During open enrollment in the fall of 2015 the Hershey Medical Center doubled the Smoker and Spousal surcharge costs. Business Agent Dave Vrona immediately filed a grievance stating that the surcharges were over the contractual rate of 16.5%. The case deadlocked at 2nd step. So, Dave Vrona with the approval of Local 776 Executive Board took the case to arbitration with the help and testimony of Steward Bob Krotser and Attorney Jason Weinstock.

Article 29 of the 2013 – 2016 agreement states that the cost the employee pays shall not exceed, in any event 16.5% of the total cost of the applicable health benefit program through June 30, 2016.

On May 4, 2016 an Arbitration was held to hear the case of the Smoker and Spousal Surcharges.

Decision award: On July 5th the independent arbitrator issued an opinion and Award upholding the claims of Local 776 members. He directed Hershey Medical Center to reimburse members whose contributions in 2016 including any surcharges exceeding 16.5%. The total award gave $150,764.98 back to all hard working members represented at Hershey Medical Center. During the calculation of the award it was also found that Hershey Medical Center was over charging for eye and dental in the same time frame which came to overpayment/refund of $9,487.57 for dental and $2,365.58 for vision for a total payout of $162,618.13 to all affected members.

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration	*	
Between	*	**FMCS Case No. 16-51818-1** **Grv. #56900 – Health Insurance**
The Milton S. Hershey Medical Center	*	
-and-	*	**Jeffrey B. Tener, Arbitrator**
Teamsters Local Union No. 776	*	

OPINION AND AWARD

I held a hearing on May 4, 2016 at the Comfort Inn in Hummelstown, PA. The Medical Center was represented by Jennifer G. Betts, Esq.; the Union was represented by Jason M. Weinstock, Esq. Both parties filed post-hearing briefs. These were received by June 14, 3016, thereby marking the close of the hearing.

Issue

In the absence of an agreement, the parties agreed the arbitrator would frame the issue. The issue to be decided is as follows:

> Did the Medical Center violate Article 29.2 of the collective bargaining agreement? If so, what shall be the remedy?

Background

Article 29, Insurances, Section 2, Health, Dental and Vision Insurance, of the parties' July 1, 2013 through June 30, 2016 agreement has the following four sub-sections:

> (a) The employee contribution for a portion of the cost of the health benefit in which the employee is enrolled, or in which the employee and dependents are enrolled, shall be fourteen and one-half percent (14.5%) of the total cost of the applicable health benefit program. Thereafter, rates will be equal with those paid by employees not represented by

a collective bargaining representative and shall not exceed in any event sixteen and one-half percent (16.5%) of the total cost of the applicable health benefit program through June 30, 2016.

(b) [This sub-section deals with dental and vision benefits and in not applicable in this case.]

(c) Health, vision and dental costs will be determined by each carrier.

(d) To the extent the Hershey Medical Center changes insurance carriers and/or restructures it health, dental and vision insurance programs for employees not represented by a collective bargaining representative, such changes similarly shall apply to members of the collective bargaining unit represented by the Union. (JX-1)

Several things are not in dispute between the parties. The parties agree that bargaining unit employees are eligible to participate in the Medical Center's benefits program and that this includes health, dental and vision insurance. They agree that the employee contribution for the health benefit portion was initially 14.5% of the applicable program and that thereafter the rates would be equal with those paid by employees not represented by a collective bargaining representative but "shall not exceed in any event sixteen and one-half percent (16.5%) of the total cost of the applicable benefit program through June 30, 2016." (Art. 29.2(a)) There is no dispute regarding employee contributions to the cost of dental and vision benefits. (Art. 29,2(b)) The parties agree that health, vision and dental costs will be determined by each carrier. (Art. 29.2(c)) They also agree that the Medical Center has the right to change insurance carriers and to restructure its health, dental and vision insurance programs for employees not represented by a collective bargaining representative and that such changes shall similarly apply to employees represented by the Union. (Art. 29.2(d))

As discussed more fully below, two things are in dispute: first, whether the 16.5% figure contained in Article 29.2(a) includes spousal and tobacco surcharges imposed by the Medical Center and, second, whether those surcharges constitute a restructuring of the health insurance program under Article 29.2(d).

Additionally, the Medical Center contends that the grievance was not timely filed. Article 8, Section 3 provides that, as the first step of the grievance procedure, a grievance "must be presented within seven (7) calendar days after the employee becomes aware or should have become aware of the circumstances of which he grieves."

The Medical Center provides health benefits through Highmark PPO through its carrier, Highmark Blue Cross/Blue Shield. Employees choose among four coverage levels: employee only, employee plus children, employee plus spouse, and employee plus family. Bi-weekly premiums vary depending upon the coverage level selected. Some parts of the plan design change each year as the Medical Center considers the costs. Bargaining unit members receive the same plan options as those provided to non-bargaining unit employees. For 2016, after working with Highmark's consultants and actuaries, the Medical Center adopted a model that resulted in a cost increase estimated to be 14%. (HX-5)

In 2014, the Medical Center began assessing a spousal surcharge on employees whose spouses elected to be covered through the Highmark PPO if those spouses had access to employer-sponsored healthcare through their employer and chose to waive that coverage. There are a number of exceptions. See the PSHMC Medical Coverage Spousal Surcharge Form for details. (HX-2)

The amount of the surcharge was $35.00 bi-weekly or $910 annually in 2014 and 2015. The Union filed no grievance challenging the imposition of the spousal surcharge in 2014 or 2015. The spousal surcharge was increased to $46.15 bi-weekly or $1,200 on an annual basis for 2016.

In 2015, the Medical Center began assessing a tobacco surcharge. The Medical Center discussed this with the Union and gave it an option of agreeing to the tobacco surcharge or having a 19% rate increase for health insurance coverage. The Union,

following a vote of the membership, agreed to accept the tobacco surcharge. No grievance was filed at that time. This surcharge is assessed on both employees and covered spouses who use tobacco products and who are not in one of several tobacco cessation programs. The amount of the surcharge was $35.00 bi-weekly or $910 annually in 2015. For 2016, the tobacco surcharge was increased to $69.23 bi-weekly or $1,800 annually.

Both of these surcharges are determined exclusively by the Medical Center and are not part of the Highmark actuarial model for the PPO. They are not considered by Highmark's actuaries

In October 2015, there was a meeting at which the Medical Center informed the Union of the increases in the surcharges for 2016 as well as of other changes in health benefits for that year. The parties met to discuss these changed on October 20, 2015. A handout was provided that showed the plan changes and cost information including the surcharges. (UX-3)

The Union filed a grievance on October 27, 2015. (JX-2) The grievance claimed a violation of Article 29.2(a) and asserted that, with both the spousal and tobacco surcharges, the total costs to employees would be over 16.5%. The grievance was processed through the grievance procedure and culminated in this proceeding.

The Medical Center provided employee contribution information for 2014, 2015, and 2016 for the various levels of plan coverage and with the spousal surcharge and one tobacco surcharge. (HX-4)[1] Thus, for example, the document shows that an employee with family coverage and a spousal surcharge in 2014 made a contribution of 19.37%. In 2015, that employee made a contribution of 18.85% and if that employee had one tobacco surcharge, the employee made a contribution of 23.2%. In 2016, the same

[1] If both the employee and spouse were subject to the tobacco surcharge, the employee's percentage contribution would be even higher than shown on the exhibits since each spouse is assessed if both use tobacco products and do not follow cessation programs.

employee made a contribution of 20.01% if there was a spousal surcharge and 27.54% if there was a spousal surcharge and one tobacco surcharge. A Union exhibit shows similar calculations for 2016. (UX-4)

Timeliness Issue

David Vrona, the Local 776 Business Agent, testified that Bruce Rhoads, the Medical Center's Director of Labor Relations since 2007, sent an email invitation to a benefits meeting. The parties met on October 20, 2015 and went over 2016 benefits. He said that a handout showing 2016 benefit plan changes was provided. (UX-3) This document lists bi-weekly and month premiums for full time and part time employees for medical, dental, and vision as well as the spousal and tobacco surcharges along with an explanation of the changes. Cost information was provided.

On October 27, 2015, the Union filed a grievance alleging a violation of Article 29.2(a). The grievance states that with the spousal surcharge employees would pay over 16.5% of the total cost of the applicable health benefit program and that the same was true with the tobacco surcharge. It asks that these surcharges be reduced so that the applicable health benefit program fits within the percentages in the collective bargaining agreement. (JX-2)

The Medical Center argues that the grievance relates to whether surcharges should be factored in to the contractual limitations expressed in Article 29.2(a). As demonstrated by Hospital Exhibit 4, the rates in 2014 and 2015 exceeded those limitations but the Union did not file a grievance in either year. Union steward Bob Krotser acknowledged that he had been aware of the surcharges. Because the surcharges were imposed in 2014 and 2015 and no grievances were filed, the Medical Center contends that a grievance in October 2015 relating to the 2016 surcharges is untimely. The grievance should be rejected on that basis.

The Union denies that the grievance was untimely. There is a recognized presumption in favor of arbitration over the dismissal of a grievance on technical grounds. It was not easy to determine whether a violation had occurred and it took the arousal of suspicion before the Union crunched the numbers and determined that the contract had been violated. The Medical Center possessed the numbers and calculations but did not share this information with the Union. Furthermore, this grievance is a classic example of a continuing violation that occurs anew each time deductions in excess of 16.5% are taken from employees. Also, the Medical Center did not raise any timeliness objection until the eve of arbitration. For these reasons, the grievance should be heard and decided on the merits.

I have determined that the grievance is timely. Not only was it filed within seven days of the meeting at which the Medical Center provided information to the Union about benefit plan changes for 2016 but it does involve a continuing violation. It is true that the Union did not file a grievance regarding the surcharges for the 2014 or 2015 plan changes even though the amounts deducted from employees' pay exceeded the contractual limits in those years if they were subject to the surcharge(s). This did not constitute a waiver of the Union's right to file a grievance subsequently because, as argued by the Union, the grievance is a continuing one that, if a violation has occurred, recurs each time an amount in excess of the contractual limit is deducted from an employee's pay.

Accordingly, I will decide the grievance on the merits.

Substantive Issue

Position of the Union The Union contends that the Medical Center violated the agreement and specifically Article 29.2(a) by requiring certain employees to pay more than a 16.5% share of health insurance premium costs. The Medical Center seems to

believe that by agreeing to the surcharges, the Union also agreed that employee costs could exceed 16.5%. These are said to be two separate things and an agreement on one does not mean that the Union agreed to the other or, specifically, that the Employer could charge employees more than 16.5%.

It is absurd to contend that the Union agreed to waive the 16.5% maximum in Article 29.2(a). There is no written modification of that provision of the agreement. The arbitrator must confine himself to the four corners of the agreement when that language, as here, is clear and unambiguous. The arbitrator cannot add to, subtract from or modify the parties' agreement.

It cannot be disputed that, with the surcharges, the Employer is deducting in excess of 16.5% for health insurance premiums for employees subject to the surcharges. This is demonstrated by exhibits from both parties.

The Union notes that under the Medical Center's theory of the case, the Medical Center could simply continue to increase the total amount of the premiums paid by employees simply by increasing surcharges to the point that the employee was paying the entire premium. It is totally illogical to believe that the contract contains limits on the premium share borne by employees but that those limits can be rendered meaningless in practice through the imposition of surcharges.

In support of its position, the Union cites the decision of Arbitrator Ira Jaffe involving a bargaining unit at the Medical Center represented by the SEIU Healthcare Pennsylvania (Dec. 28, 2013). Only a spousal surcharge was at issue in that case and the amount was $35.00 bi-weekly. That contract is different from the one before me in that it provides for different employee maximum contributions based on income level. Nonetheless, as in the case now before me, with the surcharges, employees were being charged premiums in excess of the contractual maximum. Arbitrator Jaffe determined that while the surcharges were permissible, they could not be in amounts that required

employees to pay more than contractual maximum. He ordered that the surcharges be reduced so that employees did not pay more than the contractual maximum. The relevant language in the two agreements is similar. The arbitrator should reach the same result reached by Arbitrator Jaffe.

The Medical Center argues that premium surcharges constituted a "restructuring" of its health insurance program so that the imposition of the surcharges was permitted under Article 29.2(d). The problem with this argument is that Jane Quenzer, the Medical Center's Benefits Manager, testified that the surcharges were not a restructuring of the health plan. She also agreed that the Medical Center is self-insured. Ms. Quenzer, who previously was the Benefits Coordinator, is the person primarily responsible for working on benefit plans and changes to those plans. The Union notes that Highmark does not consider the surcharges as it creates plans for the Medical Center. The surcharges have no actuarial basis and are simply a way for the Medical Center to grab money.

The Union recognizes that Mr. Rhoads said that the surcharges were structural and did not need to be bargained. Not only does he not work as closely with the plans as does Ms. Quenzer but he acknowledged that he discussed the surcharges with the Union. He claimed he did this as a "courtesy" but the Union contends that his actions speak louder than his words. The Union asks that the testimony of Ms. Quenzer be given more weight and persuasive value than that of Mr. Rhoads regarding restructuring.

Accordingly, the Union contends that the Medical Center violated the agreement by charging some employees more than 16.5% of the health care premium amount. The contract does not provide an exception for surcharges or any other extra fees. The charges were not even the result of a structural change. The grievance should be sustained and the Medical Center should be directed to credit or reimburse employees all amounts paid in excess of 16.5% of the premium. It also asks that the Union be awarded the costs of arbitration.

Position of the Medical Center The Medical Center asserts that the Union bears the burden of proof in this contract interpretation case. If it fails to satisfy its burden, the grievance must be denied. The Medical Center suggests that among the interpretative standards to be considered are giving words their normal or technical meaning, bargaining history, and past practice. Also, contract provisions should be read in light of the entire agreement.

The Medical Center contends that it had the right to revise the amounts of the spousal and tobacco surcharges. It has the right, in accordance with Article 29.2(d), to restructure its health program. The Medical Center notes that the Union has alleged a violation of Article 29.2(a) but not Article 29.2(d). Thus, the Union has apparently agreed that the Medical Center has the right to set and modify the amounts of the surcharges. Indeed, Article 29.2(d) plainly states that the Medical Center not only can change insurance carriers but also that it can restructure its health insurance programs as long as changes applied to employees represented by a collective bargaining representative also are applied to employees not represented by a collective bargaining representative. There is no claim that bargaining unit employees and non-bargaining unit employees are not paying the same rates.

The Medical Center also cites the testimony of Mr. Rhoads that it was pursuant to Article 29.2(d) that it implemented the two surcharges and set the amounts of those surcharges. These surcharges and changes in the amounts were considered to be restructuring. The Union did not demand bargaining regarding these changes when announced for 2016. It notes that the surcharges have been in place since 2014 (spousal) and 2015 (tobacco) without any challenge from the Union.

The other argument of the Medical Center is that the amounts of the surcharges for the 2016 plan year did not violate Article 29.2(a). There are said to be several reasons for this. First, the Medical Center denies that the surcharges are part of the

Article 29.2(a) limitation. It recognizes that Article 29.2(a) limited employee contributions for a portion of the cost of the health benefit to 14.5% earlier and currently to 16.5%. The surcharges, however, are said not to be part of the cost of the health benefit program. Those costs are determined by the carrier.

The parties agree that, excluding the surcharges, the employee contributions do not and never did exceed those limits. Thus, the only dispute is whether or not the surcharges should be considered part of the Article 29.2(a) limitation. In arguing that the surcharges should not be considered to be part of the Article 29.2(a) limitation, the Medical Center contends that the surcharges are not a "cost" of the program. Instead, it is a separate charge or penalty that the Medical Center has assessed. The agreement must be read as a whole. The Medical Center asserts that the language in Article 29.2(c) provides that it is the carrier that determines the "cost" of the various benefits. The surcharges have not been determined by Highmark. They have been determined by the Medical Center. As Jennifer Sarff, currently the Medical Center's Director of Benefits and formerly a consultant for Highmark assigned to the Medical Center's account, testified, Highmark does not determine the surcharges and its actuarial models make no reference to surcharges. These are costs outside of and in addition to costs the carrier determines.

Simply put, because the surcharges are not determined by the carrier, they are not subject to the Article 29.2(a) contractual limitations.

Additionally, the Medical Center notes that the Union failed to object to the spousal surcharge in 2014 when it was first imposed and it failed to object to both the spousal and tobacco surcharges in 2015. Therefore, it is argued, there is a past practice or custom of considering the surcharges to be outside the Article 29.2(a) limitation. It notes that if the surcharges were considered, then the employee contributions exceeded the contractual limitations both in 2014 and 2015. It is clear that the Union had full

knowledge of the amounts of the surcharges in both 2014 and 2015. It also knew the employee contributions and the full premium costs. Even though it had this knowledge, the Union did not object by filing a grievance or in any other way. This is said to show that the contract language, even if it is unclear – which the Medical Center denies – the parties' prior practice supports the Medical Center's interpretation of the language. Further, the Union membership voted to accept the tobacco surcharge for 2015.

Finally, the Medical Center denies that the decision of Arbitrator Jaffe is persuasive. That case arose under a different agreement with a different union, the SEIU, with different contract language. The case involved the 2014 spousal surcharge. The SEIU challenged both the ability of the Medical Center to implement the surcharge and the amount of the surcharge. Arbitrator Jaffe agreed that the Medical Center did have the right to implement the spousal surcharge but he concluded that the amount of the surcharge was subject to the contract language that included "in no event" may the cost exceed a certain percentage.

An arbitration award involving a different contract with a different union has no precedential effect. Arbitral authority is cited. The Union called no witnesses with any familiarity with the circumstances associated with the SEIU case including issues of timeliness and past practice. In the SEIU case, the Union challenged the surcharge in the first year, unlike the present case in which the surcharge was in effect for two years without any challenge from the Union.

Thus, both the contract language and the past practice support the Medical Center's position. The grievance regarding surcharges must be denied.

Discussion It is difficult to know with certainty on the record before me what the parties meant or intended whey they agreed that the Medical Center can "restructure" the various insurance programs in accordance with Article 29.2(d). I recognize the

inconsistency in the testimony of the Medical Center's witnesses with Ms. Quenzer testifying that the spousal surcharge is not structural and Mr. Rhoads testifying that the surcharges were structural. It appears more logical to conclude that the addition of the spousal and tobacco surcharges was structural and therefore was permitted under Article 29.2(d) since, as is the case here, the changes also applied to employees not represented by a collective bargaining representative.

Arbitrator Jaffe reached the same conclusion in the SEIU case he decided in 2013 regarding the imposition of a spousal surcharge. While the language of the two agreements is not identical, the SEIU agreement includes the following sentence:

> During the term of this Agreement, the Hershey Medical Center may change insurance carriers and/or restructure its health care, dental care and vision care programs, provided however, the Hershey Medical Center and the Union shall meet prior to October 15 of each year of this Agreement to discuss any proposed revisions to the provisions of health benefits plan.

That language is similar to the language in the Local 776 agreement although obligations of the Medical Center are not the same. Under the SEIU agreement, the Medical Center must meet with the Union prior to October 15. Under the Local 776 agreement, the Medical Center must made the same changes to employees not represented by collectible bargaining representatives. Both provisions, however, permit the Medical Center to change insurance carriers and restructure its health insurance program.

Furthermore, I note that the Union explicitly agreed, following a vote of its membership, to accept the "smoker surcharge" for 2015 rather than accepting a larger premium increase. (UX-6, 7, 8, 9, and 13)

Thus, I conclude that the establishment of surcharges under the Local 776 agreement did constitute a restructuring of the health insurance program. This was permitted in accordance with Article 29.2(d).

There is nothing in Article 29.2(d), however, that supersedes or negates Article 29.2(a). The limitations on the amount of employee contributions for a portion of the cost of the health benefit are unchanged. It is not disputed that, when the surcharges are included, the cost of employee contributions for 2016 exceed the 16.5% contractual maximum.[2]

I recognize that the surcharges have been established, and the amounts determined, solely by the Medical Center and not by Highmark. They are not considered by Highmark and have not been part of their actuarial computations. Article 29.2(a), however, concerns the cost to the employees. The total cost of the health benefit program is the amount from which the employee contribution is derived. The surcharges constitute a portion of the "employee contribution" as specified in the first sentence of Article 29.2(a). The "cost" referred to in Article 29.2(a) is the "total cost of the applicable health benefit program." There is no basis for excluding any surcharge from the "employee contribution." Similarly, the second sentence of Article 29.2(a) states that the "rates" paid by the employees "shall not exceed" the stated percentage "of the total cost of the applicable health benefit program through June 30, 2016." Again, the total cost of the applicable health benefit program does not include surcharges. The surcharges are not part of the cost of the health benefit program but they are part of the "employee contribution" or "rate." Therefore, they must be included in the computation of the maximum amount that employees may pay under Article 29.2(a).

I determined earlier that the grievance was not untimely because this is a continuing violation. The clear and specific contract language overrides any contrary past practice. Accordingly, the grievance will be sustained.

[2] I am aware that the employee contributions for those employees who paid the surcharge(s) in 2014 and/or 2015 also exceeded the contractual limits in Article 29.2(a).

As a remedy, the Medical Center will be directed to reduce the spousal and tobacco surcharges, individually and jointly if applicable, so that employees contribute a maximum of 16.5% of the cost of the health benefit program in which they are enrolled in 2016.[3] In addition, because the maximum employee contribution is limited to 16.5%, the Medical Center will be directed to reimburse employees whose contributions, including any surcharges, exceeded 16.5% of the cost of the health benefit program in which the employee is enrolled in 2016, the amount of that excess. Jurisdiction will be retained regarding the implementation of the remedy. In accordance with Article 8.6, the Medical Center is responsible for the cost of the arbitrator's services.

AWARD

The grievance is sustained. As a remedy, the Medical Center is directed to reduce the spousal and tobacco surcharges, individually and jointly if applicable, so that employees contribute a maximum of 16.5% of the cost of the health benefit program in which they are enrolled in 2016. Additionally, the Medical Center is directed to reimburse employees whose contributions in 2016, including any surcharges, exceeded 16.5% the amount by which their contributions exceeded 16.5%. Jurisdiction is retained regarding the implementation of the remedy.

Dated: July 5, 2016
Skillman, NJ

Jeffrey B. Tener
Arbitrator

State of New Jersey)
County of Union) ss:

[3] It is clear that the grievance referred to 2016 because the bi-weekly amounts listed in the grievance for the spousal and tobacco surcharges are the 2016 amounts of those surcharges. (JX-2) Accordingly, the remedy will be limited to 2016 as well.

On this day 5th of July, 2016, before me personally came and appeared JEFFREY B. TENER to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public, State of New Jersey
My Commission Expires
NOV 19 2020
ID # 2454015