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Arbitrator's Case No. 536-OLC

CalHR Grievance Nos. 20-08-0002,
20-07-0006

IN ARBITRATION PROCEEDINGS PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between

Cal Fire Local 2881 and California Statewide Law Enforcement Association (CSLEA),
Employee Organizations,

and

State of California, California Department of Human Resources,
Employer,

Involving, CoBen Cash Option

ARBITRATOR'S OPINION AND AWARD

February 7, 2022

APPEARANCES:

On behalf of the Employee Organization:

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On behalf of the Employer:

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This arbitration involves the grievance of two unions on behalf of affected members in the bargaining units they represent. It arises pursuant to the agreement between the State of California, CalHR, hereinafter the Employer, State, or CalHR, and Cal Fire Local 2881 and California Statewide Law Enforcement Association (CSLEA), hereinafter the Unions. KATHERINE J. THOMSON was selected as Arbitrator pursuant to Section 6.13 of the CSLEA Memorandum of Understanding and Article 6 of the Firefighters' MOU, under which this award is final and binding on the parties.

The parties had full opportunity to call witnesses and present evidence and argument during an evidentiary hearing, which was held by Zoom videoconferencing, in California, on August 25-26, 2021. Witnesses were sworn. A verbatim record of the hearing was prepared, and a transcript was made available. The record was closed on December 6, 2021, when the Arbitrator received post-hearing briefs, and the matter was submitted for decision. The parties stipulated that the Arbitrator will retain jurisdiction over the award resulting from this proceeding for a period of 12 months for purposes of resolving any dispute over implementation of the remedy, if any, but not to reconsider the merits of the decision, which is final.

STATEMENT OF THE ISSUE

The parties stipulated at the hearing to the following statement of the issues to be determined:

1. Should the grievances be denied as untimely?

2. Did the California Department of Human Resources (CalHR) violate sections 10.1(A)(2), 5.4, or 20.1 of the 2019-2023 Bargaining Unit 7 Memorandum of Understanding (MOU) by prohibiting employees with health coverage through TRICARE, Medicare, Medi-Cal, and Covered California from participating in the CoBen Cash Option Program?

3. If so, what remedy, if any, is appropriate under the MOU?

4. Did CalHR violate sections 11.1.1.2.4, 11.1.1.2.5, 16.1, or 16.2 of the 2017-2021 Bargaining Unit 8 MOU by prohibiting employees with health coverage through TRICARE, Medicare, Medi-Cal, and Covered California from participating in the CoBen Cash Option Program?

5. If so, what remedy, if any, is appropriate under the MOU?

RELEVANT CONTRACT LANGUAGE

The collective bargaining agreement between CSLEA and the Employer, effective July 2, 2019 through July 1, 2023, (Joint Exhibit 5) stated:

Section 5.4 Savings Clause

Should any provision of this Contract be found unlawful by a court of competent jurisdiction or invalidated by subsequently enacted legislation, the remainder of the Contract shall continue in force. Upon occurrence of such an event, the parties shall meet and confer as soon as practical to renegotiate the invalidated provision(s).

Section 6.8 Formal Grievance – Step 1

A. If an informal grievance is not resolved to the satisfaction of the grievant, a formal grievance may be filed no later than:

1. Fourteen (14) calendar days after the event or circumstances occasioning the grievance; or after the employee should reasonably have been aware of the event or circumstances occasioning the grievance; or
2. Within seven (7) calendar days after receipt of the decision rendered in the informal grievance procedure.

Section 10.1.A.2 Employees will be permitted to choose a different level of benefit coverage according to their personal needs, and the State's allowance amount will depend on an employee's selection of coverage and number of enrolled dependents. The State agrees to provide the following CoBen benefits:

a. If the employee is enrolled in both a health plan administered or approved by CalPERS and a dental plan administered or approved by CalHR, the health benefit enrollment party code will determine the allowance amount.

b. If the employee declines a health benefit plan which is administered or approved by CalPERS and certifies that he/she has qualifying group health coverage from another source, the employee's dental benefit enrollment party code will determine the amount of the contribution.

c. If the employee elects not to enroll in a health plan administered or approved by CalPERS and in a dental plan administered or approved by CalHR and certifies that he/she has qualifying group health coverage and dental coverage from other sources, the employee may enroll in the CoBen Cash Option program during the open enrollment period or as newly eligible to receive one hundred fifty-five dollars ($155) in taxable cash per month. Cash will not be paid in lieu of vision benefits and employees may not disenroll from vision coverage. Employees do not pay an administrative fee.

d. If the employee elects not to enroll in a health plan administered or approved by CalPERS and certifies that he/she has qualifying health coverage from another source, but enrolls in a dental plan administered or approved by CalHR, the employee may enroll in the CoBen Cash Option program during the open enrollment period or

as newly eligible to receive one hundred thirty dollars ($130) per month. (The State will pay the premium cost of the dental plan and vision plan). Cash will not be paid in lieu of dental benefits only or vision benefits, and employees may not disenroll from vision coverage. Employees do not pay an administrative fee.

Section 10.1(E) – FlexElect Program

The State agrees to provide a flexible benefits program (FlexElect) under Internal Revenue Code section 125 and related sections 105(b), 129, and 213(d). All participants in the FlexElect Program shall be subject to all applicable state and federal laws; and any related administrative provisions adopted by CalHR. The administrative fee paid by participants will be determined each year by CalHR.

The Memorandum of Understanding between Cal Fire Local 2881and the Employer, effective January 2017 through July 1, 2021, (Jt. Ex. 7) stated:

Section 6.9 Formal Grievance – Step 1

6.9.1 If an informal grievance is not resolved to the satisfaction of the grievant, a formal grievance may be filed by the grievant or CAL FIRE Local 2881 no later than:

6.9.1.1 20 calendar days after the alleged violation or knowledge of same reasonably should have been acquired, or after the date of grievants first awareness of an alleged continuing violation.

6.9.1.2 Within 10 calendar days of the decision rendered in the informal grievance procedure, whichever is later.

Section 11.1.1.2.4 If the employee elects not to enroll in a health plan administered or approved by CalPERS and in a dental plan administered or approved by CalHR and certifies that he/she has qualifying group health coverage and dental coverage from other sources, the employee will receive $155 in taxable cash per month. This cash shall be in lieu of the cash option currently available under the FlexElect Program. It will not be necessary for the employee to enroll in the FlexElect Program to receive this cash payment nor will it be necessary for the employee to pay the $1.00 administrative fee to receive the payment. Cash will not be paid in lieu of vision benefits and employees may not disenroll from vision coverage.

Section 11.1.1.2.5 If the employee elects not to enroll in a health plan administered or approved by CalPERS and certifies that he/she has qualifying group health coverage from another source, but enrolls in a dental plan administered or approved by CalHR, the employee may receive the difference between the applicable composite contribution and the cost of the dental plan selected and vision benefits, not to exceed $130 per month. Cash will not be paid in lieu of vision benefits and employees may not disenroll from vision coverage.

Section 11.15 – Flexible Benefit Program

The State agrees to provide a Flexible Benefits Program under Section 125 and related Sections 129, 213(d), and 105(b) of the Internal Revenue Code. All

participants in the FlexElect Program shall be subject to all applicable state and federal laws; and any related administrative provisions adopted by CalHR. All eligible employees must work one-half time or more and have permanent status or if a limited-term or Temporary Authorization Appointment (TAU) appointment, must have mandatory return rights to a permanent position.

Section 11.26 – Compliance with State and Federal Law

The State may implement changes to the Health and Welfare benefits under this Article in order to comply with state or federal law. The State shall meet and confer with the Union over the effects of any changes made pursuant to this section.

16.1.2.3 ...

Unless otherwise provided herein, or unless changed by mutual agreement, there shall be no diminution of existing wage rates and substantial monetary employee benefits during the term of this agreement. Provided, however, the parties agree to meet and confer over alternatives to layoff and/or other unforeseen economic crisis.

FACTUAL SUMMARY

CalHR is the Governor's designated representative for purposes of bargaining over wages, hours, and other terms and conditions of employment with the exclusive bargaining representatives for state employees in the State's 21 different Bargaining Units, including Bargaining Units 7 and 8.

Pursuant to the Dills Act, CSLEA is the exclusive recognized bargaining representative for employees in classifications within State Bargaining Unit 7 - Protective Services and Public Safety. Local 2881 is the exclusive recognized bargaining representative for employees in classifications within State Bargaining Unit 8 - Firefighters. This bargaining unit includes classifications ranging from non-supervisory Battalion Chiefs, Fire Captains, Fire Fighters, and various others employed at the California Department of Forestry and Fire Protection ("CDF" or "CAL FIRE").

For years the State had agreed to provide employees in certain State Bargaining Units a Consolidated Benefits ("CoBen") Program and to provide a taxable monthly cash-in-lieu payment to employees who waive health and/or dental benefits and certify health coverage from another source, such as through a spouse's insurance. This is referred to as the CoBen Cash Option Program. An eligible employee receives $130 per

month for waiving only health coverage or $155 per month for waiving both health and dental coverage. There is no need for proof of premium costs, and the benefit amounts have not increased in years. (See Jt. Ex. 3, CSLEA' s 2013-2016 MOU, Sec. 10.1(A)(3), at 035-037; and Jt. Ex. 6, Local 2881's 2010-2013 MOU [extended to 2017], Sections 11.1.1.2.3 and 11.1.1.2.4, at 092.) The program saves the State money because it does not pay for full coverage for employees who already were insured by another plan.

In early 2015, CalHR received legal advice from outside counsel that federal regulations promulgated pursuant to the Affordable Care Act prohibited employers from providing premiums to an employee for purchasing coverage on the individual market, and that those regulations applied to the Cash Option Program. In May and June 2015, CalHR announced a change in policy that made ineligible for the cash payments employees with health coverage through TRICARE, Medicare, Medi-Cal, and Covered California. (See, Jt. Exs. 12, 13, 14) Kasey Clark, CSLEA counsel and chief negotiator, acknowledges he attended a conference call when CalHR representatives explained the change and the motivation that the law required it. Soon after, CalHR issued PML 2015-018 (Respondent Ex. 1), which stated,

> Under the ACA, Internal Revenue Service has recently prohibited employers from offering cash to employees who elect to opt out of employer-sponsored health coverage and enroll in "individual" health coverage. To ensure the state's compliance with the market reform provisions of the ACA, employees who elect to enroll in the state's FlexElect or CoBen Cash Option programs will be required to attest that they have other qualifying group coverage to receive cash in lieu of state-sponsored health coverage.
>
> ...
>
> **Qualifying Group Health Coverage**
>
> ... Employees enrolled in individual coverage, such as TRICARE, Medicare, Medi-Cal, and Covered California, are not eligible to receive cash in lieu of other health coverage ....

CalHR explained this limit on eligibility for the program in its 2016 Consolidated Benefits – CoBen -- Handbook, which states it is applicable to employees in BU 7, 8 and five other bargaining units, including BU 2, the state attorneys' and ALJs' unit. (R. Ex. 4) Although representatives of Local 2881 could not remember the issue, neither of the Unions contend they were not notified of the policy change.

CalHR implemented the change during the Fall 2015 open enrollment period. Over 300 employees in BU 7 or BU 8 were disenrolled or denied enrollment when they failed to provide certification that they had health coverage through sources other than TRICARE, Medicare, Medi-Cal, and Covered California. (Jt. Ex. 16)

Change in Contract Language

In 2016, CalHR negotiated changes to the pertinent contract provisions in the MOUs with BU 7, 8, and 2. The language changed from requiring employees to certify "health coverage from another source" to "qualifying group health coverage from another source." (Jt. Ex. 4, Jt. Ex. 10 at 0156) The State's chief negotiator, Pam Manwiller, indicated to CSLEA that the intent of the proposal was to conform to ACA requirements and mirror language in state forms. (Jt. Ex. 10, 0163; Un. Exs. 1, 7) Clark testified that he understood that intent and that the change in language merely updated the MOU to conform with what CalHR had already implemented in 2015. Clark did not recall a specific mention of TRICARE during this bargaining.

Gary Messing, counsel and chief negotiator for Local 2881, understood that the addition of "qualifying group" health coverage would likely affect TRICARE, Medicare and Medi-Cal enrollees because Manwiller asserted that the ACA required those plans to be excluded from the cash option program. He was aware that CalHR did not consider TRICARE and Medicare group health plans. He testified he relied on the State's representations that the ACA prohibited the State from offering cash-in-lieu benefits to employees with health coverage through TRICARE, Medicare, Medi-Cal or Covered California. He believed, however, that if non-State-provided health coverage was qualified, it would be eligible for the payments.

In December 2016, after losing an arbitration described below, the State proposed to add the following section 11.26 to the Local 2881 MOU:

> The State may implement changes to the Health and Welfare benefits under this Article in order to comply with state or federal law. The State shall meet and confer with the Union over the effects of any changes made pursuant to this section.

Messing objected that the language could result in increased costs being passed on to employees. Manwiller stated that the State would bargain over costs. Notes from the bargaining session ("Har[d] to say affordable health care act, changes, TRICARE, not longer, no choice, noticed, example") indicate she reiterated as an example the ACA prohibition on cash for TRICARE enrollees and how the State notified the Union, but had no choice whether to change the benefit. Local 2881 agreed to the inclusion of the new section 11.26.

Neither CSLEA nor Local 2881 learned prior to agreeing to the new language in 2016, or ratifying the tentative agreements, that CASE had filed a grievance or won an arbitration relating to the 2015 policy change.

CASE Challenge

Unbeknownst to the Unions in this case, the California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE) had filed a grievance for BU 2 contending that the exclusion of TRICARE from the Cash Option Program violated its MOU with the State. In August 2016, Arbitrator Collins issued an award sustaining the grievance. He did not attempt to interpret the federal regulations, but found that CASE's MOU required that the State continue to allow employees covered by TRICARE to participate in the Cash Option Program, that no court or federal agency had ruled that the payments to employees covered by TRICARE would be unlawful, and that a mid-term contract change was therefore of no effect. (Jt. Ex. 9) The award was issued just before CASE and the State agreed on the language change to "qualifying group health coverage."

The State filed a petition to vacate the award upon the ground that the Arbitrator exceeded his authority. It argued the Award violated several public policies by compelling the state to structure its Consolidated Benefits (CoBen) Program in a way that would contravene the public policy codified in the ACA and could subject the state to significant penalties for violation of federal and state law.

In October 2016, CASE filed a second grievance under its new MOU because the State was continuing to deny its members covered by TRICARE cash option payments.

In June 2017, the Superior Court ruled in favor of CASE, denying the petition to vacate the Collins award and confirming the award. (Jt. Ex. 11) The ruling reads:

> Having reviewed the materials in the record on the issue, the court does not find that CalHR's interpretation of the federal law is necessarily correct or absolutely explicit. Without such a finding, the court cannot then find that the Arbitrator's Award requiring CalHR to abide by the MOU, contrary to CalHR's unilateral interpretation of federal law, violates a public policy that is "explicit, well-defined, and dominant" ....

The court emphasized that the ruling did not constitute a "decision of a 'court of competent jurisdiction' finding the MOU's CoBen provisions to be unlawful [or not] under the ACA with respect to CASE members who opt-out to TRICARE." (Id. at 0187)[1]

After the confirmation of the Collins award, CASE's second grievance proceeded to arbitration. The State relied on the new contract language requiring employees to certify they had "qualifying group health coverage" to be eligible to participate in the Cash Option Program. In January 2019, Arbitrator Harris found that the arbitration was primarily a rehash of the Collins arbitration. Even the negotiation of the new language did not prevent employees covered by TRICARE from participating in the Cash Option Program, as the bargaining history failed to show the State communicated to CASE that it did not consider TRICARE coverage as "qualifying group health coverage," particularly in light of the Collins award. (Jt. Ex. 10) CASE correctly determined that the amendment of the language would not nullify the Collins award since it had consistently disagreed that the ACA prohibited Cash Option payments. She wrote,

> Notwithstanding the status of TRICARE under the federal guidance as an individual plan *for integration purposes*, Unit 2 employees may, under Section 11.1, certify that they have "qualifying group health coverage" in the form of TRICARE *for CoBen cash purposes*.

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[1] IRS notices advised employers that a group health plan cannot be used to purchase coverage for an employee on the individual health coverage market, whether through direct premium payments or reimbursement. In 2015, IRS Notice 2015-17 specifically stated that paying or reimbursing employee premiums for coverage through Medicare or TRICARE on a pre-tax basis were not permitted, because neither Medicare nor TRICARE were considered "a group health plan for integration purposes."

(Id., 0171) Arbitrator Harris ordered the State to cease and desist from denying the cash-in-lieu benefit to TRICARE enrollees and to make the affected employees whole.

On April 8, 2019, CalHR sent CASE a letter indicating that, due to the recent labor arbitration award, employees on TRICARE "may now be eligible." (Jt. Ex. 2, p.12) An attachment to the letter entitled "Frequently Asked Questions for BU 2 Cash Benefit Repayment" (p. 014) included the following question and answer:

> Will employees in BU 2 and enrolled in TRICARE be allowed to keep the Health Cash benefit?
>
> Yes, BU 2 employees who had TRICARE and were disenrolled or denied enrollment into the Health Cash July 1, 2016, to current will be allowed to enroll.

Negotiations for Current CSLEA Agreement

In May 2019, CSLEA and the State began negotiations for the 2019-2023 MOU. CSLEA proposed increasing the CoBen cash payment to employees who were enrolled in TRICARE, assuming they still were eligible employees. The State rejected it and proposed adding language that expressly stated that employees with health coverage through TRICARE, Medicare, Medi-Cal, or Covered California "or other forms of individual health coverage, as defined by CalHR" would be ineligible for cash-in-lieu payments. (Un. Ex. 4) Angela Acker, health policy analyst at CalHR, drafted the language. She testified that the amendment explicitly excluding TRICARE and the other programs from the Cash Option was to clarify how CalHR had implemented the CoBen cash benefit. CalHR wanted specificity due to the CASE grievances and arbitrations. During the May 24 session, a CalHR bargaining team member from the Benefits section stated that the proposed language on TRICARE and the other specified coverage was consistent with and required by the ACA. (Un. Ex. 4)

The State also proposed adding Section 10.XX "Compliance with State and Federal Law" to the MOU to give CalHR the authority to make changes to BU 7 health and welfare benefits "when CalHR determines such changes are necessary in order to comply with state or federal law." (Un. Ex. 4 at 031, 039) The proposal would have made the section non-arbitrable.

Alarmed about the proposal, CSLEA negotiator Ryan Navarre researched the TRICARE issue and found a summary of the Harris award from January 2019. Clark confronted Izon about the award, both by email (Un. Ex. 5, 043) and in person, but Izon said she had not known about it when she passed the proposals on May 24.

On June 19, 2019, a CASE representative emailed Navarre a copy of the April 8 letter to CASE and the FAQs. (Un. Ex. 5, 048)

At the bargaining table on July 12, 2019. CSLEA refused to accept the State's proposal and proposed that the State treat BU7 employees the same as BU 2 employees. The State refused, but withdrew the proposals, saying the parties would keep the status quo and maintain their positions while the State waited for guidance from the federal government. (R Ex. 15) They rolled over the language from the 2016-19 MOU. The State's bargaining notes indicate Izon stated that the State was expecting federal guidance soon, that it would communicate to the Union "and let the cookie crumble…" She continued that hopefully it would not be in dispute much longer. (R. Ex. 15, 0161) Clark testified the parties' mutual understanding was that employees with TRICARE might be eligible for the cash-in-lieu benefit, depending on the guidance the State received from the federal government. CSLEA emphasized at the table that, had the Union known before of the legal question and challenge, its response would have been different.

Local 2881 Grievance Abeyance Agreement

Clark told Messing about the results of the CASE litigation in June 2019. On June 26, 2019, Messing requested that CalHR recognize TRICARE as "qualifying group health coverage" for purposes of cash-in-lieu benefit eligibility. (Jt. Ex. 2, 011) He attached the April 8, 2019 letter to CASE that indicated health coverage through TRICARE "may now be eligible." (Id., 012)

On July 12, 2019, he and Nguyen met to discuss the issue and agreed to hold deadlines for filing a grievance in abeyance while Nguyen investigated. (Jt. Ex. 2, 015)

The Grievances

After waiting months for federal guidance, CSLEA decided to file a grievance over the issue of TRICARE eligibility on February 28, 2020 (Jt. Ex. 1), which was also a pay day (Un. Ex. 6). In response to the State's claims of untimeliness, CSLEA counsel Gary Messing explained that it was not until May 2019 that CSLEA learned that the policy change was not made to comply with federal law as determined by a court ruling or legislation. (Jt. Ex. 2, 007)

Local 2881 filed its grievance a week later on March 6, 2020, charging that the State had violated Section 11.1 of its 2017-21 MOU when it denied cash-in-lieu payments to employees with coverage through TRICARE. (Jt. Ex. 2) Its demand for arbitration included as grounds violation of sections 16.1, 16.1.2.3 and 16.2. Local 2881 amended its grievance on May 26, 2020 to include similar claims for employees covered by Medicare, Medi-Cal and Covered California. (Jt. Ex. 2, at 023-24). The parties agreed to consolidate the cases for arbitration.

POSITION OF THE UNION

The State violated Article sections 10.1(A)(2), 5.4, or 20.1 of the 2019-2023 Bargaining Unit 7 MOU and sections 11.1.1.2.4, 11.1.1.2.5, 16.1, or 16.2 of the 2017-2021 Bargaining Unit 8 MOU by prohibiting employees with health coverage through TRICARE, Medicare, Medi-Cal, and Covered California from participating in the CoBen Cash Option Program.

As early as August 2016, the State knew that the 2015 policy change might not be necessary to comply with the ACA. The Unions were unaware of this fact until mid-2019. When they demanded treatment equal to the State's allowance of TRICARE as qualifying coverage in BU 2, the State refused.

The grievances were timely filed under the continuing violation doctrine. The doctrine applies to compensation and benefits grievances where the benefit is paid on a recurring basis. Here, the violation continued beyond the initial change in policy, as the employees are denied the benefit monthly. They were due to receive the payment on

February 28, 2020. Eligible BU 8 employees were due to receive payment on June 28, 2019, less than 20 calendar days before July 12, 2019, when CalHR and Local 2881 agreed to hold the grievance deadlines in abeyance. The grievances involve a large number of affected employees. If not the continuing violation doctrine, the continuous accrual doctrine makes the grievances timely.

The Unions acted promptly after discovering the violations. They stated their objections, but agreed to hold grievances in abeyance while the State tried to obtain federal guidance. They filed grievances after the State did not timely provide more information. Arbitrators have previously applied the continuing violation doctrine under MOUs for both these bargaining units. The cases the State cites did not involve these bargaining units and involved a long delay between the time of discovery and filing a grievance. Here, the Unions reasonably relied on the State's representations about the federal law until they discovered the developments in BU 2.

The State withheld information from the Unions and continued to represent that the ACA forbid cash payments to employees enrolled in TRICARE, Medicare, Medi-Cal and Covered California. The Unions reasonably relied on the State's misrepresentations and filed no grievances. The Arbitrator should find the grievances timely because the State concealed information relevant to collective bargaining and made misrepresentations. The State should be equitably estopped from asserting deadlines. Any prejudice to the State is due to its own bad faith conduct. It did not show it subpoenaed absent witnesses or that other witnesses did not have the same information.

"Qualified group health insurance" is ambiguous. It is not defined in the MOU and does not have an ordinary or popular meaning. It was a creation of CalHR. As federal regulatory guidance refers only to "group health plans," CalHR's phrase implies that the reader must look outside the contract to determine whether a plan is qualifying. A mutual mistake of law negates the Unions' consent to the State's preferred meaning. Uncertainty should be construed against the party who created the uncertainty, here the State. TRICARE can reasonably be deemed qualifying group health coverage because it is based on military service.

The Unions' consent to the language amendment was initially based on a mutual mistake of law. After the Collins award, it was based on unilateral mistake of law and the State's material misrepresentation. The State has no clear support for its interpretation. The ACA prohibits making pre-tax payments toward an employee's premiums for TRICARE. The regulatory guidance does not address cash-in-lieu payments. Cash-in-lieu payments are not an HRA or an employer payment plan, but an equity benefit. They are subject to different IRS rules.

CalHR knew it stood on shaky ground when Manwiller represented to Local 2881 in December 2016, that the ACA prevented the State from treating TRICARE as eligible health coverage for purposes of the cash benefit. Its exemption of BU 2 from the policy effectively concedes its mistake. The State's conduct during its 2019 negotiations with CSLEA indicates the State knew the CASE litigation undermined its position. Otherwise, it would not have proposed an express exclusion of TRICARE from eligible health coverage or a provision giving it the authority to change benefits based on its own legal interpretation with no arbitration challenge available. Acker admitted as much. CalHR even hid the information from its outside negotiator. It knew the Union had a mistaken view of the law and did not correct that mistake. Even innocent misrepresentation is grounds for relief. The Unions reasonably relied on the State's misrepresentations to the detriment of hundreds of employees.

Management rights clauses in the MOU do not authorize the violations. To the extent they authorize the State to make program changes necessary to comply with the law, they do not authorize changes due to mistaken or unsupported interpretations of law. Bargaining was required under CSLEA MOU section 20.1.

Local 2881's MOU contains a "no diminution" clause that prohibits the State from making changes that would result in a diminution of "substantial monetary employee benefits" during the term of the MOU. Section 11.26 does not excuse its violation of the "no diminution" clause.

Granting the requested relief will not result in an unenforceable award. The MOUs already include an obligation to make cash-in-lieu payments. There was no specification of the number of recipients when the legislature appropriated the funds.

Back pay should be retroactive to 2016, or the first pay date in the current MOUs, since the Unions did not know of the basis of the grievances at the time due to no fault of their own.

The grievances should be granted. The Arbitrator should order the State to cease and desist from continuing to implement the 2015 change in policy and order the State to make affected employees in Bargaining Units 7 and 8 whole for the years in which they were improperly denied eligibility for cash-in-lieu benefits.

POSITION OF THE EMPLOYER

The State did not violate the MOUs. The State has had an open, uniform and widely-publicized practice of excluding from the Cash Option Program employees enrolled in TRICARE, Medicare, Medi-Cal, and Covered California.

The grievances were untimely filed. The Unions knew about the facts underlying their claim in 2015. The MOUs contain clear grievance-filing deadlines within which to file after the grievant first discovers or should reasonably have known of the alleged violation. CalHR notified the Unions in May and June 2015. Employees learned of the changes in July 2015. Unlike another union, these Unions did not file grievances at the time.

The continuing violation theory does not apply when an employer is merely enforcing a policy that has been in effect for many years and the grievant has been aware of the policy. Arbitrators have rejected the theory when the Union has delayed filing after becoming aware of the circumstances.

The Local 2881 MOU effectively prohibits the continuing violation theory, as it limits the timeline to within 20 days after the date of the Grievant's "first awareness of an alleged continuing violation."

The Unions' discovery of the Harris or Collins awards does not render the grievances timely. Discovery of a new legal theory is insufficient to revive an otherwise stale claim. The grievances were filed well after the awards were issued.

Also, the doctrine of laches applies since the Unions acquiesced to the policy and the State was prejudiced by the loss of material evidence. Witnesses struggled to remember what happened during bargaining. And it is much harder to address a policy that has been applied statewide than resolving issues at the beginning.

The evidence shows the parties agreed that employees enrolled in TRICARE, Medicare, Medi-Cal, and Covered California would be barred from receiving cash-in-lieu payments. The negotiators knew what "qualifying group health coverage" meant. Employees, including Union stewards, received notices of the change in policy in 2015, and hundreds of employees lost cash-in-lieu payments, but no grievances were filed in BU 7 or 8.

The State has actively enforced the policy continuously since 2015. It has been a practice clearly enunciated and mutually accepted since 2015. The Unions voiced no objections and filed no grievances for four years.

CalHR's administrative policies supplement the MOU and are binding on the parties under Section 10.1(E) of the CSLEA MOU and section 11.15 of the BU 8 MOU. *Stoetzl*[2] holds that CalHR administrative policies are quasi-legislative rules.

The no diminution clause does not help Local 2881 because it agreed to the change in language.

As a result of two separate arbitration decisions, employees in BU 2 are currently exempt from the State's Cash Option policy of excluding employees with individual coverage. The awards are not binding on the State with respect to the interpretation of any other MOU. The Harris award was specifically based on the fact that CASE had disputed CalHR's interpretation from the beginning.

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[2] *Stoetzl v. Dept. of Human Resources* (2019) 7 Cal.5th 718.

The State made no false representations. The State had legal advice that the ACA would bar payments to enrollees in TRICARE and the other plans. Other employers interpret the ACA the same way. Arbitrators Harris and Collins did not find that the State's interpretation was incorrect. Neither did the Superior Court. The Unions presented no authority that the State's position is erroneous. Whether the policy is actually required by the ACA is beyond the scope of the stipulated issues in this case.

The State's silence about the arbitration awards does not qualify as misrepresentation unless it had a duty to speak. Here, the State had no duty to inform the Unions of awards in another bargaining unit. The facts were distinguishable from circumstances in BU 7 and 8, and there was no authoritative interpretation of the ACA requirements. CASE had always disputed CalHR's interpretation, including during negotiations in 2016 when it agreed to add the phrase, "qualifying group health coverage." The Collins award was based on different contract language.

The State's attempt in 2019 bargaining to specify TRICARE and the other barred sources was a proposal to clarify the language. CLSEA's rejection of the proposal did not rescind the policy or the agreement.

The grievances should be denied.

DISCUSSION

Timeliness of CSLEA Grievance

To determine whether the CSLEA grievance was timely filed, the Arbitrator must ascertain the "event or circumstances occasioning the grievance." The CSLEA grievance identifies the circumstances as "failing to provide Consolidated Benefit (CoBen) cash-in-lieu payments to CSLEA members eligible for such payments due to their healthcare coverage through enrollment with TRICARE." CSLEA's assertion is that employees with TRICARE are enrolled in qualifying group health coverage and therefore eligible for cash-in-lieu payments that are made monthly to eligible employees. Each time they are not paid is another instance of a continuing violation.

Grievances relating to recurring payments are often considered continuing violations even if they stem from a mistake or policy decision that was made long before the grievance was filed. CSLEA's grievance falls within the continuing violation theory.

CalHR argues that the prohibition on participation of employees with health coverage through TRICARE, Medicare, Medi-Cal, and Covered California in the CoBen Cash Option Program began in 2015, making the grievance untimely. However, CalHR ignores a significant new circumstance—CSLEA's discovery on June 19, 2019, of the fact that the State was allowing employees covered by TRICARE in BU 2 to participate in the Cash Option Program. This fact indicated that the State's policy and initial legal rationale for the exclusion of TRICARE from "qualifying group health coverage" were not being uniformly applied to TRICARE.

CSLEA was already concerned about arbitration news from CASE and had contacted Izon about its concerns in May. On July 12, 2019, CSLEA demanded the same treatment as CASE was receiving with the respect to the cash option, but the Employer refused. The parties decided to wait for federal guidance and rolled over the prior contract language. Meanwhile, despite clear objections from CLSEA, the Employer continued to deny the cash option benefits to employees during open enrollment for 2020 and for employees that may have become eligible to apply for the cash option at other times during the year.

Thus, CSLEA discovered the fact that the State was not treating TRICARE as non-qualifying coverage for cash benefits for some employees. It promptly voiced its concerns to the State. The parties decided to wait for federal guidance that would resolve the dispute. Eventually, when it did file a grievance, it filed within 14 days of a pay date. The dispute regarding TRICARE is arbitrable.

CalHR contends that the doctrine of laches should apply due to the length of time between the 2015 policy change and the grievance. It points to unavailable witnesses and faded memories. Two witnesses had retired or left CalHR, but there is no evidence that either were subpoenaed, or even that Samaniego had left state service. As the Unions are no longer contending that they did not have notice of the 2015 change, the testimony of

the two witnesses and other witnesses to events in the Spring and Summer of 2015 is not crucial to the issues before the Arbitrator. There were many witnesses to the negotiations in 2016 and 2017, but the State did not explain why those witnesses were not called to testify. The parties have official notetakers, and there is no evidence that the official notes are not available.

The State argues that the delay prevented it from resolving issues before statewide implementation of the policy. However, the State already had an objection from one union from the beginning, which it did not resolve until 2019. There is no reason to believe it would have more quickly resolved objections from CSLEA and Local 2881.

A matter found arbitrable based on the continuing violation doctrine is timely for events falling within the grievance filing period of 14 days.

Timeliness of Cal Fire Local 2881 Grievance

To determine whether the Local 2881 grievance was timely filed, the Arbitrator must ascertain the "alleged violation" that gave rise to the grievance. The Union discovered in June 2020, that the State was allowing employees covered by TRICARE in BU 2 to participate in the Cash Option Program rather than applying the 2015 policy. Messing requested on June 26, 2019, that CalHR recognize TRICARE as "qualifying group health coverage" for purposes of cash-in-lieu benefit eligibility. On July 12, 2019, he and Nguyen met to discuss the issue and agreed to hold grievance-filing deadlines in abeyance. (Jt. Ex. 2, 011) There is no evidence that agreement expired. The State has not shown that this agreement to hold deadlines in abeyance occurred more than 20 days after Local 2881's knowledge of the State's acceptance of TRICARE as qualifying group coverage in BU2.

The State argues that the discovery of a legal theory with which to challenge the exclusion of various sources of health benefits from the Cash Option program does not extend the grievance-filing deadline. But it is discovery of the fact that the State made some employees with TRICARE health coverage eligible to receive the cash option and its refusal to extend that treatment to BU8 that make the dispute arbitrable.

The grievance is arbitrable for payments due from June 2019.

The Unions argue that the State should be equitably estopped from asserting any timeliness defenses because it made misrepresentations. The issue of misrepresentation is more fully addressed below, but in short, there is no evidence that CalHR's interpretation is definitely erroneous. There also is no explanation why CalHR had a duty to tell the Unions in June 2017, that a Superior Court had found the law was not clearly and explicitly applicable to provision of Cash Option benefits to TRICARE enrollees.

Contractual Obligations

The basic question is whether the parties' MOUs obligate the State to make cash-in-lieu payments to employees who have coverage through TRICARE, Medicare, Medi-Cal, and Covered California. The State contends that employees with this coverage are not enrolled in "qualifying group health coverage" that would make them eligible for cash payments. Thus, the Arbitrator must determine the parties' intent when they agreed to amend the language to add "qualifying group" to the prior language, which read, "If the employee declines a health benefit plan which is administered or approved by CalPERS and certifies health coverage from another source, the employee's dental benefit enrollment party code will determine the amount of the contribution."

The amended language is not clear. There is no definition in either MOU of "qualifying group health coverage." There is no evidence it is a legal term of art. It is not a phrase used in the IRS guidance. It is therefore appropriate to look outside the contract language to ascertain its meaning.

It is clear that the impetus for the exclusion of TRICARE and the other coverage was due to the enactment of the ACA and particular regulatory guidance that indicated it might be unlawful to make payments to employees who had coverage through TRICARE and the other specified sources. The payments could subject the State to penalties and other tax implications if it continued them. The State's intent was to exclude from the Cash Option program those sources of coverage that it had been advised would subject it to penalties and taxes. CalHR communicated to the Unions what coverage would be excluded from eligibility under this rationale. The notices to Unions in 2015 and the PML

all point to the ACA restrictions as the reason for the change, indicating that there would have been no change in policy had the State not believed the ACA prohibited payments to employees with the specified health coverage.

CSLEA counsel Clark admitted that he had been notified of the specific health care coverage that would be excluded from the Cash Option program in 2015, and understood that the 2016 MOU amendment referring to "qualifying group health coverage" would exclude TRICARE, Medicare, Medi-Cal, and Covered California. Local 2881 counsel Messing understood that the addition of "qualifying group" health coverage would likely affect TRICARE, Medicare, and Medi-Cal enrollees because Manwiller asserted that the ACA required those plans to be excluded.

However, there is no evidence that CSLEA or Local 2881 agreed that TRICARE or any other health coverage would be excluded from the Cash Option program if it were found that the ACA did not in fact prohibit cash-in-lieu payments to employees enrolled in the particular health coverage. This intent was obvious in bargaining in 2016, and in negotiations with CSLEA in 2019. In fact, in 2016, Manwiller indicated to CSLEA that the intent of the proposal was to conform to ACA requirements. Manwiller told Local 2881 the State had "no choice" with respect to TRICARE due to ACA requirements. Izon indicated in 2019, that if the state received guidance that the ACA did not in fact prohibit cash-in-lieu payments to them, employees with TRICARE could be eligible.

Similar to the mutual intent of the parties in 2016 negotiations, the past practice of the parties that excluded the specified sources of coverage dating back to 2015 is limited to compliance with the requirements of the ACA. Practices are no broader than the circumstances under which they arose. TRICARE and the other sources are not categorically non-qualified if appropriate authority were to find otherwise.

CalHR contends that TRICARE and the other sources are excluded regardless of contract language because its administrative policies supplement the MOU and are binding on the parties under section 10.1(E) of the CSLEA MOU and section 11.15 of the

BU 8 MOU.[3] The cited MOU provisions make employees subject to state and federal laws and "related administrative provisions adopted by CalHR." However, there is an ambiguity whether the word "related" means related to laws or related to the FlexElect program. Arbitrator Harris interpreted the identical phrase in the CASE MOU to mean administrative provisions related to state and federal laws.[4] Even if the phrase is interpreted as administrative provisions related to the FlexElect program, the PML memorandum and HR Manual are based on the premise that the eligibility rules are "to conform to the market reform provisions of the ...ACA,"(R Ex. 1) or refer to the ACA as the source of authority (R Ex. 2). Therefore, CalHR did not designate TRICARE and the other sources as non-qualifying by arbitrary fiat, but because of the ACA requirements.

The problem with the Unions' contention is that there is no evidence that the regulatory guidance is clear or changed sufficiently before 2019, or that authoritative sources have found that the ACA does not bar cash-in-lieu payments to enrollees in TRICARE or the other sources. There was evidence of at least one other large employer who similarly excludes employees covered by TRICARE and the other specified coverage from eligibility. The Arbitrator finds plausible that the Cash Option program is not an employer payment plan because it does not reimburse substantiated medical costs or premium payments, but the Arbitrator has not been sufficiently briefed on the legal issues to make a determination that inclusion of TRICARE in the Cash Option program would not run afoul of the law. In addition, although there was reference to final rules from the IRS that may have loosened some of the regulations in 2019, the Arbitrator was not asked to and did not try to interpret them. The State asserts that interpretation of the law is not within scope of the stipulated issues.

In sum, the Unions were aware at the time of the 2016 negotiations that TRICARE and the other specified health coverage would make an employee ineligible

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[3] It also contends that *Stoetzl* holds that CalHR administrative policies are quasi-legislative rules. The holding in *Stoetzl* to which CalHR refers applied only to the Court's decision regarding salaries of unrepresented employees, and it is not clear that the legislature delegated similar authority to CalHR for determination of health benefits for represented employees.

[4] "In the arbitrator's judgment, the references to "any related administrative provisions adopted by CalHR" assumes that the State may adopt administrative provisions in order to implement existing state and federal laws. The provision does not authorize the State to implement the advice of its lawyers when the advice is based on unsupported legal interpretations that are controversial and untested." (Jt. Ex. 10, 0171)

for cash-in-lieu benefits, but only because the ACA prohibited payments to employees enrolled in that coverage. There is no evidence of definitive guidance or authoritative ruling that shows the State's legal interpretation of regulatory guidance (IRS Notice 2015-17 and others) is correct or incorrect. Unless or until there is a change in the law or such definitive guidance or authoritative ruling that the ACA does not prohibit the cash-in-lieu payments, the exclusion from the Cash Option program for employees with coverage from TRICARE and the specified sources does not violate the MOUs because the parties understood that they would be excluded from receiving the cash payments for legal reasons.

Mutual/Unilateral Mistake

The Unions argue that mutual mistake of law—and later unilateral mistake of law—entitles them to relief. It is true that the Unions had a mistaken impression that the ACA clearly prohibited cash-in-lieu payments to employees covered by TRICARE and the other specified sources. This turned out not to be true. But this error was a mistaken belief in how clear and settled the state of the law was rather than a mistake of law. CalHR likely had a somewhat different understanding based on the fact that it had read the outside counsel's opinion and knew the actual analysis that led to the conclusions it eventually implemented.

It has not been shown that CalHR's view of the law is mistaken. The evidence indicates the parties still have not received any definitive guidance from the federal government or the courts—or even general consensus—that states whether or not providing a flat cash after-tax benefit (not a reimbursement) to employees enrolled in TRICARE or other programs violates the ACA. Therefore, there was no mutual mistake of law.[5]

Just because there is no clear, authoritative support for the State's interpretation does not mean there was a misrepresentation when State negotiators were silent about

[5] The Unions argue that CalHR has effectively conceded its mistake by its April 2019 change of practice in BU 2, but many cost and risk calculations enter choices to initiate litigation, and the Arbitrator has no evidence what factors prevailed.

arbitration developments. In the first CASE arbitration, Arbitrator Collins expressly made no finding about the merits of the ACA interpretation. The decision was issued after the CSLEA tentative agreement and only two weeks before legislative approval of the new language. To the extent that the Unions contend the State was required to tell them that CASE had filed a grievance challenging the 2015 policy, the Arbitrator has no evidence that the Unions ever requested such information or that the State had a duty to tell them about a grievance filed by another union for a different bargaining unit.

The parties were not in negotiations when the Superior Court issued its decision in June 2017, which was after ratification and legislative approval of Local 2881's 2017-2021 MOU. The Superior Court also did not pronounce that CalHR's interpretation was wrong. Its attempt to interpret the law was in the context of determining whether the law was sufficiently clear and explicit to constitute a public policy that would require vacating an arbitration award. It found no clear and explicit law that prevented enforcement of CASE's MOU provisions requiring payment of the cash-in-lieu benefit to enrollees in TRICARE. The court went on to express some doubts about CalHR's stance in light of some 2016 changes in regulatory guidance, but there was no such ruling, in light of "the court's own lack of certainty." (Jt. Ex. 11, 0187)

Not only is this court decision insufficient to show a mistake of law, there is no showing that it imposed on CalHR a duty to tell the Unions. They were not at the time involved in negotiations or contractual disputes relating to the benefit. In 2019, CSLEA discovered the arbitration awards, unsettled nature of the law, and change in benefit for Unit 2 before it agreed to any change in language. Thus, any concealment or misrepresentation in 2019 has no effect on consent to the 2016 language change or the enforceability of the current MOU.

No Diminution Clause and Savings Clauses

Local 2881 contends that its MOU contains a "no diminution" clause in Section 16.1.2.3 that prohibits the State from making changes that would result in a diminution of "substantial monetary employee benefits" during the term of the MOU unless the Union has agreed. This argument is unavailing. The clause applies to mid-contract changes in

benefits and would only address the initial change to benefits in late 2015. Beginning January 2017, a new contract became effective with new language to which the Union had agreed. Thus, any violation of the no diminution clause ceased in January 2017, and the grievance was not timely with respect to the no diminution allegation. Similarly, the time for CSLEA to file a grievance under section 20.1 was at the time of the mid-contract change.

The savings clauses in the respective agreements are not applicable. No provision in the Cash Option program pre-2015 or as it was revised in 2015 has been found unlawful by a court of competent jurisdiction.

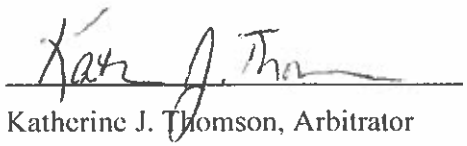
Conclusion

The parties never agreed to exclude from the Cash Option program employees enrolled in TRICARE, Medicare, Medi-Cal or Covered California if the law permits their inclusion. However, the State did not violate the specified sections of the MOUs because it has not been shown to this Arbitrator that the ACA permits cash-in-lieu payments to employees enrolled in TRICARE, Medicare, Medi-Cal or Covered California.

AWARD

The grievances were timely. The grievances are denied.

DATE: February 7, 2022.



Katherine J. Thomson, Arbitrator