in accordance with the Internal Revenue Code Section 457(b), including the associated regulations and regulatory guidance, and (2) in accordance with Minnesota law.

(a) The Employer shall make the amounts listed below available for contribution to the Section 457(b) deferred compensation program.

1. $304 per month for each eligible regular employee without claimed dependents on the hospital-medical benefit plan; or

2. $229 per month for each eligible regular Employee with claimed dependents on the hospital-medical benefit plan.

(b) Amounts contributed for regular part-time employees shall be prorated based on hours worked.

ARTICLE 18 – HOSPITAL-MEDICAL INSURANCE

Article 18.1: The Employer will make available to employees comprehensive hospital-medical benefit Plan 3A only.

(a) The Employer agrees to pay for the employees without claimed dependents 100% of the monthly premium for single employee hospital-medical benefit Plan 3A through December 31, 2012. Effective January 1, 2013, the Employer agrees to pay for the Employees without claimed dependents 90% of the monthly premium for single Employee hospital-medical benefit Plan 3A. The Employer shall deduct from each eligible and enrolled Employee's salary or wages the amount by which the monthly premium cost of the Employee's single hospital-medical plan coverage exceeds the Employer's contribution that is stated in this paragraph.

(b) The Employer agrees to pay 80% of the monthly premium for family medical benefit Plan 3A. The Employer shall deduct from each eligible and enrolled employee's salary or wages the amount by which the monthly premium cost of the Employee's hospital-medical plan family-dependent coverage exceeds the Employer's contribution that is stated in this paragraph.

(e) The Employer agrees to hold an annual open enrollment period for benefits selection. The Employee may change their benefits selection during the annual open enrollment period or at the time of a qualifying life event as defined by the Internal Revenue Service.

Article 18.8: Joint Powers Enterprise, Joint Self-Insurance Pool and Trust.

. (a) The parties acknowledge the Employer operates, on a joint basis with the HRA, DECC and DAA, one or more self-insured group health plans pursuant to the provisions of Minnesota Statutes Chapter 471 and Minnesota Rules Chapter 2785 for the purpose of providing health care benefits to eligible and enrolled Employees and their beneficiaries as described in Article 18.1 above.

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. (b) The Employer, as a Member of the Joint Powers Enterprise, agrees to ensure that the administration of the Pool and Trust complies with the provisions of Minnesota Statutes Chapter 471, as amended, and Minnesota Rules Chapter 2785, as amended.

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. (c) The Employer agrees to transfer and deposit monthly all premiums as described in Article 18.1 (a) and (b) into the Trust. Monies in the Trust shall only be expended for payment of participant health care benefit expenses, purchase of health and dental insurance (including stop loss insurance), payment of expenses incurred in the administration of the Employer's health care and dental care programs, and other health-related expenses. Expenses made pursuant to the Worker's Compensation laws, the cost of physical exams of, or medical services for, Employees which exams or services are required by the City or another governmental agency shall not be eligible expenses paid from the Trust. Any funds expended from the Trust that are later determined by the Employee Benefits Administrator or through court action, arbitration, or mediation to have been more correctly charged to Worker's Compensation shall be promptly reimbursed to the Trust. Reimbursements received by the Employer from stop loss insurance shall be promptly deposited in the Trust.

Article 18.12: The Union acknowledges that the Employer is authorized to operate a joint self-insurance pool under Minnesota Statutes Chapter 471 and Minnesota Rules Chapter 2785. In the event the City ceases to be a member of the joint self-insurance pool or the pool is dissolved, the language in Article 18.1(c) and (f), Article 18.9 and Article 18.10 as set forth in the 2010 collective bargaining agreement between the parties shall become effective immediately.

ARTICLE 36 – GRIEVANCE PROCEDURE

Article 36.1: An Employee or group of Employees with a grievance shall within thirty (30) calendar days after the first occurrence of the event giving rise to the grievance present such grievance through the Grievance Committee in writing to the Chief, or in the Chief's absence, to his or her authorized representative.

Article 36.4: The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He/she shall consider and decide only the specific issue(s) submitted to him/her in writing by the parties, and shall have no authority to make a decision on any other issue not so submitted to him/her. More than one (1) grievance may be heard by the same arbitrator by mutual written agreement of the parties. Either party may, if it desires, submit a brief to the arbitrator setting forth its position with respect to the issue(s) involved in a grievance. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws and rules and regulations having the force and effect of law. The arbitrator shall submit his/her decision in writing to the parties and shall file a copy of such decision with the Bureau of Mediation Services of the State of Minnesota. The decision shall be based solely upon his/her interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented.

RELEVANT SECTION FROM MINNESOTA PUBLIC EMPLOYMENT LABOR RELATIONS ACT (PELRA)

Public employees in an appropriate unit have the right by secret ballot to designate an exclusive representative to negotiate grievance procedures and the terms and conditions of employment with their employer. Minn. Stat. § 179A.06, Subd. 2.

BACKGROUND AND STATEMENT OF FACTS

Local 101 of the International Association of Firefighters (Union or Local 101) is one of six bargaining units at the City of Duluth (City or Employer). Union is comprised of 133 members and is party to a CBA with Employer with a term of January 1, 2012, through December 31, 2014. All six bargaining units and all City employees participate in the same self-insured hospital-medical plan. (Section 18.8 of the CBA). In addition to these employees, three other groups participate in the self-insured group heath plan, which is structured as a Joint Powers Enterprise under Minnesota Statute 471. As of January 2015, Employer's monthly contributions to the group health plan made up 87% of the total monthly contributions, while the other three groups made up 13% of the monthly contributions.

The six bargaining units have almost identical language providing the same level of benefits and the same premium sharing for single and family coverage. In addition, all of the Employer's unions participate in a health insurance labor management subcommittee, which keeps the individual unions informed on the administration and financial health of the medical plan.

The percentage share for coverage is the same for all City employees, union and non-union, as well as the total premiums paid by these employees and the City. In addition, the claims experience is pooled together and is not divided by the bargaining units.

The current CBA was negotiated in the fall of 2012. Under the previous labor agreement, the Employer paid 100% of the monthly premium for the single employee hospital-medical

benefit plan. During the fall 2012 negotiations, the Employer proposed to charge employees who elected single health care coverage 10% of the cost; that is, a 90%/10% split. The Union objected to this proposal as it felt it would have an adverse selection in the Plan as many younger, single employees who had coverage through reserve military service or through a spouse could opt out. These employees would be a good "risk" to the Plan. City Administrator Montgomery assured Union president Pete Johnson that members would not drop out of the Plan by referencing Article 17.1 of the CBA. If a single employee refused to pay 10% ($64) of the single coverage (i.e. opt out of the Plan), that employee would lose their $304 per month contribution to the City's deferred compensation program. The agreement was that the $304 per month deferred compensation contribution was "tied to" the participation in the Plan. Based on this assurance, Union agreed to the new language in Article 18.1, which required the 10% cost sharing of the single health insurance premium effective January 1, 2014. The City's other five bargaining units also agreed to the 10% cost sharing.

Additional assurance that employees could not opt out of the Plan and still receive the deferred compensation was given to Police Union President, Tom Maida, when he asked for clarification from Steve Hanke, Assistant City Attorney. In an email dated January 17, 2013, Hanke responded to Maida's question writing:

> Employees can opt out of single health insurance coverage but they forgo receiving their monthly health-insurance supplement of $304/month. Employees only obtain the $304 or $299/month health insurance supplement payment if they are on the Plan. (Union Ex. 21).

In the fall of 2013 the City sent its open enrollment letter, which employees can make changes to their benefit elections for the upcoming calendar year. Nothing in the fall 2013 letter suggested an employee could drop out of single coverage and still receive the $304 per month deferred payment contribution.

Also in the fall of 2013, the Employer's Human Resource Office began verbally advising employees that they could opt out of single coverage and still receive the $304 per month contribution to their deferred compensation account. In total, twelve employees opted out of coverage for 2014. Of that twelve, two were members of Local 101.

In the fall of 2014, during the open enrollment period for 2015, one of the members from Local 101 told Johnson that the City's Human Resource Office told him that he could drop out of single health care coverage and still receive the $304 per month contribution to his deferred compensation account. Johnson met with Montgomery on December 10, 2014, to express his concerns that the City was violating the contract and its assurances in negotiations that this exact situation would not occur. Johnson requested that Montgomery revise the City's open enrollment information to make clear that if an employee opted out of single coverage that employee would lose their deferred compensation contribution. Montgomery declined this request. Also on December 10, Johnson emailed the City's Human Resource Office who confirmed the City first began allowing employees to opt out and still receive the $304 deferred compensation as early as January 1, 2014. (Union Ex. 4). Keely Downs of the City's Human Resource Office stated, "The article for deferred comp dollars doesn't indicate anything about enrolling in medical coverage, but rather being eligible for medical coverage." (Union Ex. 4).

Local 101 filed a grievance on December 11, 2014. In its grievance, the Union demanded the following:

> All city employees who have opted out of the City of Duluth medical insurance plan are given the option to re-enroll in the plan and that if they choose not to, they stop receiving the deferred compensation described in Article 17.1 of the Local 101 CBA. (Jt. Ex. 1)

On December 31, 2014, Montgomery responded to the grievance. In this letter he offered the following changes to address the Union's grievance:

- The City will not allow new IAFA Local 101 member employees who decline the City's hospital medical benefit plan coverage to receive $304 monthly pursuant to Article 17.1(1)(1).
- In 2016, unless changed via new CBA Article 17.1(a)(1) language, the City will not allow any IAFA Local 101 member employees who decline the City's hospital-medical benefit plan coverage to receive $304 monthly pursuant to Article 17.1(a)(1). (Jt. Ex. 2)

The Union proceeded to arbitration and the parties agreed to the stipulated issue above. Prior to the arbitration hearing, the Union requested that the City immediately inform the 20 employees opting out of single medical coverage that effective March 1, 2015, they would only receive the $304 contribution to their deferred compensation account provided they enroll in and pay 10% of the cost of the premium. (Union Ex. 22). Hanke replied on behalf of the Employer stating that it would not change its current practice until after this arbitrator's decision on this matter. (Union Ex. 22).

EMPLOYER ARGUMENT

The Employer acknowledges that it made a mistake by unilaterally changing its interpretation and application a Section 17.1 of the CBA. It took sensible and legal corrective action to address the harm alleged by the Union.

The Employer argues that the CBA defines the scope of representation and CBA disputes as follows:

> Article 2.14: Employee means a member of the formally recognized bargaining unit represented by the Union and defined as a public employee in Minnesota Statutes.
>
> Article 2.17: Grievance means a dispute or disagreement as to the interpretation or application of the terms of this Agreement.

The City highlights these two articles because they limit any dispute to <u>these</u> employees and disputes that relate to <u>this</u> agreement, not employees in other bargaining units or those union's respective agreements with the Employer.

The Employer also points to Article 36 of the CBA to limit the scope of an arbitration award and the Arbitrator's authority. Article 36.4 states:

> The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of **this Agreement.** He/she shall consider and decided only the specific issue(s) submitted to him/her in writing by the parties, and shall have no authority to make a decision on any other issue not so submitted to him/her. More than one (1) grievance may be heard **by the same arbitrator by mutual written agreement of the parties.** Either party may, if it desires, submit a brief to the arbitrator setting forth its position with respect to the issue(s) involved in a grievance. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws and rules and regulations having the force and effect of law. The arbitrator shall submit his/her decision in writing to the parties and shall file a copy of such decision with the Bureau of Mediation Services of the State of Minnesota. The decision shall be based solely upon his interpretation of the meaning or application of the express terms of **this Agreement** to the facts of the grievance presented. (Emphasis added).

As noted above, none of the other five collective bargaining units have submitted a grievance regarding this matter. The CBA clearly states that the decision shall be based on an interpretation of this Agreement, not this Agreement and other bargaining units' agreements. Therefore, the scope of this Arbitrator's power is limited only to these two parties.

The Employer argues that the Union is improperly requesting this Arbitrator exceed PELRA and Article 2.17 of CBA. It argues that the Union is essentially asking the Arbitrator to change the CBA as follows:

> Article 2.17: Grievance means a dispute or disagreement as to the interpretation or application of the terms of ~~this Agreement~~ any-and-all past or current collective bargaining agreements between the Employer and any-and-all of its bargaining units.

Currently, there are approximately 900 City of Duluth Employees, which includes six bargaining units. Local 101 has 133 members and only represents one of the six bargaining units. Both PELRA and the CBA explicitly define a grievance or disagreement as to the interpretation or application of the terms of this Agreement, and only this Agreement. Local 101 is the only

bargaining unit of the six represented in Duluth to file a grievance on the present matter before this Arbitrator. The other five bargaining units were notified in approximately December of 2014 of the City's unilateral change its interpretation and application of Section 17.1 of the CBA. The Union's proposal that this Arbitrator should unilaterally change a term of every other bargaining unit's CBA exceeds this Arbitrator's authority. The absence of a grievance from another bargaining unit indicates that this Union does not represent all employees, or their individual collective bargaining interests.

The City also contends that the Union's alleged harm done to it (and other unions that are part of the Joint Powers Enterprise Trust's Health Insurance Plan Coverage) is purely hypothetical. The City is not disputing that, because 14-20 employees declined coverage, it contributed less total cash in to the Joint Powers Enterprise Trust. However, at the same time, the Duluth Joint Enterprise Trust neither incurred health insurance costs for those employees, nor did they pay health insurance claims on behalf of those employees. Furthermore, Article 18 of the CBA expressly states that the Employer makes health insurance contributions into, and pays claims out of, the Duluth Joint Powers Enterprise Trust on behalf of employees *actually* covered by Plan 3A. As Article 18.1(c) states:

> The Employee agrees to transfer and deposit monthly all premiums as described in Article 18.1(a) and (b) into the Trust. Monies in the Trust shall only be expended for payment of participant health care benefit expenses.

The Union's demands that the City pay health insurance premiums into the Duluth Joint Powers Enterprise Trust to administer and pay claims on behalf of employees who were not even covered by this health insurance plan is punitive rather than restorative.

UNION ARGUMENT

The Union argues that the City should be required to pay into the Group Health Plan the amount it would have paid had it correctly administered the contract. The number of participants, the claims experience of participants, and whether the participants can opt out of the Plan are all factors that can impact the funding of the City's self-insured group health plan and as a result the future premium amounts the employees as required to pay. Giving single employees a strong disincentive to drop out of the Plan was an important goal of the Union because it wanted to avoid adverse selection in the self-insured group health plan. Chief Administrator Montgomery recognized these goals when he assured Union president Johnson in the fall 2012 negotiations that the City would continue to require single plan coverage in order to receive the deferred compensation contribution of $304 per month. Johnson testified that it was theoretically possible for an employee to opt out of single coverage and opt pay $64 per month, but that the employee would lose the City's $304 per month contribution to their deferred compensation account. Johnson believed that, based on Montgomery's assurance, he was satisfied that adverse selection in the group health plan would not occur. Therefore, the Union's remedy must be awarded to show the harm the City's contract violation has caused.

The Union contends that the need for a meaningful "make whole" remedy is heightened in this matter because the City must not be allowed to accomplish the same result through this arbitration that it is currently seeking in labor negotiations. Denying a meaningful remedy condones the City's contract violation. Where an employer violates the contract, the arbitrator's role is to put the Union members where they would have been had the contract not been violated. In addition, the request for a meaningful remedy is supported by the need to interpret similar provisions in this CBA consistently. The City's Human Resource Office manipulated its

contract interpretation of Section 17.1 to its own advantage until it was caught, but the same interpretation of Section 18.1 requires the City to pay 90% of the premium on behalf of employees who are eligible, but not necessarily enrolled.

The Union argues that had the City been paying 90% of the single premium ($627.30) on behalf of the 12 members for 12 months in 2014, the City would have paid $90,331.20. Since the City has continued to violate the contract by allowing 20 employees to opt out of the plan, but still receive the $304 per month, each month the City skips out on paying $12,546 it would have paid into the group health plan for its contract violation.

The specific unilateral mistake the City made in this case was wrongly informing employees that they could forego paying 10% ($69.70) of the cost of coverage and still receive the $304 per month deferred compensation contribution. The Union turns to How Arbitration Works, which states, "When an employer makes an error in favor of employees in full knowledge of the facts any money paid out cannot be recovered by the employer." In this case, rather than money being paid out in error, the unilateral mistake was that the 10% premium was not deducted. But the rule still stands that the employees cannot be penalized for the Employer's unilateral mistake. If the City complains about paying 90% of the premium for employees not receiving coverage, the Union will not object to the employees receiving coverage and the City paying 100% of the premium. Either way, the employees cannot be made to retroactively pay when the City's solely to blame for the error in administering the CBA.

The Union argues that in order to restore the status quo and prevent additional damages from accruing, the Arbitrator should also award specific performance. Specifically, in this case the Union would like the City to have an open enrollment period advising the 20 employees that in order to continue to receive the City's $304 per month contribution to their deferred

compensation account, they must enroll in single health insurance Plan 3A at the cost of $69.70 per month. Each month that goes by and the City does not correct its contract violation, the dollar damages continue to grow.

As for the City's argument that a remedy cannot apply to all employees in the self-insured group health Plan, by violating this Union's CBA, it has also violated the other five unions' CBA's that have almost identical language on this subject. Union president Johnson testified that Chief Administrator Montgomery's assurance that the City's interpretation of Article 17.1 was not limited to Local 101, but rather the agreed upon interpretation was to apply to all bargaining units. This Union's negotiations and bargain was that all City employees would have a strong disincentive to drop out of the Plan. This bargain inherently included how the City would handle employees seeking to opt out from other bargaining units, and as a result, the remedy must also include other bargaining units.

The Employer also notes that Local 101 is the only union to file a grievance on this matter. However, the Union argues that other unions (non-supervisory, non-confidential, basic unit, police lieutenant,) support Local 101's requested remedy to have immediate open enrollment even if it means their members in the future will be required to pay 10% of the cost of single coverage. In addition, the other unions support Local 101's requested remedy to require the City to pay 90% or 100% of the cost of single coverage that would have been paid into the self-insured group health plan had the City not violated the contract.

The Union argues that, historically, where one union has taken the lead on a benefit issue, the City implements a consistent remedy for all bargaining units. Union president Johnson testified to four instances where this was the case. (See Union Exs. 11, 12, 13, 14, 15). Furthermore, at the City's Health Insurance Labor Management Subcommittee Meeting on

January 20, 2015, the City announced the inadequate remedy of not allowing future hires to opt out of single coverage and continue to receive $304 per month. This applied to all bargaining units. (Union Ex. 16). Thus, there has been, and as of January 20 still is, a consistent treatment of benefit issues across all bargaining units.

Lastly, the Union rebuts the Employer's argument that, based on Section 36.4 of the CBA, the Arbitrator cannot amend, modify, nullify, ignore, add or subtract from the Agreement. However, the Union is not asking the Arbitrator to do any of these listed. Rather, the Union is requesting the Arbitrator to enforce the contract while adhering to the commitment in both Section 17.1 of the CBA and Chief Administrator Montgomery's assurance given to the Union at the bargaining table that the $304 per month deferred compensation contribution was "tied to" enrollment in the Plan.

Therefore, the Union requests the Arbitrator to order the City to have an open enrollment for the 20 employees that opted out of single health coverage but continue to receive the $304 per month. Part of this open enrollment is to advise these employees that in order to receive the $304 per month they must enroll in the single health insurance Plan 3A at the cost of $69.70 per month. Additionally, the Union requests the Arbitrator to order the City to pay the Joint Powers Enterprise Trust $153,061 (assuming the open enrollment period for the 20 employees is effective June 1, 2015). Each additional month beyond June 2015 the City should be required to pay $12.546 if the Union's grievance is upheld.

ANALYSIS AND AWARD

This Arbitrator finds for the reasons which follow that the Employer has violated the terms of the CBA and the remedy is for the Employer to pay 100% of the premiums due for each year the employees of this bargaining unit were not part of the plan.

The Arbitrator rejects the post-hearing submission by the Employer of a contract entered into with another unit. The reasons for that rejection are evident in long precedence as well as common sense in that a post-hearing submission of evidence does not permit cross examination by the Union, nor does it permit the Arbitrator to question how the contract came about and what tradeoffs might have occurred in the course of negotiations for that contract.

The Arbitrator rejects the Union position that the members of the other units represented by other unions should be included as part of the Union claim. The contract is clear in giving exclusive representation of the firefighters to this Union. The Union has no such exclusive representational rights or duties with other units. The Union is correct in stating that adverse selection could occur as a result of single employees generally representing a lesser risk withdrawing from the Plan. As testified by the City Administrator, many other demographics could also affect risks, and therefore costs to the Plan. That reality, however, does not endow this Union with jurisdiction it does not legally have.

The plain language of the contract, which the Employer clearly violated, states:

> Article 17.1: For each eligible Employee who has been continuously employed by the Employer for sufficient time as to be eligible for the Employer's medical benefit plan, the Employer will facilitate contributions to a Section 457(b) deferred compensation program. Such contributions shall be made (1) in accordance with the Internal Revenue Code Section 457(b), including the associated regulations and regulatory guidance, and (2) in accordance with Minnesota law.
>
> (a) The Employer shall make the amounts listed below available for contribution to the Section 457(b) deferred compensation program.
>
> > 1. $304 per month for each eligible regular employee without claimed dependents on the hospital-medical benefit plan; or
> >
> > 2. $229 per month for each eligible regular Employee with claimed dependents on the hospital-medical benefit plan.

> (b) Amounts contributed for regular part-time employees shall be prorated based on hours worked.

This violation was even expressed by the Employer's own counsel. In an email to Police Union president, Tom Maida, Assistant City Attorney Hanke wrote:

> From the City's perspective, we would much rather pay an employee $304/month <u>not</u> to be on the City's plan, because it currently costs the City $508.50/month in premiums, plus risk of claims. (Union Ex. 21. Emphasis in original).

City Administrator Montgomery candidly acknowledged that turnover in the Human Resources department with three benefit employees retiring and two others resigning, as well as a failure to communicate with the administration, caused erroneous direction by the Human Resources personnel to the members who wished to opt out.

The arbitration clause in the CBA strictly defines the Arbitrator's power by the following language:

> The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He/she shall consider and decide only the specific issue(s) submitted to him/her in writing by the parties, and shall have no authority to make a decision on any other issue not so submitted to him/her. (Article 36.4)

The same clause also provides, "More than one (1) grievance may be heard by the same arbitrator by mutual written agreement of the parties." No such written agreement was submitted in this case. Neither the pre-hearing statement by AFSCME Local 66 (Union Ex. 23) nor testimony in support of the Union's grievance rise to the level of a mutual agreement.

To order the Employer to cover costs of employees not covered by this contract, or to require the Employer to pay for the employees that are covered by this contract for an indefinite period into the future, would not be remedial, but would indeed be punitive. There is no evidence that this Employer has acted in bad faith, and indeed the openness in dealing with the administrative error is not often enough emulated by employers, public or private.

By its error the Employer deprived the Plan of the premiums due from each employee from this bargaining unit. Therefore, it is ordered that the Employer pay 100% of the premiums due for the period.

AWARD: Grievance denied in part, affirmed in part. It is ordered that the Employer pay 100% of the premiums due for each year the employees of this bargaining unit were not part of the plan.

The Arbitrator retains jurisdiction for 90 days to resolve any implementation questions which may arise.

_____ _____

George Latimer, Arbitrator Date