

D.U.P. NO. 2015-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and-

Docket No. CO-2014-261

JERSEY CITY POLICE OFFICERS
BENEVOLENT ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Jersey City Police Officers Benevolent Association (PBA) against the City of Jersey City (City) alleging violations of N.J.S.A. 34:13A-5.4a(5) and, derivatively, (a)(1). The charge alleges the City repudiated a collective negotiations agreement (CNA) between the City and PBA by denying prescription drug coverage to two employees for human growth hormone (HGH) prescriptions. The CNA provided that prescription drug coverage for HGH would be excluded from coverage unless it was "medically necessary." Here, two PBA unit employees requested prescription drug coverage by the City (which is self-insured) and provided certifications from their physicians attesting to the medical necessity of HGH. The City denied the request and took the position that they were entitled under the CNA to have an independent medical review board determine the medical necessity of HGH before granting coverage. The Director determined that the dispute between the City and PBA was essentially contractual in nature and involved colorable arguments in support of competing interpretations of the phrase "medically necessary" under the CNA. As such, the parties are required to resolve contractual disputes covered by the CNA in accordance with the CNA's grievance procedures, and not through the Commission's unfair practice procedures.

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Appearances:

For the Respondent,
Jersey City, Corporation Counsel
(Vincent Signorile, of counsel)

For the Charging Party,
Detzky, Hunter & DeFillippo, LLC, attorneys
(Stephen B. Hunter, of counsel)

REFUSAL TO ISSUE COMPLAINT

On May 15, 2014, the Jersey City Police Officers Benevolent Association (Charging Party or PBA) filed an unfair practice charge against the City of Jersey City (Respondent or City). The charge alleges that in March and April, 2014 the Respondent violated sections 5.4a(5) and, derivatively, (a)(1)^{1/} of the New

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or
(continued...)

Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by denying prescription drug insurance coverage of human growth hormone (HGH) and testosterone prescriptions for two unit employees. The PBA alleges that the City's action repudiates a contractual provision that permitted prescription drug coverage for HGH when its use is "medically necessary."

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

On January 20, 2015, I issued a letter to the parties tentatively dismissing the charge and inviting responses. No responses were filed.

I find the following facts.

The PBA is the exclusive majority representative of rank and file City police officers. The City and PBA are parties to a

1/ (...continued)
refusing to process grievances presented by the majority representative."

collective negotiations agreement (Agreement) extending from January 1, 2013 through December 31, 2016.

Article 13(D)(2) of the Agreement limits prescription drug coverage for HGH. It provides, in pertinent part:

HGH drugs to enhance normal functions, such as anti-aging, the improvement of athletic performance, or memory enhancing, are **excluded from coverage**, unless medically necessary. (Bolded text in contract)

The Agreement does not specify how the parties determine whether HGH usage is "medically necessary" under a given set of circumstances.

On or around March, 2014, an unidentified unit employee submitted a request to the City for prescription drug coverage for a prescribed drug called Norditropin FLEXPRO, which contains HGH. Accompanying the request was a certification from a physician chosen by the employee that attested to the medical necessity for the drug. The City denied the request for coverage.^{2/}

In April, 2014, another PBA unit employee requested that the City provide prescription drug coverage for a testosterone drug that appears to be a variant of HGH. As with the March, 2014 request for coverage, this request was accompanied by the employee's physician's certification attesting to the medical

^{2/} The City is self-insured with respect to prescription drug benefits.

necessity for the drug. The City denied this request for coverage, as well.

PBA alleges that the City's denial of coverage repudiates Article 13(D)(2) of the Agreement by not granting coverage to unit employees who submitted a physician's certification attesting to the medical necessity of the HGH prescriptions. The PBA contends that the phrase, "medically necessary" requires the City to accept the employee's physician's certification of medical necessity without further investigation or inquiry.

The City disagrees. It asserts that it has not repudiated Article 13(D)(2) by denying coverage for HGH. The City maintains that Express Scripts, a prescription drug processing company that is under contract with the City to process prescription requests, requires as part of its policy that each prescription be subject to an independent review process by a medical review board or committee. This committee is responsible for investigating whether the HGH prescription is medically necessary before filling the prescription and providing coverage. Thus, the City asserts that Article 13(D)(2) does not compel it to accept, without further investigation, an employee's physician's certification of medical necessity for the use of HGH.

Article 24 of the Agreement sets forth a four (4) step grievance procedure culminating in binding arbitration. Article 24(B) defines a "grievance" as "any controversy arising over the

interpretation or adherence to the terms and conditions of this Agreement." Under Article 24(C), the grievance procedure "constitutes the sole and exclusive method for resolving grievances between the parties covered by this Agreement and will be followed in its entirety unless any step is waived by mutual consent."

Section 5.3 of the Act requires a public employer and majority representative to utilize the grievance and disciplinary review procedures established by their collective negotiations agreement for any disputes covered by the terms of that agreement. N.J.S.A. 34:13A-5.3. The Commission does not have jurisdiction over breach of contract claims. State of New Jersey (Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984)). In Human Services, the Commission noted that the National Labor Relations Board has refused to issue a complaint on an unfair labor practice charge when all that is alleged in the charge is a good faith dispute over the interpretation of an ambiguous contract clause. Human Services; Union Tp., I.R. No. 2011-18, 36 NJPER 439 (¶171 2010). The Commission cited In re United Telephone Co. of the West, 112 NLRB No. 103, 36 LRRM 1097 (1955), where the Board stated:

The complaint alleges no violation of the Act other than the one arising out of the parties' conflicting contract interpretations. It is obvious from the conflicting interpretations of the parties that the contract was not sufficiently clear

to avoid a dispute over its terms. There is no showing that the Respondents, in carrying out the contract as they did, were acting in bad faith. Furthermore, the Respondents' action was in accordance with the contract as they construed it, and was not an attempt to modify or to terminate the contract. [Human Services, 10 NJPER 422]

In certain instances, however, a breach of contract claim is sufficiently related to a party's breach of its obligation to negotiate in good faith that the issuance of a complaint and the invocation of the Commission's unfair practice jurisdiction is warranted. Human Services; Union Tp. A party's repudiation of an established term and condition of employment may be a violation of its duty to negotiate in good faith. Id. Claims of repudiation may be supported by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer changed the parties' past practice in administering the disputed clause. Id.

In Union Tp., a Commission designee denied an interim relief application filed by PBA Local 69 over the meaning of a contract clause governing the vesting of retiree health insurance coverage. The contractual provision in dispute provided that the Township of Union ". . . shall provide group health insurance coverage for all active and retired officers (after 25 years of service)." Id., 36 NJPER at 441. The PBA interpreted the clause, "25 years of service" as including prior service in both

law enforcement **and** non-law enforcement positions with the Township and with other public employers. The Township disagreed, contending that "25 years of service" included law enforcement and non-law enforcement positions with the Township, but only service accrued from law enforcement positions with other public employers. The Commission designee determined that the parties raised "colorable arguments" in support of conflicting contract interpretations and that this contractual dispute fell outside the Commission's jurisdiction to decide.

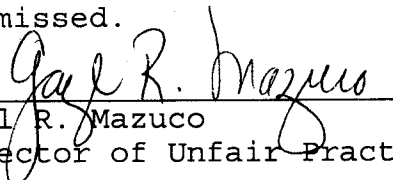
Union Tp. is analogous to the present case. The PBA and City are engaged in a good faith dispute over the meaning of the clause "medically necessary" in Article 13(D)(2) of the Agreement. PBA interprets this provision as requiring an employee to submit a physician's certification attesting to the medical necessity of HGH. Further, PBA asserts that a certification from an employee-selected physician attesting to HGH's medical necessity satisfies the requirements for insurance coverage under Article 13(D)(2) and forecloses any further review by the City. The City disagrees and contends it did not waive the right to independently assess and determine whether HGH usage is "medically necessary" and thus eligible for insurance coverage. The PBA and City raise colorable arguments in support of their competing contractual interpretations of Article 13(D)(2). As such, they are required to resolve this contractual

dispute in accordance with the grievance procedure in Article 24 of their Agreement.

Accordingly, I find that the PBA's 5.4a(5) and derivative (a)(1) allegations do not satisfy the complaint issuance standard.

ORDER

The unfair practice charge is dismissed.



Gayl R. Mazuco
Director of Unfair Practices

DATED: February 4, 2015
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by February 19, 2015.