

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NICK SUNYAK, *et al.*, : Case No.: 1:11-CV-445
Plaintiffs, : Judge Michael R. Barrett
v. : RETIREE PLAINTIFFS' MOTION TO
CITY OF CINCINNATI, *et al.* : ENFORCE THE CONSENT DECREE
Defendants. : AND FOR ATTORNEYS' FEES

Retiree Plaintiffs, for and on behalf of the Retirees Class, respectfully move this Court to enforce the Consent Decree entered November 20, 2015 by enjoining the City of Cincinnati from reducing the Retirees Class Healthcare Benefits on July 1, 2019 in violation of the Consent Decree. The Retiree Plaintiffs also request that the Court award their class counsel fees for enforcing and securing the benefits of the Consent Decree. This Motion is made pursuant to the Consent Decree (Doc. 105) entered in this matter and the accompanying Memorandum.

Respectfully submitted,

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MEMORANDUM

The Collaborative Settlement Agreement (the “Agreement”) entered by the parties to this action—including the City of Cincinnati (the “City”) and its City Manager—prohibits “reductions in benefits or increases in cost for Retirees Class Healthcare Benefits” except with the “express approval of the Court.” (Doc. 100-1, p. 38). That Agreement was incorporated in its entirety into the Consent Decree (Doc. 105) entered by this Court on November 20, 2015. Nevertheless, the City announced less than two weeks ago that it would reduce the Retirees Class Healthcare Benefits—defined in the Agreement as the benefits provided in 2014—beginning July 1, 2019. If not enjoined, the announced changes would violate the Agreement’s clear prohibition on reducing the Retirees Class Healthcare Benefits without the “express approval of the Court.”

A. Factual Background

When the parties entered the Agreement, they acknowledged that “years of poor communication among the various stakeholders has created suspicion and occasional animosity.” (Doc. 100-1, p. 2). So the Agreement sought to address “both material issues within the CRS and the less tangible (but equally important) issues of trust, access and transparency that have long hampered reform efforts.” (*Id.*, p. 2-3). As the Court knows from the Retiree Plaintiffs’ January 25, 2019 Motion to Enforce Consent Decree (“January Motion”)(Doc. 118), the parties have fallen short of the “trust, access and transparency” to which they aspired. As detailed in the January Motion, in the more-than-three years since the Agreement was executed, the City has failed to contribute any funds to the 115 Trust Fund, adopt a 115 Trust Fund policy, or address the increases in premiums resulting from the Income Related Monthly Adjustment Amount. As a result, the Auditor of the State of Ohio has issued a finding of noncompliance for fiscal years

2016-18. Nevertheless, consistent with the Agreement, and with the Court’s encouragement, the Retiree Plaintiffs had been working to negotiate a compromise of these ongoing breaches of the Agreement.

Then, on June 4, 2019, the City Manager issued a memorandum to the Cincinnati Retirement System Board of Trustees (the “Board”) with the subject line “Cincinnati Retirement System Retiree Health Care Benefits” (the “Memorandum”). A true and accurate copy of the Memorandum is attached as Exhibit A.¹ According to the Memorandum, the City’s Retirement Division identified “various cost management opportunities and industry best practices” related to Retiree prescription drug benefits. The Memorandum sets forth general, bullet-point descriptions of “changes and programs that will be implemented including projected annual savings” for each change. *See* Exhibit A.

The Memorandum provides few details and, as of this filing, the Retiree Plaintiffs and their counsel do not have clarity about several of the changes the City will implement. But the Memorandum is clear on at least two points. **First**, certain of the changes will take effect on July 1, 2019—less than a month after the Memorandum was issued, and roughly two weeks from the date of this filing. **Second**, certain of the “changes and programs” are reductions in the benefits currently provided to the Retirees Class. The first change described in the Memorandum is titled: “Remove Lifestyle Erectile Dysfunction Drugs from Coverage,” and is projected to result in savings of \$425,000 a year. The term “Remove” is nothing if not a statement that a benefit is being reduced or eliminated. Another bullet-point is titled “Implement Standard Utilization Review Package” and is described as “includ[ing] additional quantity limits, step therapy and prior authorizations.” Each of these generic terms, “quantity limits, step therapy and prior

¹ The Memorandum is a public record that is also available at https://city-egov2.cincinnati-oh.gov/Webtop/ws/fyi/public/fyi_docs/Blob/4497.pdf?rpp=-10&w=doc_no%3D%273888%27&m=1.

authorizations,” describes a process to reduce the availability and use of prescription drugs. The Memorandum projects that each reduction, vague as each is, would result in annual savings of between \$50,000 and \$465,000 a year.

The “changes and programs” outlined in the Memorandum are not a negotiated compromise. They were not introduced for consideration by the Retirees Class or the Board. Instead, these reductions were mandated by the City to the Retirees Class with no prior warning or communication. According to the Memorandum, the changes “*will be implemented*” by the City in less than two weeks. This unilateral, heavy-handed approach exemplifies the problems “of trust, access and transparency” that the Agreement was intended fix. Indeed, one of the seven enumerated goals of the Agreement was to provide the Retirees stability in their healthcare benefits and give them “confidence that neither the City nor the other Parties will attempt to alter these benefits outside of the parameters set forth in this Agreement.” (Doc. 100-1, p. 3). The Memorandum reveals that the City intends to do just the opposite.

B. The changes contained in the Memorandum would violate the Agreement because they are “reductions in benefits” that would be implemented without the “express approval of the Court.”

The “changes and programs” cited in the Memorandum would violate the rights and benefits guaranteed to the Retirees Class in the Agreement. Those rights and benefits are contained throughout the Agreement, including in section 35, which confirms that “[t]he continued provision of Retirees Class Healthcare Benefits is considered a material part of the Settlement and Consent Decree.” (Doc. 100-1, p. 38). Accordingly, “Reductions in benefits or increases in cost for Retirees Class Healthcare Benefits shall occur only with the *express approval* of the Court,” after considering enumerated factors. (*Id.*) (emphasis added). The City has not requested or received approval from the Retirees Class or the Court. So, the question for

the Court is whether the “changes and programs” outlined in the Memorandum constitute a reduction in benefits or increase in cost to the Retirees Class. For at least two reasons, this Court should find that the changes contemplated by the Memorandum would reduce Retirees Class Healthcare Benefits and must therefore be enjoined.²

First, the plain language of the Memorandum describes certain of the “changes and programs” as the removal of drugs from coverage. *See* Exhibit A (“Remove Lifestyle Erectile Dysfunction Drugs from Coverage”). Removing a drug—any drug—“from coverage” is by definition a “reduction[] in benefits.” (Doc. 100-1, p. 38). Similarly, as described *supra*, “implement[ing] standard utilization review package” is a generic description for imposing third-party review of prescriptions, which can only result in reduced access to prescription drugs. The *Cincinnati Enquirer* reached this same common-sense conclusion when it described the changes contemplated by the Memorandum as “eliminate[ing] most coverage for erectile dysfunction medication...”³

Second, the changes contemplated by the Memorandum constitute a reduction to the Retirees Class Healthcare Benefits, as defined by the Agreement. The Agreement defines “Retirees Class Healthcare Benefits,” generally, as the health care benefits in effect as of January 1, 2014.⁴ (Doc. 100-1, p. 13). One of the benefits specified in the definition is the “Rx formulary as administered in 2014 by Optum.” That prescription drug formulary included Viagra and Cialis, two lifestyle erectile dysfunction drugs, as covered drugs that were available

² Retirees Class counsel understand from a conversation with the City’s counsel that one of the changes, “Implement Maintenance Choice All Access Opt-Out Program,” is a voluntary program. This program would not, therefore, constitute a reduction in benefits. The balance of the changes contemplated by the Memorandum appear to be mandatory cuts in benefits.

³ The *Cincinnati Enquirer* article is titled “No more Viagra: Rising Costs might cost Cincinnati retirees coverage for impotence drugs,” and is available at <https://www.cincinnati.com/story/news/2019/06/09/no-more-viagra-cincinnati-may-end-coverage-retirees-ed-pills/1381375001/>.

⁴ The definition of “Retirees Class Healthcare Benefits” is more detailed and incorporates specific documents that describe the Retirees’ healthcare benefits as of January 1, 2014.

without prior authorization or step therapy. Excerpts from the 2014 Optum formulary related to Viagra and Cialis are attached as Exhibit B.⁵ Though not explicitly stated in the Memorandum, Viagra and Cialis are likely two of the “lifestyle erectile dysfunction drugs” that would be removed from coverage. If so, the changes contemplated by the Memorandum would constitute a reduction in benefits, which is specifically prohibited without “express approval of the Court.” (Doc. 100-1, p. 38).

The bottom line is that the Agreement prohibits the City from reducing the healthcare benefits available to the Retirees except with the “express approval of the Court.” Nevertheless, the Memorandum states that effective July 1, 2019, the City will—unilaterally, without input from the Retirees or permission from the Court—reduce the healthcare benefits available to the Retirees. The changes and programs contemplated by the Memorandum would, therefore, violate the Agreement.

C. This Court should enforce the Consent Decree by enjoining the City from implementing the “changes and programs” in the Memorandum.

Under the Agreement “the Court shall retain exclusive jurisdiction to oversee, enforce, interpret, implement, and administer this Settlement Agreement and the Consent Decree...” (Doc. 100-1, p. 27-28). The Consent Decree confirms “that the Court shall retain exclusive jurisdiction to oversee, enforce, interpret, implement, and administer the Settlement Agreement and this Consent Decree...” (Doc. 105 ¶ 2). Inherent in the Court’s authority to enforce, implement, and administer the Agreement is the authority to enjoin conduct prohibited by the Agreement. *See Bronson v. Bd. of Edn.*, S.D.Ohio Case No. C-1-74-205, 1991 U.S. Dist. LEXIS 21770, at *17 (June 26, 1991) (“When a consent decree is enforced, the most common method of enforcement is through contempt proceedings. However, because a consent decree is an

⁵ Footnote 5 of the Agreement required Retirees Class counsel to retain a copy of the 2014 formulary administered by Optum; the retained copy of the formulary is the source of Exhibit B.

injunction, a court may use all equitable powers to enforce it.”); *United States v. City of Detroit*, 329 F.3d 515, 522 (6th Cir. 2003) (confirming that the All Writs Act, 28 U.S.C. § 1651(a), authorizes a federal court to “issue such commands as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in exercise of jurisdiction otherwise obtained” and applying this principle to an injunction issued in support of consent decree) (internal quotations and citations omitted); *Frew v. Hawkins*, 540 U.S. 431, 440, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004) (“Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.”).

According to the Memorandum, certain reductions in benefits *will* take effect July 1, 2019. *See* Exhibit A. Other changes will take effect in September 2019, October 2019, and January 2020. *Id.* But all of the changes are, according to the Memorandum, final; the Memorandum is not an invitation to negotiate, but is instead a pronouncement of the City’s final policy decision. Accordingly, the only avenue to prevent the City’s violation of the Agreement is for this Court to exercise its authority to enforce the Agreement by enjoining the changes in the Memorandum from taking effect until the City complies with the requirements of the Agreement.

Because certain of the changes in the Memorandum will take effect July 1, 2019, Retiree Plaintiffs respectfully request that this Court order expedited briefing on this issue and that the Court render a decision before the July 1, 2019 implementation date.

D. The Court should award the Retirees Class the legal fees incurred in enforcing the Agreement.

As detailed in the January Motion, the City has refused or delayed implementing key provisions of the Agreement. Now, according to the Memorandum, the City plans to violate the Agreement’s express prohibition on reducing Retirees Class Healthcare Benefits without Court

approval. This continuing conduct has left the Retiree Plaintiffs no choice but to continue to engage counsel. Accordingly, the Retiree Plaintiffs respectfully request that the Court award additional fees to its class counsel.

As set forth in the January Motion, the Retirees' request for attorneys' fees is supported by *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 558-559, 106 S. Ct. 3088, 92 L.Ed.2d 439 (1986), in which the United States Supreme Court confirmed that "[p]rotection of the full scope of relief afforded by the consent decree was thus crucial to safeguard the interests asserted by [plaintiffs]; and enforcement of the decree...involved the type of work which is properly compensable as a cost of litigation...." Accordingly, the Court should award class counsel attorneys' fees for the time it has incurred in addressing the issues raised in the January Motion and this Motion.⁶

E. Conclusion

The City will no doubt respond with a series of justifications for the benefit cuts identified in the Memorandum. But the City cannot excuse its blatant effort to reduce the Retirees Class Healthcare Benefits without the "express approval of the Court." That conduct violates not only the Agreement's clear language, but also the benefit of the parties' bargain: that each Retiree gave up a compounding COLA largely in exchange for "confidence that neither the City nor the other Parties will attempt to alter [Retirees Class Healthcare Benefits] outside the parameters set forth in this Agreement." This Court should enforce the clear terms of the Agreement by enjoining the City from implementing the "changes and programs" in the Memorandum until the City complies with the Agreement.

⁶ Class counsel will submit an affidavit following briefing on this issue that specifies the time spent and requesting a specific amount of attorneys' fees.

Respectfully submitted,

/s/ Peter J. O'Shea

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CERTIFICATE OF SERVICE

I certify that a copy of the forgoing was filed electronically through the Court's electronic filing system this 14th day of June 2019. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.


/s/ Peter J. O'Shea

Peter J. O'Shea (0086560)

EXHIBIT A



June 4, 2019

To: Cincinnati Retirement System Board of Trustees
From: Patrick A. Duhaney, City Manager 
Subject: Cincinnati Retirement System Retiree Health Care Benefits

The Cincinnati Retirement System (CRS) is expected to spend an estimated \$34 million on retiree health care in 2019. Coverage for prescription drugs has quickly reached fifty percent of the CRS total health care dollars spent. This trend is expected to increase at alarming rates due to escalating costs for brand-name drugs, new and specialty drugs coming to market at ever-higher prices, and increased utilization.

To support the City's responsibility to act as fiscal stewards of its programs and assets, and in accordance with its fiduciary obligations under Ohio Law to preserve and manage the assets for the benefit of all CRS members, I directed the Retirement Division to identify opportunities that can assist in managing rising health care costs and maintain compliance with the Collaborative Settlement Agreement.

Various cost management opportunities and industry best practices were identified in the provision of retiree prescription drug benefits. CRS has been directed to implement certain changes and programs. The type and timing of changes to the Pre-65 Rx plans, and the Post-65 Rx plans otherwise known as Medicare Part D plans, differ due to the difference in benefits offered and Federal regulations. Below are descriptions of the changes and programs that will be implemented including projected annual savings.

Pre-65 Rx Plans

- Remove Lifestyle Erectile Dysfunction Drugs from Coverage
 - This does not affect coverage for approved disease states.
 - This coverage was removed for active City employees in 2018.
 - Projected savings for the Pre- and Post-65 plans combined are \$425,000 per year.
 - Effective 7/1/2019.

- Implement Maintenance Choice All Access Opt-Out Program
 - Requires members to obtain 90-day maintenance Rx's from a CVS pharmacy, CVS mail service, or CVS OnDemand delivery to receive reduced co-pays, unless they take action to opt out of the program.
 - A similar program was implemented for active City employees.
 - Projected savings are \$120,000 per year.
 - Effective 7/1/2019.

- Implement CVS Standard Formulary and Advance Control Specialty Formulary
 - Ninety percent of employers in the Health Coalition purchasing group use this approach.
 - The Post-65 plans currently use a Standard Formulary.
 - The City employees use a Standard Formulary.
 - Projected savings are \$465,000 per year.
 - Effective 10/1/2019.

Post-65 Rx Plans

- Remove Lifestyle Erectile Dysfunction Drugs from Coverage.
 - This does not affect coverage for approved disease states.
 - This coverage was removed for active City employees in 2018.
 - Projected savings for the Pre- and Post-65 plans combined are \$425,000 per year.
 - Effective 9/1/2019.
- Implement Standard Utilization Review Package
 - Includes additional quantity limits, step therapy and prior authorizations.
 - Projected savings are \$50,000 per year.
 - Effective 1/1/2020

The challenges of a constantly changing health care industry and the dynamics of persistent cost increases, require and demand the use of industry best practices and strategies to help mitigate costs where possible and provide comprehensive benefits for current and future retirees and their dependents who are eligible for retiree healthcare.

EXHIBIT B

			More information >
HEMATOGEN (Generic)	NA Capsule, conventional	Benefit/Plan Exclusion	Prior Authorization: No Step Therapy: No More information >
CIALIS (Brand Name) TADALAFIL TAB 10 MG	10 MG Tablet	Formulary Brand/Tier 2	Prior Authorization: No Step Therapy: No More information >
CIALIS (Brand Name) TADALAFIL TAB 20 MG	20 MG Tablet	Formulary Brand/Tier 2	Prior Authorization: No Step Therapy: No More information >
CICLODAN CRE (Brand Name) *CICLOPIROX OLAMINE CREAM 0.77% (BASE EQUIV) & CLEANSER KIT* Formulary Alternative(S): ⌵ ⌵ CICLOPIROX	NA Kit (multiple component)	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
CICLODAN CRE (Brand Name) *CICLOPIROX OLAMINE CREAM 0.77% (BASE EQUIV) & CLEANSER KIT* Formulary Alternative(S): ⌵ ⌵ CICLOPIROX	NA Kit (multiple component)	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
CICLODAN SOL (Brand Name) CICLOPIROX SOLUTION KIT 8% Formulary Alternative(S): ⌵ ⌵ CICLOPIROX	NA Kit (multiple component)	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
CICLODAN SOL (Brand Name) CICLOPIROX SOLUTION KIT 8% Formulary Alternative(S): ⌵ ⌵ CICLOPIROX	NA Kit (multiple component)	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
CIFEREX (Brand Name) FOLIC ACID-CHOLECALCIFEROL CAP 1 MG-3775 UNIT	NA Capsule, conventional	Benefit/Plan Exclusion	Prior Authorization: No Step Therapy: No More information >
CILOXAN (Brand Name) CIPROFLOXACIN HCL OPHTH SOLN 0.3% Formulary Alternative(S): ⌵ ⌵ CIPROFLOXACN	0.3 % Solution	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
CIMETIDINE (Generic)	300 MG/5ML Solution	Formulary Generic/Tier 1	Prior Authorization: No Step Therapy: No More information >
CIMZIA (Brand Name) CERTOLIZUMAB PEGOL INJ KIT 6 X 200 MG/ML	200 MG/ML Kit (multiple component)	Non-Formulary Brand	Prior Authorization: Yes Step Therapy: No More information >
CINRYZE (Brand Name) C1 ESTERASE INHIBITOR (HUMAN) FOR IV INJ 500 UNIT	500 UNIT Solution, when reconst'd	Non-Formulary Brand	Prior Authorization: Yes Step Therapy: No More information >
CIPRO (Brand Name) CIPROFLOXACIN HCL TAB 250 MG (BASE EQUIV) Formulary Alternative(S): ⌵ ⌵ CIPROFLOXACN	250 MG Tablet	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
CIPRO (Brand Name) CIPROFLOXACIN HCL TAB 250 MG (BASE EQUIV) Formulary Alternative(S): ⌵	250 MG Tablet	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >

(Generic)		Generic/Tier 1	No Step Therapy: No More information >
VORICONAZOLE (Generic)	40 MG/ML Suspension, when reconst	Formulary Generic/Tier 1	Prior Authorization: No Step Therapy: No More information >
VORICONAZOLE (Generic)	50 MG Tablet	Formulary Generic/Tier 1	Prior Authorization: No Step Therapy: No More information >
CALCIUM (Generic)	NA Tablet, chewable	Benefit/Plan Exclusion	Prior Authorization: No Step Therapy: No More information >
VIACTIV (Brand Name) CALCIUM W/ VITAMIN D & K CHEW TAB 500 MG-500 UNIT-40 MCG	NA Tablet, chewable	Benefit/Plan Exclusion	Prior Authorization: No Step Therapy: No More information >
VIAGRA (Brand Name) SILDENAFIL CITRATE TAB 100 MG	100 MG Tablet	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
VIAGRA (Brand Name) SILDENAFIL CITRATE TAB 50 MG	50 MG Tablet	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
VIBATIV (Brand Name) TELAVANCIN HCL FOR IV SOLN 250 MG (BASE EQUIV)	250 MG Solution, when reconst'd	Benefit/Plan Exclusion	Prior Authorization: No Step Therapy: No More information >
MORGIDOX (Generic)	100 MG Capsule, conventional	Formulary Generic/Tier 1	Prior Authorization: No Step Therapy: No More information >
VIBRAMYCIN (Brand Name) DOXYCYCLINE HYCLATE CAP 100 MG Formulary Alternative(S): ⌵ ⌵ DOXYCYC MONO	100 MG Capsule, conventional	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
VIBRAMYCIN (Brand Name) DOXYCYCLINE HYCLATE CAP 100 MG Formulary Alternative(S): ⌵ ⌵ DOXYCYC MONO	100 MG Capsule, conventional	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
VIBRAMYCIN (Brand Name) DOXYCYCLINE HYCLATE CAP 100 MG Formulary Alternative(S): ⌵ ⌵ DOXYCYCL HYC	100 MG Capsule, conventional	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
VIBRAMYCIN (Brand Name) DOXYCYCLINE MONOHYDRATE FOR SUSP 25 MG/5ML Formulary Alternative(S): ⌵ ⌵ DOXYCYC MONO	25 MG/5ML Suspension, when reconst	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
VIBRAMYCIN (Brand Name) DOXYCYCLINE MONOHYDRATE FOR SUSP 25 MG/5ML Formulary Alternative(S): ⌵ ⌵ DOXYCYC MONO	25 MG/5ML Suspension, when reconst	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >
VIBRAMYCIN (Brand Name) DOXYCYCLINE MONOHYDRATE FOR SUSP 25 MG/5ML Formulary Alternative(S): ⌵	25 MG/5ML Suspension, when reconst	Non-Formulary Brand	Prior Authorization: No Step Therapy: No More information >