COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On January 9, 2015, the Northampton County Deputy Sheriff's Association (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Northampton County (County or Employer), alleging that the County violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) by unilaterally changing healthcare benefits for bargaining unit employes without bargaining with the Association.

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 Association's subpoenas. 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 Association filed a post-hearing brief in support of its position on August 21, 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. 3)

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

3. The Association is the exclusive bargaining agent for all full-time and regular part-time deputy sheriffs in the County. (Association Exhibits 1 & 2)

4. The Association and 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." The schedule of benefits remained in place until December 31, 2014, including the co-pays and deductibles. (N.T. 8; Association Exhibit 1)

5. 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.

(N.T. 9-10; Association Exhibit 2)

6. The County did not make any changes to the schedule of benefits during the term of the Award. (N.T. 10)

7. By letter dated April 25, 2013, the Association requested bargaining for a new CBA for 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. (N.T. 11-13; Association Exhibits 3 & 4)

8. The parties did not reach an agreement during bargaining and ultimately proceeded to interest arbitration. The Issues in Dispute before the Interest Arbitration Panel, included the Health and Welfare Program. (N.T. 13-14; Association Exhibits 5 & 6)

9. On January 1, 2015, the County 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. The Association did not agree to the changes. (N.T. 5, 14-16; Association Exhibit 7)

DISCUSSION

The Association has alleged that the County violated Section 1201(a)(1) and (5) of PERA[1] by unilaterally changing health insurance benefits for bargaining unit employes during a period of status quo without bargaining with the Association. The County, on the other hand, contends that it did not violate PERA because it was simply acting in accordance with the bargained-for language in the parties' expired CBA, which contains a "me too" provision with regard to the Health and Welfare Program, when it provided the Association members with the same health insurance benefits that it provided to the non-union employes.

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).

In this case, the record shows that the County has violated Section 1201(a)(1) and (5) of PERA by unilaterally changing healthcare benefits for bargaining unit employes during a period of status quo without bargaining with the Association. The parties were subject to a CBA which expired on 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." The schedule of benefits remained in place until December 31, 2014, including the co-pays and deductibles. 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,

[1] Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act...(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.

2013. The Interest Arbitration Award increased the amount of employe contributions and authorized the County to change the schedule of benefits. However, the County did not make any changes to the schedule of benefits during the term of the Award.

Following the expiration of the Interest Arbitration Award, the parties engaged in bargaining a successor agreement and then proceeded to interest arbitration, which means that the County was obligated to maintain the status quo, as it existed on December 31, 2013. However, the County did not maintain the status quo, as it 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. The Association did not agree to the changes. 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 bargained-for language in the CBA, which contained a "me too" provision. Specifically, the County avers that the Association knowingly waived its right to bargain over healthcare benefits and that it was contractually privileged to act as it did. The County's arguments are without merit.

There is no question that the Association 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. The record must establish that the matter was fully discussed and consciously yielded. **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). It is not true, however, that a right once waived under PERA is lost forever. **Crawford County v. PLRB**, at 1083.

First of all, there is absolutely no evidence that healthcare benefits were fully discussed and consciously yielded by the Association. Instead, the record shows that the "me too" provision, which the County relies on, and which provides that "effective January 1, 2011, should there by (sic) further changes in the plan design for Career Service employees, the same plan design changes will be implemented for members of the bargaining unit," was actually obtained pursuant to the January 5, 2013 Interest Arbitration Award. As such, it was fully bargained to decision in arbitration and cannot be used to support an argument that healthcare benefits were fully discussed and consciously yielded.

In any event, even if the Association had waived its right to bargain over healthcare benefits, the Commonwealth Court in **Pennsylvania State Park Officers Ass'n v. PLRB**, 854 A.2d 674, 680 (Pa. Cmwlth. 2004), has 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, 2014 when the expiration of the Interest Arbitration Award became the status

[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).

quo. To hold otherwise would essentially remove healthcare as a subject from the ongoing bargaining process between the parties and force the Association to come to the table on unequal footing. At least one Hearing Examiner has already reached the same conclusion.

In **Pleasant Ridge Manor (Erie County)**, *supra*, 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.

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

Notably, the National Labor Relations Board follows the same rule, opining 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) *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 parties intended any purported waiver to extend beyond the terms of the 2006-2010 CBA or the 2011-2013 Interest Arbitration Award. As a result, the Association's purported waiver does not outlive the contract.

The same analysis must obtain with regard to the County's contractual privilege argument. 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 2011-2013 Interest Arbitration Award cannot support a contractual privilege defense following expiration of the Award. 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)(1) and (5) of PERA.

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 Association 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)(1) and (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 interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.

2. 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.

3. 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, 2013, 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.

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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	:	Case No. PERA-C-15-13-E
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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 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