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IN ARBITRATION PROCEEDINGS PURSUANT TO AGREEMENT OF THE PARTIES

In the matter of a controversy between

CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES, AND HEARING OFFICERS IN STATE EMPLOYMENT,

Union,

and

STATE OF CALIFORNIA (DEPARTMENT OF HUMAN RESOURCES),

Employer,

Involving the CoBen Cash Option Grievance.

OPINION AND AWARD
CalHR No. 16-02-0007

This grievance arbitration matter was submitted to Arbitrator Catherine Harris for final and binding decision pursuant to the Bargaining Unit 2 Memorandum of Understanding.

CASE General Counsel Patrick J. Whalen appeared on behalf of **CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES, AND HEARING OFFICERS IN STATE EMPLOYMENT** (herein "CASE"), the collective bargaining representative of Unit 2 members with TRICARE health coverage who have been denied the CoBen cash allowance (herein "the Grievants").[1]

The **STATE OF CALIFORNIA (DEPARTMENT OF HUMAN RESOURCES)** (herein "the State") was represented by Labor Relations Counsel David M. Villalba.[2]

A hearing was conducted on September 25, 2018 at Sacramento, California.[3] Each

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[1] Also present on behalf of CASE was Labor Relations Representative Monica Miner.

[2] The State's Affordable Care Act Program Coordinator Elaine Smith was also in attendance at the hearing.

[3] By agreement of the parties, the proceedings were transcribed and copies of the transcript were supplied to the arbitrator and the parties' representatives.

party was given the opportunity to present testimonial[4] and documentary[5] evidence, to cross-examine the other party's witnesses, and to make argument to the arbitrator. At the close of the hearing, a mutually agreeable briefing schedule was established.[6] On November 17, 2018, the record was closed and the matter was taken under submission.[7]

ISSUES IN DISPUTE

At the commencement of the proceeding, the parties advised the arbitrator that this matter is properly before the arbitrator for final and binding determination of the following issues:

> Issue number one, did the State violate sections 4.2, 4.3, 11.1 of the 2016-2019 Bargaining Unit 2 Memorandum of Understanding (MOU) by prohibiting employees with health coverage through TRICARE from participating in the CoBen Cash Option?

Issue number two, if so, what is the appropriate remedy, if any, under the MOU? The parties also jointly requested in the event that the arbitrator were to make a finding of a contract violation subject to an appropriate remedy under the MOU, that the arbitrator retain jurisdiction over implementation of the award for a period of ninety (90) days from the date of the award's issuance.

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[4] CASE presented the testimony of two bargaining unit members: Thomas Gilevich and Peter Flores, Jr. The State then called ACA Coordinator Elaine Smith, Deputy Director of Labor Relations Pam Manwiller and Occupational Development Specialist Bryan Bruno. CASE did not present any rebuttal testimony.

[5] At the commencement of the hearing, the arbitrator received the following joint exhibits into evidence: the Bargaining Unit 2 MOU (Joint Exh. "1"), the grievance package (Joint Exh. "2"), the Collins Award (Joint Exh. "3"), Order and Judgment Confirming Collins Award (Joint Exh. "4") and a joint submission of issues (Joint Exh. "5"). During the course of the hearing, the arbitrator also admitted various documents marked for identification as State Exhibits "A" through "H" and CASE Exhibits "1" and "2."

[6] At the close of the hearing, the parties mutually agreed to submit simultaneous post-hearing briefs to be filed by mail with the arbitrator no later than November 16, 2018 and served electronically on the opposing party on November 17. Consistent with the stipulation, both parties' post-hearing briefs had been received in the arbitrator's Sacramento office as of November 17.

[7] The parties agreed to allow the arbitrator 60 days from the closing of the record, i.e., receipt of post-hearing briefs, in which to issue her Opinion and Award by duplicate originals, regular mail, to the parties' representatives.

RELEVANT PROVISIONS OF THE AGREEMENT

The parties agree that the relevant agreement for purposes of resolving this dispute is the Bargaining Unit 2 MOU for the period July 1, 2016 through July 1, 2019 (herein "the current MOU") which contains the following provisions:

ARTICLE 4-GENERAL PROVISIONS

...

4.2 Savings Clause

Should any provision of this MOU be found unlawful by a court of competent jurisdiction, the remainder of the MOU 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).

4.3 Entire Agreement

A. This MOU sets forth the full and entire understanding of the parties regarding the matters contained herein, and any other prior or existing understanding or MOU by the parties, whether formal or informal, regarding any such matters are hereby superseded. Except as provided in this MOU, it is agreed and understood that each party to this MOU voluntarily waives its right to negotiate with respect to any matter raised in negotiations or covered in this MOU, for the duration of the MOU.

With respect to other matters within the scope of negotiations, negotiations may be required during the term of this MOU as provided in subsection b. below.

B. The parties agree that the provisions of this subsection shall apply only to matters which are not covered in this MOU.

The parties recognize that during the term of this MOU, it may be necessary for the State to make changes in areas within the scope of negotiations. Where the State finds it necessary to make such changes, the State shall notify CASE of the proposed change thirty (30) days prior to its proposed implementation.

The parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 2, when all three (3) of the following exist:

1. Where such changes would have an impact on working conditions of a significant number of employees in Unit 2;

2. Where the subject matter of the change is within the scope of representation pursuant to the Dills Act;

3. Where CASE requests to negotiate with the State.

Any agreement resulting from such negotiations shall be executed in writing and shall become an addendum to this MOU. If the parties are in disagreement as to whether a proposed change is subject to this Subsection,

such disagreement may be submitted to the arbitration procedure for resolution. The arbitrator's decision shall be binding. In the event negotiations on the proposed change are undertaken, any impasse which arises may be submitted to mediation pursuant to Section 3518 of the Dills Act.

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ARTICLE 11 - HEALTH AND WELFARE

11.1 Consolidated Benefits (CoBen) Program Description

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B. Health Benefits Eligibility

...

3. Enrollment Options

...

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 will receive $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.

...

e) 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. (The State will pay the premium cost of the dental plan and vision plan.) 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.

...

E. FlexElect Program

a) The State agrees to provide a flexible benefits program (FlexElect) under Internal Revenue Code Section 125 and related Sections 105 (b), 129 and 123 (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.

STATEMENT OF THE CASE

Background

Prior to June 2015, before the IRS had clarified the provisions of the Affordable Care

Act (ACA)[8] governing "employer payment plans," CalHR permitted employees with health coverage through TRICARE[9] to enroll in the collectively bargained CoBen Cash Option program. Per the terms of the current MOU, a monthly CoBen cash allowance of $130 (for declining enrollment in a state health plan) and $155 (for declining enrollment in a state dental plan) is provided in exchange for the State *not* having to pay its share of premiums. This program has been a benefit to both the State and employees represented by CASE insofar as the State avoids significant health costs and eligible Unit 2 members with TRICARE receive a cash benefit.

At the hearing, Elaine Smith, CalHR's ACA Program Coordinator since January of 2011, described her major responsibility as ensuring that the State complies with the employer-shared responsibility provisions of the ACA.[10] According to Smith, the instant dispute dates back to 2016 when the IRS issued a guidance to employers on how to implement certain aspects of the ACA. Smith testified that various "guidances" (not identified or produced at the hearing before this arbitrator)[11] issued by the U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS) in November of 2014 and February of 2015 raised some concerns about whether the collectively bargained CoBen Cash Option satisfies ACA requirements. As a result of these DOL and IRS guidances, CalHR sought legal advice from outside counsel, i.e., the Sacramento law firm of Hanson Bridgett.

The Hanson Bridgett Opinion

In March of 2015, Hanson Bridgett provided an opinion to the State that while the

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[8] The ACA is a shorthand reference to the Patient Protection and Affordable Care Act which was enacted on March 23, 2010.

[9] TRICARE is a health care benefits program available to active duty and retired members of the Armed Services.

[10] These provisions require employers to offer affordable health coverage to 95% of their employees and to comply with annual reporting requirements.

[11] These "guidances" are identified as part of a joint submission of stipulated facts in a 2016 arbitration proceeding before Arbitrator Doug Collins. The Collins decision was jointly submitted in this proceeding and contains a verbatim recitation of the stipulation.

CoBen Cash Option program is still viable, changes needed to be made to the program to ensure that there would be no violations of ACA requirements. This opinion is referenced in a sworn declaration of Elizabeth Masson, Esq., Hanson Bridgett, dated March 17, 2017, that was originally provided in support of the State's petition to vacate the Collins award (discussed in a subsequent section of this opinion and award) and which was presented by the State in this proceeding. The declaration references a legal opinion provided by a partner in the law firm, does not attach any opinion letter from the partner to the State, and contains no legal citations to any authorities supporting the opinion.[12]

One of the changes recommended by Hanson Bridgett was that TRICARE be excluded from the CoBen Cash Option on the grounds that it is *individual* (as opposed to group) health coverage.[13] After CalHR received this advice from Hanson Bridgett, the program that oversees the payment of the CoBen Cash Option worked to identify a process to require that the 30, 000 plus employees who were enrolled in the program statewide (including employees represented by other employee organizations other than CASE as well as management employees) re-certify their eligibility to continue to receive the benefit of the CoBen Cash Option.

The 2015 Decision to Discontinue the CoBen Option

Based on the new guidances, as interpreted by Hanson Bridgett, CalHR determined that, while it could continue to offer the CoBen Cash Option to employees who were

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[12] CASE made a public records request on April 7, 2016 for opinion letters and any other documents that support the State's decision to disallow CoBen cash payments to Unit 2 employees with TRICARE. No documents were produced in response to the request based on a claim of attorney-client privilege. The State argues in post-hearing brief, *without evidentiary support*, that the Hanson Bridgett opinion was based on a determination that transferring the burden of providing health insurance from the State to the federal government circumvents a key feature of the ACA, i.e., requiring employers to shoulder the burden of providing health insurance to their employees.

[13] In its post-hearing brief, the State relies on the aforementioned declaration of Elizabeth Masson to support this conclusion, i.e., her statement that "The IRS guidance published in February 2015 also provides that government-sponsored programs, such as TRICARE, are included in the definition of individual coverage for the purpose of determining whether an employment payment plan meets the requirements of the ACA."

enrolled in a qualifying "group" health plan, it could no longer offer the CoBen Cash Option to employees with TRICARE without running a substantial risk of violating the ACA. In order to avoid any potential exposure to what the State describes as "multi-million dollar penalties" ($100 per day per employee for 30, 000 employees),[14] the State decided to notice all the unions that it was unilaterally discontinuing the CoBen Cash Option for employees with TRICARE, Medicare and Medicaid. As a result of this decision, the Union filed a grievance that ultimately came before Arbitrator Doug Collins for final and binding determination.

The State's Notice to the Employee Organizations

On June 24, 2015 (prior to the filing of the grievance that led to issuance of the Collins award), all of the state employee organizations were notified of a potential change to eligibility for participation in the Cash Option program.[15] As an attachment to the e-mail, all state employee organizations were sent a Personnel Management Liaison (PML) which contains the following statements:

> Effective immediately, only employees who attest that they have other qualifying group health coverage are eligible to enroll in the state's FlexElect or CoBen Cash Option programs and receive cash in lieu of state-sponsored health coverage. Employees are not required to show proof of coverage.
>
> **Qualifying group health coverage includes health coverage that provides minimum value and is maintained by an employer or employee organization.**
>
> 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 even if the coverage provides minimum value. Emphasis supplied.

The PML also provides a procedure by which employees, whose enrollment forms are pending or whose enrollment forms pre-date June 20, 2015, are asked to re-certify and attest

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[14] The State has provided no specific explanation or authority for its contention that the continued participation of Unit 2 employees with TRICARE in the CoBen Cash Option would lead to imposition of penalties nor is there any evidence that penalties have been threatened or imposed.

[15] The unions were notified in approximately May of 2015 that the State was making changes to the CoBen Cash Option policy and a June conference call was held with the unions, including CASE, to discuss the change. As discussed herein, after the change was implemented, CASE filed a grievance that resulted in a final and binding award in its favor.

to their eligibility using updated enrollment forms, i.e., allowing for retroactive enrollment provided that the employee attests to other "qualifying group health coverage."[16]

The CalHR Benefits Administration Manual

At the hearing, the State also produced the CalHR Benefits Administration Manual (herein "the Benefits Manual") listing CoBen Changes for 2018. The Benefits Manual includes the following statements:

> Qualifying group coverage is maintained by an employer or employee organization and must conform to the ACA's minimum value standards [footnote explaining minimum value standard of health plan benefits]. All CalPERS sponsored health plans meet the minimum value standards.
>
> Employees covered under individual coverage, such as TRICARE, Medicare, Medi-cal, and Covered California are not eligible for the CoBen Cash, even if they meet the minimum value standards.

The State also presented the 2016 and 2017 Benefits Manuals which also contain the same language, i.e., introducing the term "qualifying group health coverage" and referencing the State's interpretation [that employees with individual coverage, such as TRICARE, Medicare and Medi-Cal and Covered California are not eligible for CoBen Cash, even if they meet the minimum value standards].

According to Bryan Bruno (formerly manager of the benefits division of CalHR until mid-January of 2018), the above-quoted language was introduced into the Benefits Manual subsequent to receipt of the legal opinion from Hanson Bridgett (in March of 2015) and has since remained unchanged. This policy is also publicly available on the CalHR website as reflected in the consolidated benefits component of the on-line version of the CalHR manual.[17]

In his testimony before the arbitrator, Bruno further explained that the changes were

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[16] This communication was sent to the e-mail address of Annette Young, i.e., young@calattorneys.org. No evidence was offered that would tend to prove that Annette Young was designated by CASE to receive formal notices of proposed changes to the administration of the predecessor or current Unit 2 MOUs.

[17] Bruno further stated that when the on-line manual was fully implemented, the PMLs were then retired.

based on the State's and Hanson Bridgett's interpretation of "some IRS guidance." In the same vein, the State presented an "Executive Approval Plan Summary" for the Flex Elect Program[18] reflecting 2016 changes, including the addition of the term "qualifying group health coverage" as a product of bilateral bargaining for the current MOU.[19]

The Collins Award

On August 12, 2015, CASE filed an All Affected grievance (CalHR No. 15-02-0008) on behalf of members that have health care through TRICARE, have received CoBen cash in the past, and are now being denied CoBen Cash. On September 12, 2015, CalHR denied the grievance on the grounds that to be eligible to receive cash in lieu of state-sponsored health coverage, an employee must attest that they have other "qualifying group health coverage." CalHR asserted in its denial that TRICARE benefits are an individual entitlement, not group coverage, referring CASE to two IRS notices and a DOL FAQ.

Arbitrator Collins, who rendered an award based solely on contract language without reference to external law, declined to interpret the ACA[20] while, at the same time, commenting that both parties' interpretations of ACA requirements were plausible.[21] Focusing on his role as the contract reader, he determined that the predecessor MOU clearly

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[18] This program includes but is not limited to the CoBen Cash Option.

[19] All of the State's documents referencing the term "qualifying group health coverage" were originally prepared in 2015 prior to issuance of the Collins Award and prior to the negotiation of the new language of Section 11.1 as discussed herein.

[20] Arbitrator Collins invoked the principle that while arbitrators should interpret the terms of a collective bargaining agreement in a manner consistent with established law, it is also widely accepted that arbitrators should not attempt to interpret external law where its meaning or application is unclear.

[21] In this regard, Arbitrator Collins stated: "Much of CalHR's argument turns on its contention that healthcare coverage through TRICARE constitutes "individual coverage" rather than "group coverage," and cites the statement in IRS Notice 2013-54 (sic) that "TRICARE is not a group health plan *for purposes of integration*" in support of that proposition. However, it is unclear whether that limited exception applies to the CoBen Cash Option, nor is it clear that TRICARE is not "group coverage" for other purposes. CASE's arguments to the contrary, while also speculative, are at least as plausible if no more convincing."

and unambiguously provides that Unit 2 employees are entitled to the CoBen Cash Option where employees certify that they have coverage from "other sources."[22] Arbitrator Collins additionally noted that there was no evidence in the record before him that any court or federal agency had ruled that the application of the CoBen Cash Option to individuals with TRICARE would be unlawful and that, absent such a ruling, the provisions of the contract should remain in effect pursuant to section 4.2 of the MOU.

As reflected in his opinion and award dated August 9, 2016, Arbitrator Collins made the following award:

> CalHR violated §§ 1.1, 4.3, 4.4 and/or 11.1 of the 2013-2016 Bargaining Unit 2 MOU by disenrolling employees with health coverage through TRICARE from the CoBen Cash Option program.

To remedy the violations, Arbitrator Collins ordered that CalHR cease and desist from refusing to pay the CoBen Cash Option to Unit 2 bargaining unit employees with TRICARE and make employees whole for CoBen Cash Option payments that they did not receive as a result of the contract violation. Following closely on the heels of the Collins award, the parties negotiated a new contract.

The 2016-2019 MOU (Changes to Section 11)

Deputy Director Pam Manwiller, the State's chief negotiator, testified that the parties negotiated the Unit 2 contract in a couple of hours, i.e., performing a month's worth of work in a period of only two hours. By all accounts, the State's proposed changes to Section 11 were negotiated by Deputy Director Manwiller and CASE President Peter Flores. CASE counsel Patrick Whelan was also present, as was Deputy Director Manwiller's notetaker (Stacy Miranda). At the time of these events, Manwiller was negotiating similar language with at least 14 different unions.[23] Under the State's proposed new language, the employee must certify, not that he or she has "health coverage from another source" (as

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[22] As explained herein, the language interpreted by Arbitrator Collins was modified in the last round of bargaining paving the way for the instant arbitration before the undersigned arbitrator.

[23] At this time Manwiller was involved in negotiations with nine separate SEIU tables and one SEIU master table, CASE, CSLEA, CAPT, UAPD, and AFSCME.

required under the predecessor MOU), but rather that he or she has "qualifying group health coverage from another source." [24] During negotiations, Manwiller informed CASE at the bargaining table that the intent of the proposed language was to conform to the ACA without further elaboration.[25] It is undisputed that on Friday August 19, 2016 (the same date that the language was first proposed and 10 days after issuance of the Collins award), the parties' representatives (Deputy Director Manwiller and Brooks Ellison) signed off on a tentative agreement which included the State's proposed changes to Section 11.1.

With regard to the added language (changing "health coverage from another source" to "qualifying group health coverage from another source," Manwiller was asked to explain the State's intent with regard to TRICARE. She provided the following response:

> Well, TRICARE, Medicare and Medi-Cal were excluded as qualifying group coverage from the ACA.

When asked if she communicated this intent to CASE during negotiations, her response, omitting any reference to a discussion of TRICARE, was as follows:

> My recollection of what happened at bargaining is we did have a brief discussion about this. I remember Mr. Whalen asking me if I had read the arbitration decision that had come out, and I said I had not had a chance to read it at that point because we were really consumed with bargaining, and I said that this was to conform to the ACA Act.

In her testimony at the hearing, Manwiller made a point of the fact that the same language has been negotiated into other bargaining unit MOUs and that no other unions have objected to the characterization of TRICARE as an individual plan excluded from the definition of "qualifying group health coverage."

CASE President Flores testified that during bargaining he requested an opportunity to speak privately with his counsel (Patrick Whalan) and, after discussion, it was decided that the change did not impact the victory that CASE had achieved in arbitration, i.e., the

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[24] Both parties agree that the State's proposal does not define what is meant by the term "qualifying group health coverage" and neither party has referenced any of the definitions contained in the ACA either at the bargaining table or in arbitration.

[25] ACA Program Coordinator Elaine Smith, who worked on the development of the new language, did not participate in any discussions at the bargaining table.

Collins award. Flores recalled no discussion across the table regarding how the proposed change, i.e., insertion of the new language, would or would not impact the result that CASE had recently obtained in arbitration. Consistent with Flores' recollection, the State presented no evidence (either by way of testimony or documents such as contemporaneous bargaining notes) that CASE was informed during bargaining that it was the State's intention to use the new language as a basis to change the outcome of the Collins award, or to exclude Unit 2 employees with TRICARE from participation in the CoBen program.

The Filing of the Grievance

On October 25, 2016, CASE filed a grievance on behalf of all affected members who continue to lose their CoBen Cash because they receive their health benefits through TRICARE. The grievance was filed directly with CalHR as individual departments would not be able to grant or deny the grievance. The grievance alleges the following:

> TRICARE is a group plan available to people with a connection to the United States Armed Forces. The state has incorrectly determined that TRICARE is an individual health plan. As a result of this determination the state incorrectly believes that it is a violation of IRS regulations to pay CoBen cash to state employees (including Unit 2 members) with health insurance through TRICARE.

The grievance also alleges that the same issue was the subject of another grievance filed in August of 2015 (referring to the Collins award). Noting that the State had filed a petition to vacate the Collins award, CASE requested that the grievance be held in abeyance pending the outcome of the State's petition.

The Order and Judgment in favor of CASE

CalHR petitioned the Sacramento Superior Court to vacate the Collins award on the grounds that the arbitrator exceeded his authority and that the award violates public policy insofar as it compels the state to structure the CoBen Program in a way that could expose the State to significant penalties for violation of federal and state law (the ACA and the State's Plan Document, i.e., an instrument required by the Internal Revenue Code). After reviewing the award and the arguments of the parties, the court refused to grant CalHR's petition, i.e.,

finding that the award did not violate any well-defined public policy. [26]

In recapping the State's position, the court made specific reference to an IRS advisory as follows:

> The IRS stated in [guidance] Notice 2015-17, at Q & A 3 that "TRICARE is not a group health plan for integration purposes." CalHR argues that this one statement alone "made it clear that any employer offering an employer payment plan to an individual covered by TRICARE ... is in violation of the ACA."[27]

While the court recognized its right to vacate an award on public policy grounds, the court denied the petition to vacate on the grounds that there was no basis for a finding that CalHR's continued payment of the CoBen Cash Option to Unit 2 employees with TRICARE violates the ACA or exposes the State to penalties for an ACA violation. Without such a finding, the court reasoned that there could be no finding of a violation of a "specific, well-defined and dominant" public policy, as required by a long line of California authorities.

The Denial of the Grievance

On October 5, 2017, Deputy Director Manwiller denied the grievance before this arbitrator, i.e., distinguishing the instant dispute from the dispute resolved by Arbitrator Collins as follows:

> ... the arbitrator's award and the court decision affirming the award are limited in their application to the 2013-2016 Unit 2 MOU. The current Unit 2 MOU contains new language that employees must have "qualifying group health coverage" in order to be eligible for the Cash Option Program. (MOU § 11.1) This MOU provision

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[26] The petition to vacate was denied on June 6, 2017.

[27] The specific language of Notice 2015-17 to which the court refers is as follows:

> TRICARE-related HRAs. Similarly, an arrangement under which an employer reimburses (or pays directly) some or all of the medical expenses for employees covered by TRICARE constitutes an HRA, and, as provided in Notice 2013-54, if such an arrangement covers two or more active employees, is a group health plan subject to market reforms. **An HRA may not be integrated with TRICARE to satisfy the market reforms because TRICARE is not a group health plan for integration purposes**. Emphasis supplied.

Neither party presented any evidence or arguments concerning the concept of integration under the ACA.

gives CalHR broad discretion to determine the general criteria for participation in the CoBen Program including defining that constitutes "qualifying group coverage." The prevailing practice at the time the parties agreed to the above language was not to treat TRICARE as qualifying coverage for purposes of the CoBen Cash Option. Accordingly, CalHR's interpretation of the term "qualifying group coverage" as excluding TRICARE does not constitute a violation of the MOU.

On October 16, 2017, CASE requested arbitration of the grievance and this hearing followed.

POSITION OF THE UNION

The State cannot successfully argue that minor changes to the language of the MOU justify its unilateral decision to exclude Unit 2 members with TRICARE from the CoBen cash benefit. The State did not communicate an intent to change Arbitrator Collins' interpretation of the MOU by virtue of its proposed language. Assuming that Deputy Director Manwiller's testimony, i.e., that she stated that the intent of the new language was to conform to the ACA, is credited, she did *not* testify that she communicated an intent to exclude TRICARE from the definition of "qualifying group health coverage" during negotiations. The parties' undisclosed intent or understanding is irrelevant in the interpretation of contracts.

The new language proposed by the State and adopted by both parties as part of the 2016-2019 MOU does not conform to the State's purported intent to end the cash option benefit for Unit 2 members with TRICARE. The new language did nothing to change the sole obligation of the employee to certify that the employee has qualifying group health coverage. Even assuming that the State's intent was to exclude TRICARE from the definition of "qualifying group health coverage, " the new language did not serve to effectuate that intent. Nothing in the new or old language gives the State the right to determine whether health coverage is or is not qualifying under Section 11.1.

POSITION OF THE STATE

The intent of the parties was to exclude employees with TRICARE from the CoBen Cash Option. Where employees must now certify that they have "qualifying group health coverage" under the new language, the primary question is what the parties meant when they

agreed to use this terminology. In June of 2015, the State, in writing, provided a definition of "qualifying group heath coverage" to the Union, i.e., via an e-mail to all unions with attached PML. Thus, CASE was aware of the State's interpretation of this term prior to bargaining the current MOU.

The bargaining history supports the conclusion that the parties intended to exclude TRICARE from the CoBen Cash Option. CASE President Flores knew that the proposed language might impact employee benefits causing him to caucus with CASE's legal counsel. Any interpretation that would render the new language mere surplusage is disfavored by both courts and arbitrators. The usage and custom at the time the MOU was negotiated was that TRICARE is excluded from the definition of "qualifying group health coverage." When viewed in light of the Collins Award, the parties' inclusion of the term (qualifying group health coverage) in the current MOU manifests a mutual intent to exclude TRICARE.

In any event, CalHR has the authority under MOU section 11.1 (E) to change the terms and conditions of the CoBen program during the term of the MOU. Under section 11.1 (E), all participants in the CoBen program are subject to any administrative provisions adopted by CalHR. CalHR's CoBen policies, to which CASE is bound, state that employees with TRICARE cannot participate in the CoBen Cash Option. Granting the grievance would expose the State to millions of dollars in penalties in contravention of sound public policy.

OPINION

Like the grievance before Arbitrator Collins, this case concerns retired military personnel currently employed as members of the Unit 2 bargaining unit and their eligibility to continue to receive the CoBen Cash Option. In this case, the State, unsatisfied with the result of the Collins arbitration and the court's refusal to vacate the Collins award, seeks a second bite of the apple. It does so based on the negotiation of the term "qualifying group health coverage from another source" into Section 11.1 of the Unit 2 MOU as a substitute for the less specific term "health coverage from another source."

The fundamental flaw in the State's approach is that, notwithstanding this contract modification, the controlling language of Section 11.1 continues to provides a cash benefit

option to Unit 2 employees who 1) do not elect to enroll in a health plan administered or approved by CalPERS and who 2) certify that the employee has "qualifying group health coverage" from another source. None of the evidence produced by either party demonstrates that Unit 2 employees denied the CoBen Case Option under the current MOU failed to satisfy either the non-election or certification requirements.[28]

This case is a rehash of the earlier grievance.

As evidenced by the joint stipulation of the parties fully set forth in the Collins award, this arbitrator cannot fail to note that the State's argument for denying the CoBen Cash Option under the old language of the predecessor MOU and the new language of the current MOU is identical, i.e., that TRICARE is an *individual* plan and not *qualifying group health coverage* for purposes of eligibility for the CoBen Cash Option.[29] Then and now CASE has always taken the position that CalHR's characterization of TRICARE as an individual plan is unsupported by legal authorities. Under these circumstances, CASE correctly determined during the course of the negotiations that the contract modification (changing "health coverage from another source" to "qualifying group health coverage from another source") would not imperil the continued viability of the Collins award. This is especially true where, as here, CASE knew that the State had been unable to convince either Arbitrator Collins or a superior court judge that its interpretation of the ACA was based on citable authority as opposed to speculation.

The record does not reflect a mutual intent to eliminate the CoBen Cash Option for Unit 2 employees with TRICARE.

Mutual intent must be inferred from statements made at the bargaining table,

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[28] With regard to the certification requirement, nothing in Section 11.1 suggests that employee certifications must be consistent with the State's interpretation of ACA requirements.

[29] As reflected in the court's ruling on the petition to vacate the Collins award, the State argued that the federal guidance provides that payment plans will violate the ACA's "market reform" rules unless they are available only to employees who certify they have other *qualifying* health coverage that is "group coverage" as opposed to "individual coverage." Thus, the State was making the same argument before the new language was added to Section 11.1 even though the State attempts to distinguish this case from the earlier grievance based on the new language.

proposals exchanged by the parties, and the history and course of dealing between the parties with respect to the disputed issue. In the arbitrator's view, the broad brush statement of the State's negotiator at the bargaining table, i.e., that the changes sought by way of a management proposal were necessary to comply with ACA requirements,[30] does not sufficiently manifest an intent to eliminate the CoBen Cash Option for Unit 2 employees with TRICARE. While the new language is more specific as a result of the use of the adjectives "qualifying" and "group" to further describe "health coverage," this language does *not* signify that employees with TRICARE will be excluded from the CoBen Cash Option program.

The State argues that CASE knew, or should have known, that the State was seeking to negotiate away the Collins award based on its earlier communications to all of the unions representing state employees and on statements contained in its Benefits Manual, i.e., to the effect that employees with TRICARE would no longer be eligible for the CoBen Cash Option due to various "guidances." The State relies on the following definition of the term "qualifying group health coverage" that appears in the PML transmitted to the state employee unions in June of 2015:

> Qualifying group health coverage includes health coverage that provides minimum value and is maintained by an employer or employee organization.

In an effort to amplify the above-quoted definition, the State further relies on the succeeding paragraph of the PML which reiterates the following legal opinion provided by Hanson Bridgett:

> 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 even if the coverage provides minimum value.

In the arbitrator's view, the State cannot rely on its own unilaterally promulgated interpretation, i.e., that TRICARE is individual health coverage for CoBen cash purposes, as

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[30] In post-hearing brief, the State argues that its chief negotiator stated that the changes were necessary to comply with *the State's interpretation of the ACA*; however, the arbitrator does not find support for this assertion in the record.

a means of imputing an intent, on the part of CASE, to relinquish the benefits of the Collins award. Likewise, the unilaterally promulgated statements contained in the Benefits Manual do not provide a sound basis from which the arbitrator can infer that CASE attached the same meaning to the term "qualifying group health coverage" as the law firm of Hanson Bridgett. Lending additional support to this conclusion, these statements were not referenced during negotiations nor were the statements incorporated by reference into the new contract language.

In sum, the record reflects that the State never communicated its undisclosed intent to, in general, obtain a concession, or specifically to exclude Unit 2 employees with TRICARE from participation in the CoBen Cash Option. Where the recent issuance of the Collins award was known to both State and CASE negotiators and discussed by the parties in negotiations, it was reasonable for CASE to conclude that the new language was not going to change the outcome of the case before Arbitrator Collins, especially where discussion of the Collins award elicited no disclosure of an intent to exclude TRICARE from the definition of "qualifying group health coverage." Under the circumstances presented here, neither the use of the term "qualifying group health coverage,"standing alone, nor the discussions of the parties at the bargaining table, manifest a mutual intent to exclude employees with TRICARE from the CoBen Cash Option program (whether based on TRICARE's status as an individual health plan, as health coverage lacking minimum value, or for any other purported reason, including transferring costs from state to federal budgets).[31]

Nothing contained in the language of Section 11.1 (e) serves to alter the arbitrator's conclusions.

The State argues that even if a reasonable dispute exists about the meaning of "qualifying group health coverage," CalHR has final discretion to define "qualifying group health coverage" under section 11.1 (E) of the current MOU. This provision generally

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[31] In reaching this conclusion, the arbitrator is mindful of the time-honored principle that ambiguities in contract language should be resolved against the party who drafted the language.

provides that "[A]ll participants in the FlexElect Program[32] shall be subject to all applicable state and federal laws and any related administrative provisions adopted by CalHR." 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 remain controversial and untested.[33]

CONCLUSION

In the instant case, the parties are re-litigating a difference of opinion as to the status of TRICARE as group or individual coverage *for CoBen eligibility purposes* under Section 11.1 of the current MOU. After reviewing the evidence and arguments of the parties, the arbitrator concludes that nothing has changed since the Collins award to shed any additional light on either party's interpretation of the status of TRICARE under the ACA, i.e., a focal point of the controversy before Arbitrator Collins and this arbitrator. Nor do the changes to Section 11.1 of the current MOU impact the continued viability of the Collins award. Having reviewed the contract language, the discussions of the parties at the table, and the course of dealing between the parties regarding the Grievants' eligibility for CoBen Cash, the arbitrator must conclude that the term "qualifying group health coverage" was *not* mutually intended by the parties to exclude the Grievants from eligibility for the CoBen Cash Option program. 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*. Finally, the State lacks the authority under Section 11.1 (E) of the

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[32] The CoBen Cash Option Program is included under the umbrella of the FlexElect Program.

[33] Where, as here, the dispute does not involve a finding by a court that a provision of the MOU is unlawful, it is unnecessary to address Section 4.2. Likewise, where the arbitrator is not persuaded that it was necessary to make any mid-term changes in areas within the scope of negotiations, it is unnecessary to address the applicability of Section 4.3.

current MOU to unilaterally promulgate regulations, based on an unsupported legal opinion, as a means of circumventing contract language or a final and binding arbitration award.

Based on the foregoing findings and conclusions, the following award is made:

AWARD

The grievance is granted.

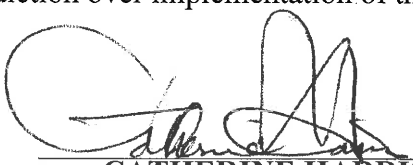
The State violated Section 11.1 of the current MOU by prohibiting the Grievants from participating in the CoBen Cash Option.

The State shall cease and desist from refusing to pay the CoBen Cash Option to the Grievants in accordance with Section 11.1.

The State shall make the Grievants whole for all CoBen Cash Option payments that they did not receive as a result of the State's violation of the current MOU.

The arbitrator retains jurisdiction over implementation of the award for 90 days from the date of the award's issuance.

Dated: January 16, 2019



CATHERINE HARRIS, Arbitrator