COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE 13 SCHUYLKILL-CARBON	:	
v.	:	Case No. PF-C-17-11-E
JIM THORPE BOROUGH	:	

FINAL ORDER

Jim Thorpe Borough (Borough) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on September 15, 2017, from a Proposed Decision and Order (PDO) issued on August 30, 2017. In the PDO, the Hearing Examiner found that the Borough violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968, by unilaterally changing employe health insurance during negotiations and interest arbitration with the Fraternal Order of Police Lodge 13 Schuylkill-Carbon (FOP). Following an extension of time granted by the Secretary of the Board, the FOP filed a response to the exceptions and a supporting brief on October 20, 2017.

On February 7, 2017, the FOP filed a Charge of Unfair Labor Practices alleging that effective January 1, 2017, following expiration of the collective bargaining agreement, the Borough unilaterally changed the employes' health benefits and the dental and vision plan, in violation of Section 6(1)(a) and (e) of the PLRA. The Secretary of the Board issued a Complaint and Notice of Hearing on February 22, 2017.[1] A hearing was held on July 28, 2017, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Based on the evidence presented by the parties, the Hearing Examiner made necessary Findings of Fact, which are adopted herein and summarized for purposes of the exceptions, as follows.

The FOP and the Borough were parties to a collective bargaining agreement effective from January 1, 2013 to December 31, 2016. (FF 3). During the term of that agreement, the Borough had provided health insurance to employes through a broker called Benecon which provided a Highmark Self-Insured Plan. In April 2016, the Borough sent a letter of intent to Benecon to withdraw from the Highmark Self-Insured Plan. (FF 8).

In June 2016, the FOP requested bargaining for a successor agreement. The parties bargained in September, October and November of 2016. (FF 6). Health, dental and vision insurance were topics discussed during bargaining, and the Borough provided information to the FOP about the health insurance plan, then in effect, as well as the prospective plans the Borough was considering. (FF 6 and 7). During two meetings with Borough representatives, the FOP informed the Borough that it did not agree to the proposed changes to health insurance. (FF 10). The parties could not reach a new collective bargaining agreement during those negotiations. (FF 5).

[1] The Borough filed an Answer to the Complaint on March 10, 2017.

At a public Borough Council meeting on December 8, 2016, Council unanimously voted to change the broker used for health insurance. Council selected ETA Benefits as the new broker, and unanimously voted to change the health insurance plan to the Highmark AffordaBlue Platinum 1 Bronze Plan (AffordaBlue Plan). (FF 9). The deductibles and co-pays under the new AffordaBlue Plan are different than under the old Benecon plan. Under the old Benecon Self-Insured Plan, co-pays for primary care physicians were $10 per office visit. Under the new AffordaBlue Plan, those office visits are $20. (FF 13). The co-pay for a specialist physician office visit increased from $20, under the old Benecon plan, to $40 under the new AffordaBlue Plan in the Tier 1 network. The co-pay for urgent care increased from $20 to $40. The co-pays for prescription drugs also increased. (FF 14).

By letter dated December 12, 2016, the FOP informed the Borough that it did not agree to the change in health care plans to the AffordaBlue Plan. (FF 10, 12). In the December 12, 2016 letter, the FOP also notified the Borough that, although none of the officers agreed to the new plan, they were signing up for it under objection to maintain health insurance coverage. (FF 11).

On January 1, 2017, the Borough's changes in health insurance became effective. (FF 12). The Borough's unilateral change to the AffordaBlue Plan has caused out-of-pocket expenses for employes. An officer's wife had been seeing a dermatologist in 2016 under the old health insurance plan costing only the $20 co-pay for a specialist physician. That dermatologist was not in network under the AffordaBlue Plan. The officer and his wife received two bills from the dermatologist for $249 and $151. The same officer received a hospital bill for approximately $23,000 for the in-hospital delivery of his child because of the Borough's change to the health insurance. (FF 15 and 18). Although the out-of-pocket maximums for employes and families are lower under the new AffordaBlue Plan, the higher co-pays will result in increased out-of-pocket expenses for employes who only have office visits, where the total cost of the co-pays does not exceed the maximum deductible. (FF 16 and 19).

Because the parties could not reach a new collective bargaining agreement, they ultimately participated in an interest arbitration on July 27, 2017, before Arbitrator Jared Kasher as the presiding neutral arbitrator. (FF 5). One of the primary issues at interest arbitration was health insurance. (FF 6).

Based on the testimony and record evidence, the Hearing Examiner concluded in the PDO that the Borough violated Section 6(1)(a) and (e) of the PLRA, as read in *pari materia* with Act 111, when it unilaterally changed health insurance plans from Benecon's Self-Insured plan to the Highmark AffordaBlue Plan offered by ETA Benefits, while the parties were negotiating and proceeding to interest arbitration over those health insurance benefits. To remedy the unfair labor practice, the Hearing Examiner directed the Borough to, *inter alia,* cease and desist from refusing to bargain collectively in good faith with the FOP; immediately restore the *status quo ante* in effect as of December 31, 2016, with respect to health insurance coverage for bargaining unit employes; make whole any and all employes in the bargaining unit for any out-of-pocket bills and expenses incurred as a result of increased

co-pays or provider charges that would have been covered under the old self-insured plan; and pay interest at the simple rate of six percent per annum on any and all losses, expenses, bills, co-pays, deductibles and out of pocket expenses incurred by employes as a result of changing to the Highmark AffordaBlue Health Plan from January 1, 2017, to the date of payment.

For some forty years, there has been unflagging consistency in Pennsylvania public sector case law holding that an employer's unilateral change in employe health care benefits, or the insurance carrier, during negotiations or interest arbitration is a change in the *status quo* in violation of the employer's obligation to bargain in good faith. Appeal of Cumberland Valley School District, 394 A.2d 946 (Pa. 1978); Salisbury Township v. PLRB, 672 A.2d 385 (Pa. Cmwlth. 1996); Palmyra Area School District v. PLRB, 27 PPER ¶27032 (Court of Common Pleas of Lebanon County, 1995); Douglass Township Police Officers v. Douglass Township, 36 PPER 160 (Final Order, 2005); Bucks County Security Guards Association v. Bucks County, 38 PPER 99 (Final Order, 2007); Northampton County Deputy Sheriff's Association v. Northampton County, 47 PPER 90 (Final Order, 2016). Health insurance benefits are wages. *See* Cumberland Valley School District, *supra*. Thus, "there are only two ways an employer under Act 111 and the PLRA can implement a change in a mandatory subject of bargaining [such as health insurance]; by agreement with the bargaining representative or pursuant to the provisions of an interest arbitration award." Douglass Township, 36 PPER at 472 (*quoting* Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 32 PPER ¶32137 at 337 (Final Order, 2001), *quoting* Bethlehem Star Lodge No. 20 v. City of Bethlehem, 23 PPER ¶23058 at 135 (Final Order, 1992) *affirmed,* 621 A.2d 1184 (Pa. Cmwlth. 1993)). On exceptions, the Borough does not directly challenge the Hearing Examiner's legal conclusion that it committed an unfair labor practice, but extensively challenges the remedy imposed on the Borough in this case.

The Borough argues that the Hearing Examiner erred in directing it to cease and desist from refusing to bargain. The Borough asserts that it has not refused to bargain over changes to employe health care, and in fact has proceeded to interest arbitration over the issue. The Borough claims that the only remedy that should be issued is to direct it to proceed to interest arbitration, which it has already done.

Section 8 of the PLRA, provides in relevant part as follows:

> If, upon all the testimony taken, the board shall determine that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall … issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such reasonable affirmative action … as will effectuate the policies of this act."

43 P.S. §211.8(c). The Board's cease and desist remedy is prospective relief, directing the respondent not to continue to engage in the unfair labor practice. The fact that the Borough has proceeded to interest arbitration over the issue of employe health insurance may evidence its steps to comply with the Hearing Examiner's cease and desist order, but it in no way excuses the Borough's prior unilateral,

unlawful change to the employes' health insurance benefits. *See* Douglass Township, 36 PPER at 473 ("the subsequent interest arbitration award, dated January 18, 2005, is simply not a relevant consideration in concluding that the [t]ownship engaged in unfair labor practices in December 2004"). As the Hearing Examiner's cease and desist remedy is required by law upon the finding of an unfair labor practice, the Hearing Examiner did not err in directing the Borough to cease and desist from refusing to bargain in this case.

The Borough also argues that the Hearing Examiner erred as a matter of law in directing the Borough to immediately restore the *status quo ante* in effect as of December 31, 2016, with respect to health insurance coverage for bargaining unit employes. The Borough contends that this directive is not legally possible because health insurance contracts are effective from January 1 through December 31 of each year, and thus immediate compliance is impossible.

To the extent the Borough suggests that restoration of the *status quo* is not appropriate relief for a unilateral change in health care insurance occurring during contract negotiations or interest arbitration, such claims have been firmly rejected by the Board and courts. First, again with unflagging consistency, it has been recognized by the courts that the Board's typical directive of restoration of the *status quo* to remedy a bargaining violation for an employer's unilateral implementation of a change in a mandatory subject of bargaining is in the purest sense remedial and appropriate. *E.g.* Upper Moreland Township v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 1997). Secondly, the Board and courts have recognized that requiring restoration of the *status quo ante* is necessary because otherwise, an employe representative would be compelled to bargain out from under the *fait accompli* resulting from the employer's unilateral action, which would be in direct conflict with the purposes and policies of collective bargaining under Pennsylvania's labor laws. *See* Snyder County Prison Board v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006) *(citing* International Association of Fire Fighters Local No. 713 v. City of Easton, 20 PPER ¶20098 (Final Order, 1998)). Indeed, in Palmyra Area School District, the court held as follows:

> The impact of the District's action in this case was not, limited to its effect on the employees as to their major medical claims. Rather, there was a larger impact on the collective bargaining process itself. At the time the action was taken, the District and the Association were actively involved in negotiation of a successor agreement.
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> We agree with the Hearing Examiner that to permit the limited remedy suggested by the District would "vitiate the purpose of this entire proceeding" and would create a significant advantage for the District in the bargaining process. If the status quo is not restored, the District will achieve the result it desires even though the means used to achieve it have been found to be an unfair labor practice. Such a result cannot, and will not, be countenanced.

Palmyra Area School District, 27 PPER at 69. Additionally, in City of Easton, the Board recognized as follows:

> [T]he [employer's] view … permits a municipality to avoid its statutory obligation to bargain and make a unilateral change regarding an expressly mandatory subject, thereby forcing the bargaining representative to attempt to bargain out from under a *fait accompli* which the municipality has already chosen and implemented, with little or no incentive to consider union proposals not consistent with its prior choice. Not only is such a result contrary to all notions of bargaining, but it is also contrary to longstanding Board policy. *See, e.g.*, Colonial School District, 19 PPER ¶ 19017 (Proposed Decision and Order, 1987).

City of Easton, 20 PPER at 268. Accordingly, under longstanding and binding case law, in the absence of an agreement with the FOP, the Borough is under the continuing obligation to remedy its unfair labor practice by restoring the *status quo ante* pending resolution of the interest arbitration proceeding and issuance of the award.

Furthermore, the Borough's suggestion that restoration of health care insurance benefits is legally impossible because changes to employes' health insurance may only be made annually is internally inconsistent. Even under the Borough's argument, compliance with a directive to restore the *status quo* with respect to health insurance would not be impossible, just delayed until year's end. So long as the parties have not reached an agreement or received an interest arbitration award covering employe health insurance, the Borough has the ongoing obligation to remedy its unfair labor practice by restoring the *status quo ante* as soon as legally possible, and in the interim, to make employes whole.

In its brief in support of exceptions, the Borough appears to argue that no remedial relief is appropriate and restoration of the *status quo ante* is impossible because the Benecon Self-Insurance Plan that the employes had on December 31, 2016, was no longer available as of January 1, 2017. However, that does not excuse the Borough's unfair labor practice in this case. Indeed, absent the Borough's unfair labor practice of imposing its health insurance changes on employes, it is pure unfounded speculation that the Borough and FOP could not have agreed to, or been awarded, health insurance benefits other than those offered through the AffordaBlue Plan. Moreover, as found by the Hearing Examiner, the Borough was well aware of the pending changes in the Benecon insurance plans, at least as of April 2016, when the Borough sent a letter of intent to Benecon to withdraw from the Highmark Self-Insured Plan, and bargaining with the FOP for a successor collective bargaining agreement, with health insurance at issue, commenced in June 2016. In light of the adequate notice of the changes to the Benecon insurance as of April 2016, and the commencement of bargaining in June 2016, the Borough had ample opportunity to take reasonable steps to compel interest arbitration in an effort to have an award issued by January 2017 that covered the issue of changes to the employes' health insurance (as is contemplated by the time frames set forth in Act 111). *See* Salisbury Township, 672 A.2d at 388 ("[i]f the parties have not reached a written agreement indicating the settlement of the issue in dispute within thirty days after the date that collective bargaining was requested, and one of the parties demands that the matter be

submitted to interest arbitration, the other party must comply with that demand"); Borough of Nazareth v. PLRB, 626 A.2d 493 (Pa. 1993).

The Borough's current plight in complying with the PDO's directive to immediately restore the *status quo ante* is somewhat understandable if Benecon no longer offers the exact health care insurance benefits that the employes enjoyed prior to December 31, 2016. Nevertheless, as discussed above, the Borough's difficulties with its legal obligations are, in part, of its own making. Starting as early as April 2016, the Borough commenced creating a *fait accompli* and effective January 1, 2017, committed the unfair labor practice of altering the *status quo* by implementing its unilateral changes to the employes' health insurance in the absence of an agreement or an interest arbitration award. Contrary to the Borough's argument, the fact that Benecon did not offer the Highmark Self-Insured Plan after December 31, 2016, does not excuse the Borough's obligation to provide remedial relief to the employes for the Borough's unfair labor practice of unilaterally imposing its changes to the employes' health care insurance benefits.

Under the PLRA and well-established case law, remedial relief in the absence of restoration of the *status quo ante*, requires that the Borough make the employes whole for any and all monetary losses incurred as if the unfair labor practice of a unilateral change to those health insurance benefits had not occurred. As aptly noted by the Pennsylvania Supreme Court in Cumberland Valley School District, 394 A.2d at 952, "[c]ommon sense dictates that those employes be made whole for the payments they had to make as a result of the employer's unfair practice. When the Board … ordered the [employer] 'to reimburse or otherwise make whole each employe,' such action is in the purest sense remedial and not punitive." Accordingly, as directed by the Hearing Examiner, as a result of the Borough's unfair labor practice as of January 1, 2017, and until such time as an interest arbitration award is issued, the Borough remains under the obligation to make the employes' whole for any monetary losses for their health care as if they had remained covered by the Benecon Highmark Self-Insured Plan.

The Borough also takes exception to the Hearing Examiner's Findings of Fact regarding the make whole relief awarded to the employes. Specifically, the Borough challenges Finding of Fact 15, wherein the Hearing Examiner found as follows:

> The Borough's unilateral change to the AffordaBlue Plan has caused out-of-pocket expenses to an officer in the bargaining unit and his wife. The officer's wife had been seeing a dermatologist in 2016 under the old health insurance plan costing only the $20 co-pay for a specialist physician. That dermatologist was not in network under the AffordaBlue Plan resulting in the officer and his wife receiving two bills from the dermatologist for $249 and $151. The same officer received a hospital bill for approximately $23,000 for the in-hospital delivery of his child because the manner in which the Borough changed the health plan resulted in a lapse in coverage.

(FF 15). The Borough argues that Finding of Fact 15 is incorrect because under both the Benecon self-insurance plan and the AffordaBlue

plan employes had out-of-pocket expenses, and the record reflects that the officer and his wife have no outstanding medical bills. However, Finding of Fact 15 is correct as stated. The testimony and evidence is undisputed that the officer and his wife did, in fact, receive those medical bills. The extent to which those bills have now been paid through the AffordaBlue insurance plan goes to the Borough's liability for make-whole relief. As acknowledged by the Board, quoting from an opinion of the Commonwealth Court, "the fact that the [u]nion has not proved economic loss due to unfair labor practices is of no consequence; … if, in fact, the [employes] suffered no monetary losses, then the [employer's] liability will be limited to reinstatement of the … policy and collective bargaining over the matter." Pennsylvania State Troopers Association v. Pennsylvania State Police, 41 PPER 34 at 126 (Final Order, 2010) (*quoting* Plumstead Township v. PLRB, 713 A.2d 730, 736 (Pa. Cmwlth. 1998)). Indeed, there is no express directive in the PDO requiring the Borough to pay any employe for any medical bills or expenses that have been fully covered through the AffordaBlue health insurance plan. The Borough has not been directed to pay punitive damages, but to make employes whole for their additional out-of-pocket expenses incurred as a result of the Borough's unlawful unilateral change in health insurance. Accordingly, the Borough's exception to Finding of Fact 15 is dismissed.

In a similar vein, the Borough also mischaracterizes Finding of Fact 16. The Borough argues that because the annual maximum out-of-pocket, in-network expenses have decreased under the AffordaBlue Plan effective January 1, 2017, it cannot be determined if an employe suffered an increase in out-of-pocket expenses until the end of 2017. However, it is undisputed that co-pays for physician visits and prescription drugs have increased under the AffordaBlue Plan. The Borough does not dispute Findings of Fact 13 and 14, in which the Hearing Examiner found as follows:

> The deductibles and co-pays under the new AffordaBlue Plan are different than under the old plan. Under the old Self-Insured Plan, co-pays for primary care physicians were $10 per office visit. Under the new AffordaBlue Plan, those office visits are $20.
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> The co-pay for a specialist physician office visit increased from $20, under the old plan, to $40 under the new AffordaBlue Plan in the Tier 1 network. The co-pay for urgent care increased from $20 to $40. The co-pays for prescription drugs also increased.

(PDO at 2, FF 13 and 14).

The Hearing Examiner acknowledged in Finding of Fact 16 that an employe's losses for out-of-pocket co-pays extend only up to the maximum deductible under the AffordaBlue Plan. Indeed, contrary to the Borough's exceptions, the full text of Finding of Fact 16 states that "[t]he higher co-pays under the new AffordaBlue Plan, will result in increased out-of-pocket expenses annually *for employes who only have office visits, the total cost of which does not exceed the maximum deductible*." (PDO at 3, FF 16, *emphasis added*). Thus, as found and acknowledged by the Hearing Examiner, if the annual maximum deductible is reached under the AffordaBlue Plan and thereafter the employe's co-

pays are fully covered, such that there is no economic loss to the employe, then the Borough would have no separate liability for those covered expenses. Make-whole relief for these individual out-of-pocket expenses is in the purest sense remedial, and not punitive, and is an appropriate remedy for the unfair labor practice of making unilateral changes in employe health insurance benefits. *See e.g.* Cumberland Valley School District, *supra*. Accordingly, the Hearing Examiner did not err in directing the Borough to reimburse employes the difference between their out-of-pocket co-pays under the AffordaBlue Plan and those that existed under the Benecon plan for each physician visit or prescription.

Finally, the Borough argues that the difference in co-pays is not attributable to the Borough because, although Finding of Fact 17 is technically correct that in-network providers are not the same under the Benecon and AffordaBlue Plans, it is the doctors who determine whether to accept a particular insurance plan and to be an in-network provider. However, this fact does not make remedial relief of reimbursing employes for the difference for each co-pay up to the maximum deductible, speculative and unascertainable. Indeed, the Borough's obligation is to restore the *status quo ante* and make employes whole with respect to the employes' wages and benefits, to remedy its unfair labor practice of a unilateral change to health insurance. *See e.g.* Cumberland Valley School District, *supra.* Thus, if a physician or pharmacy was in-network under the Benecon Self-Insured Plan as of December 31, 2016, and the Borough is unable to show that the physician or pharmacy would have been out-of-network had that plan been continued, then the difference in co-pays between the Benecon self-insurance plan and the AffordaBlue Plan for a physician visit or prescription is easily discernable. *See* Findings of Fact 13 and 14; *see also* International Brotherhood of Firemen and Oilers, Local 1201 v. PLRB, 33 PPER ¶33065 (Court of Common Pleas, 2002) (placing burden on employer to show mitigation of employe losses). Once the maximum annual deductible is reached and those co-pays are fully covered by the AffordaBlue Plan, there would be no further expenses incurred by employes, and thus the Borough's liability for co-pays would cease. However, until that maximum annual deductible is reached and co-pays are covered by insurance, the Borough must reimburse employes for any additional expense incurred in order to remedy the unfair labor practice.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the Borough violated Section 6(1)(a) and (e) of the PLRA, as read in *pari materia* with Act 111. Further, the Hearing Examiner directed the customary, appropriate remedial relief for the Borough's unfair labor practice of unilaterally implementing changes to employe health care benefits. Accordingly, the exceptions filed by the Borough shall be dismissed, and the PDO made absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Jim Thorpe Borough are hereby dismissed, and the August 30, 2017 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, James M. Darby, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this sixteenth day of January, 2018. 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE 13 SCHUYLKILL-CARBON	:	
v.	:	Case No. PF-C-17-11-E
JIM THORPE BOROUGH	:	

AFFIDAVIT OF COMPLIANCE

The Borough hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act as read with Act 111; that it has reinstated the *status quo ante* with respect to employe wages, hours and working conditions as of December 31, 2016; that it has immediately made whole any and all employes in the bargaining unit for any out-of-pocket bills, expenses, co-pays, deductibles and other charges incurred as a result of increased co-pays or provider charges that would have been covered under the old self-insured plan; that it has paid interest at the simple rate of six percent per annum on any and all losses, expenses, bills, co-pays, deductibles and out of pocket expenses incurred by employes as a result of changing to the Highmark AffordaBlue Health Plan from January 1, 2017, to the date of payment; 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.

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Signature of Notary Public