COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

FINAL ORDER

Northampton County, Gracedale Nursing Home (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)(5) of the Public Employe Relations Act (PERA) by unilaterally changing healthcare benefits for bargaining unit employes following expiration of the 2009-2010 Collective Bargaining Agreement (CBA). 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 United Steelworkers of America, Local 2599 (Union) filed a brief in response to the County's exceptions on February 11, 2016. In the PDO, the Hearing Examiner made Findings of Fact, which are summarized as follows.

The Union[2] and the County were parties to a CBA which was effective from January 1, 2009 through December 31, 2010. (FF 4). Article XV of the expired 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.

(FF 5)(emphasis in original).

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

[2] The Union is the exclusive bargaining representative 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." (PERA-R-03-190-E). (FF 3).

Upon expiration of the 2009-2010 CBA, the employes represented by the Union continued working and the parties eventually began bargaining for a successor agreement. (FF 6). 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." (FF 7).

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. (FF 8).

In the PDO, the Hearing Examiner determined that to the extent Article XV, Section 3 of the expired CBA was a purported waiver of the Union's right to bargain healthcare plan changes during the term of the 2009-2010 agreement, that waiver was no longer effective after the CBA expired. Therefore, based on the Findings of Fact, the Hearing Examiner held that the County violated Section 1201(a)(5) of PERA and its statutory obligation to bargain by making changes to the bargaining unit employes' health care benefits during the *status quo* period following expiration of the CBA while the parties were negotiating 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 that the Union 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 in the collective bargaining agreement providing that the employe representative has relinquished 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).

Here, the Hearing Examiner did not hold that Article XV of the parties' CBA could not have operated as a waiver of the Union's right to bargain. Rather, the Hearing Examiner held that the purported waiver of the Union's right to bargain changes to the healthcare plan, as a matter of law, ceased to be effective upon contract expiration while the parties negotiated over those same healthcare benefits.

The Hearing Examiner based his conclusion, in part, upon the express words of the parties CBA. The Hearing Examiner found as follows:

> 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.

(PDO at 5). Thus, the Hearing Examiner reasoned that the County lacked any foundation in the expired CBA for its reliance on a purported waiver of the Union's right to bargain over changes to the healthcare plan that were made after the CBA had expired.

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 statute. 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. As found above, no such express written contract extension exists in this case, and thus **City of Ann Arbor** is factually distinguishable from this case and irrelevant to the outcome here.

The Hearing Examiner's legal conclusion that a waiver of the right to bargain does not extend past contract expiration was based 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:
>
> > 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).

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). The County claims that in this case, there is express contract language concerning the rights of the parties, unlike the longevity wage increases in **State Park Officers**. We disagree with the County's view 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 an express wage table in the collective bargaining agreement, setting forth the agreed upon salary for corresponding years of service, extended beyond contract expiration. The Board and the Court held that upon contract expiration, employe wages were frozen as of that date. Thus, if an employe attained an additional year of service during a contract hiatus, the employe would not receive the additional compensation as set forth in the expired contractual wage table. Instead, the employe's pay remained frozen at the prior year's service amount until the employe representative and employer negotiated a successor wage table. In that case, 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 wages. Similarly here, the County's purported contractual right to effectuate a change to healthcare for bargaining unit employes must cease upon contract expiration to ensure fulfillment of the employes' statutory right to good faith bargaining over those benefits.

Furthermore, as the Hearing Examiner recognized, the County's position in this case is contrary to decisions of the National Labor Relations Board (NLRB). As discussed in the PDO, 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:

> 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 contractual waiver of the right to bargain does not survive expiration of the CBA.

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 expires with the collective bargaining agreement, and does not continue as the *status quo* during contract hiatus while the parties negotiate a successor agreement. Accordingly, the Hearing Examiner did not err in concluding, in this

case, that the County violated Section 1201(a)(5) of PERA by unilaterally implementing changes to the employes' health care plan on January 1, 2015, after the CBA had expired and while the parties were negotiating 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.

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, Gracedale Nursing Home 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.

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AFFIDAVIT OF COMPLIANCE

Northampton County, Gracedale Nursing Home hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(5) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order and Final Order; that it has rescinded the unilateral changes to the healthcare benefits package for bargaining unit employes; that it has restored the *status quo ante* which is the healthcare benefits package as it existed on December 31, 2010; that it has made whole any and all affected bargaining unit employes for any losses sustained as a result of the unfair practice; 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 United Steelworkers of America, Local 2599 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