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In the Matter of the Arbitration	*	
between	*	
	*	
	*	DECISION
	*	AND AWARD
STATE OF NEW JERSEY	*	
	*	
-and-	*	
	*	OER-10195
	*	(Medco)
COMMUNICATIONS WORKERS OF AMERICA	*	
	*	
	*	
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Before: Joel M. Weisblatt, Arbitrator

Appearances:

For the Employer
 Paula T. Dow, Attorney General
 By: Sally Ann Fields, Senior Deputy Attorney General

For the Union
 Weissman & Mintz
 By: Steven C. Weissman, Esquire

D E C I S I O N

The State of New Jersey (the "State" or the "Employer") and the Communications Workers of America (the "Union" or the "CWA") are parties to a collective negotiations agreement. Consistent with the terms of that contract, and pursuant to the mutual agreement of the State and the CWA, the undersigned Arbitrator was duly appointed to serve in this matter.

An evidentiary hearing was held on June 11, 2010, September 24, 2010 and October 22, 2010. Both parties were afforded an opportunity to argue orally, present documentary evidence, and examine and cross-examine witnesses. The parties did not mutually agree to the framing of the issue to be submitted to the Arbitrator for determination. Each party proposed wording for the issue and each party expressly stipulated to the Arbitrator's authority to frame the issue should their failure to reach mutual agreement continue.

The wording of the issue proposed by the CWA reads as follows:

Did the State violate Article 20 (*Health Benefits Program and Prescription Drug Program*) and/or Article 39 (*Maintenance of Benefits, Effective Agreement and Complete Agreement*) of the 2007-2010 collective negotiations agreement between the State of New Jersey and the CWA (the Administrative Clerical, Professional, Primary Level Supervisory and Higher Level Supervisory Agreements) by changes to the Prescription Drug Program, including the establishment of lists of preferred and nonpreferred drugs, made in or about January 2010, when Medco assumed the responsibility for the administration of the Prescription Drug Program.

The State proposed that the issue be worded as follows:

Did the State violate the terms of Article 20, B, entitled Prescription Drug Program of the parties' collective negotiations agreements through Medco's implementation of the Preferred Drug Step Therapy program?

If so, what shall be the remedy?

Both parties have submitted written, post-hearing briefs.

The briefs were received by January 22, 2011, and the record was closed as of that date. Given the volume of evidence in the record and the scope of the dispute, the parties have been gracious enough to provide the Arbitrator with an extension of time until March 31, 2011, for the issuance of this Decision and Award.

Positions of the Parties

Position of the Union

The Union contends that the State has violated the collective negotiations agreement with respect to changes implemented in the Prescription Drug Program when the administration of that plan was assumed by Medco. It asserts that the Employer violated clear and specific contract language with respect to the benefit at issue.

The CWA points out that the contract terms clearly reflect the intent of the parties to provide the three-tiered program of co-pays delineated in the contract. The Union insists that this specific language be given full weight to establish the contractual intent that it reflects. The CWA emphasizes that the language provides that the "deductible" shall not exceed the specified amount. It traces the term "deductible" back to the 1976 CSA/SEA agreement [Exhibit U-18] to establish that it is synonymous with "co-pay".

The Union asserts that the changes unilaterally implemented in January of 2010 are in violation of the terms

set forth in Section B, Paragraph 1, "which establishes a maximum co-payment of \$25 for a 30-day supply and \$40 for a 90-day mail order supply of prescription medication." It points out that the contract envisions no circumstances where a prescription would cost more; and it suggests that that would occur under the Medco administered plan.

Further, the Union urges that the general language relied upon by the Employer be considered in light of the entire provision, making its context consistent with the maximum limits referenced above. Additionally, if it is necessary to look beyond the specific terms of the contract, the Union stresses evidence of the parties' negotiations history establishing that the "CWA expressly rejected a formulary model." The CWA argues that the changes relied upon by the State are not "rules and regulations" in the legal sense since they were never adopted through formal agency action.

The CWA also relies upon Article 20, Section F, which states that "[T]here will be no reduction in benefits or increases in co-insurance, co-payments or deductibles paid by employees participating in the ...Prescription Drug

Plan." It maintains that this clause was strengthened in 2007 with the intent to provide protective assurances.

The Union challenges any assertion by the Employer that cost savings is a valid defense to the claimed contract violation. The CWA insists that prescription benefits are a "term and condition of employment", a mandatory subject for collective negotiations, the breach of which must be addressed in relation to the clear contractual elements. It argues that to allow the breach of contract terms on the basis of cost would eviscerate the collective negotiations process.

The Union concludes by urging the Arbitrator to find a contract violation and sustain the grievance. It seeks an order directing the Employer to comply with the terms of the negotiated Prescription Drug Program by restoring the plan in effect prior to the January 2010 change and "making whole any employee who suffered economic losses as a result of the State's breach of its agreement."

Position of the Employer

The State contends that it did not violate the Prescription Drug Program set forth in the parties' collective negotiations agreement when Medco implemented the Preferred Drug Step Therapy ("PDST") program. It claims that the Union "fails to acknowledge that the generic and brand name drug co-pays set forth in the contract are not changed by Medco's PDST program."

The Employer asserts that the CWA "ignores critical language" establishing that prescription benefits are "subject to specific procedural and administrative rules which are part of the program." It maintains that the Union never requested contract language to prevent the State from using preferred or nonpreferred designations in administering the drug program. The State suggests that there is no language preventing the implementation of the PDST program. It points out that Medco was awarded the position of pharmacy benefits manager after a competitive bid process. The State notes that it requested a proposal for the step therapy program and Medco's bid was in response to that request.

The Employer points out that it issued a new member handbook, updated to reflect the changes implemented with the step therapy program. It characterizes certain aspects of the handbook as "administrative rules." It also suggests that there are elements of the prior existing handbook that reflect similar concepts of preferred drug lists, that is, the exclusion of certain drugs that provided no added value or efficacy. It argues that the Union was already on notice of the potential for the kind of change implemented in 2010.

Further, the Employer claims that N.J.A.C. 17:9-2.14 presents an administrative code basis for the change to the PDST program. Specifically, it allows for the plan handbook to supplement the master contract specifying that which is to be covered and that which is to be excluded.

The Employer argues that the public interest must be considered in deciding the case at hand. This is presented with respect to both the merits and any potential remedy, should the determination reach the question of remedy. It insists that the elimination of the PDST program would have a significant fiscal impact on the State, even if the record may have provided some debate as to the measure of cost

savings involved. The Employer believes the cost estimates of its consultant, Aon, to be "well-founded."

The State stresses the need to consider the impact of this case on public policy, as a function of the public interest. It suggests that limiting the Employer's ability to "provide cost effective and fiscally prudent prescription drug benefit coverage" would be contrary to the public interest.

The Employer concludes that "the Union has failed to prove that the State has violated the prescription drug benefit contract provision" or the contractual maintenance of benefits clause. It maintains that the PDST program implemented by Medco is not in violation of the parties' collective negotiations agreement. The State seeks an order denying the grievance in its entirety.

Relevant Contract Language**Article 20, Section B**

1. It is agreed that the State shall continue the Prescription Drug Benefit Program during the period of this Agreement. The program shall be funded and administered by the State. It shall provide benefits to all eligible unit employees and their eligible dependents. Each prescription required by competent medical authority for Federal legend drugs shall be paid for by the State from funds provided for the Program subject to a deductible provision which shall not exceed the amount set forth below for the prescription or renewal of such prescription and further subject to specific procedural and administrative rules and regulations which are part of the Program.

2. Prescription Drug Copays: Effective July 1, 2007

Non-Mail Order

Generics - \$3

Brand names where there is no generic equivalent and brand names where the employee's doctor certifies that the employee is medically unable to take the generic version of the medication - \$10

Brand names where there is a generic equivalent, unless the employee meets the standard set forth above - \$25

90 days Mail Order

Generics - \$5

Brand names where there is no generic and brand names where the employee's doctor certifies that the employee is medically unable to take the generic version of the medication - \$15

Brand names where there is a generic equivalent, unless the employee meets the standard set forth above - \$40

Dispute Resolution Mechanism for Generic Claims

In the event that an employee's physician certifies that the employee is medically unable to take the generic version of medication, said certification shall be sent to the employee's carrier for review utilizing procedures for approval of said certification that are consistent with those for the approval of treatment or services by the carrier. Appeals from the decisions by the carrier shall be consistent with the internal appeal process of each carrier. Any such decision is not subject to the grievance procedure in this contract.

Article 20, Section F, Benefit Levels and Continuation of Coverage [in pertinent part]

There will be no reduction in benefits or increases in co-insurance, co-payments or deductibles paid by employees participating in the... (b) Prescription Drug Plan....

Article 39, Section A, Maintenance of Benefits

The fringe benefits, which are substantially uniform in their application to employees in the unit, and which are

currently provided to those employees, such as the Health Benefits Program, the Life Insurance Program and their like, shall remain in effect without diminution during the term of this Agreement unless modified herein or by subsequent agreement of the parties.

Discussion and Analysis

The threshold question is to resolve the wording of the issue for determination. The Arbitrator believes that the record would lead to the same result under either party's proposed wording for the issue. However, the core of issue at hand is whether certain changes implemented in early 2010 by Medco, the new administrator of the Prescription Drug Program, were in violation of elements of the parties' collectively negotiated agreements [Exhibit J-1]. The clearest wording of this issue is as follows:

Did the State violate the terms of Article 20 and/or Article 39 of the parties' collective negotiations agreements through certain changes to the Prescription Drug Program implemented in January or February of 2010?

If so, what shall be the remedy?

In accordance with the specific authority established by the express stipulations of the parties, the Arbitrator finds the above wording to be the most clear and appropriate expression of the dispute submitted by the parties at hearing. It should be noted that Article 20 is entitled *Health Benefits Program and Prescription Drug Program*. The two relevant sections of that article are Section B

(Prescription Drug Program) and Section F (Benefit Levels and the Continuation of Coverage). Article 39 is entitled *Maintenance of Benefits, Effect of Agreement and Complete Agreement*. The relevant part of Article 39 is in Section A, relating to the maintenance of benefits.

The parties constructed an extensive record over the course of three hearing dates, presenting substantial documentary evidence and thorough, detailed testimony. The Arbitrator has consider the entire record, including the written, post-hearing arguments presented by the parties. The evidence has been weighed and, with careful attention to the express terms of the collective negotiations agreements, the contractual intent of the parties has been determined in order to resolve the question of whether or not the Employer has violated those contracts. The Employer's arguments related to public policy have also been given due consideration.

The Union filed the grievance [Exhibit J-2] in this dispute on January 8, 2010, as a response to members' complaints about the administration of the contractual Prescription Drug Program. These complaints reflected employee responses to Exhibit J-3, a sample letter sent to

unit members by Medco in January of 2010. The Medco letter advised employees of changes in the program to become effective on February 1, 2010. The letter attached a list of thirty-five medications immediately impacted by the change to be implemented February 1, 2010. The letter stated:

The medications listed in the first column will only be covered by your plan if you get prior approval through a coverage review. **If you fill a prescription for one of the medications in the first column without getting prior approval, you'll be responsible for its entire cost.** [emphasis added]

The prescriptions on the list are not new ("second-line") or experimental drugs. They are widely-used, prescription drugs and include drugs with common usage among unit members. The drugs affected include: Aciphex; Actonel; Actonel with Calcium; Ambien CR; Amerge; Atacand; Atacand HCT; Avapro; Avalide; Axert; Beconase AQ; Benicar; Benicar HCT; Edluar; Fosamax D; Frova; Kapidex; Iansoprazole; Lexapro; Luvox CR; Lunesta; Nasacort AQ; Omnaris; pantoprazole; Prevacid; Prilosec Oral Suspension; Protonix; Rhinocort Aqua; Roserem; Teveten; Teveten HCT; Treximet; Veramyst; Zegerid; Zomig; and Zomig ZMT. **Until the change by Medco, effective February 1, 2010, these drugs were all**

covered under the contractual three-tiered co-payment structure, without prior approval.

It is significant to note that the Medco list provided a third column of preferred drugs, corresponding to the first column drugs noted above. This third column of drugs, as preferred drugs, would be covered as "medications that can treat the same condition as those in the first column and are preferred by your plan." Unlike "generic substitutes", the differentiation between brand name and generic drugs expressly set forth in the contract, the third column drugs are not necessarily the exact chemical equivalent of the drugs they are to replace but they are "therapeutic" substitutes.

The Arbitrator finds the express language in the parties' collective negotiations agreements to be clear and unambiguous. It is important to examine the specific terms of Article 20, Section B:

It is agreed that the State shall continue the Prescription Drug Benefit Program during the period of this Agreement. The program shall be funded and administered by the State. It shall provide benefits to all eligible unit employees and their eligible dependents. Each prescription required by competent medical authority for Federal legend drugs shall be paid for by the State from funds provided for the Program subject to a deductible provision which shall

not exceed the amount set forth below for the prescription or renewal of such prescription and further subject to specific procedural and administrative rules and regulations which are part of the Program.

The agreement expresses the intent to "**continue**" the Prescription Drug Program. It further stresses that "**each prescription**" required by medical authority "**shall be paid**" subject to a deductible provision (negotiated by the parties) which "**shall not exceed the amount set forth.**"

The contract language itself provides clear and convincing evidence that the parties contractual intent was to provide a continuation of the then existing program, subject to the specifically negotiated deductible provision set forth in subsection 2. Of particular importance is the fact that the express language refers to coverage for each prescription required by competent medical authority. The fact is that the changes implemented by Medco in early 2010, caused prescriptions, previously recognized and covered by the program, to become subject to new restrictions, including the stated possibility of no coverage, forcing the employee to pay the full expense of continuing the previously covered medications prescribed by his or her physician. This is in direct conflict with the contract terms delineating the continuation of the program covering

each prescription within the three co-pay factors expressly set forth.

The parties' prior application of the contract language, covering the prescription drugs on the non-preferred list in the Medco letter, is further evidence of their negotiated intent. The contract clearly covers these prescriptions within the three tiers of co-pay.

The Arbitrator recognizes that the express contract language contains a second proviso making the payment for prescription drugs "subject to specific procedural and administrative rules and regulations which are part of the program." Further, the Arbitrator has carefully considered the Employer's argument that it is this proviso under which the changes implemented by Medco are to be viewed as consistent with the contract language. That argument is not persuasive. It is absolutely clear that the changes implemented by Medco in implementing the Prescription Drug Step Therapy Program are substantive in nature and not merely procedural or administrative. These changes dramatically affected the quality and level of the prescription drug benefit and, as such, they are inconsistent with the terms of the contract. The Drug Step

Therapy Program implemented by Medco in 2010 was a substantive change in the benefit in violation of the express terms of the contract. The record simply does not support the contention that there is a proper basis for the substantive benefit change, founded in administrative rules and regulations.

In addition to the express language of Article 20, Section B, the contract further sets forth, in the clearest of terms, the mutual agreement of the parties that **there will be no reduction in benefits or increases in co-payments** by employees participating in the Prescription Drug Plan during the term of the contract. This contractual language is specifically delineated in Article 20, Section F, of the parties' collective negotiations agreement [Exhibit J-1]. The changes implemented by Medco in 2010 are in direct conflict with the express contract terms of Article 20, Section F. They reduced existing prescription benefits.

The determination herein is founded on clear and unambiguous contract language; however, even if one were to find that there is ambiguity in the contract terms, the record strongly supports the finding that the implementation of the Drug Step Therapy Program by Medco in early 2010 was

in violation of Article 20 of the contract. During the negotiations leading to the contracts at issue, the State, in proposals dated November 8, 2006, produced Exhibit U-1 (Health Proposals). This document sought to establish a drug plan tiered in part on the basis of "preferred brand" and "non-preferred brand" prescription drugs. The testimony at hearing produced evidence of Union discussion and resistance to such a change and that its position was based on a preference to emphasize the generic savings over name brand drugs and to avoid a "therapeutic substitution" program. The ultimate contract terms were proposed by the Union [Exhibit U-12] and accepted by the State. The evidence establishes that there was no discussion of a "formulary" nor of a non-preferred category after November 8, 2006.

The State, in negotiations, raised the issue of a preferred/non-preferred delineation in the program. That concept was not agreed upon and the contracts at hand were executed without making that change. Changes were made to the co-pay structure to enhance the generic/name brand relationship to bring about cost savings but the proposal to create a preferred/non-preferred program was abandoned by the parties. This factual aspect of the negotiations

history brings even further clarity to the parties' intent in the language of Article 20. The changes implemented in early 2010 by Medco are in obvious conflict with the terms negotiated by the parties after discussing and abandoning the concepts of a preferred system or of therapeutic (as contrasted with generic) substitutions. In essence, Medco implemented substantive changes that the Employer proposed but failed to achieve in collective negotiations.

The contractual language in Article 39, Section A, (Maintenance of Benefits) provides additional clear contractual support for the grievance presented herein. Similar to the negotiations intent embodied in Article 20, Section F, this Maintenance of Benefits clause requires that benefits:

...shall remain in effect without diminution during the term of this Agreement unless modified herein or by the subsequent agreement of the parties.

The changes implemented by Medco in 2010 were a diminution of the existing prescription drug benefits. They were implemented unilaterally, without the mutual agreement of the parties.

The Employer argues that the Union never negotiated language to prevent the State from making the changes that Medco implemented in February of 2010. That argument is not compelling. The Union did not have to negotiate language to prevent such changes because the contract contained terms which clearly defined the benefit in terms that would be violated by the unilateral implementation of substantive reductions. This is an argument without merit.

The Union insists that cost savings is not a valid defense to the contract violation asserted herein. It further challenges the estimates of the cost savings value of the changes. The Arbitrator finds that the evidentiary record presented, despite its extensive and detailed nature, does not include sufficiently reliable evidence to calculate the cost benefit of the changes. This may be due to the fact that the cost savings appear to be substantially related to "rebates" based on the volume of purchase of certain "preferred prescriptions". There are no specifics in evidence to allow for the reliable quantification of cost savings estimates. It is clear, however, that cost savings do occur from the changes imposed by Medco.

The State argues that the Arbitrator must consider public policy and the public interest in consideration of this grievance. The Arbitrator has carefully considered those factors, both in the determination of the contract violation claim and in the development of the remedy.

With respect to public policy, it is clearly in the mutual interest of the parties to find the most cost-effective program to deliver the benefit levels negotiated by the parties. This simply makes sense and serves the parties as well as the public interest. The Employer does have certain reserved powers with respect to effectuating the contract terms and cost containment, for example, choosing a carrier. However, the State and the Union are parties to collectively negotiated, enforceable contracts. The unilateral, substantive reductions of benefits, to contain costs, is a contract violation. This is not a qualitative matter of public policy but a simple question of reducing costs. The ability to contain costs unilaterally without reducing benefits exists and is not the issue herein; the substantive changes implemented through Medco in the case at hand require negotiations and agreement.

The assertion of a public policy defense requires more than simply a cost contention. It requires the Employer to establish a more qualitative impact on its mission to govern. Cost savings is not a valid defense to the simple case of a unilateral reduction in contract benefits founded in clear and unambiguous language. If one were to find that this were a public policy issue, then the Employer might be free to simply eliminate the contract benefit which had been negotiated by the parties in good faith, claiming a public policy cost reduction rationale. Such a result is clearly not consistent with public policy in the State of New Jersey. The changes imposed, required mutual agreement through negotiations.

The appropriate remedy for the contract violation proved by the evidence is clear, practical and easily defined. The State shall be ordered to prospectively reverse the substantive reductions in the prescription benefit by returning to the application of the three-tiered co-pay structure to the prescription drugs, as had been in effect under the contract until January or February of 2010. Further, all those employees who can prove individual additional costs associated with the impact of the Medco changes, shall be made whole by the Employer through

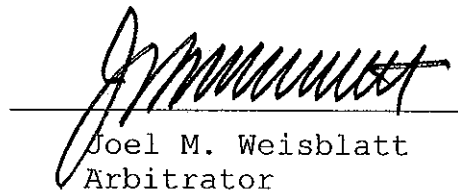
reimbursement of actual added costs due to the implementation of the Medco program. This make whole remedy shall apply to all such added costs from the initiation of the program until the return to the specified contractual benefit or until such time as the parties mutually agree to revise the contractual benefit structure for prescription drug coverage.

In conclusion, the Union has proved that the State violated Articles 20 and 39 the Collective Negotiations Agreement when Medco implemented certain substantive changes in the Prescription Drug Program in January or February of 2010. The Award herein shall order the reversal of the substantive changes and shall further order a make whole remedy for all unit members who produce proof of actual additional costs associated with the changes imposed.

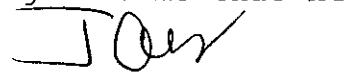
A W A R D

For the foregoing reasons IT IS HEREBY ORDERED that the State shall reverse the substantive reductions in the prescription benefit (implemented by Medco) by returning to the application of the three-tiered co-pay structure, as had been in effect until January or February of 2010. IT IS FURTHER ORDERED that each employee who can prove actual additional costs associated with the impact of the Medco changes, shall be made whole by the Employer through reimbursement of the actual added costs due to the implementation of the Medco program. This make whole remedy shall apply to all such added costs from the initiation of the program until the return to the specified contractual benefit or until such time as the parties mutually agree to revise the contractual benefit structure for prescription drug coverage.

Dated: March 23, 2011
Skillman, N.J.


Joel M. Weisblatt
Arbitrator

On this 23rd day of March, 2011, before me personally came and appeared Joel M. Weisblatt, 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.


Attorney-at-law