In the Matter of Arbitration Between	)	
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Washington Federation of State Employees, et. al (WFSE or Union),	)	
	)	
	)	
and	)	OPINION AND AWARD
	)	
	)	Healthcare Surcharge Grievance
	)	AAA Case No. 01-14-0001-9521
Washington State Healthcare Authority, (State)	)	
	)	
	)	
	)	

BEFORE:	David W. Stiteler, Arbitrator
APPEARANCES:	For the Union: Edward Younglove Attorney at Law Younglove & Coker 1800 Cooper Point Road SW, Bldg. 16 Olympia WA 98507 For the State: Margaret Kennedy and Susan DanPullo Assistant Attorneys General Office of the Attorney General 7141 Cleanwater Drive SW Olympia WA 98504
HEARING LOCATION:	Olympia, Washington
HEARING DATES:	July 20, 2015
RECORD CLOSED:	October 12, 2015
OPINION & AWARD ISSUED:	November 11, 2015

OPINION

INTRODUCTION

WFSE filed a grievance on April 16, 2014, regarding pending health insurance premium surcharges.[1] The State responded on May 27, 2014, disputing the Union's claims and asserting that the grievance was untimely. WFSE advanced the dispute to arbitration and the parties selected me as the arbitrator.

Before the July 20 hearing, the State filed a motion to dismiss, contending that the grievance was untimely. The parties briefed that issue. I issued a ruling on July 8, denying the motion.

The State renewed its arbitrability objection at hearing, but did not identify it as an issue or offer arguments about it in its post-hearing brief. That matter is summarized at the start of the Discussion.

The parties agreed that, aside from the procedural arbitrability dispute, the matter was properly before me. They also agreed that I could retain jurisdiction for 90 days following the decision to resolve remedial disputes, if any. They had the full opportunity to present documentary evidence, examine and cross-examine witnesses, and argue their positions.

After the parties presented their evidence, they waived oral closing arguments in favor of written briefs. I received the briefs on October 12 and closed the hearing record.

ISSUE

The parties did not agree to an issue statement but agreed that I could frame it based on their proposals and the record.

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[1] Several other unions subsequently filed similar grievances. WFSE, those other unions, and the State agree that the Union's grievance is representative of the other pending grievances, and that resolution of this dispute will resolve those other grievances. I understand the unions encompassed in the "et al" to be Teamsters Local 117, SEIU Local 1199NW, Union of Physicians of Washington, Affiliated Washington Pharmacists, and Washington Association of Fish & Wildlife Professionals.

The Union proposes the following issue statement:

> Does the Employer's imposition of surcharges related to tobacco use and spouse/partner insurance violate Article 1 of the Health Benefits Agreement negotiated by the parties? If so, what is the appropriate remedy?

The State proposed this issue statement in its post-hearing brief:[2]

> Did the State comply with Article 1.1A of the HBA when it implemented statutorily required tobacco and spousal surcharges in addition to the healthcare premiums paid by state employees?

I find the issues to be:

> Was the Union's grievance timely? If so, did the State's implementation of the tobacco and spouse/partner surcharges on July 1, 2014, violate Article 1 of the Health Benefits Agreement (HBA)? If so, what is the appropriate remedy?

FACT SUMMARY

The Authority is responsible for providing health insurance benefits to employees of the State of Washington. Under the governing statute, unions that represent State employees have the right to bargain about the amount the State will pay for health care benefits.

RCW 41.80.020(3) describes the scope of bargaining for health benefits as "the dollar amount expended on behalf of each employee for health care benefits" and requires the unions to bargain as a coalition. Though the law refers to bargaining a dollar amount, the parties instead have negotiated over the percentage of the weighted average premium the State will pay. In the most recent health insurance package, the employee share was set at 15%, with the State paying 85%.

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[2] At hearing, the State framed the issue as: "Does the Health Care Authority's implementation of the surcharges related to tobacco use and spouse/partner on insurance premiums enacted by the legislature and effective July 1, 2014, violate Article 1 of the Health Benefits Agreement negotiated by the parties when the Union had notice of the law change prior to the 2014 CBA? If so, what is the appropriate remedy?"

WFSE is a member of the union super coalition for health care cost bargaining. For the health care costs negotiations in 2012 and 2013, WFSE Executive Director Greg Devereux was the chief negotiator for the coalition. He is also a member of the State Public Employees Benefits Board (PEBB).

Assistant Attorney General Shane Esquibel previously worked as a labor negotiator for the State's Office of Fiscal Management. In that role, he was the State's chief negotiator in the most recent health care cost bargaining, and was on the bargaining team for prior bargaining.

There is a statutory deadline of October 1 to finish negotiations over health care costs. The negotiated results–the Health Benefits Agreement (HBA)–are incorporated into the budget and submitted to the legislature. The legislature must accept or reject the negotiated package as a whole.

In 2012, the union coalition and the State did not reach a deal by the October 1 deadline. As a result, the 2011-2013 HBA continued in effect through June 30, 2014.

In 2013, the State legislature's adopted budget for FY 2014 and FY 2015 directed PEBB to add the two premium surcharges at issue. One is a $25 per month surcharge for tobacco use, and the other is a $50 per month surcharge for spouse/domestic partner coverage where the spouse/domestic partner has comparable insurance available and does not enroll in it.

PEBB considers health plan structures, benefits, and premiums. Based on what PEBB develops, the Authority negotiates with health insurance providers for coverage for about one-third of covered employees. The Authority runs a self-insured plan for the remaining two-thirds.

The premiums State employees pay for health insurance depends on the plan they choose and the coverage provided by that plan. Employees may select from several plans that PEBB offers, and within a plan, may elect different tiers (e.g.,

employee only). The Authority or PEBB typically provides information about anticipated premium costs before health care bargaining.

The PEBB members discussed the surcharges before the start of negotiations in 2013.

At the first bargaining session for the HBA in September 2013, the union coalition proposed to continue the 85/15 split on premium costs. The State proposed an 86/14 split. The State's proposal also included the surcharges.[3]

Union representatives asked about implementation and impact issues related to the surcharges. Because details had not yet been developed, State negotiators said that the unions could demand to bargain impacts once implementation decisions had been made.

The union coalition rejected the State's proposal. The unions did not want the surcharges to be part of the HBA and did not want employees to have to pay the surcharges.

The State did not include the surcharges in its subsequent proposals. It took the position that the surcharges did not have to be in the HBA because the legislature had included them in the budget. Though the State removed the surcharge language from its proposal, Esquibel advised the unions of the State's position that the surcharges would go into effect regardless of whether they were addressed in the HBA.

Throughout bargaining, the union coalition's proposals did not directly address the surcharges. Devereux does not recall union negotiators mentioning the subject during the remainder of bargaining after the initial discussion about implementation issues. The unions did not advise the State of their view that the surcharges were not in statute, could not be imposed without bargaining or that, in any event, employees could not be required to pay more than the appropriate percentage the parties set.

[3] According to Esquibel, the proposed increase in the percentage the State would pay was based on recognition of no pay raises and the Authority's proposal to make changes to the Uniform Medical Plan (UMP) provision, and was not tied to the surcharges.

The parties reached an agreement by the October 1, 2013, deadline. The deal continued the 85/15 percentage split from prior years.[4] In relevant part, the agreement states "The Employer will contribute an amount equal to eighty-five percent(85%) of the total weighted average of the projected health care premium for each bargaining unit employee eligible for insurance each month, as determined by the Public Employee Benefits Board annually for benefits in calendar year 2015."[5] The agreement did not include any mention of the surcharges. The legislature approved the package.

After negotiations concluded, the PEBB members again discussed the surcharges. Devereux told other members that he did not think the surcharges could be implemented for employees covered by the HBA, at least not as then structured. One of the objections he raised is that the HBA provided for an 85/15 split on premium cost, but employees would be required to pay 100% of the surcharges, rather than 15%.

Over the next few months, the Authority reviewed the legislative budget language and considered various issues, including how to define tobacco use and how to implement the spousal surcharge. The Authority had some discussions with unions about how to communicate with employees concerning the surcharges. Eventually, the Authority presented these and other policy questions to PEBB.

From the Authority's perspective, it had some discretion in how the surcharges were to be implemented, but did not have the discretion not to implement them because they were included in the budget bill. In line with its discretion, the Authority imposed the tobacco surcharge on an account rather than an individual

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[4] An employee pays 15% of the premium cost for health insurance. The State pays 100% of other health care costs, such as dental insurance, so employees' overall health care cost burden is somewhat less than 15%. In addition, because of the calculation process and differences in costs among plans, some employees pay more than 15% in premium costs and some pay less.

[5] The total weighted average is calculated by multiplying the charge per person per month by the expected enrollment number per tier within a plan, adding certain administrative costs, and dividing by the number of enrollees.

basis. For the spousal surcharge, the Authority used its discretion to define "other employer" as a non-PEBB employer.

In response to the unions' objections about employees having to pay the full amount of the surcharges, the Authority noted that premiums, which are split 85/15, are based on projected service costs, while the surcharges are based on employee behavior.

PEBB issued a notice to employees on March 28, 2014, about the surcharges.

WFSE filed its grievance on April 16, 2014, challenging the planned implementation of the surcharges. The grievance claimed that imposition of the surcharges violated Section 1.1 of the HBA. Specifically, the grievance described the claimed violation in this way:

> Any premium surcharge assessed against the bargaining unit members imposes a greater premium cost than that negotiated by the parties and is a violation of the Coalition Health Benefit agreement, specifically of the terms of the 2011-2013 Health Benefits Coalition Agreement incorporated into and a part of the collective bargaining agreements between the WFSE and the employer.

The surcharges went into effect on July 1, 2014.

Diane Lutz is the head of labor relations at OFM. She held a hearing on the grievance at step 2. She had been at the bargaining table as an observer for at least one session. The grievance process was the first time she heard that the Union believed the surcharge was part of the premium cost and thus contrary to the negotiated deal.

Lutz prepared the State's response denying the grievance. She first raised the timeliness issue. On the merits, she explained that the surcharges were not subject to bargaining because they are not "amounts expended on behalf of each employee for health care benefits." She further explained that even if the surcharges were negotiable under the law, they were not part of the premium costs that the parties bargained. She pointed out that the surcharges were not part of the calculation of the

"total weighted average of the projected health care premium," and were distinct from and an addition to the premium amount. She noted that, unlike premium charges, the surcharges were not mandatory but rather were based on employee choices.

As of the hearing date, about 12,000 employees pay the tobacco surcharge. About 2,500 employees pay the spousal surcharge. The surcharge monies are deposited in a fund that pays toward PEBB benefits and reduces the State's funding obligation by a small percentage. To avoid paying one or the other of the surcharges, employees must submit a certification attesting that the surcharge conditions do not apply to them.

RELEVANT LANGUAGE

HBA – Article 1

> 1.1 The Employer will contribute an amount equal to eighty-five percent (85%) of the total weighted average of the projected health care premium for each bargaining unit employee eligible for insurance each month, as determined by the Public Employees Benefits Board annually for benefits in calendar year 2012 and calendar year 2013 respectively. The projected health care premium is the weighted average across all plans, across all tiers.[6]

HBA – Section 2.3

> A. Filing
> A grievance must be filed within twenty-one (21) days of the occurrence giving rise to the grievance or the date the grievant knew or could reasonably have known of the occurrence. * * *

RCW 41.80.020 Scope of bargaining

> (3) Matters subject to bargaining include the number of names to be certified for vacancies, promotional preferences, and the dollar amount expended on behalf of each employee for health care benefits. However, * * *, negotiations regarding the number of names to be certified for vacancies, promotional preferences, and the dollar amount expended on behalf of each employee for health care benefits shall be conducted

[6] This language comes from the 2011 – 2013 HBA. The language from the 2014 – 2015 HBA is the same in all material aspects.

between the employer and one coalition of all the exclusive bargaining representatives subject to this chapter. * * *

(6) Except as otherwise provided in this chapter, if a conflict exists between an executive order, administrative rule, or agency policy relating to wages, hours, and terms and conditions of employment and a collective bargaining agreement negotiated under this chapter, the collective bargaining agreement shall prevail. A provision of a collective bargaining agreement that conflicts with the terms of a statute is invalid and unenforceable.

Chapter 4, Laws of 2013, Operating Budget

Sec. 932. Compensation–Represented Employees–Super Coalition–Insurance Benefits

(1)(b) * * * Beginning July 1, 2014, the board shall add a $25 per month surcharge to the premiums due from members who use tobacco products and a surcharge of not less than $50 per month to the premiums due from members who cover a spouse or domestic partner where the spouse or domestic partner has chosen not to enroll in other employer-based group health insurance that has benefits and premiums with an actuarial value of not less than 85 percent of the actuarial value of the public employees' benefits board plan with the largest enrollment.

DISCUSSION

The dispute concerns the State's imposition of surcharges on health insurance premiums paid by employees. The Union contends that the surcharges violate the HBA. The State contends that the grievance was untimely, and that in any event there was no contract violation. For the reasons explained below, I conclude that the grievance was timely filed, and further conclude that the State did not violate the HBA agreement by imposing the surcharges.

Both issues are matters of contract interpretation. In interpreting disputed contract language, an arbitrator is guided by the parties' intent. Where the parties clearly expressed their intent in the language of their agreement, the arbitrator need look no further. Where the language is ambiguous, the arbitrator may look to aids

such as past practice, bargaining history, or interpretive rules to guide the determination of intent. The State has the burden of proving that the grievance was untimely. The Union has the burden of persuasion that the contract was violated.

Arbitrability

The State filed a motion to dismiss the grievance as untimely on June 15, 2015. The parties briefed that issue, and I issued a ruling on July 8, 2015, denying the motion.

At the July 20, 2015 hearing, the State continued its assertion that the grievance was not filed within 21 days of the date the Union knew or reasonably should have known about the surcharges. It offered no new evidence or argument in support of its position, however, and did not address it in its post-hearing brief.

I have reviewed the documents related to the State's motion to dismiss, and find no reason to depart from my earlier ruling. The Union filed its grievance within 21 days of the date it knew with reasonable certainty that the State was going to take an action that the Union believed was contrary to the HBA. This dispute is thus procedurally arbitrable.

Merits

The Union's grievance asserts that the State violated Section 1.1 of the HBA by imposing the tobacco and spouse/domestic partner surcharges on employees' health insurance premiums. The Union offers several arguments in support of that assertion.

First, the Union contends that the State violated the agreement by imposing the surcharges without bargaining. RCW 41.80.020(3) grants it the right to negotiate over health care costs. Because the State uses the surcharge revenue in the funding calculation, the Union contends that the surcharges are thus part of the money the State spends on health care, and subject to bargaining.

In a related argument, the Union contends that the State's claim that the surcharges are not subject to bargaining is contrary to RCW 41.80.020(3). It is the

Union's view that, because labor organizations have the right to bargain health care costs, the State could not unilaterally impose the surcharges on represented employees based on a legislative budget action.

The Union next argues that the parties essentially negotiated the surcharges out of the HBA. The Union bases this argument on the fact that the State initially proposed including language about the surcharges, but then dropped that proposal after the unions objected. The Union contends that arbitrators interpret the withdrawal of a proposal as showing the intent to exclude it from the contract, based on the interpretive rule that a party may not gain in arbitration a provision it failed to secure by negotiation. Since the State withdrew its proposed surcharge language, the Union says the State should not be allowed to claim that the surcharges are nonetheless required.

The Union points out that an arbitrator should not look outside the contract for evidence of the parties' intent unless the language is ambiguous. Here, according to the Union, there is no ambiguity–no provision of the HBA requires the surcharges.

In support of that point, the Union cites a 2014 decision by Arbitrator Michael Cavanaugh.[7] In that case, the arbitrator considered a union claim that the employer violated a contractual cap on health insurance premiums when it implemented a surcharge for tobacco use. In that case, the contract specifically provided that there would be no "co-pay of insurance premiums" for employees under one plan, and that the maximum co-pay of premiums under the other plan would not exceed $140 a month. The arbitrator found a violation, pointing out that the employer's documents essentially described the $500 per year surcharge as a type of premium, and concluding that the surcharge was appropriately considered part of the premium.

The Union also notes that accepting the State's position undermines the benefits of the HBA, which was intended to cap employee health care costs. The 15%

[7] *Sysco Corp. and Teamsters Local 839* (2014).

cap for employees to which the parties agreed would be meaningless if the State can unilaterally impose other health care costs.

The Union further contends that the question here is basically whether the budget provision or the HBA prevails, since there is a conflict between them. The Union says that the general rule is that, faced with such a conflict, the arbitrator must follow the agreement. The Union disputes the State's reliance on the provision in the law that provides that a contract that conflicts with a statute is unenforceable. According to the Union, that provision is inapplicable here because the surcharge language is not part of any statute, only a budget bill, which is not substantive law.

Finally, the Union argues that the surcharge provision was an attempt by the legislature to interfere with the bargaining process, contrary to its statutorily limited role.

The State counters that the terms "surcharge" and "premium" have different meanings. Surcharge is defined as an added cost.

The State points out that Devereux's intent and understanding about whether the term "premium" included the surcharges is irrelevant in interpreting the agreement because he never communicated his intent during bargaining. Nothing in the course of negotiations shows that the parties connected the negotiated premium split to the surcharges.

According to the State, the plain language of Section 1.1 defeats the Union's claim because the surcharges are not part of the total weighted average of the projected premium. The surcharges are not part of that average. In addition, the statute refers to bargaining the amount spent for health care benefits, and the surcharges are not spent for benefits.

The State further contends that the legislature directed that the surcharges be imposed in addition to premiums. The legislative action means the parties could not have negotiated a contrary agreement. Washington courts have treated budget bills as

statutes. In any event, the surcharges were included in the adopted budget and compiled in the session laws, giving the State no option on imposing them.

I carefully considered both parties' arguments in light of the issue. To prevail, the Union must establish that the State violated Section 1.1 of the HBA by imposing the surcharges. As explained in the paragraphs that follow, I am not convinced that the State's action violated the HBA.

The contract language at the heart of the dispute requires the State to pay 85% of "the total weighted average of the projected health care premium for each bargaining unit employee for insurance each month * * *." The parties agree that the contract does not address the premium surcharges, but do not agree about the significance of that.

For the Union, the fact that the State proposed a surcharge provision that it later withdrew means that the State essentially agreed to no surcharges and that it is now trying to gain the right to impose surcharges via arbitration. For the State, the absence of language about surcharges reinforces its position that the surcharges are not part of premiums. Overall, I find that the State has the better argument.

The parties chose particular words to describe the respective health care cost obligations. The State's obligation is for 85% of the "health care premium," which the parties defined as the "weighted average across all plans, across all tiers." The employees' obligation, though not expressly spelled out, is for the remaining 15%.

That language was negotiated pursuant to RCW 41.80.020(3), which granted unions the right to bargain over the "dollar amount expended on behalf of each employee for health care benefits." Though the parties have elected to conduct their health care cost bargaining in percentage terms, the result is the same–they bargained about the amount spent per employee for *health care benefits*.

The surcharges do not fall under either the HBA description of health care premium or the statutory bargaining scope. In other words, the surcharges are not part of the "weighted average across all plans, across all tiers." Neither are they part of

the amount the State spends for each employee's health care benefits. Rather, the surcharges are, in effect, a penalty or added cost unrelated to what the State must spend to provide health care benefits.

The Union claims that it had the right to bargain over health care costs. The statute is narrower than the Union contends. It specifically refers to bargaining over the amount the State pays on employees' behalf for health benefits. The surcharges are not an expense the State incurs to provide health care benefits.

I likewise do not agree with the Union's contention that the surcharges are negotiable because the State uses revenue from them to offset the cost of providing benefits. Although the revenue may be used for that purpose, that does not make the surcharges part of cost of providing the health benefit. This is particularly so since the parties explained how such costs were to be calculated, and their agreement focuses on what insurers charge to provide coverage, not the revenue source.

The Union's contention that the State essentially bargained surcharges out of the contract is unpersuasive. State negotiators made their position clear at the time that a surcharge provision was unnecessary because the State was compelled by legislative action to impose the surcharges.

Moreover, parties often make proposals in bargaining that are later withdrawn. Proposals are withdrawn for many reasons. The removal of a proposal from bargaining does not necessarily indicate any particular intent or agreement.

In addition, a review of the available evidence from bargaining indicates that there was no meaningful or substantive negotiation about surcharges. The State's proposal included them. Union negotiators asked questions about implementation and said they did not want the language in the HBA. There is no evidence that union negotiators contested the State's right or obligation to impose the surcharges.

Contrary to the Union's argument, this is not a case where a party is seeking to obtain something in arbitration that it failed to get in bargaining. The State has consistently taken the position that it does not matter if the surcharge language was

in the HBA. Indeed, its position was that it did not have discretion about imposing the surcharges.

Under all these circumstances, I do not find that the State bargained away the right to impose the surcharges or otherwise agreed that it would not do so.

The Union offered Arbitrator Cavanaugh's decision in support of its position. I do not find that decision helpful in resolving this dispute. I reviewed it closely, and conclude that, despite similar subject matter, there are important differences between the two cases.

First, there is the nature of the employer. There are fundamental distinctions between public and private sector bargaining. One key difference is that in the public sector, there is always a third party–the entity that controls the funds–involved to an extent, even if not a participant at the bargaining table.

More important is the difference between the contract language in the cases. Here the parties did not just cap the employee's share of the premium; they defined how that premium would be calculated. With no such restriction in the contract before him, it was logical for Arbitrator Cavanaugh to conclude, particularly in light of the employer's description of the surcharges, that they were merely an extension or part of the premium. By contrast, the parties here have expressly stated how the premium is calculated. It would be inappropriate for me to modify their definition by reading it to include the surcharges.

I do not agree with the Union's claim that there is a conflict between the HBA and the budget bill. The budget bill dictates that the State will impose the two surcharges at issue. The HBA, in contrast, concerns health insurance premiums. As already discussed, the surcharges are not a cost of providing insurance, as the parties chose to define premiums.

RCW 41.80.020(6) provides that if there is a conflict between a statute and a negotiated agreement, the statute prevails. Given my conclusion that there is no

conflict between the HBA and the budget bill, it is unnecessary for me to decide whether the budget bill is a "statute."

In sum, I conclude that the Union did not establish that the State violated Section 1.1 of the HBA when it imposed surcharges on employees' health care premiums. Those surcharges are a charge or fee that is not related to the cost of providing health care benefits, but rather is based on behavior (tobacco) or status (availability of comparable insurance for spouse/partner). The State's adoption of the surcharges was not contrary to the parties' agreement that employees would only have to pay 15% of the total weighted average of the projected health care premium. I will issue an award denying and dismissing the grievance.

AWARD

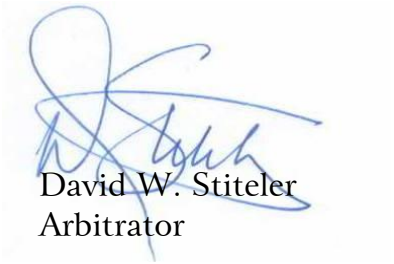
Having considered the whole record, and for the reasons explained in the Discussion, I make the following Award:

1. The grievance was timely filed and is arbitrable.

2. The State did not violate Section 1.1 of the HBA by imposing the surcharges in question. The grievance is denied and dismissed.

3. The parties will equally share the Arbitrator's fees and expenses.

Respectfully issued this 11th day of November, 2015.



David W. Stiteler
Arbitrator