COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED STEELWORKERS OF AMERICA LOCAL 2599	:	
	:	Case No. PERA-C-15-3-E
v.	:	
NORTHAMPTON COUNTY GRACEDALE NURSING HOME	:	

PROPOSED DECISION AND ORDER

On January 5, 2015, the United Steelworkers of America Local 2599 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Northampton County Gracedale Nursing Home (County or Employer), alleging that the County violated Section 1201(a)(5) of the Public Employe Relations Act (PERA or Act) by unilaterally changing healthcare benefits for bargaining unit employes without bargaining with the Union.

On January 23, 2015, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating July 6, 2015, in Harrisburg, as the time and place of hearing, if necessary. On June 30, 2015, the County filed a Motion for Protective Order, seeking to limit and/or quash the Union's subpoena duces tecum. The Union filed a Response to the County's Motion for Protective Order on June 30, 2015. On July 1, 2015, I denied the County's Motion for Protective Order.

A hearing was necessary and was held before the undersigned Hearing Examiner of the Board as scheduled on July 6, 2015, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed a post-hearing brief in support of its position on August 12, 2015. The County filed a post-hearing brief in support of its position on September 28, 2015.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4)

3. The Union is the exclusive bargaining agent for a unit defined as "[a]ll professional full-time and regular part-time employees including but not limited to N-I Nurses and Social Workers; and excluding management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act." (Union Exhibit 5, Article II; PERA-R-03-190-E)

4. The Union and County were parties to a Collective Bargaining Agreement (CBA) which was effective from January 1, 2009 through December 31, 2010. (Union Exhibit 5)

5. Article XV of the CBA, which is entitled "Hospitalization and Life Insurance," provides in pertinent part as follows:

> Section 1. Effective on the first day of the month following the hiring date, the Employer shall provide each **full-time** employee the health, dental, prescription and vision insurance benefits in existence for Career Service employees. These benefits are to be provided at the following salary deductions...

> Additionally, with respect to the County's health insurance plan, employees shall be responsible for an in-network deductible of $250 per covered person and $500 per family.
>
> With respect to the County's prescription plan, a third tier will be added to the plan to encompass non-brand preferred drugs. The employee co-pay for non-brand preferred drugs will be $30...
>
> In the event that the County voluntarily agrees to a more favorable health insurance benefit package with the AFSCME union at Gracedale, the County agrees to provide the same health insurance benefit package to the Union...
>
> Section 3. Should the County choose to change providers, plan administrators or coverage, the County agrees to provide prior notice to the Union about any potential effects upon coverage, including level of benefits.

(Union Exhibit 5)(emphasis in original)

6. Upon expiration of the 2009-2010 CBA, the Union continued working and the parties eventually began bargaining for a successor agreement. (N.T. 19-28)

7. The parties engaged in multiple bargaining sessions through October 2013. In November 2013, the County leadership changed due to the election of a new County executive, John Brown. In January 2014, Patricia Ann Siemiontkowski, the County's director of human resources, advised the Union by email that Brown was restructuring the County's negotiating team and reviewing all outstanding proposals and open articles. Siemiontkowski indicated that "[a]s soon as our team is ready to proceed, I will contact you for dates and times." (N.T. 29-39; Union Exhibit 14)

8. In November 2014, the County called the Union to a meeting, during which County spokesperson Cathy Allen advised the Union of the County's intention to change the healthcare benefits. Union official Lewis Dopson voiced an objection, stating that it would not be proper for the County to unilaterally change a mandatory subject of bargaining during a status quo period. The County implemented changes to the healthcare benefits package for bargaining unit members effective January 1, 2015, including increases in co-pays, deductibles, co-insurance, and prescription drug benefits. (N.T. 7, 39-40; Union Exhibits 20, 21, 27)

DISCUSSION

The Union has alleged that the County violated Section 1201(a)(5) of PERA[1] by unilaterally changing healthcare benefits for bargaining unit employes during a period of status quo without bargaining with the Union. The County, meanwhile, contends that it did not violate PERA because it was simply acting in accordance with the bargained-for language in the parties' expired CBA. Specifically, the County asserts that the CBA contains a waiver in Article XV Section 3, and therefore, the County appropriately maintained the status quo by acting in accordance therewith.

It is well settled that a public employer is obligated to maintain the status quo during contract hiatus while the parties are negotiating a successor agreement. **Pennsylvania State Park Officers Ass'n v. PLRB**, 854 A.2d 674, 680 (Pa. Cmwlth. 2004). The Pennsylvania Supreme Court has established that the status quo is always the last actual, peaceable, and lawful non-contested status which preceded the controversy. *Id.* at 681 citing **Fairview School District v. Unemployment Compensation Board of Review**, 454 A.2d 517 (Pa. 1982).

[1] Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

In this case, the record shows that the County has violated Section 1201(a)(5) of PERA by unilaterally changing healthcare benefits for bargaining unit employes during a period of status quo without bargaining with the Union. The parties were subject to a CBA which expired on December 31, 2010. Following the expiration of the CBA, the parties have been engaged in bargaining a successor agreement, which means that the County was obligated to maintain the status quo. However, the County did not maintain the status quo, as it unilaterally changed healthcare benefits on January 1, 2015. As a result, the County has committed unfair practices.

The County argues that it did not violate the Act because it was simply acting in accordance with the CBA, which contains a waiver in Article XV Section 3. Article XV, Section 3 of the CBA provides that "[s]hould the County choose to change providers, plan administrators or coverage, the County agrees to provide prior notice to the Union about any potential effects upon coverage, including level of benefits." Thus, the County submits that it was simply maintaining the status quo when it unilaterally altered healthcare benefits in January 2015 after providing notice to the Union in November 2014. However, the County's argument is not persuasive because, even if the Union had waived its right to bargain with regard to healthcare, the County still failed to maintain the status quo following the CBA's expiration.

There is no question that the Union can expressly agree that an otherwise negotiable subject matter[2] shall be the sole province of management and thereby waive the bargaining rights on that subject ***during the contract term***. **Crawford County v. PLRB**, 659 A.2d 1078 (Pa. Cmwlth. 1995)(emphasis added). A waiver of bargaining rights will not be lightly inferred. It is clear that the waiver of bargaining rights may only be found when the words show a clear and unmistakable waiver. *Id.* at 1082-1083. It is not true, however, that a right once waived under PERA is lost forever. *Id.*

As the Union correctly points out, in **Pennsylvania State Park Officers Ass'n v. PLRB**, *supra*, the Commonwealth Court rejected the idea that the terms of an expired contract could create a dynamic status quo. In that case, the Court held that a contract which provided for wage increases based on longevity during its term did not require the payment of such increases after expiration of the agreement. The Court specifically opined that "requiring the Commonwealth [employer] to make longevity payments essentially removes that issue from the bargaining process and forces the Commonwealth to come to the table already burdened with a wage scheme that may no longer be economically viable." *Id.* at 685.

The same result must obtain here. As I see it, unilaterally changing healthcare benefits for bargaining unit employes, following expiration of the CBA in reliance on a purported waiver, is directly akin to requiring the payment of longevity increases. The healthcare benefits package for bargaining unit employes was that which was in place on January 1, 2011 when the expiration of the CBA became the status quo. To hold otherwise would essentially remove healthcare as a subject from the ongoing bargaining process between the parties and force the Union to come to the table on unequal footing. At least one Hearing Examiner has already reached the same conclusion.

In **American Federation of State, County and Municipal Employees District Council 85 v. Pleasant Ridge Manor (Erie County)**, 44 PPER 100 (Proposed Decision and Order, 2013), Hearing Examiner Leonard rejected the contention that a purported waiver could permit the employer to unilaterally alter a mandatory subject of bargaining following the expiration of a contract. Hearing Examiner Leonard specifically found that:

> Additionally, even in instances where this Board determines that a waiver of bargaining rights has occurred, the Union is not bound by that waiver in perpetuity. Here the parties were in contract negotiations for a successor contract which means that all mandatory subjects of bargaining

[2] The County does not dispute that healthcare is a mandatory subject of bargaining, as that issue has been resolved long ago. *See* **Appeal of Cumberland Valley School District**, 394 A.2d 946 (Pa. 1978); **Kennett Consolidated School District v. PLRB**, 20 PPER ¶ 20088 (Common Pleas Court, 1989); **Moshannon Valley Education Support Professionals v. Moshannon Valley School District**, 41 PPER 58 (Proposed Decision and Order, 2010).

> are open for negotiations. Notwithstanding the contract negotiations, the Employer has refused to bargain over pension benefits. In refusing the Union's timely and lawful demand to bargain, the Employer violated PERA.

In the same vein, the parties to the instant dispute are already engaged in negotiations for a successor agreement, meaning that all mandatory subjects of bargaining, including healthcare, are open for negotiations. Nevertheless, the County has refused to bargain over healthcare benefits by unilaterally changing the healthcare benefits package for bargaining unit employes.

As the Union further points out, the National Labor Relations Board follows the same rule. Indeed, the National Board has announced "[i]t is well settled that a waiver of a union's right to bargain does not outlive the contract that contains it, absent some indication of the parties' intentions to the contrary." **Ironton Publications, Inc.**, 321 NLRB 1048, 1048 (1996) *citing* **Buck Creek Coal**, 310 NLRB 1240 fn. 1 (1993); **Control Services**, 303 NLRB 481, 484 (1991), enfd. 961 F.2d 1568 (3rd Cir. 1992); **Holiday Inn of Victorville**, 284 NLRB 916 (1987).

In this matter, there is no evidence that the Union and County intended that any purported waiver extend beyond the terms of the 2009-2010 CBA. To the contrary, the CBA provides in Article XX, Section 8, which is entitled "Waiver of Bargaining Rights and Amendments to Agreement," that "[t]his Agreement contains the understanding, undertaking and agreement of the County and the Union, after exercise of the right and opportunity to bargain, and finally determines all matters of collective bargaining ***for its term***, relative to those matters expressly addressed." (*See* Union Exhibit 5)(emphasis added). As such, the Union's alleged waiver of the right to bargain over healthcare would be strictly limited to the CBA's term, and therefore, does not outlive the 2009-2010 CBA.

To the extent the County's argument contains a contractual privilege defense, this contention is also without merit. The Board has adopted the sound arguable basis or contractual privilege defense to a claimed refusal to bargain, which calls for the dismissal of a charge when the employer establishes a sound arguable basis in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the employer's action was permissible, i.e. contractually privileged under the terms of that agreement. **Temple University Hospital Nurses Ass'n et. al. v. Temple University Health System**, 41 PPER ¶ 3 (Final Order, 2010). Where the employer asserts a contractual right to change a mandatory subject of bargaining, it must point to specific, agreed-upon contract language which arguably indicates the union expressly and intentionally authorized the employer to take the precise unilateral action at issue. *Id.* citing **Port Authority Transit Police Ass'n v. Port Authority of Allegheny County**, 39 PPER 147 (Final Order, 2008).

In this case, the language in the 2009-2010 CBA cannot support a contractual privilege defense following expiration of the agreement. To hold otherwise would contravene the Commonwealth Court's clear rejection of a dynamic status quo in **Pennsylvania State Park Officers Ass'n v. PLRB**, *supra*. Therefore, any purported contractual privilege, like an alleged waiver, does not outlive the contract that contains it. This rule is consistent with the Board's line of cases holding that changes to a mandatory subject of bargaining after certification of an exclusive representative altered the status quo, even when they were made pursuant to a compensation plan or employer handbook, which provided authority for the changes and which was in place prior to the certification. **Moshannon Valley Education Ass'n v. Moshannon Valley School District**, 41 PPER 58 (Proposed Decision and Order, 2010) *citing* **Bucks County**, 38 PPER 99 (Final Order, 2007), *aff'd on other grounds sub. nom.* **County of Bucks v. PLRB**, 39 PPER 105 (Common Pleas Court of Bucks County, 2008). Accordingly, the County's contractual privilege argument is rejected.

On this record, I must conclude that the County has committed unfair practices in violation of Section 1201(a)(5) of PERA.[3]

CONCLUSIONS

The Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The County is a public employer within the meaning of Section 301(1) of PERA.

2. The Union is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The County has committed unfair practices in violation of Section 1201(a)(5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the Examiner

HEREBY ORDERS AND DIRECTS

That the County shall:

1. Cease and desist from refusing to bargain collectively in good faith with the employe organization which is the exclusive representative of employes in the appropriate unit, including but not limited to discussing of grievances with the exclusive representative.

2. Take the following affirmative action which the Examiner finds necessary to effectuate the policies of PERA:

   (a) Immediately rescind the unilateral changes to the healthcare benefits package for bargaining unit employes, restore the status quo ante which is the healthcare benefits package as it existed on December 31, 2010, and make whole any and all affected bargaining unit employes for any losses sustained a result thereof;

   (b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place, readily accessible to its employes, and have the same remain so posted for a period of ten (10) consecutive days;

   (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

   (d) Serve a copy of the attached Affidavit of Compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

[3] Based on my disposition of the charge that the County violated Section 1201(a)(5) of PERA, even if the CBA contains a waiver of the right to bargain over healthcare benefits, it is unnecessary to determine whether Article XV, Section 3 of the CBA actually constitutes a clear and unmistakable waiver of the Union's right to bargain.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this fourth day of December, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

Northampton County Gracedale Nursing Home hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(5) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has posted a copy of the Proposed Decision and Order in the manner prescribed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid

_____
Signature of Notary Public