H.E. NO. 2016-20

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BURLINGTON,
Respondent,

-and- Docket No. CO-2009-317

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL 249,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that a Complaint alleging that Burlington County unilaterally implemented a collective negotiations proposal (that was rejected by Charging Party PBA Local 249), violating section 5.4a(3), (5) and (1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., be dismissed. The charge alleged that on February 23, 2009, County unlawfully terminated the health insurance benefits of unit employee Jennifer Michinski.

The Hearing Examiner determined that the PBA did not prove that the County unilaterally changed a term and condition of employment, inasmuch as the record demonstrated that the County, for more than two years before the charge was filed, had treated other similarly-situated employees in the same manner. The Hearing Examiner distinguished Frankford Tp. Bd. of Ed., P.E.R.C. No. 98-6, 23 NJPER 625 (¶28304 1997) and City of Linwood, H.E. No. 98-16, 24 NJPER 133 (¶29068 1997).

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent
Capehart Scatchard, attorneys
(Carmen Saginario, of counsel)

For the Charging Party
Mets, Schiro & McGovern, attorneys
(Kevin McGovern, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 10, 2009, Policemen's Benevolent Association, Local 249 (PBA) filed an unfair practice charge against the County of Burlington (County). The charge alleges that on or about February 23, 2009, the County unilaterally implemented a collective negotiations proposal (that the PBA rejected), enabling the County to terminate health benefits coverage of unit employees ". . . in a suspension or [unpaid] status for more than 10 days in a month" by terminating those benefits of corrections officer Jennifer Michinski. The charge, alleging that the

County's action occurred during negotiations for a successor agreement, was accompanied by an application for interim relief seeking reinstatement of Michinski's benefits and an Order to negotiate over related terms and conditions of employment. The County's action allegedly violates section 5.4a(1), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

On or about April 8, 2009, the County filed an "answer" to the charge, denying a ". . . unilateral imposition of any negotiation proposal" and asserting it has " . . a custom or practice which discontinues medical coverage for employees out of work in an unpaid status." The County denies violating the Act.

On May 8, 2009, a Commission Designee issued an Interlocutory Decision (I.R. No. 2009-25, 35 NJPER 167 (¶63 2009)), denying the PBA's application to restrain the County from discontinuing Michinski's health benefits coverage but ordering the County not to discontinue her coverage, ". . . until the

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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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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 refusing to process grievances presented by the majority representative."

effective date [is] established in a reasonable advance written notification of termination which also advises Michinski of her COBRA rights." Id., 35 NJPER at 169-170.

On June 8, 2012, a Complaint and Notice of Hearing issued. On March 26, 2013, Hearing Examiner Timothy Averell conducted a hearing at which the parties examined witnesses and presented exhibits. A transcript of the proceeding was filed on May 21, 2013. On May 23, 2013, the Director of Unfair Practices issued a letter advising that in light of a conflict of interest concerning the assigned hearing examiner, the case was reassigned to me. Following my receipt of correspondence from both Counsel, I issued a July 19, 2013 letter setting the matter for a new hearing, together with an Order Rescheduling. In the wake of several adjourned and rescheduled hearing dates, the parties signed a "Stipulation in Lieu of Hearing" on November 13, 2015, together with attachments, comprising the record in this case. Specifically, the stipulation provides that the record includes the transcript, exhibits marked in evidence on the hearing date, several attached documents and stipulations of fact. Post-hearing briefs were filed by December 8, 2015.

Upon the record, I make the following:

FINDINGS OF FACT

1. PBA represents all corrections officers and I.D. officers employed by the County. The applicable collective

negotiations agreement signed by the parties extended from January 1, 2005 through December 31, 2008 (J-4).

Article IV (Health Benefits) provides:

> A. Health plan: Family Hospital, Surgical and Major Medical or other medical benefits shall be available for all full-time employees on the first of the month after three (3) months of service pursuant to the following provisions:
>
> * * *
>
> B. The County will extend to a maximum of ninety (90) days the health insurance coverage of eligible employees and their covered dependents upon exhaustion of such employee's accumulated sick leave and who are granted approved sick leave without pay . . .
>
> In those instances where the leave of absence (or an extension of such leave) without pay is for a period of more than ninety (90) calendar days, the employee's coverage shall be terminated effective the first of the month following the ninetieth day. Said employee shall then be eligible for coverage under the COBRA [Consolidated Omnibus Budget Reconciliation Act] regulations. Upon returning to work, coverage will be reinstated effective the first of the month following the date of return.

Article VIII Workers' Compensation, provides in part:

> B. Any employee who is temporarily or permanently disabled as a result of work-related injury or illness, shall be covered by the provisions of the New Jersey Workers' Compensation Law and the provisions of this Article from the date of the injury or illness. Said employee shall be entitled to a leave of absence for the entire period of such disability . . .

> C. Employees on a leave of absence pursuant to Paragraph B herein, shall have the option to utilize earned sick, vacation, holiday and personal leave time while on such disability leave. In the event the employee exercises this option, said employee shall receive from the County the difference between the employee's regular salary and the workers' compensation wage benefits the employee is receiving . . .
>
> D. Notwithstanding any terms to the contrary in Paragraph C above, an employee who is injured while acting in the proper and lawful performance of his duties as a result of the direct action, effort, interference or activity of an inmate or prisoner shall be entitled to a leave of absence . . . and such leave shall be granted with pay for the period of disability or up to one (1) full year, whichever is less. In the event the employee is determined to be eligible for workers' compensation benefits, such pay shall not be in addition to any such benefits . . .

Article VII, Family and Medical Leave, provides benefits, ". . . in accordance with the federal Family and Medical Leave Act (29 U.S.C. Sec. 2601, et seq.) and/or the New Jersey Family Leave Act (N.J.S.A. 34:11B-1, et seq.).

Article XXX, Management Rights, provides that all matters affecting wages, hours and other terms and conditions of employment that are not specifically governed by the agreement remains within the discretion of the County until the agreement expires.

2. The County provides a self-insured employee and dependent "Health Benefits Plan," (Plan) effective January 1,

2007, administered by AmeriHealth Administrators, Inc. (J-5). A predecessor health benefits plan was in effect since 1999 or earlier (T183, 186). In 2007, County Director of Human Resources, Daniel Hornickel, distributed proposed revisions of the Plan to the presidents of all majority representatives of County employees, including the PBA President, together with explanations of those revisions. The PBA President at that time (2007) did not object to the revisions (T186-187). Every County employee received a copy of the Plan in 2007 and it is provided to every new County employee in "orientation materials" (T96; T187).

A prefatory letter from the County addressed to "Plan Subscribers" advises at the outset:

> This booklet is issued to describe the Employee Health Benefits Plan. The benefits as outlined in the booklet are effective only if you are eligible for benefits and remain eligible according to the provisions of the Plan. [J-5]

At the beginning of a "questions and answers" section, asking "who is covered under the Plan," the provided answer is, "all active County full-time employees, eligible retirees and eligible dependents." The answer also provides: "Please review the 'Eligibility and Termination Provisions for coverage' section for a complete explanation" (J-5).

In the Plan, a "full-time employee" is defined as a "non-temporary employee who regularly works at least 30 hours per week

for the Employer for compensation in the form of salary, wages or commissions" (J-5). Every corrections officer in the PBA's unit is a full-time employee (T97).

Article III of the Plan, "Eligibility and Termination Provisions for Coverage," in part defines "eligible employees" as those "in the regular business of, and compensated for services by the Employer during a non-temporary average work week of at least 30 hours . . ." Another section of this article provides for "termination of coverage:"

> Employee coverage terminates on the last day of the month when:
>
> 1. you terminate employment, or
>
> 2. you cease to meet the definition of an 'eligible employee' . . . [J-5]

Article III also provides, "COBRA Continuation of Coverage," in the event of an employee's ". . . termination of employment or reduction in work hours."

3. Jennifer Michinski was hired as a corrections officer by the County on March 31, 2003, working a minimum of 40 hours per week. When she was hired, Michinski received the contemporaneous version of the County health benefits plan in effect, though she did not review it (T50-51). Michinski is included in the PBA's unit (T18-19).

In September or October, 2004, Michinski had a medical condition that required surgery and she was approved for leave

under the federal Family and Medical Leave Act until March, 2006, when she returned to work (T19-20). Michinski continued to receive health care coverage under the health benefits plan for the first 90 days of that leave, pursuant to Article IV of the 2005-2008 collective negotiations agreement (T20).

In July, 2007, Michinski fell from a chair that broke under her at work, causing a back injury (T21). Michinski did not report to work continuously from August, 2007 until December 23, 2008 (T22). From August 2007 through June 2008, Michinski received workers' compensation insurance benefits and the County maintained her health insurance coverage (T23, T196, T208).

The County consistently provides health care benefits to its employees receiving workers' compensation benefits. Such recipients also accrue vacation and sick leave benefits, credited to them upon their return to work. County employees receiving FMLA benefits and those injured by inmates in the performance of their duties also receive health insurance benefits, obviating the need to work an average of 30 hours per week to qualify for them (T195, T209-210).

On July 1, 2008, County Director of Human Resources Hornickel issued a letter to Michinski confirming her request for a "contractual leave;" acknowledging her application for disability retirement because she is "unable" to perform correction officer duties; and agreeing to a "leave of absence

for a period of up to six months beginning June 12, 2008." The letter advises that if six months expire and her application remains undecided, the County will seek her "letter of resignation in good standing" (CP-2; J-3, no. 6).

Michinski commenced an unpaid leave of absence on June 12, 2008, during which the County continued to provide her health insurance benefits through September 30, 2008, pursuant to Article IV, Section B of the parties' 2005-2008 collective negotiations agreement. On October 1, 2008, the County discontinued Michinski's health care coverage, owing to her leave of absence in excess of 90 days (T27; J-3, nos. 7 and 8; J-4; T190, T195-196).

Michinski remained on an approved leave of absence from October 1, 2008 through December 23, 2008 (T43, T190). Hornickel testified credibly that Michinski was not entitled to health insurance benefits during that period, pursuant to the 90-day limitation period set forth in Article IV B of the 2005-2008 collective negotiations agreement (T190-191; J-4). In December, 2008, Michinski was examined and cleared to return to work by a County physician (J-3, no. 10). On December 23, 2008, Michinski reported to work and performed correction officer duties until January 2, 2009. On January 1, 2009, the County reinstated Michinski's health insurance benefits, pursuant to the Plan and based on her return to work on December 23, 2008 (J-3, no. 13).

On January 2, 2009, a County physician filed a supplemental medical report setting forth results of a "functional capacity" examination administered to Michinski, writing that she could not fully perform correction officer duties. Michinski was promptly placed on light duty until January 13, 2009, when she was suspended from employment and advised that she was medically unfit for duty because she was restricted from lifting anything over thirty-five pounds (T29; J-3, nos. 17, 18). On January 16, 2009, the County conducted a Loudermill[2/] hearing, concluding that Michinski was ". . . physically unable to perform the duties of a corrections officer," pursuant to the physician's report (T30; J-3, no. 19).

4. On February 23, 2009, the County sent a letter to Michinski, advising that her health insurance benefits were terminated on January 31, 2009, ". . . due to a reduction of work hours," and providing, ". . . information and rates on continuing [her] benefits through COBRA," commencing February 1, 2009, upon her timely payment of premiums. The letter asks Michinski to contact the benefits office, ". . . upon [her] return to work to reinstate County benefits" (T32; J-6).

Director Hornickel credibly testified that the letter sent to Michinski is a "standard form letter" and that its only variables are the date, the addressee, and the "effective dates"

2/ Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985).

of termination of health insurance coverage and the filing of a COBRA form (T194). Hornickel elaborated in his testimony that in 2007, he asked the County Warden (in an effort to monitor reasons for overtime unit work) to "track" employee discipline, including suspensions. Hornickel reviewed that "information" (in light of this case's litigation) and verified the reported suspensions, together with, ". . . whether or not [unit employee] benefits were terminated as a result" (T198). He testified that the County's "system" automatically generates a report [monthly] and,

> . . . the benefits office is responsible for working with personnel staff to identify whether the person remained over that thirty-hours-per-week threshold. If the person did not work an average of the thirty hours, they received a letter, a form letter, notifying them that their benefits were being terminated. [T198]

Hornickel testified that the "process" generated letters similar to the one sent to Michinski (T199). I credit Hornickel's testimony (see finding no. 11).

5. On February 25, 2009, Michinski phoned PBA President Robert Swenson and told him of the letter she received advising of the termination of her health insurance benefits (T33, T85). At that time, Swenson had been PBA President about two years (T66; T86-87). He was first employed by the County as a corrections officer in 2000 (T65). Swenson replied: "I don't know what you're talking about" (T85). He told Michinski that he will ". . . look into it" and advise (T86). At the time of

Michinski's phone call, Swenson was for the first time a member of the PBA negotiations team negotiating the terms of a successor collective negotiations agreement (to the one that expired on December 31, 2008) with the County (T67, 68, 70).

6. Also on February 25th, the County issued a six-page negotiations proposal to the PBA, detailing salaries, health benefits, sick leave benefits, work schedules, overtime and other terms and conditions of employment (CP-5; T78-79). The parties' negotiations representatives met on that date (T79). The County proposed numerous changes to Article IV, Health Benefits. A proposal designated "A.5" provides:

> When an employee is in a suspension or 'W' status for more than 10 days in a month, his/her benefits will expire at the end of that month. Benefits shall be restored the first of the month after the employee has resumed working an average of 30 hours per week over the course of a month (provided that completed enrollment forms are returned to the Benefits Office within the required time frame). [CP-5]

Swenson understood the proposal to mean that the County would suspend unit employee health insurance benefits if an employee did not work an average of 30 hours per week, including any on suspension (T80). The PBA rejected the proposal (T83).

The specified February 25 County proposal to the PBA matches verbatim a provision (under Article XVI Benefits, A.5) in the 2007-2010 collective negotiations agreement signed by the County

and CWA for a unit of about 1200 full-time County employees (CP-6; T203).

On direct examination, Hornickel was asked if the issuance of the benefits "termination" letter to Michinski and the "A.5" negotiations proposal were related. He testified: "No. The timing was coincidental" (T202). On cross-examination, Hornickel acknowledged that in the interest arbitration hearing, he testified that the County's intention for the proposal, ". . . was to make the language uniform with what we have done in the CWA contracts" (T216). In the absence of any other testimony or document(s) implicating the veracity of Hornickel's testimony, I credit it.

This colloquy promptly ensued in Hornickel's cross-examination:

> Q. Did you offer any testimony [to the interest arbitrator] with respect to your belief that you've given us here on direct [examination] today, that the County had the ability to implement this proposal, notwithstanding the decision of the arbitrator, based on the terms of the Plan?
>
> A. This proposal? No, I don't think I testified that we could implement this language without the union's agreement.
>
> Q. And yet by this time, as you've testified, employees who were suspended at least on occasion had their health benefits terminated?

> A. No, they consistently had their health benefits terminated if they were on a suspension . . . [T218-219]

7. In May, 2009, Michinski had a medical emergency requiring surgery for which the bill exceeded $6,500 (T36; CP-3). The County paid Michinski's medical bills (T37). Both Counsel agreed that benefits were restored for the period between March 10, 2009 and May 8, 2009 (pursuant to the remedial Order in I.R. No. 2009-25) (T56).

Michinski returned to work on May 27, 2009 and her health insurance benefits were restored on June 1, 2009 (T38). Michinski was unaware of any other County corrections officer(s) whose health insurance benefits were terminated as a consequence of suspension(s) from work (T46). Nor was she aware of any practice of terminating health insurance of suspended unit employees (T49).

8. PBA President Swenson testified that before February 23, 2009, no corrections officers informed him that his or her health insurance benefits were terminated because he or she was suspended from work or on "W" [unpaid] status (T100). I credit his testimony. He also credibly testified that the County provides the PBA notice(s) of disciplinary infractions of unit employees (T100).

9. The parties entered these several stipulations:

> 2. In addition to the existing record, the following documents shall be introduced into

evidence as Respondent's Exhibits pursuant to the terms of this Stipulation. Respondent's Exhibits are attached hereto and are to be identified as follows:

(a) R-1 - Draft letter to William Layton and Dependent dated April 30, 2007.

(b) R-2 - Draft letter to Steven Ferranto dated June 25, 2007.

(c) R-3 - Draft letter to Danielle Gaines and Dependent dated November 27, 2007.

(d) R-4 - Draft letter to Peter Recigno dated June 2, 2008.

(e) R-5 - Draft letter to Jermane Carter dated February 9, 2009.

3. The parties stipulate and agree that Respondent's Exhibits R-1 to R-5, inclusive, were located by the County following the close of the hearing on March 26, 2013.

4. The parties further stipulate and agree that Respondent's Exhibits R-1 to R-5, inclusive, are the only such draft letters located by the County which pre-date the letter sent to Jennifer Michinski on February 23, 2009, in evidence as Exhibit J-6.

5. The parties stipulate and agree that Exhibits R-1 to R-5 are properly characterized as draft letters, as they are unsigned.

6. The Charging Party does not stipulate or agree that Exhibits R-1 through R-5, inclusive, were either sent by the County or received by the members to whom they were addressed. However, the parties do stipulate and agree that were the County to recall former Director of Human Resources Daniel Hornickel to the stand, he would testify that signed versions of Exhibits R-1 through R-5, inclusive, were sent to the members to whom

> they were addressed on or about the date that appears on the draft letters.

* * *

Exhibits R-1 through R-5, County letterhead form letters addressed to unit corrections officers, (and apparently not copied to anyone else) are substantially identical to the February 23, 2009 letter sent to Michinski advising of the termination of her "group health benefits . . . due to a reduction of work hours" and of the possibility of continuing coverage through COBRA (J-6; see finding no. 3). In the absence of any adverse credibility issue or finding raised by Hornickel's testimony or asserted by the PBA, I infer that Hornickel's projected testimony about R-1 through R-5 is credible and I credit it.

10. In April, 2009, and "updated" in December, 2011, County Director of Human Resources Hornickel compiled a list of 35 unit employees who were suspended or on unpaid status for varied and specified periods (with several denoted exceptions) between October, 2006 and December, 2009, together with brief "explanations" for each suspension and a "yes" (with an accompanying date) or "no," indicating whether each employee's health insurance benefits were "terminated" (T197; CP-9). The document is entitled, "Employee Disciplines and Impact on Health Benefits (prepared April 2009)" (CP-9). The County reportedly terminated the benefits of 21 employees, including Jermane

Carter, Alicia Emerson, Steven Ferranto, Madeline Frisby, Danielle Gaines and Peter Recigno, all of whose separate circumstances were the subject of PBA President Swenson's testimony (CP-9; T104; 138-142; 155, 176-177). Subtracting those whose benefits were terminated after March, 2009 leaves a total of 16.

Emerson reportedly served a 120 consecutive-day suspension commencing in March, 2009, the same month her health insurance benefits were terminated (CP-9). Swenson testified that he asked Emerson if she was aware that her benefits had been terminated and if she had received notice of the termination. She replied, "no" to both questions (T104). He also testified that she said that she had not visited a doctor during the period of suspension (1T104-105, 138). Swenson was then immediately asked by PBA Counsel if ". . . anyone else made that same indication to you [i.e., denied knowing that her/his health insurance benefits were "terminated"], Swenson replied: "I don't remember the exact ones I had spoken to. It's quite some time ago. But I remember the ones I spoke to, none of them recalled receiving anything from the County notifying them their benefits had been suspended" (T105).

Carter reportedly served a 120 consecutive-day suspension commencing November, 2008, the same month his health insurance benefits were "terminated" (CP-9). Ferranto reportedly served a

60 consecutive-day suspension commencing May, 2007, the same month his health insurance benefits were terminated (CP-9). Frisby and Gaines served respectively, unspecified[3/] and consecutive six-month suspensions commencing December, 2006 and November, 2007. Their benefits were terminated in January, 2007 and November, 2007, respectively (CP-9). Recigno served consecutive 20, 45 and 90-day suspensions beginning in April, 2008 and his health insurance benefits were terminated in May, 2008 (CP-9). Swenson admitted in his testimony that although he was familiar with all of these specified and named suspended employees, he did not inquire of any of them whether their health insurance benefits were terminated (T140-142, 155). Swenson's specific recollection on cross-examination that he did not ask at least five named employees on the County's list (whose benefits were "terminated") if they received a letter from the County advising of "termination" of health benefits and the COBRA option is more probative and credible than his general denial on direct examination that none of the unspecified employees with whom he spoke, ". . . recalled receiving anything from the County." I observe parenthetically that Swenson did not specifically testify that he asked any of the unspecified employees if they received a

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3/ Unit employee Frisby was "suspended without pay" following a Loudermill hearing, as was Michinski.

County letter and that their "not recalling" receiving such a letter is not necessarily a denial.

Employees Richard Handberry, Charles Hubler and William Layton were found to have taken “unauthorized absences/w [unpaid] days,” resulting in a termination of their health insurance benefits in May 2008, August 2007, and April 2007, respectively (CP-9). PBA President Swenson conceded in testimony that Handberry, ". . . had probably 75 disciplinary charges since I was employed [by the County]" (T173). The record does not reveal circumstances of Hubler and Layton other than what is set forth in CP-9.

Michinski’s name is also included in the list, with notations, “suspended without pay,” as a consequence of a “January ‘09 Loudermill” (hearing) resulting in a termination of benefits in “February ‘09" (CP-9). Corrections officers Carter, Ferranto, Frisby and Torres similarly incurred "termination" of their health insurance benefits (or minimally, a temporary suspension) in the relevant time period as a consequence of their suspensions from work following Loudermill hearings (CP-9).

Hornickel testified that the compiled list [CP-9] was comprised of unit employees with excessive consecutive days of suspension (sufficient to fall below the "30-hour-per week" minimum required by the Plan; see finding no. 2) and those whose consecutive suspension days did not meet the "30-hour-per-week"

threshold for termination of benefits (T219-220). He testified that the latter group existed ". . . typically by way of a settlement agreement, by way of the Warden and the [PBA], did not have their health benefits suspended" (T220). Hornickel's testimony was unrebutted.

Swenson elaborated about the "settlement agreement" in his testimony:

> There were cases if a person was not disciplined frequently . . and they [incurred] an alleged violation of the policy and procedure or committed an infraction, that person may call [upon me] to see what the Warden is willing to do for [her or him], if that person is willing to accept a guilty plea for the disciplinary charge. And oftentimes we'd be able to work something out. [T135-136]

Swenson testified credibly that the Warden would sometimes split suspensions:

> Most of the time it's all about money. You know, they couldn't suffer a thirty-day continuous loss or anything like that, a whole month without pay, you risk foreclosure, people getting set back immensely. So they would exchange the guilty plea if the Warden would, at his discretion, break the suspension up a little bit. [T136]

He testified that employees sought the same remedy to preserve their health insurance benefits after the PBA became aware that health benefits of suspended employees had been terminated [i.e., February 25, 2009 when Michinski called Swenson; see finding no. 4] (T137). As reported in the exhibit, almost all suspended

employees whose health insurance benefits were not terminated served their suspensions "spread over" a period of time longer than the number of imposed suspension days.

Among those employees are Echevarria and Henry, both having served "60 day suspensions," the former's, "spread over 6 months, May-November [2008]" and the latter's from "June-December [2008]." In both instances, the number of inclusive months is 7. Listed employee Barnes was issued a "120 day suspension" in April, 2007 and "served 46 days spread [from] April to December." Listed employee Huang was issued a "30 day suspension" and a "120 day suspension," during the latter of which his health insurance benefits were terminated. His benefits were not terminated during the former suspension, though a notation provides, "should have been" (CP-9). I infer that the notation means that Huang's health insurance benefits should have been terminated during the 30 day suspension. None of these employees testified in the hearing, nor was any testimony elicited about the status of any of their suspensions, health insurance benefits or work hours.

I find that CP-9 and Swenson's testimony generally corroborate[4/] Hornickel's testimony regarding the delineation of

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4/ I find that Echevarria's and Henry's insurance benefits should have been "terminated" by the County, regardless of their having been granted "spread-over" suspensions because they would have been unable to meet the 30-hour workweek average threshold set forth in the Plan. Their respective 60-day suspensions served over six-month periods would have

(continued...)

suspended (or unpaid status) unit employees whose health insurance benefits were and were not terminated between October, 2006 and March, 2009.

11. Hornickel testified that the County's assessments of all County employees' eligibility for health insurance coverage (i.e., determining whether an employee worked an average of thirty hours per week under Articles I and III of the Plan) were performed "monthly" (T192). He elaborated that attendance reports generated, ". . . at the beginning of every month [under the County's] old financial software/payroll platform revealed who was suspended or absent without approval." The County "benefits specialist [ ] would then work with my Human Resources staff, my personnel assistants, to look at each person on that list to identify how much time they had missed that prior month" (T192-193). Hornickel continued:

> If employees had missed work due to unpaid suspensions or [unauthorized absences without pay] and it was greater than ten hours per week, so that would put them below the thirty

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4/ (...continued)
required them to be absent from work an averaged 10 suspension days per month, effectively preventing them from working the threshold minimum number of work hours. Even if I agree that the examples of Barnes and Huang also do not strictly comply with the County's proffered formula, I find that 8 of the 12 examples of suspended employees retaining health insurance on the County list (CP-9) comply with the formula. The benefit to this entire group (the "flip-side" to the "termination" of benefits group) seems congruous with their having waived any objection to the discipline(s) imposed.

> hours mark, then the benefits office would send a form letter notifying the employee that his or her benefits were terminated and advising them - because we have a legal obligation to do that - of their ability to pick up COBRA. [1T193]

He conceded in cross-examination that the monthly assessment is not set forth in the Plan (T208). (Article III of the Plan provides in part that coverage, ". . . terminates on the last day of the month when . . . [a corrections officer] ceases to meet the definition of an 'eligible employee,';" see finding no. 2).

Hornickel testified that the County form letter sent to Michinski on February 23, 2009 (J-6) was issued because, ". . . she was suspended without pay as a result of a Loudermill hearing, due to the doctor's report indicating that she was [physically] unfit for duty" (T194). Hornickel's testimony was unrebutted; I credit it.

I infer that the other form letters sent to other corrections officers (J-1 through J-5) were issued because those employees' "reduction in hours" - measured over a calendar month - rendered them "ineligible" for health insurance benefits under Article III of the Plan (see finding no. 2).

The evidence of the County's written notifications to unit employees of health benefits "terminations" and the COBRA option is more persuasive than not. Hornickel's unrebutted testimony that "form" letters were "generated" and sent to suspended unit employees following tallies each month were in part corroborated

by the stipulated submission of five "draft" letters to that effect issued within the two year period preceding the filing of the charge. The County did not proffer corroborative draft letters that could have been issued to ten other unit employees whose benefits were "terminated" in the relevant period.

I have found that Swenson's vague recollection that no unspecified suspended unit employees (other than Michinski) received such notices is not probative and far less compelling than his specific recollection of not having asked five named unit employees who were suspended for lengthy, unbroken periods if they each received a "termination" of benefits notice. His hearsay inquiry of unit employee Emerson and her reported denial of receiving a notice does not alter my overall assessment. I infer that poor record-keeping rather than omissions to send such letters accounts for the discrepancy.

12. On August 27, 2009, the Commission assigned an interest arbitrator to assist or resolve the parties' collective negotiations impasse (IA-2009-115). On June 8 and 10, 2010, the arbitrator conducted a formal hearing. On August 15, 2011, the assigned arbitrator issued a lengthy interest arbitration award, providing in a relevant portion:

> I have decided against awarding other aspects of the County's health benefits proposal, including the proposal to terminate health coverage for a corrections officer who is on suspension or W [unpaid] status for 10 days in a given month. I decline to award a

> provision that would remove health coverage for an individual who works in a dangerous environment and who, for that reason, might not be as productive in performing his duties as he or she might otherwise have been. While one CWA agreement does include such a clause [CP-6], this is an instance where the differences between law enforcement and civilian employment warrant different contractual provisions. [CP-7]

The Plan was not introduced as an exhibit in the interest arbitration hearing (T147). Nor did County Director of Human Resources Hornickel testify at the interest arbitration hearing that the County had either the "right to implement" the proposal without the PBA's agreement or a practice of terminating unit employee health insurance benefits, pursuant to the Plan (T218-219).

The resulting successor collective negotiations agreement (2009-2011) achieved by the parties does not include a provision permitting the County to terminate health care insurance of unit employees, except for ". . . instances where the leave of absence (or an extension of such leave) without pay is for a period of more than ninety (90) calendar days, the employee's coverage shall be terminated effective the first of the month following the ninetieth day" (CP-8, Article IV Health Benefits, p. 7; T95).

ANALYSIS

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and

conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also, Galloway Tp. Bd of Ed. V. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978).

Health insurance is a mandatorily negotiable term and condition of employment, as is its availability. State of New Jersey, P.E.R.C. No. 2000-12, 25 NJPER 402, 403 (¶30174 1999); Bor. of Woodcliff Lake, P.E.R.C. No. 2004-24, 29 NJPER 489 (¶153 2003); Willingboro Bd. of Ed. and Employees Assn. of Willingboro Schools, 178 N.J. Super 477 (App. Div. 1981). The Commission has also held that payment of health insurance premiums for employees on unpaid leaves of absence is mandatorily negotiable. Hopewell Valley Reg. Bd. of Ed. P.E.R.C. No. 97-91, 23 NJPER 133 (¶28065 1997); West Orange Bd. of Ed., P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd. NJPER Supp. 2nd 291 (¶232 App. Div. 1993). Unilateral changes in health benefits violate the obligation to negotiate in good faith. Bor. of Closter, P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001); Tp. of Pennsauken, P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987); City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984).

In Camden Cty., I.R. No. 2006-18, 32 NJPER 114 (¶54 2006), recon. den. I.R. No. 2006-20, 32 NJPER 182 (¶80 2006), a majority

representative alleged that the employer unilaterally changed an enumerated policy concerning health and prescription benefits for suspended employees, violating section 5.4a(1) and (5) of the Act. Specifically, it alleged that the employer unilaterally eliminated the employees' option to either pay the appropriate COBRA premium on a monthly basis during the term of a suspension or forego making premium payments during the suspension period and have the County employer deduct the accrued premiums from the suspended employee’s paycheck upon return to active duty.

The Designee recounted both the employer’s 2001 enumerated policy providing the option to unit employees and its 2005 amended policy eliminating the option and requiring any employee suspended for more than thirty days to pay the monthly COBRA premium at the beginning of the suspension or insurance coverage would be immediately terminated until the employee returned to active duty. The parties' collective negotiations agreements required the County to provide health and prescription benefits to eligible unit members.

In granting the union's application for interim relief, the Designee found in part that the employer’s revision of the policy (by removing the option an employee formerly could elect to repay the employer for premiums expended on the employee’s behalf upon that employee’s return to active status) appeared to have, “. . .

unilaterally modified a term and condition of employment" Id., 32 NJPER at 116.

The Designee identified the case before him as one in which, ". . . an existing working condition is changed and the majority representative does not claim an express or implied contractual right to prevent that change while the employer does not claim, or cannot prove, an express or implied right to impose that change without negotiations. Such a change triggers the duty to negotiate under section 5.3." Middletown Tp. Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28, 30 (¶29016 1997), aff'd 334 N.J. Super 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). The Designee cited this explanation in Middletown Tp., lifted from Sayreville Bd of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983):

> An employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment. . . even though that practice or rule is not specifically set forth in a contract. . . Thus, even if the contract did not bar the instant changes, it does not provide a defense for the Board since it does not expressly and specifically authorize such change. [Middletown Tp., 24 NJPER 30]

The Commission wrote: "To prove a violation absent an applicable defense, the representative need show only that the employer changed an existing employment condition without first negotiating." Middletown Tp., 24 NJPER 30. The facts of

Middletown Tp. revealed a practice of placing police officers with academy training and who worked at least one year in a municipal police department on step three of the salary guide, despite a lack of clarity on ". . . the exact limits of the practice." Id., 24 NJPER 30.

Like the circumstance in Camden Cty., the disputed term and condition of employment in this case is only partially revealed in the collective negotiations agreement. Article IV of the agreement refers all "full-time employees" to the Plan after their first three months of employment. As the earlier enumerated policy in Camden Cty. provided options for continuing COBRA health insurance coverage to unit employees suspended for more than 30 days, Article III of the Plan in this case provides for "COBRA continuation" in the event of "termination of employment or [a] reduction in work hours." Other parts of the Plan define employee eligibility for coverage as limited to "full-time employees" and provide for "termination of coverage." Article IV B of the parties' 2005-2008 collective negotiations agreement also identifies employee eligibility for health insurance coverage under COBRA. The County also has an uncontested practice of providing health insurance benefits to unit and all other employees receiving workers' compensation benefits and to those receiving FMLA benefits.

Unlike Camden Cty., where no genuine issue of material fact arose from the employer's "modification" of the earlier plan, the employees incurring a suspension (or "termination," as provided in the County-generated list, CP-9) of health insurance benefits in this case were identified by circumstantial and quantifiable "reduction[s] in work hours" that fell short of Plan eligibility requirements.

Between October, 2006 and March, 2009, 16 unit employees suspended for 20 or more consecutive days, including those taking "unauthorized absences," on "unpaid status" incurred "termination" of their health insurance benefits. Included in this group are Michinski and four other corrections officers whose health insurance benefits were "terminated," following their respective Loudermill hearings between December, 2006 and February, 2009. Three of these employees whose names appear on the County-generated list, CP-9, including Michinski, served "suspensions without pay" for unspecified periods (though Michinski returned to work in May, 2009 and her benefits were restored in June, 2009). Another of these three, Ferranto, received in 2007 a County "termination of benefits" form letter that advised of the COBRA option, as did Michinski in 2009. In these regards, Michinski was treated no differently than other similarly-situated employees during the approximate two and one-half years before the unfair practice charge was filed.

The PBA has not proffered a meaning or working definition of the term, "reduction in work hours" or of "eligible employee," or, for that matter, of "ceasing to be an eligible employee," as set forth in the Plan. Even if the County has not proved that it "terminated" the health insurance benefits of all unit employees who failed to work an averaged 30-hour per week threshold (see footnote no. 5, p. 20), it has shown by a preponderance of evidence that for more than two years preceding the filing of the charge, unit employees serving 20 consecutive-day or longer suspensions; those on sustained "unpaid" absences; and those subject to adverse Loudermill hearing outcomes all incurred "termination" of their health insurance benefits. I disagree that the PBA has proved that the County's substantive conduct towards Michinski -- its termination of her health insurance coverage -- unilaterally changed a term and condition of employment.

The PBA contends that Frankford Tp. Bd. of Ed., P.E.R.C. No. 98-6, 23 NJPER 625 (¶28304 1997), and City of Linwood, H.E. No. 98-16, 24 NJPER 133 (¶29068 1997), holding that public employers violated section 5.4a(5) and (1) of the Act by unilaterally imposing terms and conditions of employment regarding health insurance benefits, support the result it seeks (brief, p. 10-14). I disagree.

Frankford Tp. Bd. of Ed. is a regulatory preemption case in which the public employer admittedly changed a term and condition of employment. Before December 18, 1995, regulations in the State Health Benefits Plan defined "full-time" as "employment of any eligible employee who appear on a regular payroll and who receive a salary of wages for an average of 20 hours per week." By this regulation, Board employees working more than an average of 20 hours per week received health insurance coverage under the State Health Benefits Plan.

Effective December 18, 1995, the regulation (N.J.A.C. 17:9-4.6(a)1) was amended to read:

> (a) For purposes of local coverage, 'full-time' shall mean:
>
> 1. Employment of any eligible employees who appear on a regular payroll and who receive a salary of wages for an average of the number of hours per week as prescribed by the governing body of the particular employer. Each participating employer, shall, by resolution, determine the number of hours worked which shall be considered to be 'full-time.' In no case shall the number of hours for full-time be less than 20.

In February, 1996, the Board (acting pursuant to the regulation) passed a resolution designating full-time employment as 34.33 hours of work per week for purposes of participation in the State Health Benefits Plan. It provides that employees hired after March 1, 1996 would have to meet the change in the required minimum number of average weekly hours to qualify for benefits,

while those who became eligible for benefits before the resolution would be "grandfathered."

The Frankford Board did not deny that it acted unilaterally. It argued that the 1995 regulatory amendment preempted negotiations over the definition of "full-time." The Commission disagreed, writing that a regulation (or statute) will not preempt negotiations unless it speaks in the imperative and expressly, specifically and comprehensively sets an employment condition, citing Bethlehem Tp. Ed. Assn. v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). The Commission found that the 1995 amendment was not intended to preempt negotiations over the average number of hours per week an employee must work to be considered "full-time" and thus eligible under the State Health Benefits Plan. It considered the final sentence of the amendment as the "minimum" below which negotiations were preempted. It also relied on extensive comments and agency responses recorded prior to the amendment's adoption. The Commission concluded that the Board's "unilateral change" in the definition of "full-time employment" for purposes of insurance eligibility violated 5.4a(5) and (1) of the Act.

In City of Linwood, the majority representative alleged that the employer unilaterally modified "an established practice" of providing dependent health insurance coverage to unit employees with 25 years of service who had purchased such coverage before

their retirement from service. The facts include a history of an employer-passed resolution (1973), ordinances (1982, 1986, 1991 and 1994) and collective negotiations agreements that included a provision pertaining to health benefits coverage in retirement. Included in the provision was this sentence: "The interpretation of this article will be consistent with past practices." The provision did not otherwise specify or refer to the matter of dependent health benefit coverage for retiring employees. The hearing examiner also recounted and credited a witness's ". . . understanding of the City's policy on health benefits in retirement on the basis of his observation of other non-unit employees who retired between 1974 and 1994." The history of those named individuals, together with their respective health coverages and retirement dates enabled the hearing examiner to find that, ". . . if the employee had dependent coverage the day before retirement, that coverage remained in effect after retirement." Id., 24 NJPER at 135.

The hearing examiner also determined that several ordinances attempted (but failed) to clarify that dependent coverage for retiring employees applied only to employees hired before 1974. He determined that the health insurance provisions in the parties' collective negotiations agreements memorialized that "the contract article would be interpreted consistent with past practices." Id., 24 NJPER at 137. The hearing examiner

concluded that health benefits coverage for dependents of otherwise eligible retiring employees constituted "the existing term and condition of employment for unit employees." Id.

Eschewing the City's argument that unit employees' terms and conditions of employment are controlled by the collective agreement and not by policies or ordinances, the hearing examiner wrote that the City's enactment of a 1994 ordinance was intended, ". . . to put employees on notice that dependents of otherwise eligible employees hired after 1974 will not receive health benefit coverage when those employees retire." Id., 24 NJPER at 137. The hearing examiner found that announcing a change in a term and condition of employment is an "operative event" identifying when an unfair practice occurred and that, "the City must first negotiate with the Association prior to making any change in its practice of providing health benefits to dependents of eligible retiring employees." The City was found to have refused to negotiate in good faith concerning changes in terms and conditions of employment, violating 5.4a(5) and (1) of the Act.

This case does not concern a public employer's admitted unilateral setting of a term and condition of employment found not to be preempted by a State agency regulation (Frankford Tp. Bd. of Ed.). Nor does it involve a public employer's announced

change in a term and condition of employment without negotiations (City of Linwood).

I disagree with the PBA that the regulation's failure to preempt negotiations in Frankford Tp. Bd. of Ed. is an apt analogy to the Plan's failure to ". . . specifically provide for the loss of coverage when someone fails to average 30 hours per week in any given month" (brief at 14). The employer in that case acted unilaterally, (mistakenly) relying on regulatory preemption as a defense. The disputed term and condition of employment in this case is not and need not be so memorialized; it would have lawfully sufficed for the PBA to have demonstrated that the County unilaterally changed an existing employment condition. Specifically, the PBA did not show that before February, 2009, the County did not consistently "terminate" health insurance benefits of unit employees suspended or in an "unpaid" status for 20 or more consecutive days. See Middletown Tp.; Piscataway Tp. Bd. of Ed., P.E.R.C. No. 2016-3, 42 NJPER 95 (¶26 2015); West Essex Reg. School Dist. Bd. of Ed., H.E. No. 2001-12, 27 NJPER 88 (¶32033 2000). Such a showing would then shift the burden to the County to prove that the Plan (in the PBA's phrasing) "specifically provided for the loss of coverage when someone fails to average 30 hours per week in any given month." The County has not asserted a right to act unilaterally; it contends that its "termination" of Michinski's health

insurance benefits accorded with "longstanding practice" and with "the terms of the collective negotiations agreement and the Plan."

The PBA also contends that City of Linwood holds that, ". . . where the employer fails to effectively place its workforce on notice as to those circumstances triggering the loss of health care coverage, no existing past practice will be found" (brief at 16). I disagree.

The hearing examiner in City of Linwood found that the majority representative had proved "an existing employment condition" (i.e., dependent health insurance coverage for eligible retirees) based on unrebutted testimony, documents and express affirmations of "past practices" in the health benefits provision of then-recent collective negotiations agreements. He found the public employer's efforts at recasting or terminating the benefit through ordinances to be unavailing and that its 1994 ordinance actually, ". . . announced a change in the existing terms and conditions of employment," constituting a violation of section 5.4a(5) and (1).

In this case, I have found that the PBA did not carry its burden to prove that the County unilaterally changed a term and condition of employment. Such a showing was a necessary and demonstrated condition to finding statutory violations in both Frankford Tp. Bd. of Ed. and City of Linwood. Also, as an

uncontested change in Camden Cty. (i.e., the employer's unilateral elimination of the employee option to forego insurance premium payments during the suspension period), it provided a necessary first element of the interim relief standard. Id., 32 NJPER at 115-116; see also, Bor. of Closter.

The PBA contends that the County never notified it that unit employees were ". . . losing their health care benefits after being suspended." I agree but dispute that that omission violates the Act.

Article IV (Health Benefits) of the parties' 2005-2008 collective negotiations agreement refers all full-time unit employees with three months of service to the Plan. In 2007, the PBA was provided the revised Plan, denoting all recent revisions and it did not respond to the County. Every unit employee received the Plan, as do all new unit employees. The Plan itself cautions employees to be and remain "eligible for benefits;" it quantifies the number of work hours defining eligibility; it defines ineligibility and when ineligibility will result in "termination" of benefits (i.e., at the end of a calendar month). In the absence of an objection or demand to negotiate, I believe that the County was lawfully entitled to reasonably interpret and apply the Plan's provisions. UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009); Upper Saddle River Bd. of Ed., D.U.P. No. 2004-7, 30 NJPER 263 (¶91 2004).

I have credited testimony and documents showing that unit employees suspended for sustained periods of time were sent notices of the "termination" of health benefits and of a COBRA option. The record also shows that the PBA was informed of every instance of unit employee suspension(s) from work. Considering its ample notice of Plan eligibility requirements, I believe that the PBA should have known or inquired of the possibility that the length of certain suspensions or periods of "unpaid" status of unit employees could result in a loss of health insurance benefits.

I also find that the chronology of events on this record refutes the PBA's specific allegation that the County "unilaterally implemented" its February 23, 2009 negotiations proposal to suspend health benefits insurance of suspended unit employees or those on unpaid status. That proposal, "A.5," was already included as a provision in the County/CWA agreement for a broad-based civilian negotiations unit (see finding no. 6). The timing of the County's proposal to the PBA coincided with its issuance of Michinski's "termination" of health benefits notice. The record shows that the County had issued such notices to similarly-situated employees in the past. I have also credited Hornickel's testimony to the effect that the timing of the letter and the proposal was merely or only coincidental. I glean no bad faith from those actions.

Nor do I see anything unlawful in the County's presentation of that proposal to the interest arbitrator. The record does not suggest that the County misrepresented facts or circumstances to the arbitrator. Its decision to present at that hearing neither the Plan nor facts of an existing employment condition was within its proper discretion.

RECOMMENDATION

I recommend that the Complaint be dismissed.

/s/Jonathan Roth
Jonathan Roth
Hearing Examiner

DATED: April 22, 2016
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by May 5, 2016.