COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NORTHAMPTON COUNTY DEPUTY SHERIFF'S ASSOCIATION	:	
	:	Case No. PERA-C-15-13-E
v.	:	
NORTHAMPTON COUNTY	:	

FINAL ORDER

Northampton County (County) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on December 23, 2015, to a Proposed Decision and Order (PDO) issued on December 4, 2015, in which the Hearing Examiner concluded that the County violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by unilaterally changing healthcare benefits for bargaining unit employes following expiration of the 2011-2013 Interest Arbitration Award. The County obtained an extension of time to file a brief in support of exceptions, and timely filed its brief on January 27, 2016.[1] The Northampton County Deputy Sheriff's Association (Association) filed a brief in response to the County's exceptions on February 16, 2016. In the PDO, the Hearing Examiner made Findings of Fact, which are summarized as follows.

The Association[2] and the County were parties to a collective bargaining agreement (CBA), which was effective from January 1, 2006 through December 31, 2010. The CBA contained a schedule of benefits applicable to bargaining unit members in Article XXIII, Section 3, which was entitled "Health and Welfare Program." (FF 4). On January 5, 2013, an Interest Arbitration Award was issued by a panel of arbitrators setting forth the terms and conditions of employment for the period beginning January 1, 2011 through December 31, 2013. The Interest Arbitration Award increased the amount of employe contributions and authorized the County to change the schedule of benefits. Specifically, the Interest Arbitration Award added the following provision to Article XXIII:

> Health care cost containment shall be advanced for all employees hired on or after January 1, 2011, by requiring spousal coordination of benefits. Moreover, effective January 1, 2011, should there by (sic) further changes in the plan design for Career Services employees, the same plan design changes will be implemented for members of the bargaining unit.

(FF 5).

By letter dated April 25, 2013, the Association requested bargaining for a new CBA effective January 1, 2014, after which the parties engaged in negotiations. The Association made proposals regarding Article XXIII, Health and Welfare Program, which included no changes to the amount of the employe contribution and schedule of benefits contained in the 2006-2010 CBA.[3] (FF 7). The parties did not reach an agreement during bargaining and ultimately proceeded to interest arbitration, where the issues in dispute before the interest arbitration panel included the Health and Welfare Program. (FF 8). On January 1, 2015, while interest arbitration was still ongoing, the County unilaterally changed the medical and health plan provided to bargaining unit members by increasing the specialist's co-pay, the emergency room co-pay, the in-network and out-of-network co-insurance, and prescription co-pays for generic, brand, preferred, and non-preferred drugs. (FF 9).

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[1] The Secretary granted the County an extension of time to file its brief until January 26, 2016. However, the Board's office was closed on January 26, 2016 due to a snowstorm. Thus, the County timely filed its brief on January 27, 2016. See 34 Pa. Code §91.5; 34 Pa. Code §95.100.

[2] The Association is the exclusive bargaining representative for all full-time and regular part-time deputy sheriffs in the County. (FF 3).

[3] The schedule of benefits in the 2006-2010 CBA remained in place until December 31, 2014, including the co-pays and deductibles. (FF 4).

In the PDO, the Hearing Examiner determined that because a waiver of the right to bargain must be voluntarily agreed to in express and unmistakable terms relinquishing the statutory right to bargain, an interest arbitration panel cannot impose a prospective waiver of the right to bargain on an employe representative. Nevertheless, the Hearing Examiner also found that even if Article XXIII of the expired Interest Arbitration Award was a purported waiver of the Association's right to bargain healthcare plan changes during the term of the Award, that waiver was no longer effective after the Award expired. Therefore, based on the Findings of Fact, the Hearing Examiner held that the County violated Section 1201(a)(1) and (5) of PERA by making unilateral changes to the bargaining unit employes' health care benefits during the *status quo* period following expiration of the Interest Arbitration Award while the parties were negotiating, and proceeding with interest arbitration, for a successor agreement.

On exceptions, the County argues that the Hearing Examiner erred in failing to find that the County had a contractual privilege to change health care plans, or find that the Association waived its right to bargain over changes to the employes' health care benefits. Initially it should be noted that the waiver defense, and **not** sound arguable basis, applies whenever the charge of unfair practices involves an employer's unilateral bargaining-unit wide change to employes' wages, hours or working conditions. *See* **Wilkes-Barre Township v. Pennsylvania Labor Relations Board**, 878 A.2d 977 (Pa. Cmwlth. 2005); **Township of Upper Saucon v. Pennsylvania Labor Relations Board**, 620 A.2d 71 (Pa. Cmwlth. 1993). As the Commonwealth Court held in **Wilkes-Barre Township**:

> The Board astutely observed a distinction between an employer's application of terms in a collective bargaining agreement, which must have a sound arguable basis in the contract, and an action that attempts to expand contractual terms through unilateral adoption of managerial policies that are not in response to a specific contractual claim and have unit-wide application. In other words, the Township was not merely applying existing contract language to establish the calculation of pension benefits in its Ordinance. Rather, the Township unilaterally prescribed a certain meaning to the contractual language that is applicable to all bargaining unit members, in violation of its bargaining obligations.

Id. at 983; *see also* **Pennsylvania State System of Higher Education, California University v. Pennsylvania Labor Relations Board**, *unreported*, No. 2159 C.D. 2011, slip op. at 8 (August 15, 2012) ("[t]his Court has noted that there is a fundamental difference between the employer applying specific contract language to a particular circumstance versus using general terms in an agreement to effectuate a unit-wide change in a mandatory subject of bargaining").

A waiver arises as a defense to the employer's unilateral changes to negotiable wage, hour and working conditions where the employe representative has allegedly relinquished its statutory right to bargain those matters. A waiver of the statutory right to bargain is disfavored, and thus requires clear, express, and unmistakable language that the employe representative has agreed to relinquish its statutory right to bargain over the particular subject matter at issue. *E.g.* **Commonwealth v. Pennsylvania Labor Relations Board (Venango County Board of Assistance)**, 459 A.2d 452 (Pa. Cmwlth. 1983); **Crawford County v. PLRB**, 659 A.2d 1078 (Pa. Cmwlth. 1995); **Harrisburg School District**, 13 PPER ¶13077 (Final Order, 1982); **Teamsters, Local Union No. 205 v. Munhall Borough**, 40 PPER 102 (Final Order, 2009); **Temple University Hospital Nurses Association v. Temple University Health System**, 41 PPER 3 (Final Order, 2010); **Provena Hospital**, 350 NLRB 808 (2007).

We need not address the Hearing Examiner's discussion regarding whether a waiver may arise as a result of interest arbitration because the Hearing Examiner correctly held that the purported waiver of the Association's right to bargain changes to the healthcare plan, as a matter of law, ceased to be effective upon expiration of the Award, while the parties negotiated and engaged in interest arbitration over those same healthcare benefits.

The Hearing Examiner based his legal conclusion that a waiver of the right to bargain does not extend past expiration of the Interest Arbitration Award on sound labor policy of the Board concerning maintenance of the *status quo* while the parties are negotiating a successor contract. Indeed, as was recognized by the Hearing Examiner:

> 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:
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> > 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 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.

(PDO at 4-5).

The County argues that the Hearing Examiner erred in comparing this case to **Pennsylvania State Park Officers Association v. PLRB**, 854 A.2d 674, 680 (Pa. Cmwlth. 2004).[4] The County claims that in this case, there is express language concerning the rights of the parties, unlike the longevity wage increases in **State Park Officers**. We disagree with the County's position that **State Park Officers** is distinguishable on its facts, and agree with the Hearing Examiner that the labor policy announced in that case is controlling to the facts presented here. The issue in **State Park Officers** was whether the terms of a contractual wage table setting forth the employes' salary for corresponding years of service continued into a *status quo* period while the parties were negotiating wages. In that case, the Board rejected the union's argument that the *status quo* included the expired contractual longevity wage increases. As a matter of sound labor policy and collective bargaining stability, the Board held that the employes' contractual rights to increased salary based on years of service expired with the collective bargaining agreement while the parties negotiated over the mandatory subject of wages. **State Park Officers Association v. Commonwealth of Pennsylvania**, 34 PPER 151 (Final Order, 2003), *affirmed sub nom.* **Pennsylvania State Park Officers Association**, *supra.* Similarly here, the County's purported contractual right to effectuate a change to healthcare for bargaining unit employes must cease upon expiration of the Interest Arbitration Award to ensure the fulfillment of the employes' statutory right to good faith bargaining over those benefits.

Furthermore, as the Hearing Examiner recognized, the NLRB has held that "[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); *See* **Omaha World-Herald**, 357 NLRB No. 156 (2011); **E.I. DuPont De Nemours**, 355 NLRB No. 176 (2010); **Guard Publishing Company**, 339 NLRB 353 (2003); **Beverly Health and Rehabilitation Services**, 335 NLRB 635 (2001); **Control Services**, 303 NLRB 481, 484 (1991), *enfd.* 961 F.2d 1568 (3rd Cir. 1992); **Holiday Inn of Victorville**, 284 NLRB 916 (1987). Indeed, in **Nevada Lodge**, 227 NLRB 368 (1976), a case involving a similar "me too" provision, the NLRB held as follows:

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[4] The County argues that the Hearing Examiner erred in failing to rely on **City of Ann Arbor v. AFSCME**, 284 Mich. App. 126, 771 N.W.2d 843 (2009), to find that the contractual waiver continued to be effective after contract expiration. However, the Board is not bound by a decision in another state under that state's labor relations statutes. Moreover, as was discussed by the court in **City of Ann Arbor**, "[w]hat is clear is that … the parties executed a written document … which specifically provided that the CBA was to 'remain in effect' until a successor contract was ratified by both parties." **City of Ann Arbor**, 771 N.W.2d at 855. No such express written contract extension exists in this case. Thus, **City of Ann Arbor** is factually distinguishable from this case and irrelevant to the outcome here.

> Article II, section 4 A, … provides that all employees covered by the agreement shall be entitled to and receive the same insurance benefits provided for the other employees of the Employer working at the establishment…. The contract, therefore, not only allowed Respondent to grant the same insurance benefits to the unit employees but required that it be granted. However, the Union's contractual waiver of its right to bargain about the dental insurance plan was not in effect in February 1975 when the plan was announced and instituted. The contract expired on November 30, 1974, and the contractual waivers contained in article I, section 6, and article II, section 4 A, of the contract also expired at that time…. Once the contract expired, Respondent had the obligation to maintain existing wages and benefits while bargaining in good faith with the Union concerning any changes. There was no contract outstanding and therefore Respondent could not rely on any contractual right to make unilateral changes.

Nevada Lodge, 227 NLRB at 378. We find this NLRB precedent persuasive, and consistent with the labor relations policy underlying **State Park Officers**, *supra*., which supports the conclusion that a waiver of the right to bargain does not survive contract expiration and continue during the *status quo* period when the parties are negotiating or arbitrating a new agreement.

After a thorough review of the exceptions and all matters of record, we find that the Hearing Examiner correctly held that a purported contractual waiver of the employe representative's right to bargain does not extend into the *status* quo period following expiration of an interest arbitration award while the parties negotiate, and engage in interest arbitration, for a successor agreement. Accordingly, the Hearing Examiner did not err in concluding in this case that the County violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing changes to the employes' health care plan on January 1, 2015, after expiration of the Interest Arbitration Award and while the parties were negotiating and proceeding with interest arbitration for a successor agreement. *See* **Appeal of Cumberland Valley School District**, 394 A.2d 946 (Pa. 1978). Thus, the County's exceptions shall be dismissed and the PDO made final.[5]

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Northampton County are hereby dismissed, and the December 4, 2015 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this fifteenth day of March, 2016. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

[5] In its Brief in Support of the Exceptions filed on January 27, 2016, the County attached the current 2014-2018 Interest Arbitration Award, which contains similar language in Article XXIII to that in the 2011-2013 Award. However, the County did not raise the 2014-2018 Award in its exceptions filed on December 23, 2015. Nor did the County's exceptions challenge the Hearing Examiner's remedy or request reopening of the record. "An exception not specifically raised shall be waived." 34 Pa. Code §95.98(a)(3). Further, with regard to the finding of an unfair practice for unilaterally implementing changes to the employes' health care plan on January 1, 2015, the Board has held that a provision in a subsequent contract is not a defense to an employer's prior unlawful conduct. *See* **North Hills Education Association v. North Hills School District**, 38 PPER 78 (Final Order, 2007). Moreover, as noted by the Association in its Brief in Response to the Exceptions, Article XXIII of the 2014-2018 Interest Arbitration Award did not become effective until November 23, 2015.

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AFFIDAVIT OF COMPLIANCE

Northampton County hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has complied with the Final Order and Proposed Decision and Order as directed; that it has posted a copy of the Final Order and Proposed Decision and Order in the manner prescribed; and that it has served a copy of this affidavit on the Northampton County Deputy Sheriff's Association 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