sSTATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of Arbitration Between:

BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF LOCAL 282	PERB CASE NO. A2004-261

-And-

THE CITY OF BUFFALO

Re: Single Health Insurance Carrier

Before: Dennis J. Campagna, Esq.

Hearing Dates: October 14th & November 12, 2010
Hearing Location: CJG Law Offices, Hodgson Russ Law Offices

APPEARANCES:

A. For the Union
E. Joseph Giroux, Esq. – Local 282 Counsel
Daniel Cunningham, Local 282 President

B. For the City
Jeffrey F. Swiatek, Esq., Counsel for the City
Omar Price, Esq. – Assistant Corporation Counsel
Mary Scarpine, Esq. – Assistant Corporation Counsel

THE ISSUE

What is the appropriate remedy in light of circumstances that arose subsequent to the December 19, 2008 Interim Decision issued by the Undersigned?

BACKGROUND

A. The Parties to This Matter

The City of Buffalo, ("City") and Buffalo Professional Firefighters Association, IAFF Local 282, ("Union" or "Local 282") are parties to a Collective Bargaining Agreement with effective dates July 1, 1984 through June 30, 1986. ("CBA" or "Contract") Prior to July 1, 1984, the CBA was modified by an Interest Arbitration Award issued pursuant to Section 209 of the N.Y. Civil

Service Law and chaired by Arbitrator Stuart Pohl covering the period July 1, 1997 through June 30, 2000. The parties later entered into a Memorandum of Understanding covering the period from July 1, 2000 through June 30, 2002. Subsequently, the Interest Arbitration Panel chaired by Arbitrator Paul G. Kell issued its Award covering the period July 1, 1986 through June 30, 1988. (CBA at pages 54-56) Subsequently, the Interest Arbitration Panel chaired by Arbitrator Douglas Bantle issued its Award covering the period July 1, 1988 through June 30, 1990. (Id. pages 57-60) The City Common Council issued its approval for the monetary increases associated with each such Award, and their approvals are appended to the CBA at pages 61-66.

City Unions, including Local 282, (and the Buffalo Police Benevolent Association ["PBA"]), achieved the right through Collective Bargaining and Interest Arbitration to select from among three health insurance carriers for health insurance coverage. Those three carriers were Blue Cross/Blue Shield, Independent Health and Univera. Blue Cross/Blue Shield offered both the "traditional" indemnity plan as well as a community rated HMO plan known as Community Blue. The record giving rise to the December 19, 2008 Award issued by the Undersigned reflected that a majority of Local 282 members chose health insurance coverage through the Independent Health plan.

B. <u>The December 19 2008 Interim Decision Issued by the Undersigned</u>

Following good faith negotiations by and between the City and Local 202, the parties signed a Memorandum of Agreement on June 6, 2004 (MOA"). The MOA, if approved, would have permitted the City to provide health insurance through a single provider. Subsequent to the execution of the MOA, Local 282 moved to ratify on June 29, 2004. The Local 282 membership voted 3:1 against the MOA despite former Local 282 President Joseph Foley's strong lobbying effort in support of it. The City was subsequently notified of Local 282's rejection of the MOA, and on or about July 1, 2004 unilaterally imposed the single provider. The instant grievance followed and in September 2004, was advanced to arbitration. On December 19, 2008 following a four day hearing, the Undersigned made the following findings:

As noted above, Local 282's membership overwhelmingly rejected the terms of the June 6, 2004 MOA at its June 29, 2004 ratification vote. The record evidence demonstrates that the City was informed of the results of this vote. Given that a Local 282 ratification was a crucial element in the creation of a "mutual" agreement, the City's implementation of the single carrier health insurance plan without Local 282's mutual agreement deprived bargaining unit members of the benefit of choosing from among the three health insurance providers - Blue Cross/Blue Shield, Independent Health and Univera. In addition, given the current status of the City under the BFSA, the City's action has interfered with the future efforts of Local 282 to bargain effectively. As a result, the efforts by Blue Cross/Blue Shield together with City benefit specialists to "replicate" all of the choices, services and coverages provided under the former Health Insurance benefit fails to render the City's unilateral action cosmetic or inconsequential.

Based on this finding and conclusion, this Arbitrator issued the following Award:

1. Given my determination that the City's unilateral implementation of the single health insurance provider violated the CBA, there remains the question of an appropriate remedy. Local 282 seeks a restoration of the *status quo ante* which prevailed prior to July 1, 2004. However, this is not possible at this time given the current state of City/Local 282 litigation efforts.
2. Subsequent to the City's implementation of the single insurance provider on or about July 1, 2004, the City and Local 282 participated in an Interest Arbitration chaired by Arbitrator Thomas Rinaldo. As noted above, the Rinaldo Panel directed that "Health Insurance will be provided under the terms of the June 6, 2004 Memorandum of Agreement executed by the Parties effective June 30, 2004 or as soon thereafter as it may be implemented." As of the date of this Award, the City has sought leave to appeal to the New York State Court of Appeals in its effort to overturn the Appellate Division, Fourth Department's vacatur of the Health Insurance portion of the Rinaldo Panel award. That action by the City is pending. Until such time as there is finality in this litigation process, CPLR § 5519(a)(1) requires that the vacatur be stayed. Accordingly, any remedy must take this issue into consideration.
3. Given the foregoing, the appropriate remedy will consist of the continuation of the relevant terms of the Rinaldo Panel award through the implementation of the June 6, 2004 MOU for that period of time required by CPLR § 5519(a)(1). Should the City be successful in its litigation efforts, the issue before me is moot given the Court's blessing of the Rinaldo Panel Award. However, assuming, *arguendo*, that the Court of Appeals denies the City's Leave to

> Appeal, or in the alternative, grants the City's Leave to Appeal but upholds the decision of the Appellate Division, Fourth Judicial Department to vacate the Health Insurance portion of the Rinaldo Panel Award, absent an agreement between Local 282 and the City to retain the single carrier or another mutually agreeable alternative, or absent a directive from an Interest Arbitration Panel pursuant to N.Y. Civ. Serv. Law § 209 to the contrary, the City shall be required to restore the *status quo ante* which prevailed prior to its July 1, 2004 implementation of the terms of the June 6, 2004 MOA. In order to provide a smooth transition to the multi carrier health plan, the District shall have two (2) months from the date Local 282 serves a written demand on the City to do so.

I expressly retained jurisdiction "[t]o resolve any disputes which may arise over the interpretation and implementation of this Award."

C. The Rinaldo Panel Interest Arbitration Award

Aside and apart from the negotiations between the City and Local 282 (as well as the other City Unions) over the issue of a single health insurance provider, Local 282 and the City engaged in collective negotiations for a contract to begin on July 1, 2002. Despite the efforts of the parties to negotiate a new collective bargaining agreement, several issues remained unresolved, resulting in the filing of a joint Declaration of Impasse on September 30, 2003. Mediation efforts were unsuccessful resulting in Local 282's filing for Compulsory Interest Arbitration pursuant to N.Y. Civ. Serv. Law §209 (4)(c) which caused the creation of a three-member panel pursuant to the Statute. The Panel consisted of Joseph Foley, the designated Employee Organization, Edward Piwowarczyk, Esq. the designated Employer member, and Panel Chair Thomas Rinaldo, Esq. Hearings were held over a six-day period in November 2004 and January 2005. The most contentious issue concerned wage increases. On July 18, 2005, the Arbitration Panel issued its Award. The Award was signed by the Messers. Rinaldo and Piwowarczyk. Relevant to the instant matter, the Panel majority issued a determination on Health Insurance. The Panel Majority prefaced its Health Insurance Award with the observation that the City "agreed to withdraw its health insurance proposal (City Proposal #3) based on its understanding that it had reached an agreement with [Local 282] on June 6, 2004, regarding health insurance." As noted

above, the City and Local 282's President signed a Memorandum of Agreement allowing the City to move to a single health insurance carrier whose premiums were based on an experienced-rated plan for all of its employees, with the exception at that time of members represented by the Buffalo PBA. The Panel majority noted, however, that Local 282 subsequently challenged the validity of the Memorandum of Agreement on the ground that it had not been ratified by its membership. Further, the Panel majority recognized that three grievances had been filed by Local 282 over the City's implementation of the terms of the MOA and that both parties had filed Improper Practice Charges with PERB that were still pending at the time the Panel issued its Award. Despite the ongoing dispute over the validity of the June 6, 2004 MOA, the Panel majority opined that it was "appropriate to put the health insurance issue to rest for the parties." In so doing, the Panel majority determined that health insurance for Local 282 unit members would be provided by the City under the terms of the June 6, 2004 MOA.

On October 5, 2005, Local 282 moved to vacate the Rinaldo Award pursuant to CPLR 7511 on the grounds that the Panel majority failed to provide a specific basis for its findings, thereby exceeding its authority. The court granted the petition and vacated the Award. Subsequently, in February 2008, the Appellate Division, Fourth Judicial Department, upheld the vacatur of the health insurance provision, noting that because of the dispute between the City and Local 282 over the validity of the MOA, "[w]hich dispute was acknowledged by the arbitration panel to still be pending, . . . health insurance benefits were not at the time the panel made its award a 'matter in dispute.' And the issue was not properly before it." (*In re Buffalo Professional Firefighters Ass'n., Inc.*, 50 A.D.3d 106, 112, 850 N.Y.S.2d 744, 749 (4th Dept. 2008) Joint Exhibit 8). On October 24, 2008, the City filed an application to the New York Court of Appeals for leave to appeal the determination of the Fourth Department.[1] At the time of the drafting of my Interim Opinion and Award in December 2008, the City's application was pending determination by the Court.

[1] It was the City's stated position that pending a final determination of its appeal to the Court of Appeals, that the vacatur was stayed by operation of CPLR 5519a)(1), and accordingly, the City was under no legal obligation to return to a multiple carrier health insurance program. Therefore, the City continued to provide Local 282 bargaining unit members with health insurance through the use of a single provider under the terms of the rejected June 6, 2004 MOA.

D. Relevant Events Subsequent to the December 19. 2008 Interim Award

Subsequent to my issuance of the December 19, 2008 Award noted above, on October 15, 2009, the N.Y. Court of Appeals issued its decision vacating the Rinaldo Panel Award in its entirety. In relevant part, the Court reasoned as follows:

> However, the Appellate Division erred in vacating only the health insurance portion of the arbitration award. The arbitration panel did not consider the issue of wages in isolation. Indeed, the arbitration panel explained that it was rejecting the City's wage proposal, but that it would generate savings for the City on the health insurance portion of the arbitration award. As the parties agree, the separate portions of the arbitration award were so interdependent, no part thereof could be vacated without affecting the merits of the remainder of the award. While the parties debate whether CPLR 7511 (c) is applicable here, we need not reach the issue.

Subsequent to the release of the Court of Appeals decision, the parties returned to the Rinaldo Panel in an effort to determine the elements of an Interest Arbitration Award covering the relevant two year period. When it became evident that the reconvened Rinaldo Panel would not be ruling in the issue of health insurance, Local 282 contacted the Undersigned in an effort to put to move forward with the unresolved issue dealing with the remedy portion of my December 19, 2008 Award. The City and Local 282, each represented by Counsel, convened on October 14, 2010 for the purpose of discussing the question of the remedy. The parties and the Undersigned met again on November 12, 2010. At this time, the parties discussed the issue of returning to the status quo ante and agreed that it was neither possible nor feasible[2] to do so for the following reasons:

1. Independent Health and Univera had informed the City that the products offered in 2004 covering the Local 282 bargaining unit no longer existed, and that they had no interest in recreating such products for a limited number of employees, and

[2] In the Selchick Remedy Award, discussed below, Arbitrator Selchick found that a return to the *status quo ante* "[w]as not prudent" since such a directive "[w]ould be issued more than five years after the contractual violation, would require the City to contract for insurance at a cost disadvantage, and, the Arbitrator is not at all persuaded that, at the end of the day, either party would be served by such a directive."

2. Even if Independent Health and Univera agreed to recreate health insurance products as they existed in 2004, the cost of providing such coverage would be cost prohibitive to the City.

In my December 19, 2008 Award, I expressly retained jurisdiction "[t]o resolve any disputes which may arise over the interpretation and implementation of this Award."

E. The 2009 and 2010 Arbitration Awards Issued by Arbitrator Jeffrey Selchick

Subsequent to the release of my December 19, 2008 Award in the instant matter, a grievance filed by the PBA was advanced to arbitration. At issue was the alleged violation of the Collective Bargaining Agreement between the City and the PBA occasioned by the City's unilateral move to a single carrier insurance plan, the identical plan the City imposed on Local 282. The City and the PBA selected Jeffrey Selchick to arbitrate their dispute. On April 22, 2009, Arbitrator Selchick found and concluded that:

1. The City violated Article XV and XXI of the Collective Bargaining Agreement by the actions it took regarding health insurance coverage for PBA bargaining unit members ad retirees who retired on or after July 1, 2004; and
2. In accordance with the parties' joint request, jurisdiction is expressly retained by this Arbitrator to receive further evidence and arguments on the question of remedy and to thereafter render a final Remedy for the contact violations found herein.

On or about September 17, 2009, N.Y.S. Supreme Court Justice Michalek denied the City's application to vacate the foregoing Award.

Subsequent to the release of the foregoing Award, the City and the PBA convened over a seven day period before Arbitrator Selchick for the purpose of presenting evidence and arguments on the question of Remedy. In a decision dated January 18, 2010, Arbitrator Selchick issued the following Award:

1. Within sixty (60) days of the date of this Award, the City shall reimburse all PBA members, and retirees who retired on or after July 1, 2004, for all health insurance contributions made by said members and retirees from that date forward, and;

2. The City is directed from the date of this Award forward to make 100% of all health insurance contributions for members and retirees, and;

3. Within sixty (60) days of the date of the PBA receives this Award, PBA members and retirees who have been required to make co-pays and out-of-pocket expenses that they would not have otherwise made if the City had not eliminated Independent Health and Univera shall submit all proof of loss to the City's counsel, unless another individual or office is identified by counsel, and said members and retirees within sixty (60) days of receipt of proof of loss should be compensated within sixty (60) days.

Arbitrator Selchick stated reasoning underlying his decision provided in relevant part:

> Significantly, the Arbitrator notes that the City's contractual violations included a failure on the City's part to continue to offer Univera and Independent Health. Prior to July 1, 2004, Blue Cross, Univera and Independent Health were the three health insurance plans. Members who selected Blue Cross Traditional, based on their date of hire, were required to make some contribution, in accordance with the Rabin Interest Arbitration Award and the parties' Agreements, based on the difference in premium costs between the highest cost plan and the second lowest cost plan. By taking away PBA members' right to select either Independent Health or Univera, and with the elimination of these plans, the contribution formula was impacted. In effect, the City's contractual violations meant that there was no longer any basis to calculate any difference in costs. As a result, at that point in time, there was only one plan and no basis to calculate the difference in costs. Therefore, it is the finding of his Arbitrator that there should be no employee contribution effective July 1 2004. Hence, all unit members who made contributions to health insurance should be reimbursed for those contributions. All such members and retirees who made contributions are entitled to a retroactive 100% reimbursement for all contributions made by said members, and those who have retired, since July 1, 2004. The City, from the date of this Award forward is now responsible for payment of all contributions of health insurance for all members and retirees entitled to the retroactive reimbursement.

Subsequent to the release of Arbitrator Selchick's Remedy Award, by Order dated July 13, 2010, N.Y.S. Supreme Court Justice Timothy Drury granted the PBA's petition to confirm "[t]he remedy portion of Arbitrator Selchick's decision."

F. Application of the Selchick Remedy Award in the Instant Matter

It is the City's position that the Selchick Remedy Award should not be adopted in the instant matter primarily due to the different circumstances that resulted in the grievances filed by the PBA and Local 282. In this regard, while Arbitrator Selchick found that the City's imposition of the single carrier plan violated the PBA's Collective Bargaining Agreement, I found that the City's imposition of the same single carrier plan on bargaining unit members represented by Local 282 subsequent to Local 282's notice to the City that its membership rejected the Memorandum of Agreement negotiated by the City and Local 282 over the single health insurance provider violated the Local 282 Collective Bargaining Agreement. Respectfully, this Arbitrator finds that whatever the cause, the City's action on the bargaining unit members represented by the PBA and those unit members represented by Local 282 was identical – the unilateral imposition of the single health insurance provider on the unit members of each Union. Accordingly, I find that the City's position represents a distinction without a difference. As a result, this Arbitrator finds and concludes that the reasoning underlying Arbitrator Selchick's Remedy Award is both sound and relevant in the instant matter. Accordingly, I find and conclude that such Remedy should be mirrored as applicable in this case. I so conclude for the following reasons:

First, the applicable language taken from the PBA Collective Bargaining Agreement (as modified the Interest Arbitration Award authored by Arbitrator Robert Rabin together with other applicable agreements between the City and the PBA) referenced in Arbitrator Selchick's Remedy Award essentially mirrors the applicable language in the Local 282 Agreement. In this regard, the 1998-2000 Interest Arbitration Award issued by Arbitrator Stuart Pohl provided the following health insurance language:

> a. Effective June 30, 2000, existing employees selecting to receive either of the two higher cost plans will pay 25% of the differential between the premium of the second lowest of the lowest HMO health insurance plans and the higher cost plan that employee selects for single coverage, or 15'% of the differential for family coverage, on a pre-lax basis.
>
> b. All employees hired into the bargaining unit on or after June 30.2000 and electing health insurance coverage from the City shall be required to either:

(1) Select either of the two (2) lowest cost plans to be full paid for by the City, or (2) Pay the full cost of the difference between the second lowest cost plan and the higher cost plan selected by the employee, on a pre-tax, basis.

c. Said agreement shall remain in effect until a new agreement on the subject is negotiated and agreed to, or until another Interest Arbitration Award is issued on the subject.

The Memorandum of Agreement executed by the City and Local 282 covering the period July 1, 2000 through June 30, 2002 provided in relevant part:

All employees hired after the execution of this Agreement, shall pay twenty-five (25%) percent to the monthly premium for the "Core Coverage" for individuals and fifteen (15%) percent of the monthly premium for the "Core Coverage" for family coverage. "Core Coverage" is understood to consist of the' least expensive Medical Insurance Option available at the time of hire. If a new hire elects enrollment in one of the more expensive plans, he/she will contribute in addition to the foregoing, one hundred (100%) percent of the difference between the cost of the selected plan and the cost of "Core Coverage".

Upon completion of four (4) years of service, with anniversary dates being calculated on the same oasis as for longevity entitlements, an employee's coverage becomes the same as for employees hired prior to execution of this Agreement.

The Interest Arbitration Award between the City and the PBA issued by Arbitrator Robert Rabin in December 1997 together with negotiated agreements thereafter mirror the foregoing language.

Second, it is significant that the under the terms of New York's Taylor Law, members of the Buffalo Police Department and Buffalo Fire Department provide "essential services" to the community, and as a result, are accorded benefits under the Taylor Law not afforded to other public employees who do not provide these "essential services." In this regard, the Preamble to the Local 282 CBA sets forth the City's recognition of this important fact by noting its Public Policy "[t]o promote harmonious and cooperative relationships between the City and its employees" through good faith negotiations together with the resolution of grievances arising under the terms of the CBA. Local 282's grievance in this case was filed in 2004, and it is time to bring this matter to its finality. Given the sound reasoning of Arbitrator Selchick's Remedy Award together with the identity of language in the PBA and Local 282 Agreements, there is no

need and the parties would not be well served by "reinventing the wheel" with the crafting of a different Remedy for Local 282. Accordingly, I hereby issue the following

AWARD

1. Within sixty (60) days of the date of this Award, the City shall reimburse all Local 282 members, and retirees who retired on or after July 1, 2004, for all health insurance contributions made by said members and retirees from that date forward, and;
2. The City is directed from the date of this Award forward to make 100% of all health insurance contributions for members and retirees, and;
3. Within sixty (60) days of the date of this Award, Local 282 members and retirees who have been required to make co-pays and out-of-pocket expenses that they would not have otherwise made if the City had not eliminated Independent Health and Univera shall submit all proof of loss to the City's counsel, unless another individual or office is identified by counsel, and said members and retirees within sixty (60) days of receipt of proof of loss should be compensated within sixty (60) days.
4. Whereas the City has advised this Arbitrator that it has appealed Judge Drury's July 13, 2010 decision to the Appellate Division, Fourth Judicial Department, solely on the application of Arbitrator Selchick's Award as it applies to those PBA bargaining unit members who retired on or after July 1, 2004, in the interest of judicial economy, the portion of the foregoing Award as it applies to this class of individuals shall be held in abeyance pending the final disposition of the City's appeal process. Thereinafter, those Local 282 unit members who retired on or after July 1, 2004 shall be bound by the final results of said appeal process.
5. Finally, this Arbitrator expressly retains jurisdiction of this matter to address any and all questions and/or disputes arising from this Remedy Award.

I, Dennis J. Campagna, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

NOVEMBER 19, 2010
Date

Dennis J. Campagna
Dennis J. Campagna, Arbitrator