STATE 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: 8-10-06, 10-5-06, 10-11-06, 6-12-08
Hearing Location: Buffalo City Hall, Division of Law Offices

**APPEARANCES:**

A. For the Union
   - Gregory A. Mattacola, Esq., Counsel for Local 282
   - Tracy D. Sammarco, Esq., General Counsel, Local 282
   - Joseph Foley, Local 282 President
   - Peter Margerum, Local 282 Officer (Recording Secretary, Vice President)
   - Daniel Cunningham, Local 282 Officer (Vice President)

B. For the City
   - Jeffrey F. Swiatek, Esq., Counsel for the City
   - Eileen Fleming, Esq., Assistant Corporation Counsel (Present for first three hearing dates)
   - Leonard Matarese, (Former) Commissioner for Labor Relations

**THE ISSUE**

Following much discussion by the parties over the issue to be decided, and following a careful and thorough review of the record in this proceeding, I find the appropriate issue to be as follows:

> Did the City of Buffalo violate the Collective Bargaining Agreement by imposing a one carrier health insurance system on or about July 1, 2004?
>
> If so, what is the appropriate remedy in light of the Interest Arbitration Award issued by the Rinaldo Panel majority dated July 18, 2005?

## BACKGROUND

A. The Parties to This Dispute

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", Joint Exhibit 1) Subsequent to June 30, 1986, the CBA has been modified several times by Interest Arbitration Awards issued pursuant to Section 209 of the N.Y. Civil Service Law. Thus, the Interest Arbitration Panel chaired by Arbitrator Paul G. Kell issued its Award covering the period July 1, 1986 through June 30, 1988. (Id. at pages 54-56) Similarly, 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. Finally, the CBA contains a Memorandum of Agreement between the City and the Union over the issue of a Department of Fire Preferred Overtime List. (Id. pages 69-70)

B. Factors Giving Rise to the June 6, 2004 Memorandum of Agreement (Joint Exhibit 2)

1. The City's 2004 Budget Process

As a result of the City's abysmal fiscal condition, New York State adopted legislation which created the Buffalo Fiscal Stability Act, ("BFSA") overseen by a Control Board. BFSA required the City's budget to be balanced for each year under its authority.

On May 1, 2004, then Mayor Anthony Masiello presented his preliminary budget to the Common Council covering the July 1, 2004 through June 30, 2005 fiscal year. Relevant to the instant matter, the Mayor's proposed budget assumed the continuation of a multi carrier health insurance system as mandated by numerous Collective Bargaining Agreements the City had with its Unions, including the Firefighters Union Local 282. In order to bring his preliminary budget into a balanced state, Mayor Masiello's proposed budget included a number of employee layoffs,

seventeen of which were targeted firefighter positions. The Mayor's preliminary budget was revised by the Common Council on May 21, 2004, the deadline for the Council's budgetary amendments. Among other actions, the Council sought to restore the seventeen firefighter positions. The Council was hopeful that the City would be able to realize substantial savings through a move from a multi-carrier to a single carrier health insurance plan. Given the Council's May 21st amendments, the City Charter provided that the Mayor had until June 8, 2004 in which to approve or veto the Council's proposed changes. If the Mayor chose neither to adopt nor to veto the Council's proposed changes, the Council's amended budget would become the budget covering the 2004-2005 fiscal year. The record evidence reveals that the adoption of a single health insurance provider, with Union approval, was a significant goal in the City's ability to balance its budget and restore all laid off positions. Michael Risman, the City's Corporation Counsel at that time, testified that the City's budget was also contingent upon the City's ability to seek approval from the Control Board for its $19 million dollar Bond program, "[a] crucial element needed to close the City's budget gap."

2. Efforts Prior to June 6, 2004 at Achieving a Single Health Insurance Provider

City Unions, including Local 282, 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 shows that a majority of Local 282 members chose health insurance coverage through the Independent Health plan.

During 2003, Leonard Matarese, then the City's Commissioner for Human Resources, conducted a study to identify ways in which the City could reduce its increasing health insurance costs. Commissioner Matarese determined that converting to an experienced from a community rated plan together with a move to a single health care provider would save the City millions of dollars. Accordingly, beginning early 2004, the City initiated an effort to move all City employees, including those represented by Local 282, into a single provider, experienced rated health insurance plan through bi-lateral talks with its Unions. Talks continued with all City

Unions into 2004 over this move to a single provider, and the parties met on or about May 13th and May 14th. The City was successful with a number of its Unions including the International Union of Operating Engineers, Local 17 and AFSCME Local 650. Edward Hoock, Business Representative for Local 17, and Michael Drennan, President of Local 650 testified that agreements with the City to move to a single carrier were solidified through ratification by their respective memberships. By June all City Unions, other than Local 282 and the Buffalo Police Benevolent Association ("Buffalo PBA") had agreed to the move to a single carrier. The City elected to move the Buffalo PBA into the single-provider program under the terms of the existing CBA between the City and the Buffalo PBA. This action by the City left Local 282 as the only Union that had not agreed to move to a single-provider. Moreover, the existing CBA between the City and Local 282 would not permit the City to unilaterally move Local 282 bargaining unit members to a single provider. Accordingly, the City desperately sought Local 282's consent to do so.

3. The June 6, 2004 Negotiation Resulting in the Execution of the MOA

The City made its final effort to reach agreement with Local 282 in a joint session held on Sunday June 6, 2004 at the Hyatt Regency Hotel in Buffalo, N.Y. The City's "team" was represented by Mayor Masiello and Commissioner Matarese. Commissioner Matarese served as the City's chief spokesperson. Local 282 "team" was represented by Joseph Foley, Local 282's President, who served as the Local's chief spokesperson, Tracy Sammarco, Local 282's General Counsel and Frank Lucca, Local 282's Vice President. Michael Risman, the City's Corporation Counsel, attended the meeting near its end at the request of Mayor Masiello.

Following hours of negotiations, the City and Local 282 entered into a Memorandum of Agreement ("MOA") on June 6, 2004. The MOA begins with the following introductory paragraph:

> WHEREAS, the City of Buffalo ("City) desires to modify the existing health insurance coverage under the parties' Collective Bargaining Agreement ("CBA"), existing Interest Arbitration Awards, and Agreements by and between the parties, in order to realize substantial savings in the cost of insuring the members of the Buffalo Professional Firefighters Association, Inc., IAFF Local 282 ("Local 282"); and Blue Cross and Blue

> Shield of Western New York ("BC/BS") has proposed a coverage plan to provide for the health insurance needs of the members of Local 282 which realizes substantial savings to the City, while providing equivalent health insurance coverage and benefits to the members of Local 282 as the coverage currently provides under the parties' CBA, subsequent awards and agreements . . .

(Joint Exhibit 2)

The MOA was executed on behalf of the City by Mayor Masiello, Commissioner Matarese and Michael Risman (as to form), and on behalf of Local 282 by Joseph Foley and Tracy Sammarco (as to form). Following execution of the MOA on June 6, 2004, the record reveals that Mayor Masiello agreed to the Common Counsel's restoration of the seventeen firefighter positions that were slated to be excessed under the Draft Budget.

Local 282 moved to ratify the June 6, 2004 MOA on June 29, 2004. The membership voted 3:1 against the MOA despite Mr. 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. It was and remains the City's position that the Union never reserved a right to condition the effectiveness of the MOA on Union membership ratification. Given this position, it was and remains the City's belief that the MOA was fully effective and binding on all parties, including Local 282 upon execution by able representatives from the City and Local 282 on June 6, 2004. The instant grievance followed and in September 2004, was advanced to arbitration. (See Joint Exhibit 4)

C. <u>The Rinaldo Panel Interest Arbitration Award</u>

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'a 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 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 this Opinion and Award, the City's application was pending determination by the Court.

D. The Instant Grievance

On or about July 5, 2004, Local 282 filed the instant grievance in direct response to the City's implementation of the single provider plan. The Grievance alleges as follows:

> The City has refused to allow members to continue health care coverage provided by Independent Health and Univera.

(Joint Exhibit 3)

Unresolved at the lower administrative steps of the Grievance Procedure, Local 282 moved its grievance to arbitration with a timely filing of a Demand for Arbitration with the New York State Public Employment Relations Board. ("PERB") Pursuant to PERB's voluntary labor arbitration procedures, the undersigned was selected to arbitrate this dispute. The Undersigned was notified of PERB's appointment by letter dated October 13, 2004. Subsequently, hearings were adjourned at the request of the City on numerous occasions for various and legitimate reasons. Subsequently, a pre-hearing conference was held on November 23, 2005 followed by four days of hearing that occurred on August 10, 2006, October 5, 2006, October 11, 2006, and concluding on June 12, 2008. At all such hearings, and continuing throughout the proceedings, the parties were accorded and took full advantage of the right to call and examine witnesses, as well as the right to introduce relevant evidence. At the conclusion of the hearings, the parties elected to summarize their respective positions with the filing of post hearing briefs, dated September 12, 2008. Reply briefs were subsequently filed by the parties on November 25, 2008. Upon receipt of all briefs and reply briefs, the proceedings were closed. -

[1] See City's reply brief of November 26, 2008 at pages 3-4. It is the City's position that pending a final determination of its appeal to the Court of Appeals, that the vacatur is stayed by operation of CPLR 5519a)(1), and accordingly, the City is under no legal obligation to return to a multiple carrier health insurance program. Therefore, the City continues to provide Local 282 bargaining unit members with health insurance through the use of a single provider under the terms of the June 6, 2004 MOA.

## POSITION OF THE PARTIES

### A. The City's Position

It is the City's position that the instant grievance should be dismissed in its entirety on numerous grounds. Those grounds offered by the City are as follows.

First, the City asserts that this Arbitrator is required to give effect to the June 6, 2004 MOA and by doing so, determine that the City has not violated the CBA by implementing the single provider program. In this regard, in addressing the Union's claim that the MOA is not effective due to the unsuccessful ratification by its membership on June 29, 2008, the City maintains that the issue of whether the MOA was subject to ratification is beyond the authority of this Arbitrator. Accordingly, the City asserts that this Arbitrator must accept and apply the terms of the MOA as written. This is so, the City notes, due to the fact that while the Taylor Law recognizes the right of the parties to have their respective constituencies ratify an agreement reached by and between them, there is nothing in the Taylor Law that requires that an agreement be ratified by the Union membership as a precondition to its implementation. Moreover, the City notes, the determination as to whether an agreement has been reached is within the province of the Court and not this Arbitrator. However, this point notwithstanding, the City argues that while the PERB has no authority to enforce an Agreement, PERB does have jurisdiction over disputes involving ratification.

Next, the City maintains that nothing in the CBA vests the Arbitrator with the authority over the enforceability of the June 6, 2004 MOA or whether it was subject to ratification. In this regard, given that the Arbitrator's jurisdiction is found within "the four corners of the CBA", the City notes that nowhere does the CBA so much as refer to the issue of ratification, much less provide a standard by which the Arbitrator can rule on a dispute over ratification. Accordingly, the City maintains that while the Arbitrator clearly has jurisdiction to resolve disputes over the interpretation and application of the terms of the CBA, such authority does not include the ability to determine whether an agreement has been reached for this authority rests with the Courts.

Accordingly, lacking a determination from the Courts to the contrary, the City maintains that this Arbitrator is compelled to uphold the terms of duly executed June 6, 2004 MOA.

Next, the City argues that even if the Arbitrator was authorized to consider the issue of ratification of the MOA, the Union did not effectively reserve such right. In this regard, the City notes that there is no mention in the MOA itself of the need for ratification or any other subsequent act by either the City or the Union in order for the MOA to be fully effective. This is in sharp contrast to other instances in the past where certain Memoranda of Agreement between the City and Local 282 have, by their express terms, been specifically contingent on ratification by the Union membership, such as the 1998 and 2003 MOA for a Contract extension, both of which by their terms, were subject to "approval of the Common Council and Local 282 membership ratification." (City Exhibits 8 & 9) Accordingly, the City argues, there is no consistent practice between the parties which supports Local 282's claim that there is an automatic requirement, recognized by the City, of the need to ratify each and every agreement between it and Local 282.

Next, in addressing Local 282's claims of a contractual violation, the City asserts that Article 27, the Maintenance of Benefits Clause, provides no support for Local 282 in this matter. In this regard, the City notes that Article 27 references the "duration of this agreement" which, under the terms of the Rinaldo Award, was June 30, 2004. Thus, the City notes, any responsibility by it to continue practices covered by Article 27 terminated or "sunset" on June 30, 2004, as the stated termination date of the last CBA between the parties. Moreover, the City argues, any reliance by Local 282 on the Triborough Amendment to the Taylor Law is unavailing because the Triborough Amendment does not result in an extension of the CBA itself but rather mandates the continuation of terms of the CBA unless those terms have otherwise sunset.

Next, the City asserts that Local 282's claims regarding ratification are not credible. In this regard, the City maintains that the testimony of former Commissioner Matarese who testified that there was no mention by Local 282 during the June 6, 2004 discussions giving rise to the MOA about the need to ratify. This claim by Mr. Matarese stands in sharp contrast to the testimony given by Local 282 witnesses the City notes, and makes sense in light of the budget

circumstances that existed at the time the MOA was agreed upon and executed. In this regard, the City maintains that the agreement reached by the parties on June 4th would have made no sense if the MOA was subject to ratification because the Mayor could not allow the restored firefighter positions to remain in the budget without knowing for certain that a single provider program could be implemented. And the Mayor had only until June 8th to make his veto determination the City notes, only two days following agreement on the MOA's terms, and well short of the twenty days needed for Local 282 to complete its ratification process.

Finally, the City asserts that any award by this Arbitrator would be premature and/or moot in light of the absence of evidence in the record of the final disposition of the Rinaldo Panel Award. Thus, the City notes, even if Local 282 can establish that the June 4, 2004 MOA was not effective due to its lack of membership support, the Rinaldo Award would supersede any such determination and provide an independent basis for the City's continuation of the single provider program. Therefore, the City argues, until the NY Court of Appeals renders its final determination on the City's appeal, any determination by this Arbitrator would be premature.

B. <u>Local 282's Position</u>

It is Local 282's position that Article VI of the CBA was not properly modified by the June 6, 2004 MOA and accordingly, the City violated the CBA when it imposed the one carrier health insurance system on Local 282. Accordingly, Local 282 asserts that "the essential issue – really the only issue – was the validity of the Memorandum of Agreement to the condition precedent of approval and ratification by Local 282's members?" Local 282 maintains that this question must be answered in the affirmative, and accordingly, the City violated the CBA with its unilateral imposition of the one carrier health plan. Local 282 offers the following in support of their position.

First, Local 282 asserts that express ratification language need not be included in the MOA in order to reserve "the most basic tenet of union negotiations and in the present case – Local 282, via Mr. Foley and Ms. Sammarco, on numerous occasions beforehand and at the June 6, 2004 meeting, expressed the need for ratification by the membership." (Local 282 brief, page 4) In

this regard, Local 282's efforts at ratification are consistent in that any agreement affecting the membership as a whole and not just a single or small group of members requires membership ratification Local 282 notes.

Next, Local 282 notes that its obligation to ratify any health insurance agreement that modified Article VI of the CBA was stated consistently throughout the monthly discussions with the City. Thus, during the meetings held with the City on May 13th and May 14, 2004, Mr. Foley stated clearly and unambiguously to all parties present that his agreement with the City to move to a One Carrier system would require membership approval in the form of a ratification vote. In this regard, Local 282 noted the consistent testimony from Ed Hoock, Operating Engineers Local 17's Business Representative, Robert Meegan, President of the Buffalo PBA and Michael Drennan, President of AFSCME Local 650, each of whom testified to hearing Mr. Foley state unequivolcally that any agreement with the City to modify the existing health care language would require Local 282's member ratification. Moreover, Mr. Hoock and Mr. Drennan each testified that the agreement they struck with the City to move to a one carrier system was ultimately ratified by their membership. Local 282 maintains that they viewed any agreement reached at the June 6, 2004 meeting no differently in that it would require the ratification of its members before it could become effective.

With regard to the June 6, 2004 meeting, Local 282 maintains that it was no secret that any agreement coming out of that meeting would require membership ratification. This point was supported by the testimony of Mr. Foley, Ms. Sammarco and Mr. Lucca, all of which were present at the June 6th meeting – their testimony was clear and consistent in this regard Local 282 asserts. Lest there be any doubt in this regard, Local 282 notes, a Buffalo News article covering the details of a press conference following the June 6, 2004 meeting references Mr. Foley's mention of the requirement of ratification by Local 282's members. In addition, Local 282 notes, a transcript from a Channel 2 News broadcast held on June 30, 2004 following the rejection of the MOA by Local 282's membership quotes Marc Coppola, the Common Council member, as saying that he assumed that the June 6, 2004 MOA was subject to ratification by Local 282's rank and file members.

In addressing the City's claim that Local 282 never reserved the option of ratifying the June 6, 2004 MOA, Local 282 notes that the only witness who gave testimony in support of this notion was former Commissioner Matarese. However, Local 282 notes, during his testimony, Mr. Materese recounted numerous meetings he attended prior to the June 6, 2004 meeting where he acknowledged hearing Mr. Foley speak about the need of "selling it to the membership." Local 282 questions why Commissioner Matarese would make such a statement if indeed ratification was not required.

Next, Local 282 notes that the City's imposition of a single health carrier on its membership is not the first of such City action. In this regard, Local 282 notes that following the Buffalo City School District's inability to reach agreement with the Buffalo Teachers Federation (BTF") on the terms of a one carrier health plan, in May 2005 the District unilaterally implemented the plan. The BTF grieved, and arbitrated the matter before Arbitrator Dana Eischen, who found that the District's action in this regard violated the CBA between the District and the BTF. Local 282 notes that Arbitrator Eischen directed the District to reinstate the multiple carrier plans failing agreement between the District and the BTF that provided otherwise. Arbitrator Eischen's Award in this regard was upheld by the Court of Appeals Local 282 notes.

Finally, Local 282 notes that the instant grievance alleges a violation of the CBA between it and the City, and accordingly, the issue before this Arbitrator is ripe for determination as to whether the City violated the CBA by its unilateral imposition of a one carrier plan on Local 282's members. Accordingly, the instant matter is neither moot nor premature Local 282 asserts.

## DISCUSSION

### A. The Arbitrator's Task in This Matter

This is first and foremost a contract interpretation case involving the application of Article VI, (Health and Life Insurance) and Article XXVII "Maintenance of Benefits". It must be determined whether or not a fair reading of these Articles support Local 282's claim that the City acted improperly when it imposed the terms of the June 6, 2004 MOA on its members by

adopting and implementing a one carrier health insurance system. Given its non-disciplinary nature, it is well established arbitration precedent that Local 282 carries the burden of proof under the preponderance of the credible evidence standard. Accordingly, in order to prevail, Local 282 must demonstrate that it is more likely than not that its position is supported by the language of CBA.

Arbitrators seek to interpret contract language based on the precise language itself or lack thereof, bargaining history, and in some cases, particularly where the language at issue can be said to be ambiguous, past practice. With this in mind, we now review the circumstances giving rise to this dispute.

B. The Grievance At Issue

The CBA, at Section 23.1 defines a grievance as:

> Any controversy or dispute which may arise between the parties regarding the application, meaning or interpretation of this agreement . . .

The Grievance procedure provides for a four step review process culminating in binding arbitration. Section 23.2 (H) provides relevant advice to the arbitrator:

> No arbitrators functioning under provisions of the grievance procedure shall have the power to amend, modify, or delete any provision of this agreement or render any award contrary to the laws of the State of New York.

Given the foregoing, it is clear that the arbitrator must be guided by the four corners of the Collective Bargaining Agreement. Accordingly, it is here where we begin our analysis of the issue to be addressed.

In its grievance, Local 282 alleges a violation of Article VI as it relates to the City's obligation to provide health insurance coverage. Article VI outlines the particulars of a Blue Cross/Blue Shield plan, known at that time as the 82-83 Plan. The 82-83 plan was a traditional indemnity plan. There were no HMO or PPO options at that time. The plan also included prescription-drug coverage with a $3.00 employee co-pay. Subsequently, the language of Article VI was

essentially modified by adding the option of HMO coverage with the addition of two additional carriers – Independent Health and Univera. The terms of this change are not specifically provided for in the CBA. In addition to providing a choice for Local 282 unit members from among two different types of health plans and three different carriers, the addition of Independent Health and Univera provided a lower cost alternative to the Blue Cross/Blue Shield indemnity plan. Thus, the change represented a "win-win" for the parties by offering a choice of three health providers to Local 282 Unit Members and a lower cost HMO alternative as a benefit to the City. The record evidence reveals that a majority of Local 282 unit members opting for health coverage chose Independent Health as their provider. The instant grievance reflects Local 282's view that the City's move to the single provider plan under the terms of the June 6, 2004 MOA deprived them of the benefit of choice to choose from among three plans. Indeed, the remedy sought by Local 282 in its grievance is restoration of the Independent Health and Univera options.

Local 282 also alleges a violation of Article XXVII, Maintenance of Benefits, which provides:

> All conditions or provisions beneficial to employees now in effect which are not specifically provided for in this agreement or which have not been replaced by provisions of this agreement, shall remain in effect for the duration of this agreement, unless mutually agreed otherwise between the City and the Union.

Viewing the modified terms of Article VI together with the language of Article XXVII, it is clear that "unless mutually agreed otherwise between the City and the Union", the City's action in changing to a single provider for health insurance coverage on or about July 1, 2004 amounted to a violation of the CBA.[2] While it is the City's position that the June 6, 2004 MOA is representative of this "mutual agreement", Local 282 disagrees, noting that this MOA could not become effective until its terms were given the stamp of approval by Local 282 Unit Members through the ratification process. Accordingly, an answer to the question of whether ratification of the MOA was in fact a condition precedent to the implementation of its terms is crucial to the

[2] To the extent that these HMO alternatives were added as a result of an Interest Arbitration Award between the parties, while it is well established that "[a]n [Interest] Arbitration Award is not an agreement for purposes of the Act" (See *County of Suffolk*, 12 PERB ¶ 3014 (1979), *Town of Orchard Park*, 29 PERB ¶ 3080 (1996), it is also well established that the terms of an Interest Arbitration Award establishes the status quo until a new collective bargaining agreement is negotiated. (*Town of Southampton*, 2 N.Y.3d 513; 780 N.Y.S.2d 522 (2004). Article XXVII, noted above, mirrors this obligation by requiring the City to maintain the status quo until such time as the parties may mutually agree otherwise.

determination of the issue presented. Stated another way, it must be determined through a careful review of the credible record evidence whether it was more likely than not that as a result of Local 282's "course of conduct" in its dealings with the City, that the City knew or should have known that Local 282's ratification of the June 6, 2004 MOA was a condition precedent to its implementation?

C. The Requirement for Union Ratification

Following the Local 282 membership's rejection of the terms of the June 6, 2004 MOA and the City's implementation of the single provider terms of the MOA, Local 282 filed a series of grievances under the terms of the CBA together with an Improper Practice Charge with the N.Y. Public Employment Relations Board ("PERB"). In a Memorandum dated January 13, 2005 addressed to Matthew Van Vessem, Esq., Counsel for the City, and Tracy Sammarco, Esq., Counsel for Local 282, Jean Doerr, Esq., Administrative Law Judge with the PERB, presented what she believed to be "an exhaustive review of [PERB] cases regarding orders to execute agreements based on a failure to reserve the right to ratify and failure to support an agreement at ratification." (Joint Exhibit 6) Judge Doerr summarized her findings[3]:

> To summarize on the issue of the necessity to reserve the right of ratification, it appears from the case law that for unions, the right to ratify need not be explicit but can arise from a course of conduct. I contrast, if an employer seeks ratification by its legislative body, as a condition precedent to the existence of an agreement, it must make that fat explicit and clear.
>
> Although I have no offer of proof from [Local 282] with regard to a course of conduct related to ratification, it has been represented that presentation of tentative agreements to the membership is routine. In the alternative, if [Local 282] were held to the employer standard of having to make the need for ratification explicit, it has been indicated that there are several witnesses who would testify that Mr. Foley clearly reserved that right. Thus an order from PERB that [Local 282] must execute the MOU for failure to reserve the right to ratify is totally unlikely based upon the probable proof and prevailing caselaw.

[3] Judge Doerr relied upon the Board's decision in *Capital District Regional Off-Track Betting Corporation*, 20 PERB ¶3020 (1987), where the Board held that it would not adopt the NLRB's requirement that a contract itself must contain an express provision for ratification. In so holding, the Board noted: "The existence of an agreement between the parties that ratification (either by the union or the employer or both) is a condition precedent to contractual validity may be established by parole evidence, which need not take any particular form, but may be shown by a course of conduct which makes clear the parties were fully aware of the condition and acquiesced in it."

D. Did Local 282's "Course of Conduct" Preserve its Right to Ratify the Terms of the June 6, 2004 MOA?

While the parties may disagree over the question of whether the City was on clear notice that the terms of the June 6, 2004 MOA required membership ratification, it is undisputed that during the meetings held between the City and its Unions (including Local 282) in May 2004, Local 282 was both clear and consistent in advising the City that any agreement that might result from these bilateral talks would require Local 282 membership ratification. Thus, Frank Lucca, Local 282's Vice President at the time, testified to his recollection that Mr. Foley remarked on a number of occasions that "he was only the mouthpiece of the Union and that the members had to ratify any agreement." Mr. Lucca also testified that Commissioner Matarese acknowledged this statement by stating that he knew how Unions worked. Robert Meegan, President of the Buffalo PBA, testified that he recalled being present at these meetings with the City and its Unions where the single health care initiative was discussed. Mr. Meegan also recalled Mr. Foley's message to the City that ratification of any agreement altering the health care benefit would require ratification from the Local 282 membership. Michael Drennan, President of AFSCME local 650 testified in a substantially identical fashion by recalling Mr. Foley's statement that he would need to take any agreement back to his membership for approval. Ed Hoock, Business Representative for the Operating Engineers, Local 17, testified that he too was present at a number of meetings with the City where a move to a single carrier was discussed. Mr. Hoock testified that he recalled Mr. Foley advising Commissioner Matarese that he (Foley) would need to take something like this back to the membership for ratification. Mr. Hoock also testified that he recalled Commissioner Matarese acknowledging Mr. Foley's statement by indicating that he understood. In this later regard, it is significant that Commissioner Matarese, when remarking on Mr. Hoock's testimony testified that "Ed was accurate in that everyone in the room agreed that they would need to sell any agreement to their membership one way or the other."

Given the foregoing, it is clear that Local 282's "course of conduct" preceding the June 6, 2004 meeting reflected its need to ratify any agreement that resulted from City and Local 282 talks over the terms of a single health insurance provider. Therefore, the immediate question to be addressed is what could possibly have changed from the time of the May 2004 talks between the

City and its Unions, (which included Local 282), where is was crystal clear to everyone present that any agreement resulting from those talks would require Local 282 membership ratification, to those talks held on June 6, 2004 resulting in the MOA such that, in the City's opinion, Local 282 "waived" its right to ratify. Since it is the City who is advancing its claim of a Local 282 waiver, the City bears the burden of proof on this issue. Accordingly, the City must demonstrate that it is more likely than not that Local 282's actions or inactions on June 6, 2004 resulted in the waiver of its right to ratify the terms of the MOA. However, for the reasons that follow, it is the conclusion of this Arbitrator the City has been unable to carry its burden. Accordingly, following a careful review and analysis of the record evidence surrounding the June 6, 2004 meeting it is clear to this Arbitrator that all parties present at the June 6, 2004 meeting knew or certainly should have known that Local 282 membership ratification of this MOA was required.

Tracy Sammarco, Counsel for Local 282 was present during the discussions held on June 6, 2004. Ms. Sammarco testified that she clearly recalled Mr. Foley expressing to the parties present at that meeting the fact that any agreement resulting from those talks would require membership ratification, and that he would need some type of incentive or concession by the City to show his membership. In a similar fashion, Ms. Sammarco testified that she personally remarked to Mayor Masiello that there would need to be some type of quid pro quo resulting from the talks if the City expected membership ratification. Mayor Masiello was not called to testify. Accordingly, Ms. Sammarco's recollection in this regard stands unchallenged. Ms. Sammarco summarized her testimony by noting that given the open and frank discussions surrounding the need for Local 282's ratification of the MOA, "I think you'd have to be deaf, dumb and blind to not know that ratification was required at that meeting." While the City understandably discounts the testimony of Mr. Foley and Ms. Sammarco regarding the need for ratification, the testimony of New York State Senator Marc Coppola who, at the time was a member of the City's Common Council, and who also acted as the facilitator of and was at all times present for the talks between the City and Local 282 on June 6, 2004, is significant. Senator Coppola was quoted by the Buffalo News as follows:

> Common Council Majority Leader Marc A. Copolla said the deal, which faces ratification by union members, is expected to pass.

(Buffalo News, June 7, 2004, Union Exhibit 4)

Similarly, in a June 30, 2004 Channel 2 News interview, Mr. Coppola stated:

> I got to say, I don't remember any specific conversation on [ratification]. Again, it was something that wasn't focused on too much. Because it was the other issues we focused on. I just assumed that (union members having to ratify the proposal) was a foregone conclusion. That it had to be (voted on by the rank and file).

(Channel 2 News Transcript of June 30, 2004, Union Exhibit 5)[4]

The circumstances surrounding the June 6, 2004 meeting lend substantial credibility to Senator Coppola's remark that there were pressing issues, other than Local 282's need to ratify, that dominated the City's attention. Indeed, at the time of those talks, the City faced a mandate by the Buffalo Fiscal Stability Act, ("BFSA") overseen by the Buffalo Control Board, for a balanced budget on one end, and a $6 million dollar budget imbalance on the other. Hanging in the balance was the need by the City to borrow from its line of credit, a need that was tied to Control Board approval. In addition, Michael Risman, the City's Corporation Counsel at that time, testified that the City's budget was also contingent upon the City's ability to seek approval from the Control Board for its $19 million dollar Bond program, "[a] crucial element needed to close the City's budget gap." These City needs were contingent upon the City presenting the Control Board with a balanced budget, and an agreement on the terms of a single health insurance provider program would save the City approximately $6 million dollars, an amount sufficient together with the City's ability to borrow from its line of credit to balance the City's budget. It is clear, therefore, that the primary focus by the City representatives at the June 6, 2004 meeting was on the need to reach agreement with Local 282 in order to balance the City's budget, and that any discussion by Local 282 of the need to ratify the MOA resulting from that meeting was overshadowed by the City's immediate need to balance its budget. In his testimony, Commissioner Matarese described the City's immediate concern as follows:

> If the [City's] budget is out of balance, the impact would be devastating, requiring approximately $20 million dollars in cuts. These cuts would most likely result in the layoff of approximately 67 firefighters together with a cut of other city employees.[5]

[4] Senator Coppola also testified that at the June 6, 2004 meeting, it was his understanding that the MOA would require Common Council approval due to the fact that the MOA represented a "contract amendment", and it was not until "a couple of days later" that the Senator learned that Common Council approval of the MOA would not required.

In an effort to overcome the testimony of Local 282 witnesses Foley and Sammarco, the City solicited testimony from Commissioner Matarese and Former Corporation Counsel Michael Risman. Commissioner Matarese's testimony is discussed in Footnote 5 below. Mr. Risman, who admittedly arrived at the Hyatt Hotel on June 6, 2004 after the negotiations over the single provider had been concluded, testified that his presence was requested after the negotiation by Mayor Masiello in order to review the terms of the draft MOA. Mr. Risman testified that he reviewed the draft with his client and during his attendance he did not recall anyone from Local 282 indicating that the MOA was subject to ratification. Mr. Risman's testimony is not in conflict with that of either Mr. Foley or Ms. Sammarco, each of whom testified to making remarks during their June 6, 2004 negotiation with City officials designed to remind the City that any agreement that might be reached was subject to ratification.

Given the foregoing, it is the opinion of this Arbitrator that the City has not been able to overcome the course of conduct exhibited by Local 282 regarding its ratification obligations. Accordingly, given Local 282's course of conduct both before and during the June 6, 2004 negotiation, the City knew or should have known that any agreement that resulted from the June 6, 2004 bilateral negotiations was subject to approval by Local 282's membership.[6]

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[5] In addressing his recollection about whether Local 282 raised the issue of membership ratification at the June 6, 2004 meeting, Commissioner Matarese testified that while he did not recall Mr. Foley saying specifically that ratification by the Local 282 membership would be required, the Commissioner testified that he did recall discussions where Mr. Foley remarked that he would need to sell the terms of the MOA to his membership. Commissioner Matarese testified that he understood Mr. Foley's remarks to mean that Foley would need to carefully explain the terms of the MOA to his membership. If the Commissioner truly believed that Local 282's ratification of the terms of the June 6, 2004 MOA was not required, why would he express his concern to Mr. Foley about Foley's need to "sell" the terms of the MOA to his membership?

[6] The examples of MOAs introduced by the City in an effort to overcome Local 282's course of conduct do not alter this conclusion. City Exhibits 8 & 9 provide a statement acknowledging the need for ratification by the City and Local 282. This joint acknowledgment makes sense since an employer who wishes to make ratification a condition of an agreement must fully and explicitly express such intention. (See *City of Norwich*, 25 PERB 3056, citing *Board of Education of City School District*, 24 PERB 3033 (1991). As noted above, unlike an Employer's obligation to be explicit in its intent, a Union need only demonstrate a course of conduct. City Exhibit 10 deals with "certain employees" and accordingly, is not subject to ratification by Local 282's membership according to the uncontested testimony of Frank Lucca, Local 282's Vice President. With respect to the remaining City Exhibits, whereas it was established that Commissioner Matarese did not begin his employ with the City until November 2002, I find that while certainly well intended, he is unable to credibly testify about the relevant details of City Exhibit 11, an MOA dated March 31, 1993 and City Exhibit 12, an Agreement dated June 20, 1994.

E. The City's Implementation of the Single Health Provider Violated Article XXVII

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. Lest there be any doubt about the significance of the right of Local 282's concurrence, the following statement issued by the BFSA clearly dispels any such doubts:

> Negotiating Raises in a Wage Freeze Environment
>
> Given the combined structural budget gap in the City and its covered organizations, it is unlikely that the wage freeze can be lifted wholesale over them in the near term, absent structural changes. According to the BFSA Act, the structural budgetary gap (in all four years of the financial plan) would have to be alleviated in the City and all covered organizations before the freeze can be lifted.
>
> A single union can negotiate raises in a new contract which can be paid out even during the wage freeze if the contract brings ongoing budgetary savings which contribute to alleviating the fiscal crisis in a meaningful way.
>
> Given the wide differences in employee responsibilities and contractual arrangements, there are many and varied options for alleviating the citywide fiscal crisis. The wage freeze can be lifted union-by-union.
>
> For BFSA to approve the agreement, the savings must be permanent and real, rather than speculative or contingent.
>
> While it may be possible, with new State aid assistance, to "pay" for contractual changes in 2006-07, the contractual changes must result in long-term savings that help resolve the growing budgetary gaps associated with the fiscal crisis.

(See Union Exhibit 8, pages 11-12)[7]

F. The Appropriate Remedy

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

[7] While the BFSA Control Board lifted the wage freeze as of July 1, 2007, it retains the right to approve all collectively bargained agreements before their implementation.

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.

## CONCLUSION AND AWARD

For the reasons noted and discussed above, it is the Conclusion of this Arbitrator that the City's action in implementing the terms of the June 6, 2004 MOA lacked the mutual agreement of Local 282, thereby violating Article XXVII of the CBA. As a Remedy, the City is directed to comply with the Remedy Portion of this Opinion and Award noted in Section F, paragraph 3 on pages 21 & 22.

The Arbitrator shall retain jurisdiction to resolve any disputes which may arise over the interpretation and implementation of this Award.

**STATE OF NEW YORK**
**COUNTY OF ERIE:**

**I, Dennis J. Campagna, do hereby affirm that I am the individual described herein and who executed this instrument, which is my Award.**

12-19-08
**Date**

**Dennis J. Campagna, Arbitrator**