STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Arbitration between	
ALBANY PERMANENT PROFESSIONAL FIREFIGHTERS ASSOCIATION, Grievant,	OPINION AND AWARD
and	PERB A2017-150
CITY OF ALBANY, Employer.	

Before: Jeffrey R. Cassidy, Arbitrator

APPEARANCES

Law Officers of Thomas J. Jordan, Albany, N.Y., *Thomas J. Jordan, Esq.,* for the Grievant.

Roemer Wallens Gold & Mineaux LLP, Albany, N.Y., *Mary M Roach*, of counsel, for the Employer.

WITNESSES

Sam Fresina, President New York State Professional Firefighters Association; Lieutenant Robert Powers, City of Albany Fire Department; Lieutenant Robert Mengel, City of Albany Fire Department; Jack Holloway, retired City of Albany Fire Department firefighter, for the grievant.

Mike Wheeler, City of Albany Budget Director. for the employer.

ISSUE

Did the City violate the January 1, 2010 to December 31, 2011 collective bargaining agreement as supplemented by the January 1, 2012 to December 31, 2013 interest award (Arbitrator Dennis Campagna) when it imposed a $250/$500 deductible on the Empire Blue Cross Blue Shield PPO Plan to retirees that was effective January 1, 2016?

And if so, what shall be the remedy?

BACKGROUND

The Albany Permanent Professional Firefighters Association, Locals 2007 and 2007-A ("Association") represents the City of Albany's Fire Department's active full-time firefighters and battalion chiefs.[1] Negotiations for successor contracts to the Association's January 1, 2010 to December 31, 2011 agreements resulted in an interest arbitration award authored and issued by Chairman Dennis Campagna on April 15, 2015, that extended the 2010-11 agreements through December 31, 2013.

Thereafter, bargaining commenced for contracts that would begin January 1, 2014. During those negotiations the Association proposed that unit members who retired after January 1, 2014, would receive health insurance equal or better than the coverage they had received on their last day of employment at no cost to them. Included in its proposal was a requirement for the retiree to apply for Medicare and that they would be reimbursed for the out-of-pocket costs for Medicate Part B supplement.

In October 2015 the City notified all retirees that effective January 1, 2016, for the first time, they would be responsible for a $250 individual and $500 family annual deductible for the Empire Blue Cross Blue Shield PPO Plan (PPO). The Association grieved the City's imposed deductibles and on November 3, 2016, Arbitrator Dennis Campagna issued an Award holding that he had jurisdiction over the dispute and that the City violated Section 27.1 of the agreement(s) when it imposed the deductibles.

Section 27.1 requires that if the City wants to change the health insurance plan it has to present its proposals to the Association and if no agreement is reached an expedited arbitration would held to determine whether the City's proposal(s) "grants substantially equivalent coverage to members of the bargaining unit." Arbitrator Campagna held that the imposition of the $250/$500 deductibles was a substantial change, unlike previous changes such as minor

[1] The City and the Association stipulated that the agreements for the two locals are identical for the purposes of this arbitration.

increases in drug co-payments, and that the City had not followed the procedure under Section 27.1 by not first presenting its change to the Association for resolution.

He noted that the interest arbitration panel that he chaired issued the 2012-13 award requiring *active* employees to pay 10% of the cost of the health insurance premium. The panel had rejected the Association's proposal to contractually codify the City's policy and practice for retirees to pay the percentage of premium amount in retirement that they paid while employed. However, it included protection for retirees by providing that for firefighters who, as of December 31, 2013, were not contributing to their health plans, were deemed to be making no contribution towards their health insurance premium. Without that provision the City could impose the 10% premium contribution active employees were making on firefighters who would retire. Arbitrator Campagna in the grievance arbitration concluded that:

> "[the] imposition of deductibles . . . represents a back-door method of passing a portion of premium contribution, for which the City is obligated to pay, off to plan recipients, and therefore represents a change 'in the existing health insurance plan,' thereby triggering the requirements set forth in Section 27.1 of the CBA."

He held that he had jurisdiction over the imposition of deductibles on retirees notwithstanding their exclusion from the bargaining unit, as active employees would be future retirees and would need to anticipate the additional cost to a deferred obligation. In this regard he adopted Arbitrator Shiela Cole's view, who in two earlier decisions between the parties rejected the City's imposition of payment of Medicare Part B contributions on retirees on the grounds that the deferred obligation affected firefighters while they were active employees.

The remedy under Arbitrator Campagna's award was for the City, upon demand, to participate in an expediated arbitration under Section 27.1 to determine whether the City's $250/$500 deductibles resulted in substantially equivalent coverage to members of the bargaining unit.

The Association sought confirmation of the Campagna grievance Award in Albany County Supreme Court regarding the order to participate in expediated arbitration and to vacate that part of the award denying the Association's challenge to City imposed unilateral increases in retiree

co-payments for such items as prescription drugs and office visits. The City cross-moved to vacate the order to participate in expediated arbitration and to confirm that part of the Award the Association sought to vacate. On June 13, 2017, the Court granted the Association's motion to confirm the directive to the City to participate in expediated arbitration and denied the City's cross-motion and denied vacatur of any part of the Award.

The dispute then proceeded to expediated arbitration before Arbitrator Sumner Shapiro who on October 8, 2018, issued an award urging the parties, prior to a final award, to consider a proposal to resolve the retiree deductible dispute. Arbitrator Shapiro's suggestion was unsuccessful and on September 24, 2019, he issued his award on the issue of whether the City's $250/$500 deductibles violated the Section 27.1 requirement that plan changes must result in substantially equivalent coverage. However, he held that he lacked jurisdiction to decide that issue as he was not empowered to make an award granting a benefit to retirees when they were not part of the bargaining unit.

On June 19, 2019, Albany County Supreme Court vacated Arbitrator Shapiro's Award as irrational as he failed to render an award on the issue presented to him, *i.e.*, whether the City's proposal resulted in the health plan having substantially equivalent coverage, and because he issued a determination on a ruling previously made (Campagna's grievance award). The Court remitted the matter for determination by another arbitrator on the issue of "substantial equivalency."

On August 21, 2019, I was asked by attorneys for the City and the Association to arbitrate the issue and on October 23, 2019, a hearing was held at the Albany Fire Department Headquarters. Briefs were filed on April 15, 2020.

DISCUSSION

The City argues that the retiree deductibles must be considered in the context of the premium cost, which for the family plan is $23,729. It points out that over a ten-year period,

without consideration of premium increases, the $500 family deductible would be $5,000 and would pale in comparison to the $237, 290 cost the City would incur. As the contract language only requires "substantially equivalent" benefits, not identical ones, the plan with the $250/$500 deductibles should be considered substantially equivalent.

The Association believes that the retiree premium deductibles were, as Arbitrator Campagna stated, a "back-door" way around the interest arbitration award of a 10% contribution for all active employees but with no contribution by retirees. Association witness Lt. Robert Powers explained that prior to the Campagna interest arbitration award unit members with up to 8 service years paid 10% of individual coverage and 25% of family coverage, but after 8 years would no longer make a co-payment. After the award all members would pay 10% for their entire careers thereby increasing the amount for those with more than 8 years of service but decreasing the amount for family coverage for those with less than 8 years. But the Association, through the award, was guaranteed that those that retired would not make a premium contribution. In Power's view, the $250/$500 deductibles were a City attempt to gain what it did not gain in the award – a premium contribution from retirees.

The Association stresses that the 2015 and 2016 plans are not substantially equivalent. It relies in part on Lt. Robert Mengel who has been Association president since 2016 and was active in the Association during the Campagna interest arbitration proceedings. He explained that one reason why the $5 increase in prescription drugs co-payments for employees that Arbitrator Paul Doyle reviewed was not as substantial as the imposed deductibles and that the $5 was reimbursable through the Association's welfare fund for active employees. More relevant, Mengel pointed out that someone who retired with 21 years of service who lived 25 years after retirement at age 40 who had the family plan would be obligated to pay $12,000 in deductibles. This amount, when applied to the Association's 250 members is significant and demonstrates that the pre and post-retiree deductible plans are not "substantially equivalent."

The Association also relies on the testimony of Sam Fresina, who retired from the Albany Fire Department in 2010 after 20 years of service. He had served as an Association official from 1992 to 2010, was present during negotiations during that time, and was lead negotiator from 1997 when he became Association president to 2010. Fresina explained that over the years he

was active in the Association when the City proposed health insurance changes and that they were discussed with the Association and it would make a judgment, in consultation with its health insurance advisor, whether the changes were a substantial change. Some changes were accepted, some negotiated, and others such as the City's change in reimbursing Medicare Part B employee contributions were challenged. Arbitrator Shiela Cole decided that issue in favor of the Association who held that the employee requirement to pay the Medicare Part B co-payment resulted in the plan not being substantially equivalent.

Albany City firefighter Jack Holloway retired from a job-incurred injury, was an Association official from 1992 to 2010, and is president of the Albany Firefighters' Retiree Association. He has paid $1,000 in family deductibles for 2016 and 2017, and in 2018 when he turned 65, he was removed from the plan, obtained Medicare and was place in the Medicare Advantage plan. Holloway explained that 60-65% of the retirees in his organization are between 40-60 years old and are almost exclusively in the PPO plan because of its portability. He said that he had to accept a disability retirement at 39 and that someone in his situation, paying the new deductibles, would be liable for approximately $13,000.

The Association emphasizes that the imposition of the deductibles on retirees can be as much as a $102,000 yearly savings to the City, or $1.5 million over 15 years - paid for by retired firefighters (retirement at 50, payment for 15 years, 80% on the family plan). The deductible change is similar to the Medicare Part B contribution invalidated by Arbitrator Shiela Cole as it is a significant change without any concomitant improvements in the plan from the previous year. In fact, the changes from 2015 to 2016 were all increases in costs to employees by payment of larger co-payments. These other changes may be permissible under the parties' practices, understandings, or by arbitral precedent (Arbitrator Doyle award), but the deductible change for retirees is a sea change that like the invalidated Medicare Part B change should also be rejected.

The Association also contends that the City's imposition of the retiree deductibles undermines the Campagna interest arbitration. There, Chairman Campagna made it clear that in awarding the 10% contribution for all active employees with no limitation to years of service, "members who, as of December 31, 2013 were not contributing to their Health Insurance

Coverage shall be deemed . . . to be contributing 0% of their health insurance premium." Further, Arbitrator Campagna in the grievance arbitration recognized that the retiree deductibles were a "back door method of passing a portion of the premium contribution for which the City is obligated to pay, off to plan recipients . . . ." Part of the agreement under the interest arbitration award was a concession by the Association that all employees would pay 10% towards their health premiums during their entire careers rather than just for 8 years in exchange for a guarantee that retirees would have no obligation. The City's requirement for retirees to pay deductibles is a subterfuge of that agreement.

The Association urges that I find that the City violated Section 27.1 by imposing a change that made the PPO plan substantially unequal to the 2015 plan. Retirees should be reimbursed for any deductibles they incurred since January 1, 2016.

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Notwithstanding a rather tortured history, the dispute here is a rather simple one: was the PPO plan substantially equivalent to its prior plan once the City unilaterally implemented a retiree $250 individual and $500 family annual deductible? Arbitrator Campagna, as confirmed by Albany Supreme Court, determined that the City violated the contract by the unilateral imposition of the deductibles notwithstanding the argument that the change was imposed on retirees who were not bargaining unit members and that historically some co-payments had been unilaterally increased. Under Section 27.1 he ordered the parties to proceed to expediated arbitration to determine the equivalency issue. The answer to that question requires a comparison of the benefits under the PPO plan as it existed on December 31, 2015, with the PPO plan as it existed on January 1, 2016 when the City implemented its October 2015 notice to retirees that they would be required to pay the new deductibles. Theoretically, it is possible that the retiree benefits under the plan increased in a manner to sufficiently off-set the additional retiree annual deductibles.

It is not uncommon for public sector collective bargaining agreements to permit management to switch plans entirely, or in part, but only if the replacement plan or change (s) result in a "substantially equivalent" plan to its predecessor. In such cases the benefit levels of

the new and the old plan must, on balance, be substantially the same and a judgment is made, at first by the parties, and if necessary, ultimately by an arbitrator, whether the reduction in benefits is balanced by an increase in other benefits, including perhaps beneficiary costs.

The City has put into evidence the health open-enrollment notices to retirees and non-active employees that were sent every October from 2007 through 2013. These notices provided premium costs for various health, vision and prescription drug plans offered to these individuals and a summary of benefits that were to be in effect the following January 1. Neither the PPO plans for calendar years 2015 and 2016, nor a summary of the benefits for those years are in evidence. However, the Campagna grievance award provides a table showing changes in various co-payments from 2015 to 2016, such as for primary, specialty and chiropractic care, emergency room, urgent care and physical therapy, but all those changes represent increased cost to retirees.[2]

The City's emphasis on its cost for active and retiree health insurance is misplaced. The issue here is not the burden that the City carries and that cost's relationship to the deductible cost to the retiree. Rather, the issue is whether the deductibles converted the PPO plan into one that was not substantially equal to the 2015 plan. The City's argument that the plans do not have to be identical, which allows for some variance, is valid, but "substantially equivalent" plans require a showing that on balance, the plans are relatively, or essentially, the same.

The two plans, however, are not essentially the same. The only evidence of changes other than retiree deductibles between the 2015 and 2016 plans are those outlined in the Campagna arbitration award and they all represent increase costs to retirees and are not improvements that could possibly result in a relatively equivalent plan.

Moreover, the annual deductibles are not minor or relatively insignificant changes such as the $5 increase in prescription drugs reviewed by Arbitrator Doyle, or the others permitted under the Campagna grievance award. A $250/$500 yearly deductible is a significant financial

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[2] Arbitrator Campagna found that the City historically increased certain retiree co-payments, such as for office visits and prescription drugs, without objection from the Association. He also recognized that Arbitrator Doyle held that a $5 prescription drug increase did not substantially alter the health plan. However, Arbitrator Campagna found that the City had never previously required retirees to pay premium co-payments nor deductibles.

burden to firefighters and if permitted would allow the City to yearly increase the deductible by at least an equivalent amount thereby mitigating, if not obviating, the need to seek premium sharing as it achieved through the Campagna interest arbitration award.

The Association also makes a compelling point that the City's unilateral imposition of the deductibles undermines the integrity of the interest arbitration award. That award is clear that the 10% premium contribution that firefighters would have to make for their entire careers, rather than for just 8 years, was conditioned on the fact that the policy requiring retirees to pay in retirement what they paid when employed would not be used to require them to pay the 10% into retirement. The City's $250/$500 deductibles, whether intentional or not, was a method to obtain an offset of its failure to obtain an increase in retiree premium sharing. Deductibles are not equivalent to premium contributions as some retirees may not meet all, or possibly any part of the deductibles, but never-the-less their implementation was not consistent with the meaning and intent of the Campagna interest arbitration award.

AWARD

The City violate the January 1, 2010 to December 31, 2011 collective bargaining agreement as supplemented by the January 1, 2012 to December 31, 2013 interest award when it imposed a $250/500 deductible on the Empire Blue Cross Blue Shield PPO plan to retirees that was effective January 1, 2016.

The City shall reimburse all retirees who were employed on or after October 20, 2015, for the any portion of $250/$500 annual deductibles that they paid from January 1, 2016, and shall rescind those deductibles for those retirees and any future retirees.

I, Jeffrey R. Cassidy, do hereby affirm that I am the individual described in and who executed this instrument, which is my Award.

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Jeffrey R. Cassidy

April 23, 2020