COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UTILITY WORKERS UNION OF AMERICA LOCAL 580	:	
v.	:	CASE NO. PERA-C-20-44-W
INDIANA BOROUGH	:	

PROPOSED DECISION AND ORDER

On February 18, 2020, Utility Workers of America Local 580 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (PLRB or Board) alleging that Indiana Borough (Borough or Employer) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) by unilaterally changing health insurance during a status quo period.

On July 15, 2020, the Secretary of the Board issued a complaint and notice of hearing designating October 2, 2020, in Pittsburgh, as the time and place of hearing.

The hearing was continued and held on June 23, 2021, via Microsoft TEAMS before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed its post-hearing brief on September 3, 2021. The Borough filed its post-hearing brief on September 27, 2021. The Borough filed an amended post-hearing brief on October 20, 2021.

The Hearing Examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The Employer is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5).

3. The Parties were subject to a collective bargaining agreement (CBA) that expired on December 31, 2019. (N.T. 11; Borough Exhibit 1).

4. Negotiations on a successor agreement began in June, 2019. During these initial discussions, the Parties discussed changing healthcare benefits. (N.T. 11, 17).

6. During 2019, the Borough provided the Community Blue Options healthcare plan for the bargaining unit member employes. (N.T. 12, Employer Exhibit 3).

7. The Union did not agree to change from the Community Blue Options healthcare plan during successor CBA negotiations in 2019. (N.T. 13).

8. The Community Blue Options plan expired on December 31, 2019, if it was not renewed. In the fall of 2019, the Borough explored different healthcare options because the Borough predicted a 12% increase in costs for healthcare in 2020 and wanted to lower those costs. (N.T. 26-27, 36-37).

9. After reviewing different available plans, the Borough selected the MunicipalBenefits Services PPO (MBS PPO) plan in late 2019. The Union never agreed to this change in healthcare plans. (N.T. 13, 36-39).

10. The new MBS PPO plan has an effective date of January 1, 2020. (Borough Exhibit 4).

11. In January, 2020, the Parties had a negotiation meeting where the Union learned that the Borough had switched healthcare plans from Community Blue Options to MBS PPO. (N.T. 13-15; Borough Exhibit 4).

12. With the Community Blue Options plan, bargaining unit members only had access to outlying (non-Pittsburgh) UPMC facilities and doctors. With the MBS PPO plan, the bargaining unit members have access to Highmark, AHN, independent and all UPMC facilities, providers and hospitals. Thus, the MBS PPO has an expanded network. With the Community Blue there was a $1,000 (individual)/$2,000 (family) deductible for each bargaining unit member. The bargaining unit member paid the first $250 (individual)/$500 (family) of that deductible and had an HRA that paid anything over $250/$500. With MBS PPO, the HRA was eliminated and deductibles were lowered to a flat $250 (individual)/$500 (family). Additionally, the MBS PPO plan and the Community Blue Options plan have different Total Maximum Out-of-Pocket ("TMOP") levels for employee only and family coverage. (N.T. 27-31; Borough Exhibit 8).

13. Article 30 of the CBA states in part:

> Article 30. Insurance
> . . .
> The Borough shall provide full-time employees and their family, including dependent children enrolled in an accredited school, college, or university until child reaches the ages of twenty-six (26) years or as provided in the policy with the Community Blue Option, United Concordia Preferred (WPA) Dental Plan and an Optical Plan or equivalent plan. . . .

(Borough Exhibit 1, page 16).

14. At the time of the hearing, the Parties had not reached an agreement on a successor CBA and did not argue that the Parties had reached an impasse.

DISCUSSION

The Union alleges that the Borough committed an unfair labor practice in violation of Section 1201(a)(1) and (5) of PERA by

unilaterally altering the status quo regarding health insurance when collective bargaining negotiations were ongoing and impasse had not been reached.

The Board has consistently supported the obligation of an employer to sustain the status quo with respect to mandatory subjects of bargaining (including healthcare) during a contract hiatus while the parties are engaged in negotiating a successor agreement. Appeal of Cumberland Valley School District, 483 Pa. 134 (1978) (holding that an employer may not withdraw the health care benefits provided in the expired contract inconsistent with the employer's bargaining position as a coercive bargaining tactic); Pennsylvania Labor Relations Board v. Williamsport Area School District, 486 Pa. 375 (1979) (holding that, during negotiations, an employer may not abandon the grievance mechanism in an expired contract); and Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, 620 A.2d 594 (Pa. Cmwlth. 1993) (holding that employer may not implement its last offer absent impasse and a strike by the employes).

In this matter, it is clear that the changes to the health plan by the Borough were unilaterally implemented on January 1, 2020, in the status quo period after the expiration of the CBA. It is not contested in this matter that healthcare is a mandatory subject of bargaining. Thus, the Borough clearly committed an unfair practice in violation of Section 1201(a)(1) and (5) of PERA.

In defense of the charge, the Borough argues it has a contractual privilege to change health insurance plans. Both the Commonwealth Court and the Board have recognized the affirmative defense of contractual privilege. Pennsylvania State Troopers Ass'n v. PLRB, 804 A.2d 1291 (Pa. Cmwlth. 2002); Jersey Shore Area Sch. Dist., 18 PPER ¶ 18117 (Final Order, 1987).

In its Amended Post-Hearing Brief, the Borough argues the following:

> In defense of these charges, the Borough points to the following language from the parties' collective bargaining agreement:
>
> > The borough shall provide full-time employees and their family, including dependent children enrolled in an accredited school, college, or university until child reaches the age of twenty-six (26) years or as provided in the policy with the Community Blue Option, United Concordia Preferred (WPA) Dental Plan and an Optical Plan or equivalent plan.
>
> (Ex. 1). The Borough argues that the above-quoted language provides it with the contractual authority to act as it did in changing the health insurance plan it offered to its employees. The language above clearly allows the Borough to

> provide the Community Blue plan or an equivalent plan. (Ex. 1). The only limitation on the Borough' s ability to switch plans contained in the above language is that the new plan be equivalent to the Community Blue plan. Accordingly, because the plans are equivalent, the Borough was contractually privileged to act as it did.

(Borough's Amended Post-Hearing Brief at 5-6).

I disagree. The Borough cannot succeed on a contractual privilege defense because the change happened in the status quo period after the expiration of the CBA and while the parties were negotiating a successor agreement. The Board's policy in these status quo cases is that contractual provisions, to the extent that they permit changes to mandatory subjects, must be frozen at contract expiration because those subjects are the issues for bargaining. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), appeal denied, 582 Pa. 704 (2005) (holding that the payment of increased wages in the form of longevity increases provided for in the expired contract must stop during the status quo because wages are mandatory subjects of bargaining at issue); Philadelphia Community College, 51 PPER ¶ 23 (Proposed Decision and Order, 2019). To permit a contract provision to allow a change in a mandatory subject of bargaining after expiration is to allow the *dynamic status quo* which the Board rejected in State Park Officers, supra. In Northampton County, 47 PPER 85 (Final Order, 2016), the Board more recently held that a union's express waiver to bargain changes to healthcare in a collective bargaining agreement did not survive contract expiration and that the employer could not unilaterally make those changes during the status quo period. The Board opined that its Northampton County decision was consistent with State Park Officers, supra, and that contractual provisions, to the extent that they permit changes to mandatory subjects, must be frozen at contract expiration because those subjects are the issues for bargaining during contract hiatus. The Board in Northampton County, supra, states "the [employer'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."

With the above law and policy in mind, it is clear that the Borough cannot succeed in its contractual privilege defense in this matter. When the contract expired, the Borough was providing to the bargaining unit members the Community Blue Options plan. The next day, at the beginning of the status quo, the Borough switched its healthcare plan to MBS PPO, which was a different plan. To allow the Borough to rely on an alleged contractual privilege defense during the status quo would be to allow a dynamic status quo, which is against the explicit policy of the Board.

In its Brief, the Borough further argues that January 1, 2020, is not the operable date and that the switch to MBS PPO happened before the expiration of the CBA. (Borough's Amended Post-Hearing Brief at

14).[1] However, what is important for this case is that the change to the bargaining unit member's healthcare plan happened in the status quo. On December 31, 2019, when the CBA expired, the bargaining unit members had Community Blue Options. On January 1, 2020, in the status quo, the bargaining unit members had MBS PPO. This is the important and relevant change. The Board has clearly said that any contractual right to change a healthcare plan "cease[s] upon contract expiration." Northampton County, supra. As soon as the CBA expired on December 31, 2019, the Borough had no right to change healthcare provisions. The Parties were in contract negotiations beginning in the Summer of 2019. The Borough should have foreseen that any change to healthcare for the bargaining unit members would have occurred in status quo and that any alleged contractual privilege to change healthcare to an "equivalent plan" would be void as soon as the CBA expired on December 31, 2019. The options available to the Borough were to either keep the existing healthcare coverage into the status quo or, through collective bargaining, reach an agreement with the Union on the issue of healthcare. By unilaterally changing healthcare in the status quo, the Borough has effectively removed healthcare as a bargainable topic which is firmly against Board policy and PERA.

The Borough alternatively argues that a contractual privilege rooted in sound arguable basis survives into the status quo. The Borough cites five cases to support its contention that "[t]here are countless examples of the Board allowing, analyzing, and often upholding "sound arguable basis" arguments offered to defend against charges filed in response to unilateral changes that occurred after the expiration of the CBA." (Borough's Amended Post-Hearing Brief at 16). The Borough cites White Oak Borough, 39 PPER 159 (Proposed Decision and Order, 2008). I find that case distinguishable because it deals with a change related to inherent managerial policy and not a mandatory subject of bargaining. The Borough cites Ridgway Area School District, 38 PPER 21 (Proposed Decision and Order, 2007). I find that case distinguishable because the Hearing Examiner in that matter incorrectly states that the employer had a "contractual privilege" to expand bargaining topics after the expiration of a CBA. A careful reading of Ridgeway shows that the employer in that matter waited until the expiration of a CBA that had language limiting possible negotiations to begin broad negotiations with the union in that matter. Thus, the employer was not "contractually privileged" in the sense put forth by the Borough in this case. The employer in Ridgeway was merely unbound by contract language when a previous CBA expired. The Borough also cites Southeastern Pennsylvania Transportation Authority, 35 PPER 29 (Proposed Decision and Order, 2004). I find the Borough's reliance on that case misplaced as the Hearing Examiner in that case clearly holds "[w]hile it is true that at the time of the unilateral change the parties' last collective bargaining agreement had expired and the new

[1] The Borough points to Borough Exhibit 7 (a plan election form signed by Union President Brudnock in mid-December, 2019) to partially support its arguments in this context. I do not find this document to be persuasive evidence and, to the extent the Borough argues it shows knowledge or concurrence by the Union as to the change in health care plans, I credit instead the testimony of Brudnock (N.T. 13) that the Union had no knowledge of the plan change prior to January 1, 2020, and certainly did not agree to it.

collective bargaining agreement was yet to be agreed upon, SEPTA was bound, under Board law, to maintain the status quo." The Borough cites Philadelphia Community College, supra. I find that Philadelphia Community College is distinguishable insofar as the Hearing Examiner found that the employer exercised its inherent managerial rights and was not bound by previous agreement. This matter, in contrast, deals with a change to a mandatory subject of bargaining. Finally, the Borough argues that Northampton County, supra, is distinguishable because it dealt with a waiver defense, and not a sound arguable basis defense. (Borough's Brief at 19-20). I find that distinction is not dispositive as both defenses (waiver and sound arguable basis) are, at their core, similar defenses rooted in a CBA or other agreement which predate the commencement of the status quo period. It makes no difference if an employer who changes mandatory subjects of bargaining during a status quo after the expiration of CBA relies on waiver or sound arguable basis: their actions are similar violations of the Board's policy against a dynamic status quo.

For the above reasons, the Borough has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA. As a remedy, the Borough is ordered to return the bargaining unit member's health care to the status quo that existed at the expiration of the CBA on December 31, 2019. That is, the Borough is ordered to immediately reinstate the Community Blue Options plan. To the extent that any bargaining unit members suffered monetary losses from the switch from Community Blue Options to MBS PPO since January 1, 2020, the Borough shall reimburse those bargaining unit members and make them whole including statutory interest of 6% *per annum*. To the extent that bargaining unit members benefited monetarily from the change in healthcare plans on January 1, 2020, they shall not be required to disgorge any of the monetary benefits to the Borough. However, the Borough may use any monetary benefits accrued in such a manner to offset any claimed monetary losses by the bargaining unit members as a result of the change of healthcare plans on January 1, 2020.

CONCLUSIONS

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

1. The Borough 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 Borough 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 PERA, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that Indiana Borough 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 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.

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

(a) Immediately reinstate the status quo with respect to healthcare that existed on December 31, 2019, including, but not limited to, reinstating the Community Blue Options plan for bargaining unit members;

(b) Immediately make bargaining unit members whole for any monetary losses suffered as a result of the change from Community Blue Options to MBS PPO with statutory interest of six percent *per annum* in the manner described in the Proposed Decision and Order;

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

(d) 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

(e) 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 at Harrisburg, Pennsylvania, this twenty-seventh day of October, 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich
STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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v.	:	CASE NO. PERA-C-20-44-W
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AFFIDAVIT OF COMPLIANCE

The Borough of Indiana hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it complied with the Proposed Decision and Order as directed therein; that it immediately reinstated the status quo with respect to healthcare that existed on December 31, 2019, including, but not limited to, reinstating the Community Blue Options plan for bargaining unit members; that it immediately made bargaining unit members whole for any monetary losses suffered as a result of the change from Community Blue Options to MBS PPO with statutory interest of six percent *per annum* in the manner described in the Proposed Decision and Order; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed 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