P.E.R.C. NO. 88-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLAYTON,

Respondent,

-and-

Docket No. CO-H-87-193

PBA LOCAL NO. 178,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Borough of Clayton violated the New Jersey Employer-Employee Relations Act when it refused to sign a collective negotiations agreement containing the same medical insurance article as the predecessor contract and when it unilaterally changed its practice of paying the costs of HMO coverage.

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BOROUGH OF CLAYTON,

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-and- Docket No. CO-H-87-193

PBA LOCAL NO. 178,

Charging Party.

Appearances:

For the Respondent, Joseph F. Lisa, Esq.

For the Charging Party, Colflesh & Burris, Esqs.
(Ralph Henry Colflesh, Jr., of counsel)

DECISION AND ORDER

On January 27, 1987, PBA Local No. 178 filed an unfair practice charge against the Borough of Clayton. On February 17 and November 20, 1987, the PBA amended the charge. The charge, as amended, alleges that the Borough violated subsections 5.4(a)(1), (5) and (6)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it refused to sign a collective

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

negotiations agreement containing the same medical insurance article as the predecessor contract and when it unilaterally changed its practice of paying the costs of HMO coverage.

On September 15, 1987, a Complaint and Notice of Hearing issued.

On November 20, 1987, the parties stipulated the facts and submitted joint exhibits. Post-hearing briefs were filed by February 8, 1988.

On March 11, 1988, Hearing Examiner Alan R. Howe issued his report. H.E. No. 88-42, 14 NJPER ___ (¶_____ 1988). He found that the Borough violated the Act by refusing to execute a successor contract with the previous article on medical insurance and by unilaterally initiating and then rescinding employer-paid HMO coverage.

On March 14, 1988, the Borough filed exceptions in the form of its post-hearing brief.

We have reviewed the record. We incorporate the stipulated facts (pp. 4-9).

We also adopt the Hearing Examiner's conclusions of law. We stress that the Hearing Examiner did not find that the interest arbitration award required the employer to pay for HMO coverage. Instead he simply found that the old medical insurance article was not modified by the interest arbitration proceedings and the Borough had to negotiate before establishing or discontinuing employer-paid HMO coverage for unit members. We agree.

ORDER

The Borough of Clayton is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to negotiate in good faith with the PBA with respect to the establishment or discontinuance of employer-paid HMO coverage for PBA unit members and by refusing to execute a successor agreement to that which expired December 31, 1984, containing the original Article XI.

2. Refusing to negotiate in good faith with the PBA, particularly, by failing to negotiate in good faith with the PBA with respect to the establishment or discontinuance of employer-paid HMO coverage for PBA unit members.

3. Refusing to execute the successor agreement to that which expired December 31, 1984, particularly, by refusing to agree to include in the successor agreement the original Article XI.

B. Take this affirmative action:

1. Restore employer-paid HMO coverage for PBA unit members .

2. Negotiate in good faith with the PBA over any proposal to discontinue employer-paid HMO coverage for PBA unit members.

3. Forthwith make whole PBA unit members for any financial loss actually incurred due to the discontinuance in June 1986 of employer-paid HMO coverage plus interest from June 30, 1986, at the rate authorized by R.4:42-11(a).

4. Forthwith execute the successor collective negotiations agreement to that which expired December 31, 1984, containing the original Article XI.

5. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by its authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

C. Notify the Chairman of the Commission within twenty (20) days of receipt what steps it has taken to comply herewith.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
April 27, 1988
ISSUED: April 28, 1988

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to negotiate in good faith with the PBA with respect to the establishment or discontinuance of employer-paid HMO coverage for PBA unit members and by refusing to execute a successor agreement to that which expired December 31, 1984, containing the original Article XI.

WE WILL NOT refuse to negotiate in good faith with the PBA, particularly, by failing to negotiate in good faith with the PBA with respect to the establishment or discontinuance of employer-paid HMO coverage for PBA unit members.

WE WILL forthwith restore employer-paid HMO coverage and make whole PBA unit members for any financial loss actually incurred due to the discontinuance in June 1986 of employer-paid HMO coverage plus interest from June 30, 1986, at the rate authorized by R.4:42-11(a). We will negotiate in good faith over any proposals to discontinue employer-paid HMO coverage.

WE WILL forthwith execute the successor collective negotiations agreement to that which expired December 31, 1984, containing the original Article XI.

WE WILL upon demand, negotiate in good faith with the PBA regarding the establishment or discontinuance of employer-paid HMO coverage for PBA unit members.

Docket No. CO-H-87-193 BOROUGH OF CLAYTON
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 88-42

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLAYTON,

Respondent,

-and-

Docket No. CO-H-87-193

PBA LOCAL NO. 178,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Borough violated §§5.4(a)(1), (5) and (6) of the New Jersey Employer-Employee Relations Act when: (1) on December 1, 1985, it unilaterally provided PBA unit members with employer-paid HMO coverage and then in June 1986, unilaterally withdrew such coverage; and (2) it refused to execute a successor agreement containing the prior language with respect to medical insurance where, in an interest arbitration proceeding, neither party had requested any change in the medical insuance provision of the prior agreement nor had the interest arbitrator made any language modification.

The Borough's unilateral establishment and then withdrawal of employer-paid HMO coverage for PBA unit members is governed by the Commission's decision in Hunterdon County Board of Chosen Freeholders, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986) and P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987). Further, the Borough's insistence on modifying the language as to medical insurance in the prior agreement, after the interest arbitrator's award, was a manifestation of bad faith. Thus, there being no other disagreement as to contract language, the Hearing Examiner ordered the Borough to execute the successor agreement. Finally, the Borough was ordered to make whole any PBA unit members for losses incurred as a result of first providing employer-paid HMO coverage and then withdrawing it six months later.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 88-42

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLAYTON,

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-and- Docket No. CO-H-87-193

PBA LOCAL NO. 178,

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Appearances:

For the Respondent
Joseph F. Lisa, Esq.

For the Charging Party
Colflesh & Burris, Esqs.
(Ralph Henry Colflesh, Jr., Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on January 27, 1987, and amended on February 17 and November 20, 1987, by PBA Local No. 178 (hereinafter the "Charging Party" or the "PBA") alleging that the Borough of Clayton (hereinafter the "Respondent" or the "Borough") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that, following an interest arbitration award, the parties had by December 31, 1986, reached agreement on all contractual language

items in conformity with the award except for Art. XI, "Medical Insurance," as to which the Borough insisted on language, which would require PBA members to contract for HMO coverage "at their own expense beyond the cost of the 1420 plan," contrary to the Art. XI provision in the prior agreement (1983-84); that on December 1, 1985, the Borough instituted HMO coverage for all of its employees, the members of the PBA collective negotiations unit being informed that they were entitled to HMO coverage at no expense to themselves; but in May 1986, the members of the PBA unit who had secured the earlier HMO coverage were informed that they would have to pay the difference between Blue Cross/Blue Shield 1420 Plan rates and the HMO rates; as a result of this change in the offer of benefits by the Borough, the PBA instituted a grievance and Arbitrator Thomas DiLauro scheduled an arbitration for February 12, 1987; and, finally, the contested HMO coverage was extended to all other employees of the Borough who are not represented for purposes of collective negotiations by any other employee representative nor have they ever been so represented; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (5) and (6) of the Act.[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of

Footnote Continued on Next Page

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 15, 1987. Pursuant to the Complaint and Notice of Hearing, hearings were initially scheduled for October 20, 21 & 22, 1987, in Trenton, New Jersey. The hearing dates were rescheduled by agreement of the parties to November 19 and November 20, 1987. However, on November 19, 1987, prior to hearing, the parties indicated that they could agree to a stipulation of the facts pertinent to a resolution of the instant Unfair Practice Charge, as amended, and, thus, the hearing dates were cancelled and a stipulation of facts was reached in a conference call between the Hearing Examiner and the parties on November 20, 1987. The stipulated facts are set forth hereinafter under "Findings of Fact" and a briefing schedule was subsequently agreed to, the parties having filed post-hearing briefs by February 8, 1988.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of

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1/ Footnote Continued From Previous Page

employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; 6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

The PBA amended its Unfair Practice Charge on November 20, 1987, by deleting the §5.4(a)(7) allegation and substituting in its place the allegation that the Borough violated §5.4(a)(6) of the Act.

the Act, as amended, exists and, based upon the agreed upon stipulation of facts, infra, and the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the stipulated record hereinafter set forth, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Borough of Clayton is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. PBA Local No. 178 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The most recent collective negotiations agreement between the parties was effective during the term January 1, 1983 and December 31, 1984 (J-1).[2/] The terms and conditions set forth in J-1 continued after the expiration date of December 31, 1984, pending negotiations for a successor agreement and, ultimately, interest arbitration proceedings, which resulted in an interest arbitration award on May 15, 1986 (J-5, infra).

4. During the entire course of negotiations, which included assistance from PERC mediator Carolyn Gibson and the mediation efforts of the interest arbitrator, Joel G. Scharff, the central

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2/ The employees in the Borough's Police Department, who are collectively represented by the PBA herein, are the only employees of the Borough in a collective negotiations unit. All other employees are unrepresented.

issue was the offer of the Borough for increased medical insurance coverage under the Blue Shield/Blue Cross PACE Program, which would modify Art. XI of J-1,[3/] and this proposal of the Borough was uniformly rejected by the PBA.

5. The final offer of the Borough to the interest arbitrator, dated November 21, 1985 (J-2), included under "Medical Insurance" (Art. XI) a proposal that PBA unit members be granted a one-time lump sum payment of $100 for the year 1985. This sum was equivalent to the cost of coverage for "...top-of-the-line Blue Cross/Blue Shield Pace coverage..." for the year 1985, it then being too late to implement such coverage for 1985 (J-2, p. 2). The PBA had made no proposal whatsoever regarding modification of Art. XI, "Medical Insurance" (J-4, pp. 19-21). However, the PBA did reject the Borough's proposal that the above sum of $100 be paid to all PBA unit members as a one-time payment.

6. On or about December 1, 1985, the Borough instituted HMO coverage for all of its employees. This HMO coverage was provided as an alternative to the then existing Blue Cross/Blue Shield Plan and the premium difference between HMO coverage and

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3/ Art. XI, "Medical Insurance" in J-1 provided in its first paragraph that:

> All medical insurance presently afforded each employee shall be continued; specifically the Blue Cross 1420 Plan, Major Medical and all other plans inclusive of the insurance package afforded other Borough employees. The cost of these plans shall be at no cost to the employee (J-1, p. 16).

Blue Cross/Blue Shield Plans for these employees was paid entirely by the Borough. Members of the PBA collective negotiations unit were informed in or around December 1985, that they were entitled to HMO coverage by Councilperson Judith Hibbs. Subsequently, members of the PBA unit applied for and received HMO coverage at no expense to themselves.

7. Interest arbitrator Scharff rendered his Opinion and Award on May 15, 1986 (J-5) wherein, after noting that the PBA preferred to receive the value of the medical insurance benefit increase under the salary package (J-5, p. 9), concluded that the "PBA economic proposal is the more reasonable" and, thus, adopted the final economic package of the PBA (J-5, pp. 11, 12).

8. The Borough's final economic proposal having been rejected by the arbitrator's adoption of the PBA economic proposal, he then proceeded to adopt the Borough's non-economic proposal regarding uniform replacement together with the parties' mutual non-economic proposal concerning holiday pay. All of the other proposed alterations of contractual provisions pertaining to non-economic issues were denied. See J-5, pp. 12, 13.[4/]

9. In June of 1986, the members of the PBA collective negotiations unit who had secured the above HMO coverage were informed that they would have to pay the difference between the

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4/ Subsequent to the Scharff award, supra, the Borough implemented retroactive salary payments and the mandated new rates of salary and other benefits for PBA unit members.

Blue Cross/Blue Shield 1420 Plan rates in effect for the PBA unit members and the HMO rates. This change by the Borough necessarily came after it received notification of Scharff's award of May 15, 1986.

10. As a result of the above change, the PBA instituted a grievance culminating with the appointment of Arbitrator Thomas DiLauro, who scheduled an arbitration hearing for February 12, 1987, but by agreement of the parties the arbitration has been held in abeyance pending the decision in the instant proceeding.

11. On or about December 31, 1986, the parties reached agreement on all contractual language items in conformity with the interest arbitrator's award with the exception of one item, that being Art. XI, "Medical Insurance." The Borough insisted that Art. XI of J-1 be rewritten as follows:

> All medical insurance presently afforded each employee shall be continued; specifically the Blue Cross 1420 Plan and the major medical insurance. Other plans (such as HMO) may be afforded officers under this contract at their own expense beyond the cost of the 1420 Plan.5/

12. On some date shortly after December 31, 1986, the attorney for the PBA submitted to the Borough contract language for a proposed collective negotiations agreement for the years 1985-86

5/ Compare this language with the prior contract language in Finding of Fact No. 4 (fn. 2) supra.

(J-6). In a new Art. XII, "Medical Insurance" (p. 11) the PBA proposed the following language:

> All medical insurance presently afforded each employee shall be continued; specifically the Blue Cross 1420 Plan and Major Medical insurance. Other plans (such as HMO) may be afforded officers under this contract.

The PBA had initially proposed in the new Art. XII, supra, the phrase "...at their own expense beyond the cost of the 1420 plan..." but this was deleted by the "strike of a pen."

13. Sometime prior to a meeting of the parties on January 6, 1987, the PBA substituted in place of the language quoted above, Art. XII "Medical Insurance," the following:

> All medical insurance presently afforded each employee shall be continued; specifically the Blue Cross 1420 Plan and Major Medical and all other plans inclusive of the insurance package afforded other Borough employees. The cost of these plans shall be at no cost to the employee (J-8).6/

14. The parties agree that the language in Art. XI, "Medical Insurance" in J-1 was not modified in negotiations. The Borough contends, however, that the Art. XI language in J-1 was modified by the interest arbitrator's award and had been addressed by the Borough in its final offer (J-2) when it offered a one-time lump sum payment of $100 to PBA unit members (J-2, p. 2). The PBA's response is that the arbitration award of Scharff does not support

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6/ It is noted that this language in J-8 is substantially identical to the provision of Art. XI in J-1, p. 16, supra.

the Borough's position that the language of Art. XI (J-1) has been modified.[7/]

15. The contested HMO coverage has been extended to all other employees of the Borough who are not represented for purposes of collective negotiations by any other labor organization nor have they ever been so represented (see also, footnote 2, supra).

DISCUSSION AND ANALYSIS

The Relevant Facts

The resolution of the instant dispute between the parties requires a preliminary consideration of the relevant stipulated facts with resort to the related joint exhibits where necessary.

The HMO Issue

During the pendency of the Scharff interest arbitration proceeding, which concluded with his award on May 15, 1986, the Borough unilaterally decided on or about December 1, 1985, to provide members of the PBA unit with HMO coverage at no expense to themselves (see Findings of Fact Nos. 6 & 7, supra). The apparent motivation of the Borough in so doing was to provide employer-paid HMO coverage for all of its employees whether represented, as in the case of PBA unit members, or unrepresented as in the case of all

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7/ The Hearing Examiner does not perceive that this disagreement of the parties as to what the Scharff award did or did not do regarding the language of Art. XI of J-1 presents a significant factual dispute which might otherwise impair the stipulation of facts. The Hearing Examiner will construe the Scharff award in rendering his decision, infra.

other Borough employees (see Findings of Fact Nos. 3, 6 & 15, supra).

However, after having thus granted all of its employees employer-paid HMO coverage in December 1985, the Borough unilaterally decided in June 1986, that the PBA unit members would have to pay the difference between the Blue Cross/Blue Shield 1420 Plan rates in effect for the PBA unit and the HMO rates (see Finding of Fact No. 9, supra). Significantly, this decision by the Borough occurred after receipt of the Scharff award of May 15, 1986. Of course, the Scharff award had nothing whatever to do with the denial or grant of HMO coverage since it was not within the economic proposals submitted by either party in the interest arbitration proceeding.

Additionally, the grievance, which was filed by the PBA as a result of the discontinuance of employer-paid HMO coverage for PBA unit members, is of no factual significance in this proceeding since the arbitration has been held in abeyance by agreement of the parties pending the decision in the instant proceeding (see Finding of Fact No. 10, supra).

* * * *

The "Medical Insurance" Clause Issue

The 1983-84 collective negotiations agreement (J-1) made provision in Art. XI, "Medical Insurance," in the first paragraph that

> All medical insurance presently afforded each employee shall be continued; specifically the Blue Cross 1420 Plan, Major Medical and all other plans inclusive of

> the insurance package afforded other Borough employees. The cost of these plans shall be at no cost to the employee (J-1, p. 16).

The final offer of the Borough to the interest arbitrator (November 21, 1985) included under "Medical Insurance" a proposal that PBA unit members be granted a one-time lump sum payment of $100 for the year 1985, which was calculated as the cost of coverage for Blue Cross/Blue Shield Pace for that year. The PBA made no proposal regarding modification of the "Medical Insurance" provision in J-1, supra. The PBA did, however, reject the Borough's proposal for payment of $100 to unit members on a one-time basis. [See Finding of Fact No. 5, supra.]

The interest arbitrator, in his award of May 15, 1986, noted that the PBA preferred to receive the value of the medical insurance benefit increase, supra, as part of the salary package (see Finding of Fact No. 7, supra). Specifically, the arbitrator stated, in evaluating the "Medical Plan" positions of the parties, that: "...The Borough offers PBA members a cash bonus of $100 for 1985 in lieu of this benefit (increased coverage under Blue Cross/Blue Shield). The PBA position is that it prefers to receive the value of this benefit increase under the salary package..." [J-5, p. 9]. Ultimately concluding that the "PBA economic proposal is the more reasonable," the interest arbitrator adopted the final economic package of the PBA (J-5, pp. 11, 12). The formal "Award" confirmed his adoption of the PBA economic proposal (J-5, p. 12, ¶1), which necessarily constituted a rejection of the Borough's economic package, including any change in the "medical insurance" provisions

of the agreement.[8/]

Findings of Fact Nos. 11 through 13 deal with the efforts of the parties to reduce to writing their agreement on all contractual language in conformity with the interest arbitration award, the only problem being the language in the successor agreement with respect to Art. XI, "Medical Insurance." As previously found, the Borough proposed a change in the prior language of J-1, supra, while the PBA, after initially proposing some changes in Art. XI, between December 31, 1986 and January 6, 1987, decided not to modify the original Art. XI language.

* * * *

The Respondent Violated §§5.4(a)(1) And (5) Of The Act When On December 1, 1985, It Unilaterally Provided PBA Unit Members With Employer-Paid HMO Coverage And Then In June 1986 Unilaterally Withdrew Such Coverage.

Based upon the factual history regarding the "HMO Coverage" issue, supra, it is clear that the Borough unilaterally instituted HMO coverage for PBA unit members at no expense to themselves on or about December 1, 1985. The members of the PBA unit then applied for and received this HMO coverage. Finally, in June 1986, following the Scharff award, the Borough informed the PBA unit members that they would have to pay the difference between the Blue Cross/Blue Shield 1920 Plan rates and the HMO rates. Thus, the Borough made two unilateral changes without collective

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8/ N.J.S.A. 34:13A-16c(2) limits the arbitrator to a choice between the "last offer" of the employer or that of the employee representative as a single package.

negotiations: first, by instituting cost-free HMO coverage for PBA unit members in December 1985, and, secondly, by withdrawing this coverage in June 1986.

Unfortunately for the Borough, the Commission has recently decided that the unilateral establishment of a benefit, followed by the unilateral withdrawal of the same benefit, is a violation of §§5.4(a)(1) and (5) of the Act: Hunterdon Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986); P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987); app. pending, App. Div. Dkt. No. A-5558-86T8. The Commission in Hunterdon was confronted with an employer which had unilaterally established a safety performance program for employees with a payment schedule for meritorious performance. The Commission concluded, initially, that the establishment of the safety performance program by the County was a mandatorily negotiable subject, notwithstanding the argument of the County that it need not negotiate because the payments involved only a "token award."[9/] The Commission concluded further that the "award" payments intimately and directly affected the work and welfare of the employees and that, therefore, the County was obligated to negotiate before unilaterally setting a payment schedule for safety performance. Thus, the County's unilateral establishment of a payment schedule for safety performance was deemed a violation of §§5.4(a)(1) and (5) of the Act.

9/ See County of Essex, P.E.R.C. No. 86-149, 12 NJPER 536, 539 (¶17201 1986): compensation issues are always mandatorily negotiatiable.

Additionally, the Commission's decision in Hunterdon held that the unilateral discontinuance of the safety performance program by the County also violated of §§5.4(a)(1) and (5) of the Act. Regarding the unilateral termination, the Commission said:

> ...The essential point is that the County, both when it instituted and terminated the program, did so unilaterally. That is the antithesis of its statutory duty to negotiate. In a similar situation, in Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984) we relied on National Labor Relations Board precedent and quoted from a Court of Appeals decision affirming a Board order...(12 NJPER at 772).

In this decision, NLRB v. Keystone Consolidated Industries, 653 F.2d 304, 107 LRRM 1343, 1346 (7th Cir. 1981), the Court stated that where an employer unilaterally changes its insurance plan(s), and its action results in some favorable and some unfavorable changes to its employees, the NLRB was correct in deciding that in order to restore the status quo ante, the unfavorable changes are to be eliminated but the employees are not to be penalized by a revocation of the favorable changes. The Court concluded that, "In effect, the favorable change becomes the established condition of employment. An employer can change this condition only as it can change any condition--by giving notice of the proposed change and by successfully bargaining with the union to secure the union's approval..." (emphasis supplied). [107 LRRM at 3146-47].

Relying upon the above decision of the Court of Appeals in Keystone, the Commission in Hunterdon held that the County, in unilaterally granting a favorable benefit, contrary to its statutory duty to negotiate, could not thereafter unilaterally terminate this

benefit absent a request to do so by the collective negotiations representative. Rather, the County was obligated to negotiate with the representative as to any unilateral change in benefits. The Commission also cited a series of cases decided by the NLRB on this issue: Gardena Buena Ventura, Inc., 242 NLRB 595, 101 LRRM 1248 (1979); Bellingham Frozen Foods, 237 NLRB 1450, 1467, 99 LRRM 1270 (1978) and Great Western Broadcasting Corp., 139 NLRB 93, 96, 51 LRRM 1266 (1962).

Finally, the Commission in Hunterdon stated that there were good reasons for its holding. First, one unilateral action does not justify a second unilateral action, both of which violate the Act, and second, it is evident that the collective negotiations representative would otherwise be blamed for the rescission of the favorable benefit. In other words, since the employer was the wrongdoer, the representative should not suffer for the employer's wrongful action (12 NJPER at 772).

For all the foregoing reasons, the Hearing Examiner will recommend that the Respondent Borough violated §§5.4(a)(1) and (5) of the Act when, after unilaterally granting employer-paid HMO coverage to PBA unit members, it unilaterally withdrew such coverage six months later.

The Respondent Violated §§5.4(a)(1), (5) And (6) Of The Act When It Refused To Execute A Successor Agreement Containing The Prior Art. XI, "Medical Insurance," Language Which Had Not Been Changed By The Interest Arbitrator's Award.

The stipulated facts and the joint exhibits plainly indicate that the original language in the first paragraph of Art. XI in the

1983-84 collective negotiations agreement (J-1, p. 16) survived the interest arbitration proceeding intact. The "Medical Insurance" portion of the Borough's economic proposal (J-2, p. 2) made no reference whatsoever to altering the prior language of Art. XI. It contained only the "wish" of the Borough to upgrade medical insurance for all police officers and proposed a one-time lump sum payment of $100 in lieu of such upgrading for the year 1985. Since the PBA made no proposal regarding the modification of Art. XI, then it follows that the interest arbitrator did not alter the language of Art. XI when he adopted the economic proposal of the PBA (J-5, pp. 9, 11, 12). Thus, the parties were left exactly where they started prior to the interest arbitration.

On December 31, 1986, when the parties reached agreement on all contractual language in conformity with the interest arbitrator's award, excepting Art. XI, supra, the Borough violated its statutory obligation to negotiate in good faith by insisting that the language in Art. XI be rewritten (Finding of Fact No. 11, supra). Since this language had not been modified in the interest arbitration proceeding, the Borough acted in bad faith by taking the position that it had a right to modification of the prior Art. XI language. The Hearing Examiner attaches no weight to the fact that the PBA after December 31, 1986, and prior to January 6, 1987, proposed language which differed from the original Art. XI since, after initially proposing a modification of the "Medical Insurance" language, it promptly retreated to its position that the language remain unchanged (see Findings of Fact Nos. 12 & 13, supra).

The Commission in Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 87-117, 13 NJPER 282 (¶18118 1987) found a §§5.4(a)(1) and (6) violation where the employer refused to sign three contracts submitted by the Association, after concluding that the contracts submitted "...accurately reflected the parties'agreements..." (13 NJPER at 284). This conclusion was consistent with the Commission's earlier observation in that case that "To establish a violation, the Association must establish that the contract it prepared incorporated the parties' agreement..." and that the jurisdiction of the Commission "...is limited to determining whether an agreement has been reached and whether a party refused to sign that agreement. See Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983)..." (13 NJPER at 283).

It is worth noting here that the primary reason for a finding of no violation of §5.4(a)(6) of the Act in past decisions of the Commission has been either the absence of a "meeting of the minds" as to the terms being incorporated into an agreement or the absence of authority on the part of the negotiator(s) on either side to bind their respective principals. See, e.g., Matawan (supra at p. 284); Passaic Valley Water Comm., P.E.R.C. No. 85-4, 10 NJPER 487 (¶15219 1984) and Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983).

However, the "meeting of the minds" decisions, supra, have no application herein since the stipulated facts indicate beyond doubt that there could be no issue of the "meeting of the minds" in

the instant case. The parties never sought to alter the language of Art. XI, nor did the interest arbitrator.

The Hearing Examiner will recommend that the Respondent Borough violated §§5.4(a)(1), (5) and (6) of the Act when it refused to execute a successor agreement containing the original language of Art. XI, "Medical Insurance," as contained in J-1 (p. 16).

* * * *

Upon the foregoing, and upon the stipulated record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally and without negotiations with the PBA instituted employer-paid HMO coverage for PBA unit members on or about December 1, 1985 and in June 1986 unilaterally terminated this coverage.

2. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(1), (5) and (6) when on and after December 31, 1986, it refused to execute a successor collective negotiations agreement to that which expired December 31, 1984, containing the original language of the first sentence of Art. XI in the prior agreement (J-1, p. 16).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Borough cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to negotiate in good faith with the PBA with respect to the establishment and/or discontinuance of employer-paid HMO coverage for PBA unit members and by refusing to execute a successor agreement to that which expired December 31, 1984, containing the original language of Art. XI, supra.

2. Refusing to negotiate in good faith with the PBA, particularly, by failing to negotiate in good faith with the PBA with respect to the establishment and/or discontinuance of employer-paid HMO coverage for PBA unit members.

3. Refusing to execute the successor agreement to that which expired December 31, 1984, particularly, by refusing to agree to include in the said successor agreement the original language of Art. XI, supra.

B. That the Respondent Borough take the following affirmative action:

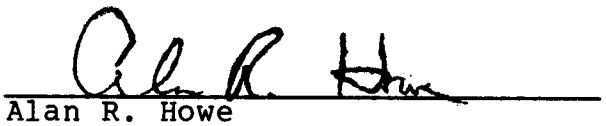
1. Upon demand, negotiate in good faith with the PBA regarding the establishment or discontinuance of employer-paid HMO coverage for PBA unit members.

2. Forthwith make whole PBA unit members for any financial loss actually incurred due to the discontinuance in June 1986 of employer-paid HMO coverage plus interest from June 30, 1986, at the rate authorized by R.4:42-11(a) [9.5% in 1986, 7.5% in 1987 and 6% in 1988].

3. Forthwith execute the successor collective negotiations agreement to that which expired December 31, 1984, containing language in Art. XI unchanged from J-1.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

C. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.



Alan R. Howe
Hearing Examiner

Dated: March 1, 1988
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to negotiate in good faith with the PBA with respect to the establishment and/or discontinuance of employer-paid HMO coverage for PBA unit members and by refusing to execute a successor agreement to that which expired December 31, 1984, containing the original language of Art. XI, supra.

WE WILL NOT refuse to negotiate in good faith with the PBA, particularly, by failing to negotiate in good faith with the PBA with respect to the establishment and/or discontinuance of employer-paid HMO coverage for PBA unit members.

WE WILL forthwith make whole PBA unit members for any financial loss actually incurred due to the discontinuance in June 1986 of employer-paid HMO coverage plus interest from June 30, 1986, at the rate authorized by R.4:42-11(a) [9.5% in 1986, 7.5% in 1987 and 6% in 1988].

WE WILL forthwith execute the successor collective negotiations agreement to that which expired December 31, 1984, containing language in Art. XI unchanged from J-1.

WE WILL upon demand, negotiate in good faith with the PBA regarding the establishment or discontinuance of employer-paid HMO coverage for PBA unit members.

Docket No. CO-H-87-193 BOROUGH OF CLAYTON
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.