

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

In the Matter between

STATE OF CALIFORNIA, DEPARTMENT OF
FORESTRY AND FIRE PROTECTION, Employer

and

CALIFORNIA DEPT. OF FORESTRY FIREFIGHTERS,
Employee Organization

Involving issues related to rural health subsidy program,
Unit 8

DPA No. 99-08-0005

ARBITRATOR'S
OPINION AND AWARD

February 18, 2000

APPEARANCES:

On behalf of the Employee Organization:

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On behalf of the Employer:

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BEFORE:

Bonnie G. Bogue
Arbitrator

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This arbitration arises pursuant to the agreement between the STATE OF CALIFORNIA, DEPARTMENT OF FORESTRY AND FIRE PROTECTION, hereinafter the State or Employer, and the CALIFORNIA DEPARTMENT OF FORESTRY FIREFIGHTERS, hereinafter the Union, under which BONNIE G. BOGUE was selected as Arbitrator and under which this award is final and binding on the parties.

An evidentiary hearing, wherein the parties availed themselves of the opportunity to call witnesses and present evidence and argument, was held in Sacramento, California, on December 6 and 7, 1999. Witnesses were duly sworn. A verbatim record of the hearing was prepared, and a transcript was made available. The parties presented their arguments in post-hearing briefs, at the direction of the Arbitrator and pursuant to Sec. 6.16.1 of the collective bargaining agreement (RT II, 230). The record was closed on January 18, 2000, post-hearing briefs having been received by the Arbitrator as of that date, and the matter submitted for decision. The parties stipulated that the matter was properly before the Arbitrator.

STATEMENT OF THE ISSUE

The parties stipulated at the hearing to the following statement of the issue to be determined (RT I, 17):

Is the benefit to pay qualified medical expenses contained in the parties' agreement in Joint Exhibit 2 effective at the beginning of the contract, July 1, 1999? If so, and the State does not pay the qualified medical expenses incurred between July 1, 1999 and January 1, 2000, what is the appropriate remedy?

SUMMARY STATEMENT OF FACTS

Following is a summary of the facts of the case. When appropriate to a particular issue, a more detailed finding of facts is included in the Discussion, below.¹ For the most part, the facts are not in dispute.

The State and the CDF Firefighters negotiated a collective bargaining agreement for Unit 8 that became effective July 1, 1999 (JX 7). In the course of those negotiations, the parties reached a tentative agreement (TA) on August 18, 1999, regarding a new benefit, known as the rural health subsidy. (JX 2) The purpose of the benefit was to provide a monetary subsidy to employees in the bargaining unit, living outside metropolitan areas, who were unable to obtain lower cost health care plans and were paying a higher rate for health insurance than employees living where a choice of lower-cost plans was available. The subsidy would reimburse employees for expenditures to a maximum of \$1,500 a year.

At the time these negotiations were underway, a piece of legislation, SB 514 (Chesbro) (State Ex. 1), was under consideration in the state legislature that would fund this health plan subsidy for state employees in this and other bargaining units as well as non-represented (exempt) employees. Several state employee organizations were interested in the benefit, and a legislative as well as bargaining approach were being pursued to achieve the benefit. At the time the TA was reached in Unit 8 on

¹ Citations to the reporter's transcript are given when noting specific testimony or resolving conflicts in testimony. Testimony on general background or undisputed testimony is not referenced. Transcript references are to page (RT 152), or page and line (RT 152:9).

August 19, 1999, that bill was still in draft form. The bill was adopted in October 1999, after the parties reached their TA on the Unit 8 contract as a whole. After Unit 8 settled, other bargaining units also reached negotiated settlement that included a rural health subsidy benefit. Part of the agreement involved a delay in a general salary increase in the second year of the contracts to "free up" approximately \$25 million to fund the rural health subsidy benefit. (RT 189-191, 202-203)

The dispute between the parties, as reflected in the above issue statement, is whether the effective date of the rural health subsidy benefit for Unit 8 is July 1, 1999, which is the effective date of the collective bargaining agreement, or January 1, 2000, which is the effective date for the subsidy authorized in SB 514, as adopted. Negotiators for both sides testified that an effective date for the benefit was never mentioned at the bargaining table.

The TA (JX 2) describes how the program is to operate in some detail. It specifically incorporates SB 514 by reference, and a copy of a memo outlining the then-current draft bill was attached (there is no evidence that a printed draft bill was available at the time and the TA refers to the attachment as the draft bill). The TA at Par. 3 specifies that "money shall be available for use as defined in SB 514." No language regarding an effective date for the new benefit appears in the TA. The TA uses both the term "fiscal year" and the term "per year" in various provisions, with no expressed distinction in meaning. The term "calendar year" does not appear.

During negotiations on August 19, 1999, several proposals regarding this benefit were passed. The State's negotiator, Heine, requested that the words "as amended" be inserted after the reference that incorporates SB 514, and those words were written in on the proposal (SX 2). Bargaining notes shows that the Union negotiators accepted that language addition when it was proposed (JX6-B, p. 152). However, the typed, signed TA does not contain the words "as amended." Negotiators acknowledged that the omission of the phrase in the final version was not the result of any discussion or agreement to omit the words; they were apparently omitted in the process of retyping the amended proposal. The omission was not noted when the final version was signed.

The TA's language as it appears on JX 2 is incorporated verbatim into the Unit 8 1999-2001 contract as Sec. 11.02. The reference to SB 514 does not contain the phrase "as amended" and reads as follows:

1. The State shall contribute \$1,500 per year on behalf of each bargaining unit member (employee) who lives in a defined rural area, as more definitely described in Senate Bill 54 (Senator Chesbro), a copy of which bill is attached hereto and hereby incorporated herein by reference. ...

The draft version of S.B. 514 as it existed at the time of the TA, as described in the memo attached to the TA, had no express effective date. It contained an urgency clause, which would call for the measure to become effective "immediately." (JX 2) The measure as adopted a couple of months later (SX 1) was expressly made effective January 1, 2000, and at Sec. 4 states:

All qualified employees and annuitants may see reimbursement for qualified medical expenses incurred on or after January 1, 2000.

Sec. 16.04.a of the Unit 8 1999-2000 agreement (JX 7) contains the following language regarding effective dates:

Unless a specific provision provides for a different effective date, the terms of this Contract shall go into effect on July 1, 1999 and shall remain in full force and effect through and including July 2, 2001.

POSITION OF THE EMPLOYEE ORGANIZATION

The Union's principal contention is that the language of the contract is clear and unambiguous and controls over any bargaining history or unspoken intentions of the parties that would lead to a different interpretation than that conveyed by the contract's language.

The Union notes the Sec. 16.04 clearly and unambiguously provides that all terms of the contract are effective July 1, 1999 unless expressly stated otherwise, and that nothing in the TA or Sec. 11.02 provides for a January 1, 2000 effective date for the rural health subsidy benefit.

It further contends that, should the Arbitrator somehow be persuaded that the contract's language is ambiguous, bargaining history and principles of contract construction also support the Union's position that the rural health subsidy benefit is

effective for Unit 8 on July 1, 1999. The Union presented extensive argument and marshalled evidence to support that contention in its post-hearing brief.

POSITION OF THE STATE

The State likewise contends that the contract is clear and unambiguous. It contends that the TA and Sec. 11.02 call for the rural health subsidy benefit to be available "as defined in SB 514" and incorporate that measure into the contract. SB 514, as adopted, made the rural health subsidy program effective January 1, 2000; therefore, the benefit under the contract is effective January 1, 2000. This incorporation of the terms of the legislation provides a specific effective date other than July 1, 1999 and, therefore satisfies Sec. 16.04.a. Although the TA itself may be effective July 1, 1999, it calls for a benefit which is expressly made effective on January 1, 2000.

The State argues that, if the arbitrator should find ambiguity in the language of the TA and Sec. 11.02, it must be construed against the Union, since the Union proposed the language and failed to make its intention clear regarding the effective date. Furthermore, the retyping of the proposals during bargaining was done by the Union staff, so the error in omitting the phrase "as amended" when referencing the bill must likewise be construed against the Union, not the State. It argues that there is no language in the TA that states that terms of the draft version of the bill, rather than of the final adopted version if SB 514, were to be incorporated by reference into the contract.

The State contends that failure of the parties to discuss the fundamental question of the provision's effective date leads to the inescapable conclusion that the parties intended that SB 514 would ultimately determine the start date of the benefit.

The State argues that the Union is now seeking to have the arbitrator provide that which it failed to obtain at the bargaining table, but the arbitrator is precluded from adding to or modifying the terms of the agreement by providing a July 1, 1999 start date when the contract calls for a January 1, 2000 effective date for this benefit. It contends that the Union's interpretation is inconsistent with the language agreed upon and inconsistent with every effort by the State to establish a benefit that would commence on January 1, 2000.

DISCUSSION

The Unit 8 contract specifies in Sec. 16.04.a that all terms of the agreement are to be effective on July 1, 1999 “[u]nless a specific provision provides for a different effective date.”

There is no language in the TA or Sec. 11.02 of the contract that “provides for a different effective date” for the negotiated rural health subsidy benefit. Therefore, the effective date must be July 1, 1999 unless the incorporation of SB 514 into the TA had the effect of “providing a different effective date” for the negotiated benefit because the

bill, as adopted, contained an effective date for the legislated benefit other than July 1, 1999.

Since nothing in the signed TA expressly states that any effective date that would appear in the yet-to-be adopted bill would also be the effective date of the negotiated benefit, that creates an obvious, facial ambiguity in the contract, requiring a resolution of whether the parties did intend to override Sec. 16.04's effective date by referencing the bill. When there is ambiguity in a contract language, the bargaining history must be examined to determine whether the parties had reached an understanding as to the intended meaning of the language that they put in the contract.

The State and Union negotiators never discussed the effective date of the benefit when negotiating this provision.² There are two conclusions that could be drawn from their silence about such a significant aspect of the benefit as its effective date. One is that, since they had reached no understanding that they would override Sec. 16.04 by providing a different effective date, they both assumed and understood that the standard July 1, 1999 effective date would apply. The other possible conclusion to be drawn is that they did share a mutual understanding that they would let the legislation dictate the effective date, if the legislation provided for a date other than July 1, 1999.

² Testimony shows that negotiators at one time used a January 1 date in their discussion of how the plan would work. However, that was not in the context of an effective date, but rather was used in devising a hypothetical to explain how funds would be disbursed to an employee who had incurred more in expenses than had yet accrued in his "account" owing to the fact the account would not be funded with an annual lump sum, but by monthly contributions that would accumulate to an annual total of \$1,500 (RT 110-111, 208-216-217, JX 5, p. 4).

The former interpretation is the more persuasive, based on the bargaining history and the contract's language.

When the TA was signed, the then-current version of the bill had no effective date in it. Rather, the draft merely stated that it would be effective "immediately" as an urgency measure. There is no evidence that the negotiators were aware at that time that the legislation might have a delayed effective date as late as January 1, 2000, or any other date, for that matter. There is simply no evidence that the parties had any reason to believe that the standard July 1, 1999 effective date for all contract terms would not apply. There was no meeting of the minds on an different effective date.

The State contends that, since the Union proposed the rural health subsidy benefit, the failure to specify an effective date must be construed against the Union. However, the Union was justified in relying on the terms of Sec. 16.04 which clearly specified a July 1, 1999 effective date for all contract terms. It had no need to propose that as the effective date of this new benefit since Sec. 16.04 governs the date for all contract provisions, absent an express agreement to the contrary.

Evidence that the parties did understand they were agreeing to a July 1 effective date is implied in their use in the TA of the term "fiscal year" to define the benefit. The fiscal year for the State begins July 1. Although elsewhere the TA simply uses the word "year," at no time does it define that term to mean "calendar" year, or is there any reason to assume the word "year" is intended to mean anything other than "fiscal year."

The only evidence that tends to support the State's theory that the parties did agree to incorporate whatever effective date the legislature would eventually adopt is the evidence that the parties agreed to include the words "as amended" when referencing the bill. However, those words do not appear in the signed TA, or in Sec. 11.02 of the 1999-2001 contract. The State would have the language implied because of the bargaining history showing the parties agreed to include those words while they were working on the language of the TA.

Arbitrators are restrained from adding to the terms of the agreement by the Sec. 16.17.2: "... The arbitrator is not authorized to add to, subtract from, or otherwise modify the Agreement of the parties..." Drafting errors that lead to harsh or nonsensical results may justify an arbitrator reading into a contract language which both parties plainly understood was intended at the time the contract was drafted, to correct what is clearly a mutual mistake and to effectuate the actual agreement of the parties. But arbitrators are reluctant to add words to the language of the agreement to correct a mistake that would benefit the party who was responsible for the drafting error.³ The State's contention that the Union was responsible for the omission because its staff did the retyping is not persuasive. Both parties had access to the final version and handwritten modifications and corrections appear in the final, signed copy.

The State had the opportunity ascertain whether its requested language was in the final version and to insert any missing words. It failed to do so before signing off on

³ Elkouri and Elkouri, *How Arbitration Works*, 5th Ed., Volz and Goggin, eds. (BNA 1997), pp. 572-73.

the final TA. It now needs that language to support its contention that, by agreeing to use the words "as amended," the parties expressly agreed that the significant and unanticipated amendment of the bill – the addition of a delayed effective date – would override the contract's express language governing the effective date. The failure to assure that the words were included must be construed against the State, which now needs those words to support its interpretation of the ambiguous contract language. To reach the State's conclusion would require adding to the contract language on which the parties signed off, and would violate the limits of the arbitrator's authority explicitly imposed by Sec. 6.17.

Even if those two words were read into the contract, that would not lead to the State's conclusion about the effective date. The TA called for an annual benefit of \$1,500. If the effective date were January 1, 2000, that would reduce the benefit to \$750 for the remainder of the 1999-2000 fiscal year, as recognized by State witnesses (RT 208). There is no evidence that the parties agreed that a lesser amount would apply to Unit 8 if the legislation delayed the effective date, no evidence that the \$750 figure ever came up at the bargaining table. Therefore, it would conflict with the express terms of the TA, which explicitly provides for \$1,500 per fiscal year, to read into it an effective date that would have the effect of reducing the amount of the annual benefit by half, where there is no evidence the either party even contemplated that result, say nothing of expressing it at the bargaining table. And there is no indication the parties ever discussed the \$1,500 in terms of a "calendar" year, and the term "calendar year" appears no where in the agreement.

The State offered evidence to show that the January 1, 2000 effective date was the effective date for the benefit, understood by all of the parties who supported the legislation, including the CDF Firefighters, because of the amount of funding that was available was sufficient for half a year, which caused the legislature to set the delayed effective date in January. However, there is no evidence that the parties discussed that funding would be a condition that would govern the effective date for Unit 8; therefore, there is nothing to support the inference that the parties understood they were agreeing to an effective date other than the standard effective date specified in Sec. 16.04 of the contract.

Therefore, the ambiguity in the contract language created by the reference to SB 514 must be resolved by finding that there is no specific provision in the TA or Sec. 11.02 that provides for a different effective date than the July 1, 1999 effective date specified in Sec. 16.04.a of the contract. The rural health subsidy benefit is effective July 1, 1999.

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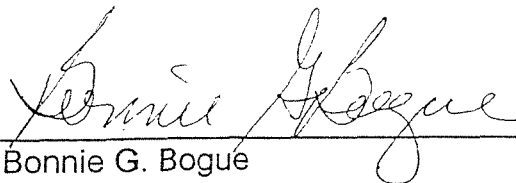
AWARD

The benefit to pay qualified medical expenses contained in the parties' agreement in Joint Exhibit 2, and as incorporated into the 1999-2001 collective bargaining agreement as Sec. 11.02, is effective at the beginning of the contract, July 1, 1999.

The State is directed to pay the qualified medical expenses incurred between July 1, 1999 and January 1, 2000 to Unit 8 employees who qualify for the benefit under the terms of the agreement.

Date: _____

2-18-2000



Bonnie G. Bogue
Arbitrator

PROOF OF SERVICE

DELIVERY BY U.S. MAIL

I declare that I am over the age of 18 years and not a party to the action.

My address is: Office of Bonnie G. Bogue
 618 Curtis Street
 Albany, CA 94706-1421

On February 21, 2000, I served the attached Arbitration Award in the matter of:

State of California, Department of Forestry and Fire Protection v.
California Department of Forestry Firefighters

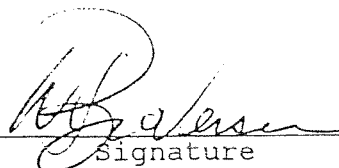
By placing a true copy enclosed in a sealed envelope with postage fully prepaid in the U.S. mail, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 21, 2000, at Albany, California

Wayne Brodersen
Printed Name


Signature