

STATE OF OHIO
DEPARTMENT OF INSURANCE
50 WEST TOWN STREET
THIRD FLOOR – SUITE 300
COLUMBUS, OHIO 43215

IN RE: : MARY JO HUDSON
COMPLAINT OF TIMOTHY METCALFE : SUPERINTENDENT OF INSURANCE
AND WILLIAM BIASELLA :
: LOUIS E. GERBER
: HEARING OFFICER
:
: CASE NO. LGL-0001900-H

ORDER

Pursuant to the Report and Recommendation issued on the 7th day of April, 2010, and the deposition(s), affidavit(s) and exhibits, I, Mary Jo Hudson, Superintendent, Ohio Department of Insurance ("Department"), hereby make the following findings:

1. An Order of Reference was issued by Judge Marvin Shapiro of the Summit County Court of Common Pleas dated February 7, 2006, in the case of *Metcalf, et al. v. City of Akron, et al.*, Case no. 2005-11-6527, asking the Superintendent of the Department of Insurance ("Department") to assert jurisdiction of the coordination of benefits issues that were before the Court, or to decline to assert such jurisdiction. A Complaint filed with the Department by Complainants Timothy Metcalfe and William Biasella also raised the issue of whether Respondent, City of Akron's municipal self-funded healthcare plan for retirees is subject to Ohio's coordination of benefits law and, if so, whether a violation of that law and rules adopted thereunder constitute an unfair and deceptive practice under Ohio Revised Code § 3901.19, *et seq.*
2. On March 12, 2008, the Department issued a NOTICE OF OPPORTUNITY FOR HEARING to the City of Akron, Medical Mutual of Ohio, Medical Mutual Services LLP, and the Ohio Police and Fire Pension Fund advising them that the Superintendent found that a hearing under Ohio Revised Code § 3901.22 is justified and necessary for the protection of the people of Ohio and that the purpose of the hearing will be to determine whether the City of Akron violated Ohio Revised Code § 3901.20 pursuant to Ohio Revised Code § 3902.13. A copy of said NOTICE OF OPPORTUNITY FOR HEARING is marked **Exhibit A**, attached hereto and made a part hereof as if fully set forth herein.
3. In his Report and Recommendation, the Hearing Officer made Findings of Fact, *inter alia*, as follows:
 2. Timothy Metcalfe ("Mr. Metcalfe") is a retired employee of the City of Akron, Division of Fire. William Biasella ("Mr. Biasella") is a retired employee of the City of Akron, Division of Police. Both men

are covered by a healthcare plan provided by the City of Akron. They are also members of the Ohio Police and Fire Pension Fund ("OP&F").

Mr. Metcalfe retired from his employment with the City of Akron on July 21, 1996, and became eligible for coverage under Akron's retiree plan immediately. Mr. Metcalfe's healthcare coverage with OP&F also became effective on his retirement date.

Mr. Biasella retired from service to the City of Akron on April 19, 1998, and became immediately eligible for coverage under the Akron retiree plan. Mr. Biasella's OP&F healthcare coverage became effective the same day.

For both Mr. Metcalfe and Mr. Biasella, the effective dates of coverage under their Akron and OP&F plan are identical.

3. The City of Akron sponsors a self-funded medical plan for its retired police officers and firefighters who pay no premiums for such coverage. The retiree healthcare plan is a separate plan from that offered to City of Akron active police officers and firefighters. The City of Akron contracts with Medical Mutual Services LLC ("MMS") to act as its third-party administrator.
4. Mr. Metcalfe and Mr. Biasella enrolled for healthcare coverage through their membership in OP&F for which they pay approximately \$300.00 and \$566.00 a month, respectively.
5. Mr. Metcalfe and Mr. Biasella filed a Complaint in the Summit County, Ohio, Court of Common Pleas claiming that the City of Akron improperly coordinated healthcare benefits by designating OP&F as the primary health insurer and Akron's self-funded medical plan as the secondary health insurer.
6. The Defendants to that action, OP&F, Medical Mutual of Ohio and the City of Akron (Respondents herein) each filed motions to dismiss based upon the doctrine of primary administrative jurisdiction.
7. Eventually, the Metcalfe and Biasella action was stayed by the Summit County Court of Common Pleas "... until such time as the Department of Insurance rules on the question presented in this matter or until such time as the Superintendent of Insurance declines jurisdiction of the matter."
8. Subsequently, Mr. Metcalfe filed a complaint with the Department pursuant to Ohio Revised Code § 3901.20 alleging that the City of Akron, OP&F and/or Medical Mutual of Ohio ("MMO") had committed an unfair and deceptive act by violating Ohio Revised Code § 3902.13, Ohio's Coordination of Benefits Law.

9. Thereafter, the City of Akron filed a Motion to Dismiss the NOTICE OF OPPORTUNITY FOR HEARING, and, on or about April 28, 2009, the Hearing Officer issued a ruling overruling the City of Akron's Motion to Dismiss finding that the Department did have jurisdiction over the City of Akron and the coordination of benefits issues raised in the Complaint. The Entry overruling the City of Akron's Motion to Dismiss is attached hereto, marked [**Exhibit B**], and incorporated herein as if fully set forth.
10. Following the ruling on the Motion to Dismiss, a status conference was convened where the parties agreed to a hearing date of October 29, 2009, with simultaneous exchange of witness lists and exhibits by September 30, 2009.
11. By agreement of the parties and Hearing Officer Entry, the scheduled hearing date was converted to a status conference where all parties participated and agreed to submit the matter upon a written record and briefs. An Entry was issued calling for the submission of exhibits which would form the record in this matter, followed by objections to exhibits, and an agreed briefing schedule.
12. Exhibits were submitted by the parties and objections were filed. The Hearing Officer issued a ruling on the objections, which ruling is attached hereto, marked [**Exhibit C**], and incorporated herein as if fully set forth.
13. In support of its position, the City of Akron submitted two affidavits from Mark McLeod, the City's Employee Benefits Manager. In his first affidavit, Mr. McLeod stated:
 9. The City of Akron's retiree medical plan, through its contract with MMO, is secondary or supplemental to the OP&F retiree medical insurance plan.
 10. The retiree medical benefit plan of the City of Akron is administered in such a way that medical claims for police and fire retirees and their dependents cannot be processed unless they have first been processed under the OP&F plan as the primary plan. As such, to receive supplemental medical benefits under the City's plan, the retired police officers and firefighters and their dependents must first be enrolled in the OP&F plan. During my entire tenure as Employee Benefits Manager, the City has administered the retiree plan in this manner.
14. Retired Akron police officers and firefighters must enroll in OP&F's insurance plan as a condition precedent to receiving any coverage under Akron's plan.

15. Akron's Group Insurance Plan covering retired police and firefighters contains a coordination of benefits provision that in all material respects is identical to that codified in Ohio Revised Code § 3902.13, previously effective Ohio Administrative Code § 3901-1-56 and, since November 14, 2008, Ohio Administrative Code § 3901-8-01.
16. Since at least 2004, both OP&F and Medical Mutual of Ohio have expressed concerns to Akron over Akron's position that it is always secondary and that the coordination of benefits provision of Akron's plan was inapplicable. Akron always rejected those concerns and demanded that its plan must be administered secondary to the OP&F plan and any other plans in which its retirees were enrolled.
17. Ohio Revised Code § 3901.20 provides:

No person shall engage in this state in any trade practice which is defined in sections 3901.19 to 3901.23 of the Revised Code as, or determined pursuant to these sections to be, an unfair or deceptive act or practice in the business of insurance.

This section applies to any person as defined in section 3901.19 of the Revised Code, regardless of whether the person is licensed or required to be licensed by the superintendent of insurance.
18. Ohio Revised Code § 3901.19(A) provides:

'Person' means any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, fraternal benefit society, title guaranty and trust company, health insurance corporation, and any other legal entity. (Emphasis added.)

The City of Akron's self-funded medical plan is a legal entity within the meaning of Ohio Revised Code § 3901.19(A).
19. Ohio Revised Code § 3901.19(D) provides:

(D) 'Insurance,' includes, but is not limited to, any policy or contract offered, issued, sold, or marketed by an insurer, corporation, association, organization, or entity regulated by the superintendent of insurance or doing business in this state. (Emphasis added.)

The City of Akron's self-funded medical plan is an organization within the meaning of Ohio Revised Code § 3901.19(D).
20. Ohio's Coordination of Benefits law in Ohio Revised Code § 3902.11(B)(3) provides that a plan of health coverage means, *inter alia*:

Any other individual or group policy or agreement under which a third party payer provides for hospital, dental, surgical or medical services. (Emphasis added.)

The City of Akron's self-funded medical plan is a group agreement within the meaning of Ohio Revised Code § 3902.11(B)(3).

21. Ohio Administrative Code § 3901-1-56(C)(6)(a)(ii) provided that a healthcare plan:

(6) 'Plan' means a form of coverage with which coordination is allowed. * * *

(a) Plan includes: * * *

(ii) An uninsured arrangement of group or group-type coverage.

22. Effective November 14, 2008, Ohio Administrative Code § 3901-1-66, which provided for Coordination of Benefits, was replaced by Ohio Administrative Code § 3901-8-01, which now provides for Coordination of Benefits.

Ohio Administrative Code §§ 3901-8-01(C)(11)(a) and (c)(ii) provide that a:

(a) 'Plan' means a form of coverage with which coordination is allowed. * * *

(c) Plan includes: * * *

(iii) An uninsured arrangement of group or group-type coverage.

The City of Akron's self-funded medical plan is a "Plan" within the meaning of Ohio Administrative Code § 3901-1-56(C)(6)(a)(ii) and §§ 3901-8-01(C)(11)(a) and (c)(ii).

23. Ohio Revised Code § 3902.13(K)(2) provides:

No primary plan shall direct or encourage an insured to use the benefits of a secondary plan that results in a reduction of payments by such primary plan.

Ohio Administrative Code § 3901-1-56(E)(2) provided, in part, as follows:

(E) Prohibited coordination and benefit design.

* * *

- (2) No contract, certificate or policy shall contain a provision that its benefits are 'excess' or 'always secondary' to any other plan. * * *

The City of Akron's self-funded medical plan was in violation of Ohio Revised Code § 3902.13(K)(2) and Ohio Administrative Code § 3901-1-56(E)(2).

- 24. Ohio Administrative Code §§ 3901-8-01(E)(1)(a)-(b) and (2) provide:

(E) Prohibited Coordination and Benefit Design.

- (1) A contract shall not reduce benefits on the basis that:
 - (a) Another plan exists and the covered person did not enroll in that plan;
 - (b) A person is or could have been covered under another plan, except with respect to Part B of Medicare;

* * *

- (2) No contract, certificate or policy shall contain a provision that its benefits are 'always excess' or 'always secondary' to any other plan.

The City of Akron's self-funded medical plan, since November 14, 2008, is in violation of Ohio Revised Code § 3902.13(K)(2) and Ohio Administrative Code § 3901-8-01(E)(1)(a)(b)(2).

- 25. Ohio Revised Code § 3902.13(L) provides:

(L) Whoever violates division (K) of this section is deemed to have engaged in an unfair and deceptive insurance act or practices under sections 3901.19 to 3901.26 of the Revised Code and is subject to proceedings pursuant to those sections.

- 26. Ohio Revised Code § 3902.13(A) provides:

(A) A plan of health coverage determines its order of benefits using the first of the following that applies:

- (1) A plan that does not coordinate with other plans is always the primary plan.
- (2) The benefits of the plan that covers a person as an employee, member, insured, or subscriber, other than a dependent, is the primary plan. The plan that covers the person as a dependent is the secondary plan.
- (3) When more than one plan covers the same child as a dependent of different parents who are not divorced or separated, the primary plan is the plan of the parent whose birthday falls earlier in the year. The secondary plan is the plan of the parent whose birthday falls later in the year. If both parents have the same birthday, the benefits of the plan that covered the parent the longer is the primary plan. The plan that covered the parent the shorter time is the secondary plan. If the other plan's provision for coordination of benefits does not include the rule contained in this division because it is not subject to regulation under this division, but instead has a rule based on the gender of the parent, and if, as a result, the plans do not agree on the order of benefits, the rule of the other plan will determine the order of benefits.
- (4)(a) Except as provided in division (A)(4)(b) of this section, if more than one plan covers a person as a dependent child of divorced or separated parents, benefits for the child are determined in the following order:
 - (i) The plan of the parent who is residential parent and legal custodian of the child;
 - (ii) The plan of the spouse of the parent who is the

residential parent and legal custodian of the child;

- (iii) The plan of the parent who is not the residential parent and legal custodian of the child.

- (b) If the specific terms of a court decree state that one parent is responsible for the health care expenses of the child, the plan of that parent is the primary plan. A parent responsible for the health care pursuant to a court decree must notify the insurer or health insuring corporation of the terms of the decree.

- (5) The primary plan is the plan that covers a person as an employee who is neither laid off or retired, or that employee's dependent. The secondary plan is the plan that covers that person as a laid-off or retired employee, or that employee's dependent.

- (6) If none of the rules in divisions (A)(1), (2), (3), (4), and (5) of this section determines the order of benefits, the primary plan is the plan that covered an employee, member, insured, or subscriber longer. The secondary plan is the plan that covered that person the shorter time.

27. Ohio Administrative Code § 3901-1-56, Coordination of Benefits, further provided at APPENDIX A, III, Order of Benefit Determination Rules, Subsection (B)(6), as follows:

Longer/shorter length of coverage. If none of the above rules determines the order of benefits, the benefits of the plan which covered an employee, member or subscriber longer are determined before those of the plan which covered that person for the shorter term.

28. Ohio Administrative Code § 3901-8-01, APPENDIX A, COORDINATION OF THIS CONTRACT'S BENEFITS WITH OTHER BENEFITS, Subsections D.(5)-(6) as follows:

ORDER OF BENEFIT DETERMINATION
RULES.

When a person is covered by two or more plans, the rules for determining the order of benefit payments are as follows:

* * *

(5) Longer or shorter length of coverage. The Plan that covered the person as an employee, member, policyholder, subscriber, or retiree longer is the Primary plan and the Plan that covered the person the shorter period of time is the Secondary plan.

(6) If the preceding rules do not determine the order of benefits, the Allowable expenses shall be shared equally between the Plans meeting the definition of Plan.* * *

4. In his Report and Recommendation, the Hearing Officer made the following Conclusions of Law:

29. Service of the Notice of Opportunity for hearing was perfected as to all parties. The Department is vested with personal jurisdiction over the parties.
30. The Department has subject matter jurisdiction over Unfair and Deceptive Practices and Coordination of Benefits issues presented herein.
31. The City of Akron's self-funded medical plan is a legal entity within the meaning of Ohio Revised Code § 3901.19(A).
32. The City of Akron's self-funded medical plan is an organization within the meaning of Ohio Revised Code § 3901.19(D).
33. The City of Akron's self-funded medical plan is a group agreement within the meaning of Ohio Revised Code § 3902.11(B)(3).
34. The City of Akron's self-funded medical plan was a healthcare plan within the meaning of Ohio Administrative Code § 3901-1-56 until November 14, 2008, and since that time, is a healthcare plan within the meaning of Ohio Administrative Code § 3901-8-01.

35. The Department has subject matter jurisdiction over the City of Akron's conduct once Akron chose to offer a healthcare plan to its employees.
 36. The matter is governed, in part, by Ohio Administrative Code § 3901-1-56 in effect until November 14, 2008. Since November 14, 2008, the matter is governed, in part, by Ohio Administrative Code § 3901-8-01.
 37. The City of Akron's self-funded medical plan is not a joint self-insured program under Ohio Revised Code § 9.833(C)(10).
 38. The City of Akron's Collective Bargaining Agreement with police and firefighters is inapplicable to an analysis of the coordination of benefits provisions of the City of Akron's self-funded medical plan.
 39. The City of Akron's knowing failure to apply legally appropriate coordination of benefits provisions of its self-insured program constitutes a violation of Ohio Revised Code § 3902.13(K)(1), and is, therefore, deemed an unfair and deceptive practice as a matter of law.
 40. The City of Akron has violated Ohio Revised Code § 3902.13(K)(2) by requiring retired police and firefighters to enroll in OP&F insurance coverage as a condition precedent to coverage under the City of Akron's self-funded healthcare insurance plan.
 41. The City of Akron's self-funded medical plan is in violation of Ohio Revised Code § 3902.13(K)(2) and Ohio Administrative Code § 3901-1-56(E)2 until November 14, 2008, and since November 14, 2008, is also in violation of Ohio Administrative Code § 3901-8-01.
 42. The City of Akron's refusal to properly coordinate benefits violates Ohio Revised Code § 3902.13(K)(1), which states as follows:

No third-party payer shall knowingly fail to comply with the order of benefits as set forth in division (A) of this section.
 43. The City of Akron's actions constitute unfair and deceptive acts under Ohio Revised Code § 3901.20.
5. The Hearing Officer recommended that the Superintendent issue Orders directing the City of Akron, Medical Mutual of Ohio, and Ohio Police and Fire Pension Funds to immediately cease and desist from further violations of Ohio's coordination of benefits law and further ordering the City of Akron and Medical Mutual of Ohio, and Ohio Police and Fire Pension Fund to coordinate benefits of its members pursuant to the terms of their plans consistent with Ohio law.

6. The Hearing Officer recommended that the City of Akron be ordered to immediately cease and desist from further violations of Ohio Revised Code §§ 3901[2].13(K)(1)-(2).
7. The Hearing Officer recommended that an accounting be made by the City of Akron with the assistance of the Complainants and Medical Mutual of Ohio to determine the amount of Complainants' past healthcare claims subject to coordination.
8. The Hearing Officer recommended that any Orders issued by the Superintendent be directed to the Summit County Court of Common Pleas for further application in the case of *Metcalfe, et al. v. City of Akron, et al.*, Case No. 2005-11-6527.
9. I have considered the definitions and criteria enumerated in Ohio Revised Code §§ 3901.19 through 3901.22, as well as the law of coordination of benefits contained in Ohio Revised Code §§ 3902.11 through 3902.14, and Ohio Administrative Code §§ 3901-1-56 and 3901-8-01. I have reviewed the Objections to the report and recommendation of the Hearing Officer put forth by City of Akron, Ohio Police and Fire Pension Fund, and by Complainants. I concur with the Hearing Officer's facts and conclusions of law, and agree with the recommendations, with the following minor modifications, which make them accepted.
 - a. Finding of Fact Item 2: change "Biasella to "Biasella."
 - b. Finding of Fact Item 19: Change the last sentence to read, "The City of Akron's self-funded medical plan is an organization doing business in this state within the meaning of § 3901.19(D) when by its terms it chose to coordinate benefits with other plans of health coverage in this state."
 - c. Finding of Fact Item 22: change 3901-1-66 to 3901-1-56, delete the "a" before the semicolon, and change (iii) to (ii).
 - d. Finding of Fact Item 24: in the quoted portion of 3901-8-01(E)(2) insert an ellipse after "plan."
 - e. Finding of Fact Item 24: insert a hyphen between (a) and (b) and an "and" between (b) and (2) in the last sentence.
 - f. Finding of Fact Item 25: in the quoted portion of 3902.13(L), change "practices" to "practice."
 - g. Finding of Fact Item 28: insert "states" after "D.(5)-(6)."
 - h. Conclusion of Law Item 32: change to Item 33 and to read, "The City of Akron's self-funded medical plan contains a coordination of benefits provision within the meaning of Ohio Revised Code § 3902.11(B)(3).
 - i. Conclusion of Law Item 33: change to Item 32.
 - j. Conclusion of Law Item 35: change to read, "The Department had subject matter jurisdiction over the City of Akron's conduct of its retiree healthcare plan once Akron chose to coordinate benefits under that plan.
 - k. Conclusion of Law Item 41: change "3901-1-56(E)2)" to "3901-1-56(E)(2)."

I. Recommendation 2: change "3901.13(K)(1)-(2)" to "3902.13(K)(1)-(2)."

Therefore, the recommendations put forth by the Hearing Officer are hereby accepted with these minor modifications.

IT IS THEREFORE ORDERED that the City of Akron, Medical Mutual of Ohio, and Ohio Police and Fire Pension Fund(s) immediately cease and desist from further violations of Ohio's coordination of benefits law and the City of Akron and Medical Mutual of Ohio, and Ohio Police and Fire Pension Fund coordinate benefits of their members pursuant to the terms of their plans consistent with Ohio law.

IT IS FURTHER ORDERED that the City of Akron immediately cease and desist from further violations of Ohio Revised Code §§ 3902.13(K)(1)-(2).

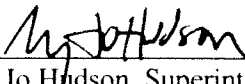
IT IS FURTHER ORDERED that an accounting be made by the City of Akron with the assistance of the Complainants and Medical Mutual of Ohio to determine the amount of Complainants' past healthcare claims subject to coordination.

IT IS FURTHER ORDERED that this Order is directed to the Summit County Court of Common Pleas for further application in the case of *Metcalf, et al. v. City of Akron, et al.*, Case No. 2005-11-6527.

This Order is effective immediately and is hereby entered into the Journal of the Ohio Department of Insurance.

Any party desiring to appeal shall file a Notice of Appeal with the Department of Insurance, to the attention of Sharon Green, Hearing Administrator, setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court. In filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice. Such notices of appeal shall be filed within fifteen (15) days after the mailing of the notice of the Agency's Order as provided in Section 119.12 of the Ohio Revised Code.

Signed this 20th day of July, 2010, at Columbus, Ohio.



Mary Jo Hudson, Superintendent of Insurance



STATE OF OHIO
DEPARTMENT OF INSURANCE
2100 Stella Court
Columbus, Ohio 43215-1067

IN RE: Complaint of Timothy Metcalfe and
William Biasella

: NOTICE OF OPPORTUNITY
: FOR HEARING

On February 7, 2006, the Court in *Metcalfe, et al. v. City of Akron, et al.*, Case No. 2005-11-6527 (Judge Marvin Shapiro) ("Metcalfe") issued an Order staying that litigation until such time as the Department rules on the questions presented in the litigation or until such time as the Department declines jurisdiction in this matter and referred the matter to the Department.

The Ohio Department of Insurance ("Department"), on behalf of the Superintendent of Insurance ("Superintendent"), is conducting an investigation of the matters alleged in *Metcalfe, et al. v. City of Akron, et al.*, Case No. 2005-11-6527 (Judge Marvin Shapiro) ("Metcalfe") and a related complaint separately submitted to the Department beginning on or about February 14, 2006. As a result of the ongoing investigation, the Department accepts primary jurisdiction of these matters to determine whether there has been a violation of Section 3901.20 of the Ohio Revised Code as a result of (1) violations of Ohio Revised Code ("Revised Code") Section 3902.13 as averred in the *Metcalfe* Complaint, a copy of which is attached to and incorporated by reference into this Notice of Hearing as Exhibit A, and a related complaint submitted to the Department dated February 14, 2006, and/or (2) violation of corresponding insurance regulations.

In accordance with Title 39 and Sections 3902.13(L), 3901.04(B), 3901.22(A) of the Ohio Revised Code ("Revised Code"), and Chapter 119 of the Revised Code, City of Akron, Medical Mutual of Ohio and Medical Mutual Services LLC (Medical Mutual of Ohio and Medical Mutual Services LLC are hereafter referred to collectively as "Medical Mutual") are hereby notified that the Superintendent intends to take any and all actions authorized pursuant to Section 3902.13, Section 3901.04 and Sections 3901.19, *et seq.* of the Revised Code and Chapter 119 of the Revised Code and Ohio Administrative Code Section 3901-1-56, including but not limited to, an order to return disputed payments, civil penalties and/or administrative costs. The grounds for such action are set forth below.

COUNT ONE-JURISDICTION OF THE DEPARTMENT

On November 4, 2005, Metcalfe filed the *Metcalfe* Complaint against, City of Akron ("the City") and Ohio Police and Fire Pension Fund ("OPF"), and Medical Mutual of Ohio alleging violations of Ohio insurance statutes, and in particular Revised Code Section 3902.13. The City and OPF are non-ERISA, self-funded plans. Medical Mutual of Ohio is an Ohio domiciled insurance company that provides third party administrator (TPA) services through its subsidiary Medical Mutual Services.

In lieu of filing an Answer in the *Metcalf* case, the City and OPF each filed a Motion to Dismiss the Complaint in its entirety pursuant to Ohio Rule of Civil Procedure 12(B). OPF argued in its Motion that the Ohio Superintendent of Insurance has initial and primary jurisdiction over all claims set forth in the Complaint. (OPF Motion pp. 1,3). The City also maintained that (1) all of the Plaintiffs' claims arise under Ohio Revised Code 3902.13 (coordination of benefits) (Akron Motion, p. 2); (2) the Complaint fails to state a claim for which relief can be granted by the Court because there is no private cause of action under 3902.13 (Akron Motion, pp. 2); (3) Plaintiffs failed to exhaust their administrative remedies at the Ohio Department of Insurance conferred by Revised Code Section 3901.20; and (4) the exclusive remedy for Plaintiffs' claims is administrative proceedings through the Ohio Superintendent of Insurance. (Akron Motion to Dismiss, pp. 3-5).

In response, the Summit County Court of Common Pleas indefinitely stayed all proceedings in *Metcalf* until such time as the Department rules on the questions presented in the litigation or until such time as the Department declines jurisdiction in this matter.

The Department has determined to accept, and not to decline, primary jurisdiction of the coordination of benefits issues in both the *Metcalf* Complaint and a complaint separately submitted to the Department, including but not limited to the proper coordination of benefits pursuant to Revised Code Section 3902.13 and any corresponding regulations. In addition to the City's and OPF's admissions as to the Department's primary jurisdiction in Motions filed in the *Metcalf* case, the Department's jurisdiction over the parties and the subject matter in *Metcalf*, as well as the complaint filed at the Department, is conferred in part by Revised Code Sections 3901.19 to 26. Revised Code Section 3901.20 provides:

No person shall engage in this state in any trade practice which is defined in [Revised Code] sections 3901.19 to 3901.23 of the Revised Code as, or determined pursuant to those sections to be, an unfair or deceptive act or practice in the business of insurance.

Revised Code Section 3901.20 applies "to any person, as defined in section 3901.19 of the Revised Code, regardless of whether the person is licensed or required to be licensed by the superintendent of insurance." (Emphasis added). City of Akron, OPF and Medical Mutual are "persons" as defined by Revised Code Section 3901.19. Each of them is therefore subject to Revised Code Sections 3901.19 to 3901.23 and prohibited from engaging in this state in any practice which is defined or determined pursuant to those statutes to be an unfair or deceptive act in the business of insurance.

Revised Code Section 3902.13(K) defines a knowing violation of the order of benefits set forth in Section 3902.13(A)(6) by a primary plan (such as either City of Akron or OPF) or a third-party-payer (such as Medical Mutual), as alleged in both the *Metcalf* Complaint and the complaint submitted to the Department, as an unfair or deceptive act or practice in the business of insurance under Revised Code Sections 3901.19-26. Ohio Administrative Code Section 3901-1-56, which implements Revised Code Section 3902.13(A)(6), further provides, "[w]hoever violates this rule or any paragraph thereof shall be deemed to have engaged in an unfair and deceptive insurance act or practice under sections 3901.19 to 3901.26 of the Revised Code, and is

subject to proceedings pursuant to those sections." Ohio Administrative Code Section 3901-1-56(J).

As noted above, the City's and OPF's plans are non-ERISA plans. Therefore, there is no ERISA preemption for the City's and OPF's governmental plans. See 29 U.S.C. 1003(b)(1); see also Ohio Administrative Code Section 3901-1-56 Appendix A, Section II(A)(2)(defining "plan" subject to coordination of benefits as including certain governmental plans).

Since securing the stay order, the City suggested to the Department that the Department does not have jurisdiction to conduct the same administrative proceedings the City advocated to the Court in support of its Motion to Dismiss the *Metcalfe* Complaint in favor of administrative proceedings before the Ohio Superintendent of Insurance. The City stated to the Department as recently as October 22, 2007, "... while the Department has exclusive jurisdiction over coordination of benefits issues, it does not have jurisdiction to determine the proper administration and/or coordination of [benefits established] under the City's plan because it is a governmental self-funded plan" allegedly exempt from Ohio's insurance laws under Revised Code Section 9.833(C)(10). As drafted by the legislature, Revised Code Section 9.833(C)(10) applies to certain joint self-insurance programs. Neither the City's nor OPF's plans of health coverage are joint self-insurance programs. Therefore, Revised Code Section 9.833(C)(10) does not exclude the City or OPF or their respective plans of health coverage from the Department's jurisdiction or from Revised Code Section 3902.13 and Ohio Administrative Code Section 3901-1-56.

COUNT TWO - METCALFE COMPLAINT

The *Metcalfe* Complaint and the complaint separately submitted to the Department allege violations of Revised Code Section 3901.20 as a result of violations of Revised Code Section 3902.13. Pursuant to Revised Code Section 3901.22(A), and in reliance on the Court Order issued in *Metcalfe* on February 7, 2006, the Superintendent finds that the complaints were made in good faith. The Superintendent further finds based on the Department's investigation to date that, if the alleged violations are proven, then one or more of the complainants, including Mr. Metcalfe, would be aggrieved by the alleged violations. The Superintendent finds that a hearing under Revised Code Section 3901.22 is justified and that it is necessary for the protection of people in this State. The purpose of the hearing will be to determine whether the alleged acts specified in the complaint attached to and incorporated herein by reference as Exhibit A and the complaint filed with the Department dated February 14, 2006, occurred and are violations of Revised Code Sections 3901.20 pursuant to Revised Code Section 3902.13 (A), (K) and (L).

COUNT THREE

Revised Code Section 3902.13(A) requires a "plan of health coverage" to determine its order of benefits in accordance with the first of the applicable order of benefits determination rules found in the coordination of benefits statute. The City's and OPF's plans are plans of health coverage as defined in Revised Code Section 3902.11(B). Each plan contains coordination of benefits provisions. The Superintendent finds that a hearing under Revised Code Section 3901.22 is justified and that it is necessary for the protection of people in this State. The purpose of the hearing will be to

determine whether the City's correspondence submitted to the Department stating that its plan is "always secondary" to OPF coverage and requiring that its plan be administered as such, are violations of Revised Code Section 3901.20 pursuant to Revised Code Section 3902.13 (A), (K) and (L).

COUNT FOUR

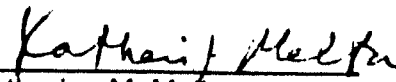
Revised Code Section 3902.13(K)(2) prohibits a primary plan from directing or encouraging an insured to use the benefits of a secondary plan that results in a reduction of payments by the primary plan. The Superintendent finds based on correspondence submitted to the Department that a hearing under Revised Code Section 3901.22 is justified and that it is necessary for the protection of people in this State. The purpose of the hearing will be to determine whether the City violated Revised Code Section 3901.20 pursuant to Revised Code Section 3902.13 (A), (K) and (L).

City of Akron, OPF and Medical Mutual are hereby notified that a hearing pursuant to Revised Code Section 3901.22 and Chapter 119 of the Revised Code will be held at the Ohio Department of Insurance on July 29, 2008. At the hearing, City of Akron, OPF and Medical Mutual may appear in person, by their attorney, or by such other representative as is permitted to practice before the agency, or they may present their positions, arguments or contentions in writing and, at the hearing, they may present evidence and examine witnesses appearing for and against it.

MARY JO HUDSON
Superintendent of Insurance

DATED: March 12, 2008
Columbus, OH

BY:


Katherine M. Melton
Staff Attorney

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO
2005 NOV -4 PM 1:11

TIMOTHY METCALFE)
2990 8th Street)
Cuyahoga Falls, Ohio 44221)

and)

WILLIAM BIASSELLA)
1405 Castalia Drive)
Barberton, Ohio 44203)

Plaintiffs)

vs.)

CITY OF AKRON)
c/o Max Rothal)
Director of Law)
161 S. High Street, Suite 202)
Akron, Ohio 44308-1655)

and)

OHIO POLICE & FIRE PENSION)
FUND)
c/o Diane Lease, General Counsel)
140 East Town Street)
Columbus, Ohio 43215)

and)

MEDICAL MUTUAL OF OHIO)
c/o John S. Dorrell)
2060 E. Ninth Street)
Cleveland, Ohio 44115-1355)

Defendants)

CASE NO:

2005-11-6527

JUDGE:

ASSIGNED TO JUDGE SHAPIRO

COMPLAINT-CLASS ACTION

CLASS ACTION ALLEGATIONS

1. Plaintiffs, Timothy Metcalfe and William Biasella, bring this lawsuit on behalf of themselves, and all persons who are similarly situated in that they are retired sworn employees of the Division of Police or the Division of Fire of the City of Akron; or the widow of either.

2. Plaintiffs are informed and believe, and on that basis allege, that the class of persons consists of approximately nine hundred fifty (950) persons.

3. The claims set forth in this complaint are common to each and every member of the class in that each member alleges that they are entitled to payment of health insurance claims by the Defendants in compliance with Ohio Revised Code § 3902.13 and corresponding Ohio Insurance Regulations, as they relate to the coordination of benefits.

4. The claim of civil conspiracy is also common to each member of the class in that the overt actions of the Defendants have forced each member to purchase health care insurance from Defendant Ohio Police & Fire Pension Fund (O P & F) in order to receive secondary health care coverage from the City of Akron.

5. Plaintiffs are proper representatives of the class of persons previously identified in paragraph one above. The claims that they are asserting in this complaint are typical of all members of the class. The claims of the Plaintiffs are not subject to any unique defenses, nor do any interest of the Plaintiffs in this litigation conflict with the interests of any other member of the

class; and the representative parties will fairly and adequately protect the interests of the class.

6. Plaintiffs contend that the claims set out below are proper for certification as a class action and maintainable under the provisions of Rule 23(B)(1)(a), (B)(2) and (B)(3) of the Ohio Rules of Civil Procedure.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT-STATE ORDINANCE

7. Plaintiff, Timothy Metcalfe, is a resident of the City of Cuyahoga Falls, County of Summit and State of Ohio, who is a retired sworn employee of the City of Akron, Division of Fire.

8. Plaintiff, William Biasella, is a resident of the City of Barberton Falls, County of Summit and State of Ohio, who is a retired sworn employee of the City of Akron, Division of Police.

9. Defendant, City of Akron is a municipal corporation and a public employer, organized and existing under and by virtue of the Constitution and laws of the State of Ohio and is a political subdivision of the State who is subject to suit for the relief sought in this complaint.

10. Defendant, O P & F, is a uniformed state retirement system as defined in Ohio Revised Code (R.C.) § 145.295 organized and operating under the laws of the State of Ohio as contained within R.C. § 742.

11. Defendant, Medical Mutual of Ohio, (MMO) is a health care insuring Corporation organized and existing under the laws of the State of Ohio.

12. Plaintiffs are informed and allege that at all relevant times each

Defendant was subject to Ohio Insurance Laws contained within the Ohio Revised Code and more specifically R.C. § 3902.13 (Order of benefits for health care coverage), as well as any corresponding insurance regulations.

13. At all relevant times, as defined by R.C. 3959.01, MMO was acting as a third party administrator for the City of Akron Health Care Plan, which covered retired employees and was at the same time one of the providers of health care coverage for the O P & F Health Care Plan, thereby placing MMO directly in a position to coordinate claims between the City of Akron Health Care Plan and the O P & F Health Care Plan.

14. At all relevant times, Plaintiffs were and continue to be covered by a health care plan provided by the City of Akron as defined by city ordinance and various collective bargaining agreements.

15. At all relevant times, Plaintiffs were also and continue to be covered by a health care plan that they had purchased from O P & F based upon representations made to the Plaintiffs at retirement that they were required to purchase the plan in order to receive secondary coverage from the City of Akron Plan.

16. R.C. 3902.13(A)(6) commonly known as the longer-shorter rule states "If none of the rules in divisions (A)(1), (2), (3), (4), and (5) of this section determines the order of benefits, the primary plan is the plan that covered an employee, member, insured, or subscriber longer. The secondary plan is the plan that covered that person the shorter time."

17. Plaintiffs are informed and allege that Divisions (A)(1), (2), (3), (4),

and (5) of R.C. 3902.13 do not determine the order of payment of benefits to the Plaintiff's and therefore R.C. 3902.13(A)(6) is controlling for determining the order of payment for benefits.

18. Plaintiffs are informed and allege that proper application of R.C. 3902.13(A)(6) would require the City of Akron Health Care Plan to be primary, and any other coverage secondary.

19. Plaintiffs are informed and allege Defendants are in direct violation of R.C. § 3902.13(A)(6) as to the order for payment of benefits currently being utilized by the Defendants recognizes the City of Akron Health Care as secondary as the secondary plan.

20. Despite actual notice to the Defendants and acknowledgement of the improper order of payment by Defendants O P & F and MMO, as contained in various writings of both, the Defendants continue to operate in direct violation of R.C. § 3902.13(A)(6).

21. As result of Defendants' overt actions the Plaintiffs, at great expense to each, have been and continue to be forced to participate in a health care plan operated by Defendant O P & F.

SECOND CAUSE OF ACTION
CIVIL CONSPIRACY

22. Paragraphs 1- 21 are incorporated as if originally plead hereafter.

23. Plaintiffs are informed and allege that Defendants have conspired and acted in concert to mislead and deceive Plaintiffs into believing that they must purchase health care coverage from Defendant O P & F in order to obtain any health coverage from Defendant City of Akron.

24. Plaintiffs on reliance of the representations and corresponding overt actions of the Defendants as to the payment of benefits have each contracted with Defendant O P & F for health care coverage, or in the alternative do not currently have health care coverage because of the inability to pay the premiums charged by O P & F.

25. Defendants, City of Akron, O P & F and MMO have acted with full knowledge that their actions were unlawful.

26. Defendants, City of Akron, O P & F and MMO after being given actual notice that their actions were contrary to law and after acknowledgement of the improper order of payment by Defendants O P & F and MMO, as contained in various writings of both, the Defendants continue to operate in direct violation of R.C. § 3902.13(A)(6).

27. As result of Defendants' overt actions, the Plaintiffs, at great expense to each, have been and continue to be forced to participate in a health care plan operated by Defendant O P & F.

WHEREFORE, Plaintiffs pray that this Court:

1. Declare that the R.C. 3902.13 and any corresponding Insurance Regulations are binding on the Defendants;
2. Declare that Defendant City of Akron's Health Care Plan is primary;
3. Award Plaintiffs special damages for hospital premiums paid for coverage under the O P & Health Care Plan;
4. Award Plaintiffs compensatory and punitive damages in a sum in

excess of Twenty-Five Thousand Dollars (\$25,000);

5. Award Plaintiffs reasonable attorneys' fees as well as the costs of this action;

6. Grant plaintiffs such other and further relief as this Court may deem fair and equitable.

Respectfully submitted,

Larry D. Shenise (0068461)
Attorney for Plaintiffs
190 N. Union Street, Ste. 201
Akron, Ohio 44304
330-252-9950
Fax 330-798-7779
LShenise@neo.rr.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Notice of Opportunity for Hearing was sent this 12th day of March, 2008, via certified mail, return receipt requested, to: City of Akron, Attn: Director of Law, 161 S. High Street, Suite 202, Akron, Ohio 44308-1655; Medical Mutual of Ohio and Medical Mutual Services LLP, c/o John S. Dorrell, 2060 E. Ninth Street, Cleveland, Ohio 44115-1355; Ohio Police and Fire Pension Fund, c/o Diane Lease, General Counsel, 140 East Town Street, Columbus, Ohio 43215; Vincent J. Tersigni, Esq., Vorys Sater Seymour & Pease, LLP, 106 South Main Street, Akron, Ohio 44308; Michael E. Smith, Esq., Franz Ward, LLP, 2500 Key Center, Cleveland, Ohio 44114-1230, and via regular U. S. Mail, John T. Williams, Esq., Assistant Attorney General, Attorney General's Office, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215.

Katherine J. Melton

Katherine J. Melton
Staff Counsel