P.E.R.C. NO. 2023-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX
Respondent,

-and- Docket No. CO-2017-096

FOP LODGE 106,
Charging Party.

COUNTY OF ESSEX,
Respondent,

-and- Docket No. CO-2017-105

PBA Local 382,
Charging Party.

COUNTY OF ESSEX,
Respondent,

-and- Docket No-CO-2017-113

PBA Local 183,
Charging Party.

COUNTY OF ESSEX,
Respondent,

-and- Docket No- CO-2017-125

PBA LOCAL 183A,
Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the County's exceptions and largely adopts a Hearing Examiner's decision on unfair practice charges alleging that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) when it decreased the level of contractual health benefits by unilaterally changing health insurance carriers from Aetna to the State Health Benefits Plan (SHBP). The Commission concurs with the Hearing Examiner that the County's unilateral change to the SHBP, as to FOP Lodge 106 and PBA Local 382, reduced their contractual level of health benefits without negotiating in good faith in violation of the Act. The Commission finds that the Hearing Examiner's remedy of reimbursement for increased costs incurred by employees due to the change in health benefits is reasonable and supported by precedent. Specifically, the Commission finds that judicial precedent supports the viability of a reimbursement fund, provided after point-of-service, as a remedy for a reduction in health benefits caused by an employer's unilateral change to the SHBP. The Commission denies PBA Local 183's exceptions, finding that the record indicates a genuine issue of material fact concerning whether PBA Local 183 agreed to change to the SHBP without additional conditions. The Commission partially grants PBA Local 183A's exceptions, thereby reversing the Hearing Examiner's grant of summary judgment to the County on PBA Local 183A's charge, by finding that the record indicates that there is a genuine issue of material fact concerning whether Local 183A consented to change to the SHBP.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2023-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,
Respondent,

-and- Docket No. CO-2017-096

FOP LODGE 106,
Charging Party.

COUNTY OF ESSEX,
Respondent,

-and- Docket No. CO-2017-105

PBA LOCAL 382,
Charging Party.

COUNTY OF ESSEX,
Respondent,

-and- Docket No. CO-2017-113

PBA LOCAL 183,
Charging Party.

COUNTY OF ESSEX,
Respondent,

-and- Docket No. CO-2017-125

PBA Local 183A,
Charging Party.

Appearances:

For the Respondent, Genova Burns, LLC, attorneys (Joseph M. Hannon, of counsel and on the brief; Leonard S. Spinelli, of counsel and on the brief)

For the Charging Party - FOP Lodge 106 - C. Elston & Associates, LLC, attorneys (Catherine M. Elston, of counsel)

For the Charging Party - PBA Local 382 - Law Offices of Steven A. Varano, P.C., attorneys (Albert J. Seibert, of counsel)

For the Charging Parties - PBA Local 183 and PBA Local 183A, Law Offices of Nicholas J. Palma, Es., P.C., attorneys (Valerie Palma DeLuisi, of counsel)

DECISION

This case comes before the Commission on exceptions filed by the County of Essex to a Hearing Examiner's decision on a joint motion for partial summary judgment filed by FOP Lodge 106, PBA Local 382, PBA Local 183, and PBA Local 183A (Charging Parties) and a cross-motion for summary judgment filed by the County of Essex (County).[1/] H.E. No. 2023-6, 49 NJPER 428 (¶105 2023). On November 1, November 10, November 18, and December 9, 2016, the Charging Parties filed their respective unfair practice charges alleging that the County violated subsection 5.4a(5) and (1) of the New Jersey Employer-Employee Relations Act (Act)[2/], N.J.S.A. 34:13A-1 et seq., by unilaterally changing the level of health insurance benefits provided to the Charging Parties' employees. The consolidated charges allege the County's unilateral change in health insurance carrier from Aetna to the New Jersey State Health Benefits Program (SHBP), effective January 1, 2017,

1/ The Charging Parties' joint motion does not seek to "address a calculation of damages/arguments over possible remedies" or "Petitioner FOP Lodge 106's allegations of retaliation."

2/ 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 refusing to process grievances presented by the majority representative."

reduced the Charging Parties' negotiated health insurance benefits.[3/4/]

The unfair practice charges were held in abeyance pending separate litigation pursued by the Charging Parties and the County before the State Health Benefits Commission (SHBC) and Public Employment Relations Commission (Commission), both of which were appealed to the Superior Court of New Jersey, Appellate Division and are discussed in the analysis below.

On March 8, 2022, the Director of Unfair Practices (Director) issued a Complaint and Notice of Pre-Hearing on the 5.4a(1) and 5.4a(5) allegations by FOP Lodge 106, PBA Local 183, and PBA Local 183A. On June 8, 2022, the Director issued a Complaint and Notice of Pre-Hearing on PBA Local 382's 5.4a(1) and 5.4a(5) allegations. On June 9, 2022, the Director consolidated the Complaints. On June 20, 2022, the County filed an Answer denying the allegations.

On August 10, 2022, the Charging Parties jointly filed a motion for partial summary judgment, along with a Statement of Undisputed Material Facts (SUMF), exhibits, a certification of

---

3/ The Charging Parties also filed applications for interim relief along with their unfair practice charges, which were denied by a Commission Designee in unpublished decisions issued in November 2016 and on February 1, 2017.

4/ As a remedy, the charges seek for the County to cease unilaterally changing mandatorily negotiable health benefits, negotiate over health benefits changes, maintain the level of health benefits prior to the change to the SHBP, and any other remedies the Commission deems appropriate.

counsel, and the certifications of 17 different members and representatives of the Charging Parties. H.E. at 4-6. On September 12, the County filed a cross-motion for summary judgment, a brief in opposition to the Charging Parties' motion, a response to the Charging Parties' SUMF (SUMF Response), exhibits, a certification of counsel, and three certifications from County employees or consultants. H.E. at 7-8. On September 13, the motion and cross-motion for summary judgment were referred to a Hearing Examiner for decision pursuant to N.J.A.C. 19:14-4.8(a). On September 30, the Charging Parties filed a response to the County's cross-motion and opposition, including a reply brief, a "Reply Statement of Facts," a "Counter-Statement of Facts," a certification of counsel, and a supplemental certification of Robert Slater, PBA Local 183 President.

On March 20, 2023, the Hearing Examiner issued a Report and Recommended Decision, H.E. 2023-6, granting the Charging Parties' motions for summary judgment and denying the County's cross-motion as to PBA Local 382 and FOP Lodge 106, denying the Charging Parties' motion for summary judgment and granting the County's cross-motion as to PBA Local 183A, and denying both the Charging Parties' and the County's motions as to PBA Local 183. As to PBA Local 382 and FOP Lodge 106, the Hearing Examiner held that the County violated subsection 5.4a(5) of the Act when it unilaterally changed their health benefits as a result of

changing their insurance carrier from Aetna to the SHBP in 2017. H.E. at 48, 50. The Hearing Examiner found that both unions had contract clauses providing that the County could change health insurance carriers "as long as the benefits are not less than those now provided by the County" as well as clauses providing that all existing benefits "shall be maintained and continued" during the terms of their agreements (until a successor agreement is reached). H.E. at 40-42, 48-49. The Hearing Examiner found that the County did not negotiate in good faith prior to the change to the SHBP, but switched carriers and thereby reduced the contractual level of health benefits without the consent of PBA Local 382 or FOP Lodge 106. H.E. at 43-45, 49-50. Specifically, the Hearing Examiner found that the change to the SHBP reduced health benefits by, among other things: increasing doctor visit co-pays; increasing prescription drug costs; decreasing coverage for in-network dental services and physical exams; imposing new chiropractic pre-certification requirements; and removing the Traditional insurance plan which resulted in higher deductibles, increased ER co-pays, and reduced coverage for physical exams, lab work, and x-rays. H.E. at 11-17, 20, and 40-41.

As to PBA Local 183A, the Hearing Examiner found that, while their contractual level of health benefits changed as a result of the switch to the SHBP, Local 183A did not submit evidence opposing the County's certification attesting that Local 183A

consented to the change to the SHBP. H.E. at 50-53. As to PBA Local 183, the Hearing Examiner found that, while their contractual level of health benefits changed as a result of the switch to the SHBP, the record demonstrates a genuine issue of material fact as to whether Local 183 consented or waived its right to negotiate the switch to the SHBP. H.E. at 50-53.

On March 30, 2023, the County filed exceptions to the Hearing Examiner's decision. The County asserts the following four major points:

> 1. The Hearing Examiner deprived the County of due process by ordering a remedy where no remedy was sought in the unions' motions and County lacked any opportunity to oppose a remedy.
>
> 2. Even if the unions had requested a remedy, the recommended order is not appropriate because it violates State Health Benefits regulations and interferes with the Plan Design.
>
> 3. The Hearing Officer erroneously concluded that increased premiums, pre-certification requirements and loss of coverage of certain prescription medications were a reduction in the negotiated level of benefits.
>
> 4. Summary judgment was not appropriate because material issues of fact existed as to the interpretation of the parties' contracts.

On April 18, 2023, the Charging Parties filed a response brief in opposition to the County's exceptions. The Charging Parties asserted the following four major points:

> 1. PERC's fashioning of a remedy upon a finding of a violation of the Employer-Employee Relations Act is authorized by statute as per rulings by this state's Supreme Court. No "due process" rights were owed the County, and none were violated.

2. PERC has already ruled that the County cannot hide behind the "Uniformity Requirement" of the SHBP.

3. The Hearing Examiner correctly concluded that the County failed to dispute any certifications provided by petitioners that evidenced increased costs and reduction in benefits.

4. There are no material facts in dispute; as such, summary judgment is appropriate as to FOP 106 and PBA 382.

On March 30, 2023, PBA Local 183 and PBA Local 183A filed separate exceptions to the Hearing Examiner's decision. PBA Local 183 asserts the following two major points:

1. Standard of review for summary judgment motion was not properly applied as to PBA 183 concerning the operative law of waiver.

2. As outlined in the certification of counsel, the County's "facts" alleged against PBA 183 are not supported by relevant, competent evidence and are inherently contradictory.

PBA Local 183A asserts the following two major points:

1. Standard of review for summary judgment motion was not properly applied as to PBA 183A.

2. As outlined in the certification of counsel, the County's facts as to PBA 183A (formerly known as FOP Lodge 138) are inherently contradictory and, therefore, summary judgment as to PBA 183A was not appropriate.

On April 20, 2023, the County filed a response brief in opposition to PBA Local 183 and PBA Local 183A's exceptions. The County asserts the following three major points:

1. The rules of evidence are not binding in an unfair practice hearing and the hearing examiner has the discretion to rely upon relevant, competent evidence.

2. The Hearing Examiner properly determined that a genuine disputed material fact precluded summary judgment in favor of PBA Local 183, because a hearing was required to determine whether the union affirmatively voted to join the SHBP.

3. The Hearing Examiner correctly concluded that PBA Local 183A failed to dispute the County's statement of fact that FOP Local 138 affirmatively voted in favor of the transition at a joint PBA 183/FOP 138 meeting.

SUMMARY OF FACTS

We have reviewed the Hearing Examiner's Findings of Fact and find that they are supported by the record, with one exception. (H.E. at 9-30). We accordingly adopt and incorporate the Hearing Examiner's Findings of Fact, except we modify Finding of Fact 35, as discussed below. We summarize the pertinent facts as follows:

- FOP Lodge 106 (FOP) is the exclusive majority representative of County DOC sergeants, lieutenants and captains. The FOP and the County are parties to a collective negotiations agreement (FOP Agreement) effective January 1, 2011 through December 31, 2013, further extended by Memorandum of Agreement from January 1, 2014 through December 31, 2017.

- Article 21 of the FOP Agreement, entitled "Health Insurance and Section 125 Cafeteria Plan," provides, in pertinent part (emphasis added):

  > The existing Hospitalization, Medical-Surgical and Major Medical Insurance Benefits shall be paid for by the County except as set forth below. The County reserves the right to select the insurance carrier who shall provide such benefits <u>as long as the benefits are not less than those now provided by the County</u>.

- The FOP Agreement also sets forth a "Retention of Existing Benefits" clause, which provides:

  > The rights, privileges and benefits which these employees have heretofore enjoyed and are enjoying via this Agreement shall be maintained and continued by the County during the term of this Agreement until the ratification/approval of a successor agreement, notwithstanding any statute, law, ordinance, precedent or ruling by a Court or State agency.

- PBA Local 382 (Local 382) is the exclusive majority representative of County DOC officers below the rank of sergeant. Local 382 and the County are parties to a

collective negotiations agreement extending from January 1, 2014 through December 31, 2017 (Local 382 Agreement).

- Article 21, Section 1 of the Local 382 Agreement provides, in pertinent part (emphasis added):

  > The existing Hospitalization, Medical-Surgical and Major Medical Insurance benefits shall be paid for by the County except as set forth below. The County reserves the right to select the insurance carrier who shall provide such benefits, as long as the benefits are not less than those now provided by the County.

- Article 4 of the Local 382 Agreement, entitled "Retention of Existing Benefits", provides:

  > Except as otherwise provided herein, all rights, privileges, and benefits which County Correction Officers have heretofore enjoyed and are presently enjoying, shall be maintained and continued by the County during the term of this Agreement.

- PBA Local 183 (Local 183) is the exclusive majority representative for rank-and-file County Sheriff's officers. Local 183 and the County are parties to a Memorandum of Agreement from January 1, 2014 through December 31, 2017.

- PBA Local 183A (Local 183A) is the exclusive majority representative of County Sheriff's superior officers. Local 183A and the County are parties to a Memorandum of Agreement extending from January 1, 2014 through December 31, 2017. This unit was represented by FOP Lodge 138 when the charge was filed, but is now represented by PBA Local 183A.

- Sections 4 of Local 183's and Local 183A's MOAs govern health benefits and provide, in pertinent part:

  > Employees may select any health plan offered by the County. Employees hired after the full execution of this agreement shall not be eligible for Traditional coverage.

- For the year 2016, the County contracted with Aetna to provide health insurance benefits to County employees.

- In 2016, in anticipation of a significant increase in renewal costs with Aetna for 2017 due to its "negative claims experience," the County's insurance consultant, Conner, Strong, and Buckelew (CSB) solicited insurance quotes from other carriers, including the SHBP.

- On January 15, 2016, March 13, 2016, and June 17, 2016, the County conducted "Labor Roundtable" meetings between the County, CSB, and representatives of the County's 26 negotiations units (not all units were present at every meeting) to explore changing health insurance carriers from Aetna to the SHBP. CSB consultants presented PowerPoint slides comparing the costs and benefits of the Aetna and SHBP plans. The presentations stated the County would need to adopt a resolution by October 1, 2016 to join the SHBP.

- By September 8, 2016, the County had obtained premium rates for the SHBP for 2017 as well as renewal rates from Aetna for 2017. The County calculated it would achieve $9,732,095 in cost savings in 2017 by switching from Aetna to the SHBP.

- On September 13, 2016, the County held a Labor Roundtable, which included representatives of the Charging Parties, in which the County apprised the unions of the SHBP costs compared to Aetna and the benefits provided by the SHBP.

- The County held "information sessions" with the Charging Parties and their members on September 16, 19, 20, 21 and 22, 2016 to ask them to consider changing to the SHBP. The County provided the Charging Parties with a deadline of September 23, 2016 to review the change to the SHBP, consult with their members, and allow a membership vote.

- FOP Lodge 106 did not agree to change to the SHBP. On September 21, 2016, the County met with FOP Lodge 106 to discuss the change to SHBP and the FOP expressed concerns about the move to SHBP. On September 26, the FOP provided the County with an offer outlining its terms to agree to the SHBP. On September 28, the County rejected FOP Lodge 106's offer and provided the FOP with the same offer it had made to 24 other negotiations units. The FOP rejected the offer and advised the County it did not agree to move to the SHBP.

- PBA Local 382 did not agree to change to the SHPB. In September 2016, County attorney Robin McGrath contacted PBA Local 382 President Brian Hanlon and requested an update on Local 382's decision on SHBP enrollment. Hanlon notified McGrath that Local 382 was scheduled to vote on the plan at a September 29 meeting. McGrath requested that the meeting be rescheduled for September 28, but Hanlon declined. Local 382 never consented to change to the SHBP prior to the County's adoption of the SHBP resolution.

- The County and PBA Local 183 disagree about whether Local 183 consented to enrollment in the SHBP. The County certifies that PBA Local 183 President Robert Slater

notified McGrath that Local 183 voted on September 27, 2016 to enroll in the SHBP. The County certifies that Local 183 union leadership attended the Board's September 28 meeting and did not object to the County's resolution to change to the SHBP. Local 183 certifies that its vote was contingent upon reaching an agreement with the County that addressed the impact on Local 183 unit members of the change. Local 183 certifies that no such agreement was reached.

- The County and PBA Local 183A disagree about whether Local 183A consented to enrollment in the SHBP.[5/] The County certifies that PBA Local 183A/FOP Local 138 verbally agreed to switch to the SHBP. County Counsel Gaccione certifies: "Additionally, President Slater called Essex County Chief of Staff, Philip B. Alagia, on that same night after the vote and indicated that both unions, Local 183 and FOP Lodge 138[now Local 183A] had voted yes in connection with the move into the SHBP." PBA Local 183 President Slater certifies he had no authority to speak for Local 183A/FOP 138 and that he never indicated to the County that PBA Local 183A/FOP 138 had voted yes. Local 183A counsel Valerie Palma DeLuisi certifies that Local 183A "voted against the transition" and "refus[ed] to agree to the change in benefits as a result of the transition into the [SHBP]."

- On September 28, 2016, the County adopted "Resolution 31," which changed the health insurance carrier for all County employees from Aetna to the SHBP. The effective date of the change to SHBP was January 1, 2017.

- The change from Aetna to SHBP resulted in a change in the level of health benefits for the Charging Parties in the following areas, as reflected in the County insurance consultant's side-by-side comparison:

  1) Under the Aetna "Point of Service" (POS) Choice Plan in 2016, employees received better coverage or more favorable benefits in "eight of twelve" areas of health insurance coverage than what was provided under SHBP, including but not limited to better coverage for office visits, skilled nursing facilities, and eye exams;

  2) Aetna provided a higher level of coverage for in-network dental services and physical exams; and

---

5/ This finding modifies H.E. Finding of Fact 35, which had found that "PBA Local 183A agreed to enter into the SHBP" based on a determination that PBA Local 183A had not submitted any certified facts or probative evidence to dispute the County's certification.

3) The Aetna Traditional Plan offered a higher level of benefits for the following out-of-network services: deductibles, maximum out-of-pocket costs, inpatient hospital, inpatient hospice, skilled nursing facility, routine physical and gynecological exams, and Rx Copay Reimbursements. For in-network services, the County Plan has a higher level of benefits for Rx Co-payments.

- Since the January 1, 2017 transition to SHBP, FOP Lodge 106 unit employees and their dependents with chronic health conditions have seen their out-of-pocket costs increase by $6,000. Doctor's office co-payments have doubled and ER co-pays have tripled since the switch to SHPB. Other FOP officers experienced loss of coverage for prescriptions previously covered by Aetna.

- Local 382 unit employees were impacted by the switch from Aetna to SHBP in the following ways: increase in health insurance contributions; increase in prescription drug costs; increase in hospital visit, doctor's office visits, and specialist visit co-payments; loss of dental insurance coverage; loss of coverage for dependent's birth control medication; and reduction in period available to obtain certain name brand or generic prescriptions.

- The loss of Traditional Plan coverage as a result of the change from Aetna to the SHBP caused the following changes in health insurance benefits for Local 183 unit employees: higher deductibles and out-of-pocket maximum under SHBP out-of-network plan; reduction in hospital coverage; increase in emergency room co-payments; reduction in coverage for physical exams, lab work, and x-rays; and reduced reimbursement for prescription co-pays.

- The County acknowledges that the Charging Parties incurred additional medical costs as a result of the switch from Aetna to SHBP, but asserts that those costs were offset by benefits and reductions in premium contributions under the SHBP. The County concedes the following changes in the level of benefits occurred as a result of the switch to SHBP (limited to projected changes in insurance costs for 2017):
  1) Co-pays for ER visits increased from $25-$35 per visit under Aetna to $75 per visit under SHBP;

  2) Co-pays for doctor's office visits increased from $5 per visit under Aetna to $10 per visit under SHBP;

3) Additional prescription drug costs for brand name prescriptions versus generic prescriptions, with employee now responsible for cost difference;

4) Pre-certification requirements for chiropractic care under SHPB that were not required under Aetna; and

5) Loss of the Traditional Plan that had been available to unit employees.

- The County also does not dispute the Charging Parties' employee certifications attesting to additional insurance costs incurred by unit employees in 2018 to the present that would have been covered under the 2016 Aetna plans. However, the County asserts these costs were offset by the following added benefits/coverage under the SHBP in 2017:
  1) A reduction in health insurance premium contributions in 2017;

  2) SHBP provided a "higher usual and customary allowance for out-of-network coverage" than Aetna;

  3) SHBP provided lower "out-of-network deductibles" than the 2016 Aetna County POS plans (with SHBP deductible for single/family coverage being $100/250 versus $1000/$2000);

  4) Higher member co-insurance payments under Aetna as compared to SHBP (member co-insurance was 40% under Aetna, as compared to 20% under SHBP); and

  5) Lower maximum out-of-pocket costs under the SHPB than the Aetna County POS plan for in-network coverage for medical and dental plans.

- On October 11, 2016, two weeks after deciding to enroll County employees into the SHBP, the County notified all 26 County units of its offer concerning the impact of SHBP. The County describes the terms of this offer as follows:
  First, each unit could agree to extend their collective negotiations agreement for one, two or three years. Second, the increases on wages would be guaranteed at 2.20% for 2017, 2.25% for 2018 and 2.25% for 2019.

- The offer communicated on October 11 included a September 29, 2016 letter from the County Counsel providing:
  This letter shall serve as confirmation that in moving the County of Essex into the SHBP effective January 1, 2017, that the level of benefits provided under the SHBP for the year 2017 will not change during 2017.

> Further, when moving into the calendar year 2018, the County of Essex agrees that if there is a change in benefits provided by the SHBP that the parties mutually agree is not equal to or greater than those benefits provided under the SHBP during the 2017 calendar year, the County will negotiate in good faith benefits or compensation to be provided.

- PBA Local 382 and FOP Lodge 106 did not agree to the County's October 11 offer, and the County Officer Units filed interim relief applications and the instant charges in November 2016 to enjoin the change to SHBP.

STANDARD OF REVIEW

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C. 19:14-8.1(a). The standard we apply in reviewing a Hearing Examiner's decision and recommended order is set forth in part in N.J.S.A. 52:14B-10(c). In the context of a motion for summary judgment, the relevant part of the statute provides:

> The head of the agency, upon a review of the record submitted by the [hearing examiner], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . ., the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. . . . In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J.

520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). N.J.A.C. 19:14-4.8(e) provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. We "must grant all the favorable inferences to the non-movant." Id. at 536. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981), certif. denied, 87 N.J. 388 (1981).

ANALYSIS

Negotiability of Health Benefits

Absent a preemptive statute or regulation, the level of health benefits for employees is a mandatorily negotiable term and condition of employment. See Willingboro Bd. of Ed., 178 N.J. Super. 477 (App. Div. 1981), aff'g P.E.R.C. No. 81-2, 6 NJPER 367 (¶11186 1980), certif. den. 91 N.J. 545 (1982); In re Council of New Jersey State College Locals, 336 N.J. Super. 167

(App. Div. 2001), aff'g P.E.R.C. No. 2000-12, 25 NJPER 402 (¶30174 1999); and E. Rutherford Bor., 2010 N.J. Super. Unpub. LEXIS 45236 (App. Div. 2010), aff'g P.E.R.C. No. 2009-15, 34 NJPER 289 (¶103 2008).

Once an employer and a union agree upon a level of benefits, the employer has discretion to choose a health insurance carrier to provide the negotiated level of benefits. Newton Bd. of Ed., P.E.R.C. No. 2021-47, 47 NJPER 522, 523 (¶121 2021); Rockaway Bor. Bd. of Ed., P.E.R.C. No. 2010-9, 35 NJPER 293 (¶102 2009). However, an employer's selection of insurance carrier becomes mandatorily negotiable if the change would affect the level of benefits or administration of the plan. Essex Cty., 2021 N.J. Super. Unpub. LEXIS 65947 (App. Div. 2021), aff'g P.E.R.C. No. 2020-40, 46 NJPER 359 (¶88 2020); and Matawan-Aberdeen Reg. Bd. of Ed., 2020 N.J. Super. Unpub. LEXIS 150547 (App. Div. 2020), aff'g P.E.R.C. No. 2019-42, 45 NJPER 378 (¶98 2019). As health benefits are mandatorily negotiable, an employer's unilateral change in the level of health benefits violates subsection 5.4a(5) of the Act. Union Tp., P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002); City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511, 512 (¶15234 1984); and Metuchen Bor., P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984).

Duty to Negotiate in Good Faith

N.J.S.A. 34:13A-5.3 defines when a public employer has a 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. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

The Supreme Court has thus held that changes in negotiable terms and conditions of employment must be addressed through the collective negotiations process because unilateral action is destabilizing to the employment relationship and contrary to the principles of our Act. See, e.g., Atlantic Cty., 230 N.J. 237, 252 (2017); Middletown Tp., 166 N.J. 112 (2000), aff'g 334 N.J. Super. 512 (App. Div. 1999); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 337-338 (1989); and Galloway Twp. Bd. of Educ., 78 N.J. 25, 52 (1978). "[U]nilateral imposition of working conditions is the antithesis of [the Legislature's] goal that the terms and conditions of public employment be established through bilateral negotiation." Atlantic Cty., 230 N.J. at 252, quoting Galloway Twp. Bd. of Educ., 78 N.J. at 48.

A public employer's unilateral change to negotiable terms and conditions of employment may constitute an unfair practice in violation of subsection 5.4a(5) of the Act, which prohibits public employers from "[r]efusing 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." City of Orange Tp., P.E.R.C. No. 2019-40, 45 NJPER

367 (¶96 2019), aff'd, 2020 N.J. Super. Unpub. LEXIS 104746 (App. Div. 2020); State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985). An employer violates 5.4a(1) independently if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification and, derivatively, when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., 2005 N.J. Super. Unpub. LEXIS 841 (App. Div. 2005), aff'g P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

"A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged." State of New Jersey, E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd, 141 N.J. Super. 470 (App. Div. 1976). "The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a predetermined intention to go through the motions, seeking to avoid, rather than reach, an agreement." Ibid. Although an employer or union may take a hard line in negotiations, it must do so "with a sincere intent to reach agreement instead of a pre-determined intention to avoid agreement." Hamilton Tp. Bd. of Ed., P.E.R.C. No. 87-18, 12 NJPER 737 (¶17276 1986), aff'd, NJPER Supp.2d 185 (¶163 App. Div. 1987), certif. denied, 111 N.J. 600 (1988).

Analysis of FOP Lodge 106 and PBA Local 382 Charges

Here, we concur with the Hearing Examiner's well-supported determinations that the County's unilateral changes to PBA Local 382's and FOP 106's health insurance benefits as a result of switching to the SHBP were "not preceded by good faith negotiations nor a clear waiver of the parties' contractual right to preserve their level of health benefits when a carrier change was made." H.E. at 40. First, we find that the Hearing Examiner properly interpreted these parties' contracts, which state that the County "reserves the right to select the insurance carrier who shall provide such benefits as long as the benefits are not less than those now provided by the County" and contain general maintenance of existing benefits clauses. H.E. at 41-42, 48-49. We therefore deny the County's exception asserting a material issue of fact regarding interpretation of these contract clauses.

Next, we concur with the Hearing Examiner's determination that the County's information sessions and meetings leading up to its switch to the SHBP did not satisfy the standards for good faith negotiations. H.E. at 43-45, 49-50. "Discussions" or "information sessions" about a proposed change without a meaningful dialogue and/or exchange of proposals about a proposed change to negotiable terms and conditions of employment do not satisfy the Act's duty to negotiate in good faith. Hamilton Tp. Bd. of Ed., 12 NJPER at 739; Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61, 62 (¶19020 1987) ("information sessions" with union to explain benefits of new health insurance plan did not satisfy

negotiations obligations where union did not consent to changes in levels of health benefits). In Piscataway Tp., P.E.R.C. No. 2005-55, 31 NJPER 102 (¶44 2005), recon. den., P.E.R.C. No. 2005-79, 31 NJPER 176 (¶71 2005), aff'd, 2006 N.J. Super. Unpub. LEXIS 221732 (App. Div. 2006), we held that the employer violated the Act by unilaterally implementing new promotional procedures and that its meetings with the union regarding the changes did not evince good faith negotiations. The Appellate Division affirmed, finding:

> Thus, although PERC recognized the Township "met with the PBA and discussed many aspects of the promotional policy," it found that the Township violated the Act when it "discussed rather than negotiated over the two disputed aspects of the policy" because "[n]egotiations require dialogue between two parties with an intent to achieve common agreement rather than an employee organization presenting its view and the employer considering it and later announcing its decision."
>
> [Piscataway Tp., 2006 N.J. Super. Unpub. LEXIS 221732 at *8-9.]

The record here similarly does not indicate that the County's Labor Roundtable Meetings and information sessions concerning the SHBP included a meaningful dialogue or exchange of proposals concerning alternative health insurance plans. The County rejected the FOP's negotiations proposal concerning the SHBP on the grounds that it was beyond what the County had proposed to other negotiations units, and then without further negotiations and over the FOP's objection, adopted the SHBP. The

County also adopted the SHBP for Local 382 without its consent. These actions are not indicative of good faith negotiations.

Next, we find that the Hearing Examiner's determination that the level of health insurance benefits decreased in multiple ways as a result of the change to the SHBP was supported by the factual record. The record indicates that some of the changes in health insurance benefits included: increased doctor visit co-payments; increased prescription drug costs; new chiropractic pre-certification requirements; and the loss of the Traditional insurance plan. H.E. at 12-14, 40-41. Furthermore, the Hearing Examiner's findings were supported by the County insurance consultant's own comparison indicating multiple areas of decreased coverage and increased costs under the SHBP versus the Charging Parties' existing level of benefits. H.E. at 11-12.

The County argues that more affordable premiums compared to what the existing benefits would have cost in 2017 should be considered as "offsetting" any reduced coverages or increased costs under the SHBP. However, that view does not comport with the County's obligation under the Act to not unilaterally change the existing level of benefits. "That certain benefits of the new plan are greater is essentially irrelevant in determining whether there has been an unfair practice." Metuchen Bor., P.E.R.C. No. 84-91, supra, 10 NJPER at 128; see also Union Tp., P.E.R.C. No. 2002-55, supra, 28 NJPER at 200 ("That other employees may experience greater coverage [after a change in

carrier] does not change the fact that the employer changed benefits.") The employer may not unilaterally determine which plan is better "on balance" or that certain benefits increases "offset" benefit reductions caused by the change where the parties' agreement does not give it that right. Pennsauken Tp., P.E.R.C. No. 88-53, supra, 14 NJPER at 62. "It would be inconsistent with the purposes of the Act to permit one party to determine unilaterally which insurance plan is better for the other party, thus disturbing the other party's expectations." Metuchen Bor., 10 NJPER at 128. Accordingly, we deny the County's exception to the Hearing Examiner's conclusion that the switch to the SHBP reduced the Charging Parties' health benefits.

Analysis of County's Exceptions to Remedy

The County next contends the Hearing Examiner should not have ordered a remedy because the unions did not request a remedy in their motion for summary judgment. The County argues it was deprived of due process because it had no opportunity to oppose a remedy. Initially, we note that the underlying unfair practice charges did request remedies and the Commission is statutorily authorized to order remedies for the commission of unfair practices. N.J.S.A. 34:13A-5.4(c);[6/] Galloway Twp. Bd. of Ed. v.

6/ N.J.S.A. 34:13A-5.4(c) provides, in pertinent part:

> The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. . . . If, upon all the evidence taken, the commission shall determine that any party charged has

(continued...)

Galloway Twp. Ass'n of Educ. Sec'ys, 78 N.J. 1 (1978). However, given that the Charging Parties' motion for summary judgment did not seek for remedies to be considered, we find that once the Hearing Examiner determined that she would make a recommendation as to remedy, she should have solicited additional briefs from the parties on the issue. Although we acknowledge that would have been the preferred procedure, the County has now had notice of the recommended remedy and a full opportunity to oppose it before the Commission. The County's brief in support of its exceptions sets forth its substantive arguments in opposition to the Hearing Examiner's remedy, which are addressed below. We therefore find there has ultimately been no deprivation of the County's due process rights that has not been cured.

We next turn to the County's substantive exceptions to the Hearing Examiner's recommended remedy. Initially, we reject the County's claim that the Hearing Officer's remedy included a "carve-out" of the Charging Parties from the SHBP or ordered them back to the County's previous Aetna plan. The Hearing Examiner's recommended order did not order such a carve-out or return to the previous health insurance plan. The County has apparently

---

6/ (...continued)
engaged or is engaging in any such unfair practice, the commission shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this act.

misconstrued the "cease and desist" portion of the order, which only refers to the unilateral change to the SHBP for purposes of describing what the County did that violated the Act. Rather, it is the recommended order's "affirmative action" section which clearly sets forth the remedy ordering the County to "reimburse all PBA Local 382 and FOP Lodge 106 unit employees (active or retired) for any costs or losses incurred since January 1, 2017 as a result of Essex County's change in health insurance carriers from Aetna to the New Jersey State Health Benefits Program on January 1, 2017." This is consistent with Commission precedent in health benefits change cases, in which we have held that a remedy for a change in the contractual level of health benefits cannot order the SHBC to either alter its plans or create a "carve-out" to its uniformity rules for a particular unit or units. See Essex Cty., 46 NJPER at 362.

We find that the Hearing Examiner's reimbursement remedy is supported by Commission precedent and is the least disruptive remedy to address the County's violation of the Act. Rather than ordering a strict return to the status quo ante, which might require returning all County employees to their previous health plan in addition to financial reimbursement, the establishment of a health reimbursement fund does not order the County to change health insurance carriers or require it to administer a separate health insurance plan for the affected units. In unfair practice cases where a change in health insurance carrier resulted in a

reduction in the level of contractual health benefits, the Commission has typically ordered targeted remedies that effectively reinstate the previous level of benefits without changing health insurance carriers by requiring reimbursement for any additional medical costs which would have been paid under the previous health plan. See, e.g., Lakeland Reg. Bd. of Ed., P.E.R.C. No. 2014-38, 40 NJPER 278 (¶107 2013); Pennsauken Tp., P.E.R.C. No. 88-53, supra; and Union Tp., P.E.R.C. No. 2002-55, supra. In Metuchen Bor., P.E.R.C. No. 84-91, supra, where the Commission found that the employer's unilateral change in health insurance carrier reduced the level of some health benefits while increasing others, we ordered reinstatement of the benefits that were decreased and immediate reimbursement for any financial losses caused by the change. Consistent with this Commission precedent, we find that the Hearing Examiner's remedy requiring reimbursement for any increased costs caused by the unilateral change in health benefits was reasonable and appropriately crafted to effectuate the purposes of the Act.

Analysis of Reimbursement Remedy in SHBP Cases

The County asserts that the Commission cannot order a reimbursement remedy for increased health care costs caused by the change to the SHBP because such reimbursements would impermissibly conflict with the SHBP's uniformity rules. However, the Commission and courts have held that an employer's choice of health insurer, including enrollment in the SHBP, does

not insulate it from enforcement of an agreement over a level of health benefits by way of a reimbursement remedy. See, e.g., Essex Cty., 2021 N.J. Super. Unpub. LEXIS 65947 (App. Div. 2021), aff'g P.E.R.C. No. 2020-40, supra; and E. Rutherford Bor., 2010 N.J. Super. Unpub. LEXIS 45236 (App. Div. 2010), aff'g P.E.R.C. No. 2009-15, supra.

In Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190 (2013), the Supreme Court of New Jersey affirmed an Appellate Division decision which held that the arbitrator's make-whole remedy of reimbursement for the difference between SHBP co-pays and the parties' contractual level of health benefits did not violate the SHBP's uniformity policies. In that case, the union was already enrolled in the SHBP and challenged a change in its contractual level of health benefits caused by the SHBP's increase in co-pays from $5 to $10. The Appellate Division found:

> We have been offered no controlling statute or precedent that would establish the illegality of the remedy of reimbursement during the term of a CBA in effect at the time of the statutory change, so long as the full amount of the co-pay was remitted in the first instance by the employee enrolled in the SHBP. Therefore, we find no statutory violation or violation of the policy of uniformity in connection with the implementation of N.J.S.A. 52:14-17.29(c).
>
> [East Rutherford, 2011 N.J. Super. Unpub. LEXIS 1921 (App. Div. 2011), at *15-16.]

Applying the reasonably debatable standard to the arbitrator's award, the Supreme Court affirmed the Appellate Division's

decision reinstating the award. In finding that the award's remedy was not contrary to law or public policy, the Court held: "[T]he Borough's arguments that the arbitration award violates law and public policy . . . fail to withstand scrutiny because it cannot be said that the arbitration award clearly violates or undermines implementation of the SHBP." East Rutherford, 213 N.J. at 206. The Supreme Court found that because employees were still required to initially remit the full $10 co-pay to their medical providers as required by the SHBP, and then get reimbursed by their employer for the difference between that co-pay and their contractually agreed co-pay, there was no direct conflict with the SHBP's requirement. Id. at 206-207.[7/]

7/ The Court noted that a 2010 amendment to the SHBP (P.L. 2010, c. 2, §8, codified as N.J.S.A. 52:14-17.36(b)) that "expressly mak[es] state-negotiated changes to SHBP plan conditions applicable to all plan participants 'at the same time and in the same manner as to State employees'" was not applicable because it occurred after the arbitrator's award. 213 N.J. at 207-208. We note that while N.J.S.A. 52:14-17.36(b), once effective, might preempt a challenge to a SHBP co-pay increase under the factual circumstances in East Rutherford (i.e., unit employees were already enrolled in the SHBP and the SHBP, not the employer, changed its plans/co-pays), that statute is not pertinent to the instant case where the employees were not already enrolled in the SHBP and it was the employer's voluntary, unilateral change to the SHBP that changed health benefits and made employees subject to the SHBP. See Matawan-Aberdeen Reg. Bd. of Ed., 2020 N.J. Super. Unpub. LEXIS 150547 at *11 (App. Div. 2020) (where employer activated a preemptive statute (N.J.S.A. 52:14-17.28c) concerning payment of dental benefits by changing from the SEHBP to a private plan, the Appellate Division held: "[T]he language of the statutory preemption is irrelevant because the fact that it was a voluntary non-mandated change in health insurance providers requires this

(continued...)

Furthermore, the Supreme Court recognized that a separate Appellate Division panel, following the issuance of the arbitration award, had already affirmed the Commission's decision denying the Borough's request to restrain arbitration over the change in the level of health benefits. Id. at 197; see E. Rutherford Bor., 2010 N.J. Super. Unpub. LEXIS 45236 (App. Div. 2010), aff'g P.E.R.C. No. 2009-15, supra. The Supreme Court quoted the following from the Commission's holding:

> To restrain arbitration, we would have to first conclude that the PBA is not entitled to pursue its claim that the Borough was obligated to maintain a contractual level of benefits. Such a holding would be a departure from well-established case law. Purchasing insurance from the SHBP does not insulate an employer from enforcement of an agreement over a level of health benefits. Absent a preemptive statute or regulation not present here, an employer must reconcile its contractual obligations with its choice of health insurance providers.
>
> [East Rutherford, 213 N.J. at 197.]

In a separate matter involving a scope of negotiations petition filed by the County concerning PBA Local 382's challenge to the change in contractual health benefits, the Commission denied the County's request to restrain arbitration. Essex Cty., P.E.R.C. No. 2020-40, supra. In response to the County's objections over potential arbitral remedies, we found that while the SHBP cannot be ordered to provide coverage options

---

7/ (...continued)
dispute to be arbitrated as a mandatorily negotiable and legally arbitrable issue.")

to comply with the parties' negotiated level of benefits, a remedy consisting of reimbursement for employees' increased costs due to a change in health benefits does not violate SHBP laws or uniformity policies. Id. The Appellate Division affirmed, stating: "[W]e discern no basis to disturb PERC's well-reasoned decision and affirm substantially for the reasons articulated therein." Essex Cty., 2021 N.J. Super. Unpub. LEXIS 65947 (App. Div. 2021) at *8-9. The Appellate Division found:

> PERC correctly recognized the parties in the present matter "agreed on a level of health benefits" and it was within the County's discretion to contract with a health insurance provider "so long as the chosen provider offered plans consistent with the negotiated level of benefits."
>
> [Essex Cty. at *5.]

Finding no basis for restraining arbitration based on the County's arguments that a reimbursement remedy could impact its participation in the SHBP, the Appellate Division stated:

> Notably, PERC found "if the arbitrator determines that the transition to the SHBP also resulted in changes to the level of health benefits that the County agreed to in its CNA with . . . PBA [382], the County cannot use the SHBP's uniformity rules as a shield to claim immunity from an arbitrator's remedy. . . . Moreover, as PERC correctly concluded, the County was not required to select the SHBP as its health care provider. In that regard, PERC's decision is consonant with its earlier decision in Borough of East Rutherford, which the Court cited with approval. 213 N.J. at 197.
>
> [Essex Cty. at *6, 12.]

In Paterson Police PBA [et al] v. City of Paterson, 2021 N.J. Super. Unpub. LEXIS 652 (App. Div. 2021) the Appellate Division specifically endorsed a reimbursement fund as a viable remedy for a reduction in health benefits caused by the employer's unilateral change to the SHBP. Significantly, both the public employer and the State (as amicus and administrator of the SHBP) confirmed to the court "that a reimbursement plan sponsored by the City to supplement any changes in the level of benefits was a permissible alternative to withdrawal . . ." Paterson Police at *20-21. The Appellate Division noted that the State "persuasively argued [that] employer-provided Health Reimbursement Accounts, Flexible Spending Accounts, and funded debit-type cards constitute a viable remedy to compensate members for their increased out-of-pocket costs without affecting member utilization." Paterson Police at *33.

The County argues that Paterson Police precluded a "dollar-for-dollar" reimbursement remedy. However, the Appellate Division, consistent with the Supreme Court in East Rutherford, clarified that the only limit on health expense reimbursements is that they not be "at the time service" - i.e., while the initial SHBP co-pays and deductibles charged at "point of service" cannot be changed, full reimbursements for the out-of-pocket difference between the SHBP's costs and those of the previous plan are permissible. Paterson Police at *33-34. The Appellate Division thus found that the arbitrator "was mistaken" in concluding that

a remedy of "reimbursement of the monetary differences between the City's self-insured plan and the SHBP" was impermissible. Paterson Police at *31. The Appellate Division held:

> Contrary to Borough of E. Rutherford, in which our Supreme Court specifically affirmed a reimbursement plan as a lawful remedy for increased out-of-pocket expenses, 213 N.J. at 206-07, the arbitrator here incorrectly believed he had no flexibility to allow for some type of reimbursement fund, which resulted in an unlawful, extreme remedy that impacts all City's employees to resolve some employees' grievances.
>
> [Paterson Police at *31-32.]

The Appellate Division remanded the matter for "the arbitrator to render an appropriate remedy, which may include a reimbursement fund or mechanism to reasonably compensate employees and retirees of the police and fire unions for the increased out-of-pocket costs they experienced as the result of the challenged action. Paterson Police at *39; emphasis added.

The County asserts that Essex Cty. Sheriff's Officers PBA Local 183 v. Dep't of the Treasury, 2019 N.J. Super. Unpub. LEXIS 1368 (App. Div. 2019), which preceded the Appellate Division decisions in Essex Cty. and Paterson Police, undermines the Supreme Court's East Rutherford holding because it suggests that the Commission may not order reimbursement for increased costs due to the County's unilateral change to the SHBP. In Essex Cty. v. Treasury, the Charging Parties appealed a declaratory ruling from the SHBC determining that "a local employer may not reimburse any out-of-pocket costs that are part of the design of

an SHBP plan." Although the Appellate Division affirmed the SHBC's authority to make a determination on the question posed to it concerning a reimbursement remedy, it noted that the SHBC "did not rule that PERC cannot issue an appropriate remedy if an unfair labor practice is found by PERC," and that "[t]he questions of remedy must be decided in the first instance by PERC." Id. at *25.

The SHBC's underlying concern in Essex Cty. v. Treasury was that a health reimbursement fund "would affect utilization of health benefits and, in turn, upset the economic balance of the overall state plan." Id. at *24. However, that concern is only minimally present in this case because the reimbursement remedy here is being issued more than six years after the County's January 1, 2017 change to the SHBP. As the unit employees have continued to pay the higher costs required by the SHBP for the duration of this litigation without knowing its outcome, the SHBC's concern over increased utilization of services is significantly minimized. The Supreme Court in East Rutherford similarly noted that as employees in that case continued to pay the full $10 SHBP co-pay prior to the arbitrator's reimbursement award, the award had no effect on employees' conduct because they "were required to pay the enhanced co-payment without knowledge of the outcome to the arbitration." 213 N.J. at 206, n.4.

In sum, we find that the County's enrollment in the SHBP does not preempt a reimbursement remedy that is narrowly tailored

to effectuate the purposes of the Act to prevent violations of the duty to negotiate in good faith before changing health insurance benefits. While the County's change to the SHBP represented significant cost savings, it was not required to choose the SHBP and in doing so changed the contractual level of benefits of PBA Local 382 and FOP Lodge 106 in violation of the Act.[8/] An order requiring the County to reimburse employees for additional costs incurred due to the unilateral change to the SHBP is the least disruptive remedy to the County's current SHBP enrollment while also being consonant with the broad remedial purposes of the Act to prevent unfair practices. Galloway Township, 78 N.J. 1 at 9. A make-whole reimbursement fund (provided after the time of service) for increased health costs is a viable remedy that does not significantly undermine the SHBP's utilization of services or uniformity policies. East Rutherford, 213 N.J. at 206-207; Paterson Police at *33.

Analysis of PBA Local 183's Exceptions

Next, we address PBA Local 183's exception to the Hearing Examiner's denial of its motion for summary judgment based on her conclusion that "there is a genuine issue of material fact

8/ We note that the contract between the County and FOP Lodge 106 expired on December 31, 2017 and the contract between the County and PBA Local 382 expired on December 31, 2017. Neither party has pursued interest arbitration, which, pursuant to statutorily required time frames, would resolve the terms of successor contracts on a hastened basis. Any health benefits issue that may be submitted to interest arbitration would be subject to the limitations set forth in N.J.S.A. 34:13A-18.

concerning whether Local 183 waived the right to negotiate the change in health benefits attendant to enrolling in SHBP." H.E. at 55. The record includes the County's certification that PBA Local 183 President Slater notified County attorney McGrath that PBA Local 183 voted at a meeting on September 27, 2016 to enroll in the SHBP. H.E. at 28. The County further certified that Local 183's leadership attended the County Board's September 28 meeting and did not object to the County's adoption of a resolution to switch to the SHBP. H.E. at 28-29. The record also includes certifications from Local 183 that, while it does not dispute that it voted "yes" to switch to the SHBP, that vote was "contingent upon PBA Local 183 reaching an agreement with the County" addressing the impact of the change on PBA Local 183 unit members. H.E. at 29. Local 183 further certifies that it met with the County Executive prior to the September 28 resolution in an attempt to negotiate conditions for entering the SHBP, but was profanely rebuffed. H.E. at 29.

We find that the parties' certifications raise material questions of fact concerning whether PBA Local 183's agreement to join the SHBP was conditioned on further impact negotiations. We concur with the Hearing Examiner's determination that: "Given the divergent accounts by the County and Local 183 about the nature and context for agreeing to SHBP, a plenary hearing is necessary to make credibility determinations concerning these competing

accounts." H.E. at 54-55. We therefore deny summary judgment to PBA Local 183 and the County regarding PBA Local 183's charge.

Analysis of PBA Local 183A's Exceptions

Finally, we address PBA Local 183A's exception to the Hearing Examiner's finding that it "waived by consent and agreement the right to negotiate over the change to SHBP" based on her determination that PBA Local 183A had not submitted any certified facts or probative evidence to dispute the County's certification that PBA Local 183A had verbally agreed to switch to the SHBP. H.E. at 53. As noted above in our summary of facts modifying H.E. Finding of Fact 35, we find the record does not support this determination. N.J.A.C. 19:14-6.6(a) provides that the parties are not bound by rules of evidence and all relevant evidence is admissible, but the hearing examiner has discretion to "exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice or confusion." Specific to hearsay, N.J.A.C. 19:14-6.6(b) provides:

> Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

We find that the statement in County Counsel Gaccione's (undated) certification stating that PBA Local 183A was among the unions that had verbally agreed to switch to the SHBP (Local 183A

Exhibit 3; County MSJ Exhibit E, Para. 41) was supported only by her own statement in her other (undated) certification (Local 183A Exhibit 2; County MSJ Exhibit F, Para. 10), which was based on double hearsay. Gaccione certified:

> Additionally, President Slater called Essex County Chief of Staff, Philip B. Alagia, on that same night after the vote and indicated that both unions, Local 183 and FOP Lodge 138[now Local 183A] had voted yes in connection with the move into the SHBP.
>
> [Local 183A Exhibit 2, Gaccione Cert., Para. 10.]

This statement is double hearsay and is not supported by any legally competent evidence in the record. Therefore, we do not credit it as a fact. N.J.A.C. 19:14-6.6(b); see, e.g., City of Cape May, P.E.R.C. No. 2021-46, 47 NJPER 476 (¶113 2021) (hearsay statements in certifications were rejected because risk of undue prejudice outweighed their probative value).

Furthermore, the County Counsel's assertion that Slater told Alagia that PBA Local 183A had agreed to change to the SHBP is refuted by Robert Slater's September 29, 2022 certification and directly contradicted by PBA Local 183A's unfair practice charge which was certified by its counsel, Valerie Palma DeLuisi. Slater certified both that he "had no authority to speak for [Local 183A/FOP 138]" and that he had never indicated to the County Chief of Staff that PBA Local 183A/FOP 138 had voted yes ("that never happened, period"). (PBA Local 183A Exhibit 4, Slater Reply Cert., Para. 21). Moreover, PBA Local 183A's unfair

practice charge certified that Local 183A "voted against the transition" and "refus[ed] to agree to the change in benefits as a result of the transition into the [SHBP]." Thus, even if Slater's certification had not sufficiently contradicted the County's certifications, the County's asserted facts would still not be entitled to be considered as true because a "material factual issue to adjudicate" had already been "raised in the movant's pleadings." CWA Local 1037 (Schuster), H.E. No. 86-10, 11 NJPER 621, 622 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985).

Accordingly, based on PBA Local 183A's certified submissions both prior to and following the County's assertion that PBA Local 183A had agreed to join the SHBP, we find that PBA Local 183A met its burden on summary judgment to submit certified facts or probative evidence to dispute the County's claims. Judson v. Peoples Bank & Trust Co., supra, 17 N.J. at 75. Given the conflicting assertions from both parties, we find there is a genuine issue of material fact concerning whether PBA Local 183A consented to change to the SHBP, which requires a plenary hearing. We therefore deny summary judgment to PBA Local 183A and the County regarding PBA Local 183A's unfair practice charge.

For all the above-discussed reasons, we deny the County's exceptions to the Hearing Examiner's report, we deny PBA Local 183's exceptions, and we partially grant PBA Local 183A's exceptions by denying both the County's and PBA Local 183A's

motions for summary judgment. PBA Local 183 and PBA Local 183A's charges will proceed to hearing before the Hearing Examiner. FOP Lodge 106's and PBA Local 382's motions for summary judgment are granted. As specified in the below Order, we modify the Hearing Examiner's recommended reimbursement remedy only to provide additional clarification.

ORDER

The County of Essex is ordered to:

A. Cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the contractual level of health benefits of PBA Local 382 and FOP Lodge 106 unit employees as a result of changing their health insurance carriers from Aetna to the New Jersey State Health Benefits Program.

2. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by unilaterally changing the contractual level of health benefits of PBA Local 382 and FOP Lodge 106 unit employees as a result of changing their health insurance carriers from Aetna to the New Jersey State Health Benefits Program.

B. Take this affirmative action:

1. Establish a health benefits reimbursement fund to immediately reimburse all PBA Local 382 and FOP Lodge 106 unit

employees (active or retired) for any costs or losses incurred since January 1, 2017 as a result of Essex County's change in health insurance carriers from Aetna to the New Jersey State Health Benefits Program on January 1, 2017. Employee claims for reimbursement may only be submitted to the County by their majority representative, i.e., PBA Local 382 or Lodge 106, as applicable, on their behalf. Disputes over health benefits reimbursement claims shall be reviewable in binding arbitration pursuant to the parties' negotiated grievance procedures. The County's reimbursement obligation shall continue until such time as the parties negotiate and agree to a different level of health benefits or have otherwise settled the matter.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Board's authorized representative, be posted immediately and maintained by it for at least sixty (60) days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chair of the Commission within twenty (20) days of receipt of this decision what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: June 29, 2023

Trenton, New Jersey

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the contractual level of health benefits of PBA Local 382 and FOP Lodge 106 unit employees as a result of changing their health insurance carriers from Aetna to the New Jersey State Health Benefits Program.

WE WILL cease and desist from refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by unilaterally changing the contractual level of health benefits of PBA Local 382 and FOP Lodge 106 unit employees as a result of changing their health insurance carriers from Aetna to the New Jersey State Health Benefits Program.

WE WILL establish a health benefits reimbursement fund to immediately reimburse all PBA Local 382 and FOP Lodge 106 unit employees (active or retired) for any costs or losses incurred since January 1, 2017 as a result of Essex County's change in health insurance carriers from Aetna to the New Jersey State Health Benefits Program on January 1, 2017. Employee claims for reimbursement may only be submitted to the County by their majority representative, i.e., PBA Local 382 or Lodge 106, as applicable, on their behalf. Disputes over health benefits reimbursement claims shall be reviewable in binding arbitration pursuant to the parties' negotiated grievance procedures. The County's reimbursement obligation shall continue until such time as the parties negotiate and agree to a different level of health benefits or have otherwise settled the matter.

Docket No. CO-2017-096
CO-2017-105

County of Essex
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830

APPENDIX "A"